

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 289
3186659

BETWEEN COURTNEY ANNE CLARKE
 Applicant

AND TAKITIMU TAVERN LIMITED
 Respondent

Member of Authority: Lucia Vincent

Representatives: Simon Claver, advocate for the Applicant
 Mark Donovan, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 3 April 2023 from the Applicant
 11 April 2023 from the Respondent

Date of Determination: 02 June 2023

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Courtney Clarke seeks a penalty against Takitimu Tavern Limited for failing to make a payment within the timeframe ordered by the Authority in a determination dated 18 July 2022.¹ In that determination, Ms Clarke succeeded in seeking a penalty pursuant to section 133 of the Employment Relations Act 2000 (Act) against Takitimu for breaching the settlement agreement's payment timeframes.

[2] The Authority ordered Takitimu to make two payments to Ms Clarke within 28 days of the date of that determination (i.e. within 28 days of 18 July 2022). Specifically:

- (a) a penalty of \$600.00 (penalty payment);² and

¹ *Clarke v Takitimu Tavern Limited* [2022] NZERA 331.

² At [24].

(b) costs in the amount of \$600.00 plus her application fee of \$71.56 (costs payment).³

[3] Ms Clarke provided a screenshot from her online account showing she received the costs payment on 15 August 2022 and the penalty payment on 31 August 2022.

[4] Takitimu accepts it paid the penalty payment late. It says it mistakenly misread the penalty payment as being part and parcel of the costs payment - having assumed it was only required to pay Ms Clarke \$671.56, and not an additional \$600.00. This is despite an email from Ms Clarke's advocate to Takitimu's counsel on 18 July 2022 stating, "You will by now have read the decision in the above matter, your client have been ordered to pay the total sum of \$1271.56 within 28 days" (sic).

[5] Ms Clarke seeks a penalty for the delay in paying the penalty payment. She considers an amount between \$5,000.00 and \$7,000.00 to be appropriate and asks for a portion of the penalty to be awarded to her.⁴ Ms Clarke also seeks costs of \$1,800.00.

[6] Takitimu says the Authority has no jurisdiction to award a penalty. Even if the Authority has jurisdiction, it says no penalty would be warranted given the unintentional and minor nature of the breach.

How did the Authority investigate?

[7] Given the narrow scope of this matter and by agreement with the parties, I decided this matter without holding an investigation meeting.⁵

[8] In a notice of direction dated 22 February 2023 I declined to exercise my discretion to dismiss the proceeding as frivolous or vexatious in the circumstances, as asked by Takitimu's counsel in our case management conference that same day. I referred to the Employment Court's view of the Authority's power to dismiss as limited, requiring a high threshold and reserved for clear cut cases.⁶ To assist in my consideration of the legal issues, I asked that

³ At [25] to [26].

⁴ Section 136(2) of the Act.

⁵ As provided for under section 174D of the Act.

⁶ Noting comments by the Employment Court in *Lumsden v Sky City Management Limited* [2015] NZEmpC 225, at [37]-[39].

submissions identify any applicable sections relied on in seeking a penalty and any case law on point.⁷

[9] The parties lodged and I have considered their statement of problem, statement in reply, supporting documents and written submissions. I have not recorded all of the evidence and submissions received but have considered everything provided. My determination states relevant findings of fact, issues of law and expressed conclusions on matters and issues I consider necessary to dispose of the matter including any orders made.⁸

What are the issues?

[10] The issues requiring determination are:

- (a) Does the Authority have jurisdiction to award a penalty for failing to comply with the timeframe for payment in a determination?
- (b) If the answer to the above question is yes, then what (if any) penalty should I award?

Does the Authority have any jurisdiction to award a penalty?

[11] Under section 133 of the Act, the Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under the Act for any breach of an employment agreement or for a breach of any provision of the Act for which a penalty in the Authority is provided for in the particular provision.⁹ Section 161 reinforces that jurisdiction by listing as an example of the Authority's exclusive jurisdiction to determine employment relationship problems generally, actions for the recovery of penalties under the Act for breaching an employment agreement or any sections in the Act or other employment legislation where a penalty is provided for.¹⁰

[12] The Authority's exclusive jurisdiction to determine employment relationship problems under section 161 has a wide scope and broad nature.¹¹ In contrast, the Authority's ability to award a penalty under section 133 is specifically set out in restrictive terms. It follows that,

⁷ Referring to the Authority's jurisdiction to award penalties as set out in section 133(1)(b) of the Act.

⁸ Section 174E of the Act.

⁹ Section 133 of the Act.

¹⁰ Section 161(m) of the Act.

¹¹ See the Supreme Court's decision in *FMV v TZB* [2021] NZSC 102.

without a specific provision in the Act providing for a penalty in the specific circumstances,¹² the Authority is unable to do so.

[13] The Employment Court's approach in *Dollar King Ltd v Jun* [2020] NZEmpC 91 supports this conclusion. When considering whether the Authority can impose a penalty on a party of its own motion outside the limited circumstances set out in the Act, the Court commented on the "... restrictive, rather than expansive, reading" applied to penal provisions generally.¹³ The Court did not view the Authority's power to act as it thinks fit in equity and good conscience as extending to anything that could be considered inconsistent with the Act.¹⁴

[14] I am reinforced in my interpretation of section 133 given neither party could identify any provision in the Act that allows for a penalty in the present situation nor any case law directly on point.

[15] I find the Authority does not have jurisdiction to award a penalty for failing to comply with the timeframe for payment in a determination. Having found the Authority does not have jurisdiction to award a penalty, I do not need to answer the question of what, if any, penalty to award.

Costs

[16] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Clarke may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Takitimu would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

¹² For example, section 149(4) of the Act provides for a penalty where a person breaches an agreed term of settlement.

¹³ *Dollar King Ltd v Jun* [2020] NZEmpC 91, at [14].

¹⁴ Section 157(3) of the Act. Above note 13 at [18].

[17] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁵

Lucia Vincent
Member of the Employment Relations Authority

¹⁵ See www.era.govt.nz/determinations/awarding-costs-remedies.