IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 383
3041931

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	VISHNU HOSPITALITY LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Marija Urlich, Counsel for the Applicant Gary Tayler, Advocate for the Respondent
Investigation Meeting:	29 November 2018 by telephone conference
Determination:	30 November 2018

DETERMINATION OF THE AUTHORITY

A. Vishnu Hospitality Limited breached the terms of its certified agreement with a Labour Inspector to pay monthly instalments of certain sums in settlement of a minimum entitlements claim totalling $28,273.32 (gross).

B. Consequently, a term of that agreement requiring VHL to pay the balance of the settlement amount in the event of default applies. VHL must pay the balance within 28 days of the date of this determination.

C. VHL must also pay a penalty of $2,000 for its breach of an agreed term of settlement. Payment of the penalty must be made within 28 days of the date of this determination, to the Authority for transfer to the Crown Account.

D. VHL must also pay costs of $750 to the Inspector and reimburse her the sum of $71.56 for the fee paid to lodge her application.

Employment Relationship Problem

[1] Labour Inspector Clare Lyons-Montgomery sought orders on the grounds she said Vishnu Hospitality Limited had not complied with the terms of a settlement agreement made on 19 June 2018 and certified under s 149 of the Employment Relations Act 2000 (the Act).

[2] Certification of such an agreement under s 149 of the Act makes its terms final, binding, enforceable and not subject to cancellation, review, or appeal. The Authority may consider only applications for enforcement of the terms and for penalties for breach of those terms.[1]

[3] The terms were agreed to be in full and final settlement of all matters in that particular proceeding, except for the issue of penalties on employment standard matters. Those penalties were the subject of an Authority investigation meeting held on 13 August and a determination issued on 18 September 2018.[2]

[4] The agreement made was not subject to a confidentiality clause. Its terms required arrears of minimum wage entitlements to be paid in monthly instalments to the Labour Inspector for the benefit of Lovelesh Nanda, a former manager of VHL's restaurant in Rotorua. A total of "$28,273.32 (gross)" was agreed to be paid in those instalments, commencing on 1 August 2018 and running through until March 2020. Instalments in winter months were to be $1000 and in summer months $2000.

[5] A further term said in the event of "default of any payment due … for seven days, the balance becomes due and owing".

[6] The Inspector has sought an order requiring VHL to pay the full balance because, from the date of the first instalment pay on 1 August 2018, the company has paid only a net amount and not the gross amount agreed as due each month.

[7] The Inspector also sought a penalty against VHL for breach of the terms of settlement and orders for costs and for reimbursement of the fee paid to lodge the matter in the Authority.

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[1] Employment Relations Act 2000, s 149(3)(b) and (4).
[2] *A Labour Inspector v Vishnu Hospital Limited* [2018] NZERA Auckland 293.

[8] The investigation meeting about her application was held by telephone conference for the convenience of the parties. The representatives each provided a written synopsis and made oral submissions.

[9] By this time VHL had made four such payments.

[10] For the first two (due 1 August and 1 September) VHL transferred $686.11 to the Inspector, applying a tax rate of around 31 per cent. It applied that rate because it said Mr Nanda was now employed elsewhere so a higher secondary tax rate should apply to payment of those amounts due as arrears of minimum entitlements not received when he was employed by VHL.

[11] For the second two instalments (due 1 October and 1 November) VHL transferred $881.11, based on a primary tax rate of 18 per cent. Both rates were said to have been found on the IRD website.

[12] In her initial discussion with VHL's director Nilin Patel the Labour Inspector had accepted the notion monthly instalment payments made to her would be a net amount calculated by VHL. However the Inspector revised her view when VHL deducted tax at a high secondary rate from the first instalment.

[13] In the ensuing debate between her and VHL's representative about the appropriate level of payments, the Inspector reverted to the actual text of the agreement which referred to gross amounts only. She said those were the amounts that should be paid into the Ministry of Business trust account. The Ministry's finance department would then calculate the appropriate rate for deduction of tax before transferring a net amount due to Mr Nanda. This was said to be the usual arrangement for payments made to Inspectors under agreements with employers to pay arrears in settlement of minimum entitlement claims.

[14] VHL refused to accept the Inspector's position although it did adjust the rate at which it deducted tax from the third and fourth instalments, as noted above. VHL relied on a letter from an IRD advisor for its position that, according to tax legislation, the company was required to deduct PAYE for payments made under the settlement agreement. It said VHL could be liable to substantial fines if the company knowingly failed to make deductions.

[15] There are several difficulties with the reliance VHL placed on the IRD letter.

[16] Firstly, VHL was not in a position of authority to unilaterally decide it could impose an interpretation of tax legislation on the terms of a settlement agreement certified under s 149 of the Act.

[17] Secondly, the IRD analysis refers to the payments as if they were being made directly by VHL to Mr Nanda. It does not touch on the actual situation where the payments are being made to the Inspector in exercise of her statutory role in recovering minimum employment entitlements. In that respect the arrangement is different from the situation contemplated in IRD's public ruling on employer liability to make tax deductions on awards of lost wages made by the Authority or the Employment Court for personal grievances.[3]

[18] Thirdly, the parties made an agreement for payment of certain sums and VHL is due to pay those specified amounts. If the parties had intended, when they developed the detailed payment plan set out in their settlement agreement, for VHL to transfer only net amounts, they would have specified that arrangement. If the arrangement made leaves VHL in some difficulty with accounting to IRD for deductions due, it seems unlikely IRD would not accept the necessary tax deductions had not been made if the Ministry of Business had carried out that part of the process before remitting net amounts to Mr Nanda.

