

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 169
3053575

BETWEEN YERIM KIM
 Applicant

AND CATHARINA LION (KI SOOK
 JANG)
 First Respondent

Member of Authority: Michele Ryan

Representatives: Seungmin Kang, counsel for the applicant
 Nicola Lee, counsel for the respondent

Investigation Meeting: On the papers

Submissions 5 February 2020 for the applicant
 11 February 2020 for the respondent

Date of Determination: 28 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Yerim Kim, seeks compliance with a Record of Settlement agreed between the parties. Ms Kim asks the Authority to order her previous employer, Ms Catharina Lion (also known as Ki Sook Jang) to pay all monies due under the settlement agreement, penalties for ongoing breaches and costs associated with her application before the Authority.

Summary of background events

[2] The Record of Settlement was certified by a mediator under 149 of the Employment Relations Act 2000 (the Act) on 17 October 2018. Despite a confidentiality provision

contained within the Record of Settlement, it has been necessary to detail some aspects of the parties' arrangement to determine Ms Kim's claim.

[3] The respondent, Ms Catharina Lion, complied with some immediate fixed payments specified under the settlement agreement, but weekly payments of \$350 scheduled to continue until late April 2019 quickly became intermittent and often paid below the sum agreed, or not at all.

[4] Ms Kim lodged a statement of problem with the Authority in early April 2019.

[5] Following a case management conference call with the Authority, the parties altered their arrangements. These matters were also certified by a mediator on 10 June 2019. Ms Lion agreed to pay an additional \$1,375 in compensation for the breach to the payment schedule and costs. The quantum of weekly payments was reduced to \$200 each week until the outstanding sum was paid. This increased the time frame over which payments were required to be made. These matters were certified by a mediator on 10 June 2019 in a second settlement agreement.

[6] Whilst the additional \$1,375 appears to have been paid promptly, Ms Lion again fell behind with the weekly payments due.

[7] In mid-December 2019 Ms Kim resurrected her application for compliance.

[8] Ms Lion does not challenge Ms Kim's position and accepts \$3,500 remains outstanding under the Record of Settlement. She asks however that the Authority allow her to pay the debt at the rate of \$100 per week until it is repaid.

Should compliance be ordered by way of instalment payments?

[9] At issue is whether an order for full and immediate compliance be made, or whether the order should allow for instalment payments.

[10] Section 138(4A) of the Act provides that the Authority may order compliance, in respect to payment of a sum of money to an employee, by ordering payment by instalments "*but only if the financial position of the employer requires it*". The wording of the provision indicates the threshold for which the Authority may exercise its discretion and order compliance by way of instalment payments is high.

[11] The basis on which Ms Lion seeks to have the Authority order compliance by way of instalment payments is said to be because she does not have the funds to pay the full sum at once. She says the two stores from which she previously traded have both closed. She now sells clothing on behalf of a wholesaler at a temporary location. Ms Lion says her main source of income is from WINZ in the form of superannuation payments.

[12] Ms Lion provided a copy of a business bank statement for 2 months up to 28 March 2019 and a copy of her credit card transactions over a similar timeframe. On the information provided her financial situation appears to be strained. However I have insufficient information as to the value of assets or remaining stock from the business or the quantum of payment she receives from the wholesaler to properly assess whether Ms Lion's financial situation warrants an order that allows for the payment of the monies in instalments.

[13] In making this finding I am also mindful there have already been two prior agreements where Ms Lion agreed to make weekly payments to Ms Kim. I accept the inference that Ms Lion's past approach to her obligations to make payment by instalments is a strong indicator of future conduct.

[14] On balance I am unwilling to order payment by way of instalments where I am concerned the pattern of non-compliance will continue if a third instalment regime is formulated.

Should a penalty be imposed?

[15] A penalty may be imposed where a terms of settlement agreed under s 149 of the Act have been breached. Treating the failure to pay scheduled payments as a single breach, a penalty of up to \$10,000 may be awarded against an individual.¹

[16] The quantum of a penalty is determined by an assessment of the factors set out at s 133A of the Act and by the guidance given by the Court. In *Borsboom (Labour Inspector) v Preet PVT Ltd*² the Court found that the quantum of any penalty imposed should be proportionate to the level to the seriousness of the breach(es) and harm occasioned by them.³

¹ Employment Relations Act 2000, s135(2)

² [2016] NZEmpC 143

³ Above at [147]

[17] I have no direct evidence as to the effect of the breaches for Ms Kim but I accept the submission that non-compliance with the settlement agreement has been ongoing and Ms Kim Yim remains deprived of the total benefits to which she agreed. Had Ms Lion paid the outstanding amount at the rate she now says she can afford the debt would likely have been paid before the Authority was asked to re-intervene.

[18] Agreements made under s 149 of the Act are a critical means by which parties to an employment relationship may resolve a problem. A breach of a mediated settlement impacts not only on the parties directly involved, but may do so on any individual contemplating resolution of dispute by the same method. As a consequence any breach of a mediated settlement may be considered serious. I find a penalty is warranted in these circumstances but it is appropriate to take Ms Lion's particular circumstances into account in determining the amount of penalty.

[19] I note Ms Lion has paid over 2/3rds of the sums agreed between the parties in the settlement agreement before she began to default on the arrangement.

[20] I am unaware of any previous involvement by Ms Lion in proceedings for similar breaches.

[21] I also recognise Ms Lion's circumstances were adversely altered soon after the parties' agreement to the terms contained in the Record of Settlement in October 2018 for negatively reasons largely outside her control. Her business partner became seriously unwell and could not contribute to the business. I accept Ms Lion was left with unexpected financial obligations where one store could no longer operate in her partner's absence but that rent and overheads connected with those premises continued to accrue. However, to the extent Ms Lion preferred to direct monies to other creditors rather than Ms Kim I must find the breach of her obligation to make weekly payments was intentional, and cannot be regarded as minor.

[22] Taking all the above factors into account, including that a sizeable portion of the agreed sum under the record of settlement has been paid, Ms Lion's attempts to mitigate the breach and her financial situation, I consider a penalty of \$600 is proportional to the seriousness of the breaches and harm occasioned in this instance. I consider it would be just that the full amount be awarded in Ms Kim.

Costs

[23] Ms Kim is entitled to a contribution to costs associated with obtaining a compliance order where she was assisted by her representative. Her application has been determined on the papers where the claim did not require an investigation meeting. Ms Kim's representative attended a telephone conference and prepared submissions. An order of \$750 as contribution to Ms Kim's costs is appropriate.

Summary of Orders

[24] Pursuant to the Employment Relations Act 2000:

- (a) Ms Catharina Lion is ordered to comply with the settlement agreement of 10 June 2019 and pay Ms Kim the sum of \$3,500 within 30 days of this determination.
- (b) Ms Catharina Lion must also pay a penalty sum of \$600 for breach of the settlement agreement. This sum must be paid to Ms Kim in full no later than 6 weeks after this determination is issued.
- (c) Ms Catharina Lion must contribute \$750 towards Ms Kim's costs. This sum must be paid within 6 weeks of the date of this determination.

Michele Ryan
Member of the Employment Relations Authority