IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 331
3152982

	BETWEEN	COURTNEY ANNE CLARKE Applicant
	AND	TAKITIMU TAVERN LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Simon Claver, advocate for the Applicant Mark Donovan, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	3 June 2022 and 3 July 2022 from the Applicant 2 July 2022 from the Respondent
Date of Determination:	18 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Courtney Anne Clarke applied to the Authority on 19 January 2022 for a penalty order pursuant to section 133 Employment Relations Act 2000 (the Act) against Takitimu Tavern Limited for breaching a settlement agreement. The settlement agreement in dispute

was signed by Ms Clarke and Matt Clark (a director of Takitimu Tavern Limited) and an MBIE mediator pursuant to s 149 of the Act on 31 May 2021.

[2] The settlement agreement provided Ms Clarke be paid the sum of $4,000 as a compensatory payment under s 123(1)(c)(i) of the Act without deduction by way of the following instalments:

1) $1,000 on or before 15 July 2021.
2) $1,000 on or before 15 August 2021.
3) $1,000 on or before 15 September 2021.
4) $1,000 on or before 15 October 2021 and:
5) A contribution to receipted legal costs to a sum not exceeding $2,000 + GST on or before 15 June 2021.

[3] The four instalments of compensatory payments cited above had a stipulation attached that "provided any instalment is not paid on due or within 3 working days thereof the balance of monies then due and owing will immediately become due and payable". The payments above have all been made but Ms Clarke made a statement that the failure to make such by the agreed due dates, was a breach of the settlement agreement causing her distress and undue financial disruption. Ms Clarke produced bank statements that evidenced:

1) The first payment was made on 15 July 2021.
2) The second payment was made on 16 August 2021.
3) The third payment was made on 21 September 2021.
4) The fourth payment was made on 18 October 2021.

[4] Ms Clarke's counsel by way of an email of 19 September 2021 placed Takitimu Tavern Limited on notice of the breach and indicated if the payment was not made by "close of business Monday 29th September (tomorrow) I am instructed to return the matter to the Authority" and "I look forward to your confirmation that this breach will be rectified and there will be no further breaches". A further email shortly afterwards corrected the error in

date confirming counsel meant 20 September. In the event the payment was made on 21 September.

[5] However, in an email of 22 September counsel for Ms Clarke sought to invoke the provision of the settlement agreement that the final payment fell due based on the delay of the third payment seeking such by "no later than close of business this coming Friday the 24th - along with the costs incurred as a result of your clients (sic) breach being my fee of $120 plus GST ($138). The monies should be paid directly to Ms Clarke". Whilst the fourth payment was paid on 18 October 2021, Ms Clarke's counsel in an email of 1 November 2021 signalled that a breach of the settlement agreement had taken place.

[6] The Takitimu Tavern Limited's director Matthew Clark provided a signed statement to explain he resides in Hong Kong and he provided bank statements to show he had actioned the payments on the due dates, claiming Ms Clarke's late receipt of such was due to bank processing delays due possibly to weekends and public holidays.

[7] Mr Clarke however, provided no explanation for a failure of the company to meet the request of 22 September that the final payment be paid immediately in accord with the settlement agreement provision. I also observe that no Hong Kong public holidays fell around the dates of the payments but accept that initiating payments close to weekends may trigger banking delays. However, none of the dates Mr Clark has indicated the money left his account are on weekends. What is more likely than not is the 'bank to bank' processing caused delays as the August and October payments were both initiated on Fridays.

[8] In submissions, Takitimu Tavern Limited's counsel suggested the s 149 agreement "did not specify when the funds were to be received, only when they were to be paid" and that Takitimu Tavern Limited complied with this requirement and that in interpreting the settlement agreement the Authority should take account of the intermediatory action of banks being outside Mr Clark's control. Counsel also posited that because the payments were made as required, Ms Clarke was not able to rely "on the acceleration clause and demand the final instalment be paid immediately".

Assessment

[9] I reject any suggestion made in submissions that there is any ambiguity about the obligations Takitimu Tavern Limited signed up to in the s149 settlement agreement that included the indulgence they gained in Ms Clark allowing payment by instalments. The wording "on or before" could not be clearer and when Mr Clark was alerted to delays (that included not paying Ms Clarke's counsel legal costs on time) he took insufficient action to resolve matters – the third September payment delay of six days was inexplicable.

Findings

[10] I find that the agreement to pay the amounts agreed by specified dates was breached on three occasions.

[11] I also find on the final payment, that Takitimu Tavern Limited's failure to pay the third payment within three working days of it falling due, breached the obligation that the final payment became immediately payable on 21 September 2021.