[19] It is unfortunate VHL took a position in breach of the clear terms of its settlement agreement with the Inspector and thereby triggered the default term requiring immediate payment of the balance of funds due. It is particularly unfortunate because it has, thereby, forfeited the benefit of the very generous instalment payment plan to which the Inspector had agreed. The plan allowed for those payments to be spread out over the period from 1 August 2018 to March 2020, and without incurring interest on the sum due.

[20] This has occurred against a background where VHL's director Mr Patel had agreed to make the payments to the Inspector but, to put it plainly, felt some resentment about money going, eventually, to Mr Nanda. In his evidence at the

[3] *Employment Court Awards for lost wages or other remuneration – employers' liability to make tax deductions Public Ruling* – BR Pub 06/06. Retrieved 29 November 2018: https://www.ird.govt.nz/resources/4/5/45025da8-407e-4fce-8b39-347f8afa8cda/tib-vol18-no7.pdf .

previous Authority investigation meeting, referred to above, Mr Patel had made clear that he thought Mr Nanda was personally responsible for VHL's difficulties in answering inquiries from the Labour Inspector. VHL had not been able to provide necessary records to show it had met minimum employment standards for Mr Nand and other employees. Mr Patel believed this was because Mr Nanda himself, in his role as a manager, had not kept proper records or had removed records.

[21] There is a strong public policy interest in upholding compliance with terms of records of settlement certified under s 149 of the Act. All parties need to know when they make a deal, they must keep the deal. It is not open to reworking or rethinking on one or other party's whim or notion. In this particular case, involving an agreement with a Labour Inspector exercising her statutory function to enforce compliance with employment standards, there was also a public interest in the full payments being made as agreed to her so there was no doubt that only appropriate tax deductions would be made and remitted to IRD from the gross amounts paid.

[22] Whatever the motivation for its dispute with the Inspector over the appropriate amounts to pay for the monthly instalments, VHL has failed to pay the amounts specified in the agreement. This is a default and meant, under the further term agreed about such a circumstance, it was liable to pay the balance due. The balance due is $24,273.32 plus the difference between the actual amounts sent to the Inspector for the first four instalments and the $4,000 that was due for those instalments. If VHL can verify to the Inspector's satisfaction that it has already remitted the amounts deducted from the first four instalments to IRD, it need not pay those amounts as part of the balance.

[23] Under s 137 of the Act VHL must comply with paragraph 5.6 of the settlement agreement by paying the balance now due and owing. It must do so within 28 days of the date of this determination.

Penalty for breach of a record of settlement

[24] VHL was also liable to a penalty for breach of a record of settlement. Assessment of a penalty considers relevant matters set out in s 133A of the Act and judicial guidance on setting penalties.[4] The factors and steps followed are set out in summary form.

[4] See *Nicholson v Ford* [2018] NZEmpC 132 at [14]-[19].

[25] A penalty was appropriate because an object of the Act is to promote effective enforcement of employment standards. Deliberate breach of the instalment terms seriously undermined the integrity of the agreement. The loss to the Inspector comprised the time then necessary to seek enforcement. This loss and potential adverse effects of the breach are mitigated to a large extent by the requirement for payment of the balance, reducing overall administrative effort which otherwise would have continued for a further 15 months. The circumstance of the breach, being of a certified agreement intended to provide certainty and finality of outcome, made the matter serious but, because of the default clause, should not impact to any significant extent on the vulnerability of the former employee for whose eventual benefit the payments were to be made to the Inspector. VHL has been subject to two prior penalties regarding employment standards but not a breach of a settlement agreement.

[26] Deterrence of parties from breaching agreed settlement terms was the major factor favouring imposition of a penalty in this case.

[27] Globalising the failure to pay the full amount due on each of four instalments due to date as one breach (not four breaches), VHL was liable to a penalty of up to $20,000. Because the effect is substantially mitigated by the requirement to pay the balance in full, the severity of the breach is also significantly reduced. A penalty at ten per cent of the maximum was an appropriate adjustment to the total provisional amount for the relative severity. It was an amount that still had sufficient deterrent effect. It was also proportionate to the level of penalties imposed in other cases of a breach of a record of settlement, which involve a vast range of differing circumstances. Further, there was no information to suggest VHL could not meet the burden of paying a penalty at that level.

[28] Accordingly, within 28 days of the date of this determination, VHL must pay a penalty of $2,000 for its breach of the terms of the settlement agreement. The Inspector also sought an order for some part of any penalty imposed to be paid to Mr Nanda. The impact on him of the breach by VHL was not sufficient to warrant such an order in this case. The penalty is to uphold the public interest in parties honouring s 149 agreements. It is to be paid in full to the Authority for transfer to the Crown Account.

Costs and expenses

[29] In the event of the success of her application the Inspector sought an order for her costs of representation and reimbursement of the Authority filing fee. Allowing a modest amount for preparation for and attendance at the investigation meeting held by telephone conference, VHL must pay the inspector $750 as a contribution to costs and a further $71.56 to reimburse the fee paid for lodging that application.

Robin Arthur
Member of the Employment Relations Authority