

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 87
3000180

BETWEEN SAH JAHAN
Applicant

AND AUTO REPAIRS AND
COMPLIANCE LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Navin Sharma, Director of Respondent by telephone
conference

Investigation Meeting: 27 March 2017 at Auckland

Written Record of Oral
Determination: 28 March 2017

**WRITTEN RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Miss Jahan entered into a Record of Settlement with her former employer, Auto Repairs and Compliance Limited (Auto Repairs) on 27 October 2016. This Record of Settlement was signed by a mediator from the Ministry of Innovation Business and Employment (MBIE) under s.149 Employment Relations Act 2000 (the Act).

[2] Clause 2 of the Record of Settlement required Auto Repairs to pay Miss Jahan a specified amount within seven days within the date of that agreement, i.e. by 03 November 2016.



[3] Auto Repairs breached clause 2 of the Record of Settlement because it failed to pay the full amount payable by the due date. Instead it made a part payment on 14 November and a further two payments on 24 November 2016. By 25 November 2016 just under 70% of the amount payable had been paid with \$1,100 left outstanding.

[4] On 21 February 2017 the parties entered into a second Record of Settlement under s.149 of the Act. Clause 2 of the second Record of Settlement required Auto Repairs to pay Miss Jahan the amount of \$1,100 (which was outstanding from the first Record of Settlement) within seven days, i.e by 28 February 2017.

[5] Auto Repairs also breached this second Record of Settlement because it failed to pay any money by 28 February 2016, although it did make the full payment, 9 days later, on 09 March 2016.

[6] By the time the last payment of \$1,100 had been paid 138 days had elapsed from the original due date of 03 November 2016.

[7] Although Miss Jahan has received the money she was owed under both Records of Settlement agreements she still seeks interest and that penalties be imposed on Auto Repairs for breaching both agreements.

[8] Auto Repairs admits that it breached the terms of both Records of Settlement but it says it did so because on both occasions when the funds were due to be paid under each of the Records of Settlements it was unable to log into its bank account because fibre optic work that was being done at the time prevented the company from accessing its computer systems.

[9] Mr Sharma admits that he did not inform Miss Jahan that Auto Repairs was unable to meet its obligations to pay her the money it had agreed to pay her by the date the payment was due. I find that Mr Sharma could and should have explained any computer or optic cable related issues and sought her agreement to vary the due date for the payment.

[10] Auto Repairs failure to do that left Miss Jahan in a position where she was expecting the money to be paid but did not receive it thus causing her financial embarrassment and stress.

[11] Auto Repairs further says that it deliberately withheld \$1,100 from Miss Jahan because it considers she owed it money. However Mr Sharma never told Miss Sharma that was why \$1,100 under the first Record of Settlement was paid 138 days late.

[12] Auto Repairs is not legally entitled to withhold funds under a record of Settlement because it considers it was owed money, which I note Miss Jahan disputes. I find that this explanation is not an acceptable reason for breaching the Records of Settlement.

[13] Clause 4 of both Records of Settlement expressly record that the Records of Settlement are in "*full and final settlement of all matters between [the parties].*" That clause prevents Auto Repair from pursuing Miss Jahan for any employment related issues. It had an opportunity to compromise all legal claims and it did so, not once but twice. Auto Repairs is now legally unable to resurrect and/or relitigate any historical issues between the parties.

[14] I also note that in its Statement in Reply Auto Repairs did not refer to either of the above matters. There was no mention of optic fibre cable or computer issues or of its decision to withhold payment due to an alleged (but legally misguided) set off.

[15] In its Statement in Reply Auto Repairs sought to claim that it should not have had any liability in terms of the issues that resulted in the parties entering into the first Record of Settlement. I do not accept that is a valid reason for breaching both Records of Settlement.

[16] The parties freely and voluntarily compromised whatever issues they had arising from their employment relationship by way of the first Record of Settlement. It is therefore inappropriate to revisit the circumstances which lead to the Record of Settlement.

[17] The mere fact that the parties entered into a s.149 Record of Settlement created final binding and enforceable obligations that Auto Repairs was legally required to comply with. The time for Auto Repairs to have disputed liability was prior to the execution of the first Record of Settlement.

[18] I find that Auto Repairs breached the first and second Records of Settlement so are therefore potentially liable for a penalty for each of these breaches.

