IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 165
3052712

	BETWEEN	DAVID ELLIOT Applicant
	AND	ALL COAT PAINTERS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Nathan Santesso, advocate for the Applicant Kim Hobson, director of the Respondent
Investigation Meeting:	11 March 2019 by telephone conference
Determination:	21 March 2019

DETERMINATION OF THE AUTHORITY

A. By no later than Friday 29 March 2019 All Coat Painters Limited (ACPL) must pay David Elliot:

(i) $4,803.03 for three instalment payments that were due to be made earlier under terms of settlement certified under s 149 of Employment Relations Act 2000 (the Act); and

(ii) $3,000 as a penalty for its three breaches of those certified agreed terms of settlement; and

(iii) $1,071.56 for costs and expenses in making this application to the Authority.

B. Leave is reserved for Mr Elliot to revert to the Authority for further orders in the event that ACPL does not also pay the fourth and final instalment of $1601.01 due under the agreed terms to be paid on 29 March 2019.

Employment Relationship Problem

[1] David Elliot applied for a compliance order and penalties because All Coat Painters Limited (ACPL) did not pay three instalments of payments due under agreed terms of settlement certified by a Ministry of Business employment mediator under s 149 of the Employment Relations Act 2000.

[2] The agreement was made in mediation between the parties and certified by the mediator on 8 November 2018. The effect of certification, as stated at s 149(3) of the Act, is that

> (a) those terms are final and binding on, and enforceable by, the parties; and
>
> (ab) the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017; and
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> (b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[3] ACPL did not lodge a statement in reply. A copy of the statement of problem was delivered to and signed for at its registered office on 8 February. It did not respond to a further notice about a reply.

[4] When Mr Elliot had asked by email on 2 January 2019 why an instalment of $1,601.01 due on 31 December 2018 was not paid, ACPL's director Kim Hobson replied: "Sorry bit short at the moment. I'll get it to you in a week". The amount was not paid in one week or since then. Neither has ACPL paid instalments of the same amount due on 31 January and 28 February 2019 or provided Mr Elliot or his representative with explanations for the failure to make the agreement payments.

The Authority investigation

[5] By Minute to the parties on 27 February directions were given for an investigation meeting to be held by telephone. The Minute also explained that failure to make payments agreed under a certified settlement agreement rendered ACPL liable to a penalty under s 149 of the Act. Mr Elliot, through his representative, was given permission to provide an amended statement of problem updating the overdue instalments. He did so and this was sent to the ACPL along with a Notice of Investigation Meeting.

[6] Mr Hobson, Mr Elliot and Mr Elliot's advocate, Mr Santesso, attended the investigation meeting by telephone. Mr Hobson said he had not paid the instalments due because of business and family difficulties. He suggested the arrangements for instalments should be changed. I explained that the requirements of s 149(3) did not allow for the agreement terms to be rewritten by the Authority.

[7] After explaining ACPL's liability for penalties, I adjourned the investigation meeting to provide a further opportunity for the company to pay the amounts due. The adjournment was made on the basis that if the payments were not made by 19 March, Mr Elliot's advocate was to advise the Authority and a determination requiring payment of the instalments and a penalty would be issued. On 20 March Mr Santesso advised that the payments had not been made.

Compliance order

[8] There was no dispute that ACPL failed to pay three instalments of equal amounts of $1601.01 due under the 8 November 2018 certified agreement. Mr Elliot was entitled to an order for payment of those three amounts, totalling $4,803.03. ACPL must comply with the terms of that agreement by paying those amounts by no later than Friday, 29 March 2019.[1]

Penalty for breach of a term of a settlement agreement certified under s 149

[9] A person who breaches an agreed term of settlement certified by a Ministry of Business employment mediator under s 149 of the Act is liable to a penalty imposed by the Authority.[2]

[10] This determination has applied the framework found in s 133A of the Act and decisions of the Employment Court to set an appropriate penalty.[3] The relevant matters and considerations, in the circumstances of this case, are as follows.

Object of the Act

[11] The object of the Act includes promoting mediation as the primary problem-solving mechanism.[4] Part of that mechanism is the provision for certified agreements

[1] Employment Relations Act 2000, s 151 and s 137 (1)(a)(iii) and (3).
[2] Employment Relations Act 2000, s 149(4).
[3] Employment Relations Act 2000, s 133A and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19] and *Nicholson v For*d [2018] NZEmpC 132 at [18].
[4] Employment Relations Act 2000, s 3(a)(v).

under s 149. Such agreements are the means by which most employment relationship problems are resolved in the formal steps available in our statutory dispute resolution system. Some 11,000 or so such agreements are certified each year. They give the parties to them finality and certainty of the outcome. A breach by any party of those final, binding and enforceable terms undermines the integrity and security that system for certified agreements is intended to provide to workers and to employers.

Nature of the breaches

[12] At the date of this determination ACPL had failed to pay three of the four agreed instalments. The payments were, in part, for holiday pay and, in part, compensation for humiliation and injury to feelings under s 123(1)(c)(i) of the Act. The holiday pay component, which was due to be paid at the end of the employment, therefore arose from a breach of the Holidays Act 2003.[5]

Number of breaches

[13] There were three breaches of the agreement – on each of the three dates for payments of instalments: 31 December 2018, 31 January 2019 and 28 February 2019. For penalty-setting purposes those three materially identical breaches may be globalised as a single breach. The initial provisional liability of ACPL, as a company, for such a breach is $20,000.[6]

Intentional, inadvertent or negligent breach?

