IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 20
3047232

	BETWEEN	TAI FINAU Applicant
	AND	MCL SECURITY (1988) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person No attendance by the Respondent
Investigation meeting:	16 January 2019
Determination:	16 January 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tai Finau applied to the Authority for a compliance order and a penalty to be imposed on his former employer, MCL Security (1988) Limited, because the company had not paid the second instalment of wage arrears due under a certified settlement agreement signed on 7 June 2018.

[2] Their agreement was certified by a Ministry of Business employment mediator under s 149 of the Employment Relations Act (the Act). The certification is not done until the mediator has explained its effects to the people signing the agreement, in this case Mr Finau and the company's director Malcolm Little. The mediator explains that the settlement is final, binding on and enforceable by the parties. Once signed by the mediator, the terms of the agreement could only be brought before the Authority for enforcement purposes, not for appeal or review. Section 149 of the Act also states that those terms of settlement cannot be cancelled and any person who breaches an

agreed term of settlement is liable to penalty. The Authority may impose a penalty of up to $20,000 against a company in those circumstances.[1]

The Authority investigation

[3] Having read Mr Finau's statement of problem (lodged 30 November 2018), the statement in reply lodged by Mr Little on his company's behalf (lodged 24 December 2018) and the attached documents, I considered an investigation meeting by telephone would be sufficient to gather any further evidence or information from the parties. A Notice of Investigation Meeting was issued, with both Mr Finau and Mr Little confirming to the Authority Officer their contact details and availability for the appointed time. In a Minute sent with the Notice, delivered by courier post to both parties, I indicated some likely problems in the company's case, based on what Mr Little had written in its statement in reply. Those problems were identified so Mr Little had an opportunity to prepare responses or to arrange any further information that might assist the company at the investigation meeting.

[4] On the day before the investigation meeting Mr Little contacted the Authority office by telephone and said he was not available for the meeting. At the appointed time today an Authority Officer twice tried to contact him on two telephone numbers held for him, without success. As indicated on the Notice of Investigation Meeting the Authority may proceed to determine a matter if a party does not attend. As the company was duly notified and had the opportunity to attend and participate and no good cause for its absence was shown, I proceeded with the investigation meeting.[2]

The breach of the settlement agreement

[5] Under affirmation Mr Finau confirmed the company had not paid him the net sum of $1,639.34 in outstanding wages that was due on 29 July 2018 under their settlement agreement. This was a clear breach of the terms of the certified record of settlement.

[6] The company's statement in reply set out some reasons that the payments were not made and what it considered should be done. For the following reasons, those explanations were not satisfactory.

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[1] Employment Relations Act 2000, s 135(2).
[2] See also Employment Relations Act 2000, s 173(2) and Schedule 2 clause 12.

[7] Firstly, the company suggested "new terms may need to be negotiated in order to settle the matter". Renegotiation is not permitted under a certified settlement agreement. The very point of such agreements, as confirmed through the explanation process before they are certified by the mediator, is that they are full, final and binding. The Authority cannot change those terms, it may only enforce them and, if they are breached, may impose a penalty.

[8] Secondly, the company suggested it might be in a better position to pay the overdue instalment once it was paid outstanding invoices by one of its clients. The term of the agreement to pay $1,639.34 on 29 July 2018 was not stated to be conditional on any payment by a client or on the company's financial state or capacity. The agreement set the date and the amount without condition.

[9] Thirdly, the company's reply indicated it had some capacity to get the funds necessary to pay the instalment due to Mr Finau – either by Mr Little providing the amount personally or from external income unrelated to the business. There appeared to be no reason what was due to Mr Finau could not be paid by the company borrowing the necessary funds.

[10] Accordingly, it was appropriate to make a compliance order as sought in Mr Finau's application. MCL Security (1988) Limited must pay Mr Finau $1,639.34, net by no later than 14 days from the date of issue of this determination.

Penalty for breach of an agreed term of a certified settlement

[11] MCL Security (1988) Limited was liable to a penalty for its breach of the agreed term.

[12] The Minute sent to the parties on 8 January gave the following explanation regarding a liability to penalty in such circumstances:

> More than 11,000 employment relationship problems are fully and finally resolved in New Zealand [each year] through settlement agreements made under s 149 of the Act. Because the finality and certainty provided by that system is important to so many employers and employees, the Authority and the Court have taken a rigorous approach to imposing penalties for breaches of those agreements.[3] A penalty of up to $20,000 may be imposed on a company for such a breach. In a case such as this one the range for a likely penalty is between $1000 and $3000. If such a penalty is imposed and

[3] *ITE v ALA* [2016] NZEmpC 42 at [62].