Penalty

[19] Miss Jahan seeks penalties for breaches of both records of settlement. The full Employment Court in *Labour Inspector v Preet PVT Ltd and Warrington Discount Tobacco Ltd*¹ provides guidance regarding the imposition of penalties. I have therefore been influenced by the principles identified in *Preet*.

[20] In terms of the number of breaches, I find there were two discrete breaches of two separate Records of Settlement. The maximum penalty available in respect of each of these breaches is \$20,000 per breach so the total maximum penalty is \$40,000.

[21] I consider it appropriate to impose separate penalties for each breach because I consider the second breach more serious than the first because the second breach involved a Record of Settlement that had been entered into specifically to address the first breach.

[22] I consider the severity of these two breaches to be at the lower end of the scale in terms of the nature and type of breaches the Authority often sees. Although Auto Repairs did not comply with its legal obligations to pay the amounts it owed Miss Jahan by the specified dates it did pay almost 70% of its liability within 19 days of the due date. The final amount was also paid, albeit nine days late.

[23] I find that these breaches had an adverse impact on Miss Jahan who was deprived of the use of money she was expecting. She was entitled to expect that Auto Repairs would meet its legal obligations.

[24] I am also concerned that Auto Repairs entered into legal obligations that it (on two occasions) breached merely days later. I consider the explanations for these breaches are unsatisfactory. I consider that such breaches reasonably call into question the seriousness with which Auto Repairs viewed its legal obligations under the two Records of Settlement.

[25] If there was any issue associated with Auto Repairs not being able to meet its legal commitments then it should have addressed that at the time by informing Miss Jahan of the problem and attempting to negotiate additional time for payment. Auto Repair's failure to do so not once but twice is of concern.

¹ [2016] NZEmpC 143.

[26] I consider the short time frame (7 days) between entering into and then immediately breaching its obligations on both occasions are aggravating factors that need to be reflected in the level of penalties imposed.

[27] I consider it to be a mitigating factor that Auto Repairs did take steps to pay most of the amount it owed Miss Jahan and that while late, Miss Jahan did in the end actually receive all of the money she was owed. Auto Repairs is entitled to some credit for rectifying its breaches before the Authority's investigation meeting today.

[28] When I explored Auto Repairs' ability to pay a penalty with Mr Sharma he did not identify any information that suggested a penalty could not be paid. He confirmed that the business was operating as a going concern and was not facing closure or liquidation.

[29] I consider it necessary to impose a penalty in this case to emphasise to Auto Repairs and other parties that enter into Records of Settlement that these are legally binding obligations which must be complied with. Parties who enter into such arrangements must be aware that failure to strictly comply with their legal obligations is likely to attract the imposition of a penalty.

[30] I consider that a penalty is necessary to act as a deterrent to those who may be inclined to take their obligations under an s.149 Record of Settlement casually by entering into obligations that they know they cannot meet or from taking unilateral action to withhold funds that are to be paid to the other party.

Interest

[31] Miss Jahan seeks interest on the money that she was paid late to compensate her for that fact that Auto repairs has effectively had the use of her money as a result of its breaches.

[32] I consider it appropriate to exercise the Authority's discretion to award Miss Jahan interest at the current prescribed rate of 5% per annum on the \$1,100 that was not paid on time in breach of the first Record of Settlement.

[33] The award of interest runs from 03 November 2016 until 09 March 2017, being the date the outstanding amount was paid. This interest amounts to \$20.70 being 138 days at 5% per annum which accrues at the rate of 0.15 per day.

[34] Auto Repairs is therefore ordered to pay Miss Jahan interest of \$20.70.

Costs

[35] Miss Jahan represented himself so is not entitled to legal costs on the basis she has not actually incurred any legal costs. Miss Jahan is however entitled to be reimbursed \$71.56 for her filing fee.

Orders

[36] Within 28 days of the date of this determination Auto Repairs is ordered to pay Miss Jahan:

- a. \$20.70 interest;
- b. \$1,000 penalty;
- c. \$71.56 to reimburse her filing fee.

[37] Within 28 days of the date of this determination Auto Repairs is ordered to pay \$500 of the total penalties imposed directly to the Crown bank account.

Rachel Larmer
Member of the Employment Relations Authority