[14] There was no question that the breach was intentional. Mr Hobson knew the terms because he had attended the mediation and signed the certified agreement that required payments by those dates. He said payments could not be made because of business and personal issues but had not sought to arrange funds by, for example, seeking a loan from friends, family or financial institutions to meet those commitments. In that sense, the failure to pay was deliberate rather than inadvertent or negligent.

Nature and extent of any loss, damage or gain made

[15] Mr Elliot was deprived of the use of money he reasonably expected to have the use of by the agreed instalment dates. In a relatively generous concession on his

[5] Holidays Act 2003, s 27(2).
[6] Employment Relations Act 2000, s 135(2)(b).

part he said he was not seriously disadvantaged by the failure as he had subsequently gained new work so had other income on which he could rely in the meantime.

[16] ACPL, by contrast, gained the benefit of deferral of a financial commitment. If relying on borrowed money to continue its business, it thereby reduced the amount of debt on which it had to pay interest.

Any steps to avoid or mitigate the effects of the breach

[17] ACPL had paid two other amounts that were due under its settlement agreement – some wages that were paid in the week after the agreement was made and a contribution to Mr Elliot's fees for representation. Its breach, in that sense, was a partial breach of the terms of the settlement agreement, rather than all of it.

Circumstances of the breach

[18] Having occurred in the context of a certified, final and enforceable agreement, the breach took place in circumstances where Mr Elliot was thereby deprived of the certainty and security which he should have been able to rely. He was fortunate, by having gained new work and income, not to be in a particularly vulnerable state of relying entirely on those instalments being made on time. That was not a circumstance for which any credit could be given to ACPL.

Previous conduct

[19] There was no information provided to indicate ACPL had engaged in similar conduct in the past.

Deterrence

[20] For reasons already touched on in this determination, a significant penalty was warranted to deter both ACPL and any other party to certified settlement agreements from not honouring the terms they had freely agreed. Such breaches corrode the certainty of such agreements. They are contrary to the public interest in the benefits that flow from their finality and enforceability, both for employers and workers.

Culpability

[21] As touched on under the considerations concerning the intentional nature of the breach, ACPL was entirely responsible for the breach. Its director, Mr Hobson,

made the deal in November 2018 and could reasonably be expected to be aware of ACPL's likely capacity to meet the agreed terms. The shortfall in doing so rested with ACPL.

Consistency

[22] Early in this proceeding I advised the parties that, considering the range of penalties in similar cases, the penalty for the breach in this case would likely be somewhere between $2,000 and $5,000.[7] Weighing the factors considered, a penalty at the level of $3,000 appeared appropriate.

Ability to pay

[23] While Mr Hobson had referred to business and personal difficulties being a reason for the default, there was no evidence that ACPL could not raise a loan to satisfy this debt to Mr Elliot or could not liquidate assets for that purpose. At the date of issue of this determination ACPL remained registered and there was nothing to indicate it was not still trading. Even if there were some difficulty in immediately meeting a $3,000 penalty, a company's fortunes may ebb and flow and liability is different from subsequent enforcement.[8] No adjustment of the provisional penalty of $3,000 was warranted on the ground of ability to pay.

Proportionality

[24] A final cross check considers, among other things, the amount of a provisional penalty ($3,000) in relation to the amount that was subject to the breach in payment ($4,803.03). This was not disproportionate. At 15 per cent of the maximum liability, $3,000 is a relatively moderate penalty. A lesser amount would risk being an insufficient deterrent. There was also a fair opportunity given, by way of an adjournment, for ACPL to have avoided paying a penalty at all. It had not used it.

[25] Accordingly ACPL must pay a penalty of $3,000 for its breaches of the settlement agreement.

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[7] See for example *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 383 ($2000); *High v Mighty Rocket Properties Limited* [2018] NZERA Wellington 111 ($6000); *Mangos v Metrofloor Contracting Ltd* [2018] NZERA Christchurch 46 (penalty $1,500); *Masjedi v Phoenix Publishing Ltd* [2018] NZERA Auckland 161 ($10,000).

[8] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [45].

[26] At the date of issue of this determination, one further instalment of $1,601.01 is due to be paid on a future date. Failure to pay that instalment would amount to a further breach and would render ACPL liable to a further penalty. If that situation occurred ACPL would be a repeat offender which could affect the level of any penalty imposed. Leave is reserved for Mr Elliot to revert to the Authority for further orders in the event that the final instalment of agreed payments is not made.

Penalty paid to whom?

[27] The Authority has a discretionary power to order that some or all of any penalty imposed be paid to any person, rather than to the Authority for transfer to the Crown Account.

[28] In the circumstances of this case the public interest in the deterrent element of the penalty imposed is still effective if some or all of the penalty is awarded to Mr Elliot. He is also, with his representative's assistance, likely to be able to pursue payment of the penalty if he has to also pursue further enforcement action for the instalment payments due to him. He may do so by use of the District Court enforcement procedures, available under s 151(2)(b)(ii) and s 141 of the Act, or through proceedings to liquidate ACPL.

[29] ACPL must pay the whole of the penalty of $3,000 to Mr Elliot.

Costs

[30] Mr Elliot had incurred further costs of representation in pursuing ACPL for breaches of the settlement agreement. An order for ACPL to pay a contribution to those costs in the amount of $1,000 was appropriate.

[31] He was also entitled to reimbursement of the expense of $71.56 paid to lodge his application in the Authority.

Robin Arthur
Member of the Employment Relations Authority