

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 173
3126715

BETWEEN MATILDA PRUNELLA PAKU
 Applicant

AND HOTEL CHATHAMS LIMITED
 Respondent

Member of Authority: David G Beck

Representatives: David Neil Balfour, advocate for the Applicant
 No appearance for the Respondent

Investigation Meeting: On the papers

Submissions Received: 15 April 2021 from the Applicant
 None from the Respondent

Date of Determination: 29 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Matilda Prunella Paku applied to the Authority on 14 December 2020 for an order pursuant to section 137(1)(a)(ii) Employment Relations Act 2000 (the Act), requiring Hotel Chathams Limited to comply with the terms of a settlement agreement made with her. The settlement agreement in dispute was signed by Ms Paku and Toni Croon (a co-director of Hotel Chathams Limited) and an MBIE mediator pursuant to s 149 of the Act on 23 and 30 October 2020. It provided Ms Paku be paid by direct credit within seven days:

- (i) outstanding wages owed in the sum of \$7,020.00 (gross);

(ii) a compensatory payment under s 123(1)(c)(i) of the Act in the sum of \$5,000 without deduction by 1 December 2020; and:

(iii) upon receipt of a GST invoice payment of costs in the amount of \$1,000 + GST towards David Balfour's legal costs by 1 December 2020.

[2] Mr Balfour indicated that to date of the above amounts, (i) outstanding wages of \$7,020 has been paid and (iii) his costs contribution of \$1000 plus GST was paid after his submission was filed.

[3] As remedies Ms Paku seeks:

- A compliance order;
- Costs including reimbursement of the filing fee; and
- A penalty for breach of the settlement agreement.

The Authority Investigation

Ms Croon, apart from briefly appearing then leaving a scheduled telephone hearing on 9 April 2020, has failed to participate in any of the proceedings. This includes not filing any statement in reply, submissions or attending earlier scheduled investigation meetings held by telephone on 31 March and 6 April 2021. It was agreed the matter be determined by written submissions and Ms Croon had until 27 April to file on the company's behalf but she did not do so and has provided no further explanation.

[4] I am satisfied that Ms Croon has been given ample opportunity to respond to Ms Paku's claims and she has been specifically apprised of the potential penalty sought but has advanced no explanation for the continued breach of the settlement agreement.

[5] Mr Balfour in submissions detailed unsuccessful attempts to resolve outstanding payments that included email correspondence to and from Ms Croon and provision of an invoice for legal costs. Ms Paku also provided a statement setting out the impact upon her of non-compliance.

[6] Ms Croon gave no explanation for failing to meet the agreed compensatory payment and the contribution to Ms Paku's legal costs.

[7] I find the settlement agreement terms were breached.

Order for Compliance

[8] The terms of settlement are clear and the payments due have not been made in full. Accordingly under s 137(1)(a)(iii) of the Act, I order Hotel Chathams Limited to make the payments overdue within fourteen days of this determination being issued.

Imposition of a penalty and whether it should be awarded to Ms Paku?

[9] Failure to fulfil, without adequate explanation, the terms of an s 149 settlement agreement is a serious breach of the Act. The Authority under s 133 of the Act has the jurisdiction to award a penalty against a defaulting party. In the situation of a company, the maximum penalty is \$20,000 for each breach and I must consider matters set out in s 133A of the Act in determining what amount I can impose including whether the penalty should be paid to the Crown or apportioned.

[10] Generally the approach I must take has to be consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited*.¹ *Preet* identified a four-step framework to fixing penalties:

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.

Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.²

¹ *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

² At [151].

The nature and extent of the breaches

[11] The breach is in regard to the non-payment of an agreed and modest compensatory amount to end an employment relationship that was filed in the Authority on 11 August 2020. As the agreement is full and final, Ms Paku gave away an opportunity to pursue her personal grievance which is of value to Hotel Chatham in the sense of finality and no ongoing litigation expenses. In simple terms, this was a compromise of rights in return for consideration that has not been met in full.

Were the breaches intentional, inadvertent or negligent?

[12] Given that Ms Croon who is a signatory to the settlement agreement has chosen to provide no explanation on behalf of Hotel Chathams Limited I can only infer that this is an intentional breach.

What steps have been taken in mitigation?

[13] Whilst Hotel Chathams' Ms Croon has remained uncommunicative, I acknowledge that the amounts due fell within a very difficult period for businesses and that the wage arrears component of the settlement has been paid but no further steps have been taken to resolve matters and the timeframe is now extended beyond reasonable.

Severity of breaches

[14] On top of statutory considerations (the aims of the Act), I am obliged following *Preet*, to examine the extent of Hotel Chathams' culpability and take the public interest factor of using the penalty regime as a legitimate deterrent to others into account.

[15] Whilst the breach here may appear to involve a relatively small amount of money I have to consider that Ms Paku is in a vulnerable bargaining position.

Means and ability of the respondent to pay?

[16] I was provided with no information to accurately assess ability to pay and the onus to provide supporting information is on the respondent party, Hotel Chathams Limited.

Proportionality

[17] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breach and the context of such. In considering similar cases of breaches of certified settlement agreements, a penalty in this matter would likely fall in the range of \$2,000 to \$3,000.³ Whilst the breaches have been partly resolved, the respondent's non-participation has given me nothing further to consider and I consider that the totality of the ongoing breach warrants a modest deterrent penalty that I fix at \$1,500 of which \$1,000 is to be made available to Ms Paku and the remaining \$500 to the Crown.

Conclusion on penalty

[18] Within 28 days of the date of this determination being issued Hotel Chathams Limited must pay into a Crown bank account a penalty in the sum of \$500 and to Matilda Prunella Paku a penalty in the sum of \$1,000.

Compliance order

[19] Pursuant to s 137(iii) of the Employment Relations Act 2000, I order Hotel Chathams Limited to within 28 days, pay to Matilda Prunella Paku the sums of \$5,000 without deduction.

Costs

[20] The applicant has indicated costs of this action have been resolved between the parties.

³ See, for example, *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 383 (\$2,000); *High v Mighty Rocket Properties Limited* [2018] NZERA Wellington 111 (\$6,000); *Mangos v Metrofloor Contracting Ltd* [2018] NZERA Christchurch 46 (penalty \$1,500); and *Elliot v All Coat Painters Limited* [2019] NZERA 165 (\$3,000) and *Singh v Mega Civil Limited* [2020] NZERA 21 (\$3,000).

David G Beck
Member of the Employment Relations Authority