Significance of breaches

[12] The Authority has consistently held that breach of a settlement agreement made under s 149 of the Act is a significant issue due to public interest considerations including that they often involve compromises of parties to avoid litigation and produce mutual benefits. Counsel for Ms Clarke rightly pointed to the observation of the Authority that I concur with that: "Such breaches corrode the certainty of agreements" and undermine the public's confidence in entering such settlements that in turn, impacts the objects of the Act (s 143) of encouraging prompt and less costly settlements of employment relationship problems between originating parties. [1] Consideration of a penalty for deterrence purposes is allowed for under s 149(4) of the Act and is discussed below.

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[1] *David Elliott v All Coat Painters Ltd* [2019] NZERA 165 and *Whitewood v Stevenson* [2019] NZERA 348.

Imposition of a penalty and whether it should be awarded to Ms Clarke?

[13] Failure to fulfil without adequate explanation, the terms of an s 149 settlement agreement is a serious breach of the Act. The Authority under s 133 of the Act has the jurisdiction to award a penalty against a defaulting party. In the situation of a company, the maximum penalty is $20,000 for each breach and I must consider matters set out in s 133A of the Act in determining what amount I can impose including whether the penalty should be paid to the Crown or apportioned.

[14] Generally, the approach I must take has to be consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited.* [2] *Preet* identified a four-step framework to fixing penalties:

> Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
>
> Step 2: Assess the severity of the breach in each case to establish a provisional penalty starting point. Consider both aggravating and mitigating features.
>
> Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
>
> Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances. [3]

The nature and extent of the breaches

[15] The breaches involve a delay in paying agreed compensatory amounts in a timely fashion and Takitimu Tavern Limited ignoring the rectification provision that governed these defaults. As the agreement is full and final Ms Clarke forwent an opportunity to pursue any personal grievance she may have been contemplating and it was evident that the agreement

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[2] *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.
[3] At [151].

drew the employment relationship to an end. In simple legal terms, this was a compromise of rights in return for consideration and the conditions on the delivery of the latter which I find advantaged Takitimu Tavern, were not all met.

Were the breaches intentional, inadvertent, or negligent?

[16] On the first three breaches (instalment timeliness) Mr Clark who is a signatory to the settlement agreement, gave only partial and retrospective explanations for his neglect and expressed no apology for the inconvenience he had caused Ms Clarke. I, however, do not find that his neglect was intentional as he appears to have made some effort to ensure the payments were made – his actions were inadvertent.

[17] On the fourth breach I find Mr Clarke simply and by implication intentionally, ignored the request to make the last payment swiftly as per the settlement agreement provision that Ms Clarke's counsel had highlighted. He has not addressed in his evidence why this was so.

What steps have been taken in mitigation?

[18] Whilst Mr Clark only provided a brief statement, I acknowledge that the amounts due fell within a very difficult trading period for Takitimu Tavern Limited and that the instalment payments were paid in full without undue delay.

Severity of breaches

[19] On top of statutory considerations (the aims of the Act), I am obliged following *Preet,* to examine the extent of Takitimu Tavern Limited's culpability and take the public interest factor of using the penalty regime as a legitimate deterrent into account.

[20] Whilst the breach here may appear to involve a relatively small amount of money, I must consider that Ms Clarke was in a vulnerable bargaining position. I also must consider that the impact on the late payments was inconvenience rather than demonstrated hardship and that not getting the final payment earlier was in a similar vein.

Means and ability of the respondent to pay?

[21] I was provided with no information to accurately assess ability to pay and the onus to provide supporting information is on the respondent party, Takitimu Tavern Limited.

Proportionality

[22] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breach and the context of such. In considering similar cases of breaches of certified settlement agreements, a penalty in this matter would likely fall in the range of $500 to $2,000.

Finding

[23] Taking all the circumstances into account including that Takitimu Tavern Limited paid the scheduled compensatory amounts in a reasonably timely fashion, I fix the penalty at $600 and direct that the full amount is to be made available to Ms Clarke.

Conclusion on penalty

[24] Within 28 days of the date of this determination being issued Takitimu Tavern Limited must pay Courtney Clarke the sum of $600.

Costs

[25] Costs are at the discretion of the Authority and here Courtney Clarke was successful in her action for a penalty and has sought costs but Mr Claver did not specify in what amount. In the circumstances, by exercising the discretion I have under Section 15 Schedule 2 of the Act I award Courtney Clarke costs in the amount of $600 and her Authority application fee of $71.56.

[26] The latter amounts are to be paid by Takitimu Tavern Limited to Courtney Clarke within 28 days of this determination being issued.

David G Beck
Member of the Employment Relations Authority