> awarded to Mr Finau, he will be able to take steps to have payment of such an amount and the outstanding instalment enforced through the District Court.[4]

[13] Having regard to the relevant matters identified in s 133A of the Act for determining an appropriate penalty and the guidance of the Employment Court on how to carry out that assessment, it was appropriate to impose a penalty.[5]

[14] Mr Finau's application involved one on-going breach by his former employer – that is failure to pay by a date agreed in their certified settlement agreement. The breach was contrary to the objects of the Act to promote mediation as the primary problem-solving mechanism and to promote effective enforcement of employment standards. The certified agreement was to rectify a failure to pay wages due. Despite Mr Finau's attempts, with the assistance of the Auckland Community Law Centre, to have the term honoured the company's breach has continued for almost six months. Because the company was asked to pay and did not, its breach was intentional and made in knowledge that it breached the term of an s 149 certified agreement. Its breach caused loss and damage to Mr Finau. He was denied the use of money he needed to meet debts. One consequence of not having that money was that he could not pay hire-purchase payments due on a fridge and a lounge suite. Both items were repossessed by the supplier when he could not make those payments.

[15] The company had done nothing to mitigate or avoid any potential effects on Mr Finau of its breach. The company, more likely than not, was aware of Mr Finau's reliance on receiving money due to him but had taken advantage of his vulnerable and relatively powerless position. There was no information that the company had previously engaged in any other breaches of the terms of any other s 149 agreements.

[16] A substantial penalty was warranted to deter the company and other parties who entered such agreements from breaching their terms. The company's degree of culpability for the breach was high. Due to the deliberate and extended nature of the breach, a provisional penalty at one quarter of the maximum was appropriate, that is $5000. No ameliorating factors warranted a reduction from that provisional level. The company provided no evidence corroborating its assertion of financial problems. As already noted its statement in reply indicated there were funds outside the

[4] Employment Relations Act 2000, s 141(1).
[5] *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

company that it could call upon. There was no reason given that the company could not arrange such a loan rather than have Mr Finau give it a de facto loan by making him wait for the money the company had committed to pay him under the s 149 agreement. As a matter of proportionality, with the amount due and for consistency with penalties awarded in similar cases, a penalty in the range of $1,500 and $3,000 was warranted.[6]

[17] From the assessment of those various factors, a penalty of $2000 was a suitable and relatively lenient amount to both deter such action and to punish the company for its breach. As Mr Finau has suffered the consequences of the company's breach, an order under s 136(2) of the Act for payment of the penalty to him was also appropriate. Accordingly MCL Security (1988) Limited must pay a penalty of $2,000 to Mr Finau for the company's breach of an agreed term of settlement. The payment must be made within 14 days of the date of this determination.

Reimbursement of fee

[18] Within 14 days of the date of this determination MCL Security (1988) Limited must also reimburse Mr Finau for the fee of $71.56 he paid to lodge his application in the Authority.

Next steps

[19] Mr Finau's application to the Authority attached a copy of a letter sent to MCL Security (1988) Limited on his behalf by a solicitor of the Auckland Community Law Centre. Dated 18 September 2018 the letter explained to the company what could happen once the situation now established by this determination was reached and if the company then failed to abide by any orders made the Authority. It noted that Mr Finau could then seek enforcement steps through the District Court for the $1,639.34 wages and $2,000 penalty that the company must now pay him.[7] It also noted Mr Finau could begin steps for liquidation of the company if the amounts owed to him were not paid.

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[6] See, for example, *A v Raelene and Dean Rees Partnership* [2017] NZERA Christchurch 31 ($3000); *Massam Transport Limited v Moerua* [2018] NZERA Auckland 123 ($1500); and *Mangos v Metrofloor Contracting Ltd* [2018] NZERA Christchurch 46 ($2000).
[7] Employment Relations Act 2000, s 141(1).

[20] At the time of issue of this determination the Companies Office register showed MCL Security (1988) Limited remained registered.

Summary of orders

[21] By order of the Authority, MCL Security (1988) Limited must pay Mr Finau the following sums within 14 days of the date of issue of this determination:

(i) $1,639.34 net for outstanding wages, in compliance with an agreed term of a certified agreement; and

(ii) $2,000.00 as a penalty for breach of the agreed terms; and

(iii) $71.56 in reimbursement of the fee paid to lodge his application in the Authority.

Robin Arthur
Member of the Employment Relations Authority