

NOTE: This determination contains an order prohibiting publication of certain information at paragraph [6].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 465
3282199

BETWEEN RUPALI RUPALI
Applicant

AND ARUN RARICHAN
First Respondent

AND SHIJO THOMAS
Second Respondent

Member of Authority: Natasha Szeto

Representatives: Dhilum Nightingale, counsel for the Applicant
Arun Rarichan for both Respondents

Investigation Meeting: On the papers

Submissions received: 13 May 2024 from the Applicant and 30 May 2024 from
the Respondents

Date: 31 July 2024

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Rupali Rupali was employed by Flame Meals Limited as a Restaurant Manager until 14 February 2021. An employment relationship problem arose between Ms Rupali and her employer, which the parties agreed to resolve on terms set out in a Record of Settlement (Settlement).

[2] Ms Rupali entered into the Settlement with Flame Meals Limited and the two directors of the company, Arun Rarichan and Shijo Thomas. Under the Settlement, Ms Rupali was to receive compensation by way of instalment payments to be paid on the 15th of each month for a period of 15 months. In the event of a default, the full amount outstanding would become immediately payable and enforceable. The directors provided personal guarantees under the Settlement that the instalment payments would be met. A Mediator from the Ministry of Business, Innovation and Employment (MBIE) endorsed the Settlement on 20 May 2022.

[3] Flame Meals Limited has now been removed from the Companies Office register. Ms Rupali says the directors have breached the Settlement because instalment payments amounting to \$5,000.00 have not been paid. She seeks a compliance order, interest on overdue amounts, a penalty and costs.

[4] The directors acknowledge they have breached the Settlement, but say they need more time to meet their financial obligations.

Procedural History

[5] The Authority convened a Case Management Conference on 29 April 2024. The parties agreed this matter should be determined on the papers without the need for an in-person investigation meeting. Mr Thomas confirmed Mr Rarichan has authority to represent him on this matter. Ms Rupali filed evidence and submissions, and Mr Rarichan filed a submission in response.

[6] The effect of certification of the Record of Settlement under the Employment Relations Act 2000 (the Act) is that the agreed terms are final and binding and can only be brought before the Authority for the purposes of enforcement. While the parties agreed the terms of the Settlement were to remain confidential to them, the terms at issue must be disclosed for the purposes of this determination. I prohibit from publication the balance of the Settlement under clause 10(1) Schedule 2 of the Act.

[7] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, however all information provided has been considered.

Relevant Background

[8] The Settlement was signed by Ms Rupali and both directors on 4 and 5 May, and certified by a Mediator from MBIE under s 149 of the Act on 20 May 2022.

[9] A term of the settlement was that the company would pay Ms Rupali \$15,000.00 by way of monthly instalment payments of \$1,000.00 commencing on 15 June 2022. Further, if the company did not make any of the instalment payments on time, the full sum would become immediately payable and enforceable.

[10] Between 14 June 2022 and 17 January 2023, Mr Rarichan paid Ms Rupali a total of \$7,500.00 in monthly instalment payments. An instalment payment of \$1,000.00 was missed in December 2022, but a larger payment of \$1,500.00 was made in January 2023. Ms Rupali lodged a Statement of Problem in the Authority on 11 March 2024. By that date, Flame Meals Limited had been placed into receivership and then liquidation. On 30 April 2024, Mr Rarichan paid another \$2,500.00 into Ms Rupali's bank account. To date, there is \$5,000.00 still outstanding.

[11] Mr Rarichan accepts the default of payments under the Settlement, and says he takes "full responsibility" for the overdue amount of \$5,000.00. He says the default is due to financial struggles and proposes a payment plan in instalments as follows:

- (a) By 30 June 2024: \$2,500.00
- (b) By 30 July 2024: \$2,500.00
- (c) By 30 August 2024: Interest and costs owing (or another month if interest and costs exceed \$1,000.00).

Issues

[12] The issues the Authority is to investigate and determine are:

- (a) Whether Mr Rarichan and Mr Shijo have breached the terms of a Record of Settlement, and should be ordered to comply with the Settlement by paying \$5,000.00 to Ms Rupali.
- (b) Whether Mr Rarichan and Mr Shijo should be ordered to pay interest (using the Civil Debt Interest Calculator) on any overdue amounts.
- (c) Whether Mr Rarichan and Mr Shijo should be ordered to pay a penalty under s 149(4) of the Act.

- (d) Costs and disbursements (two filing fees, at \$71.55 each).

Analysis

Have Mr Rarichan and Mr Shijo breached the Settlement?

[13] A Record of Settlement made under s 149 of the Act will only be signed by a Mediator after the parties have affirmed their understanding that the terms are final and binding on, and enforceable by the parties, may not be cancelled under the Contract and Commercial Law Act, and except for enforcement purposes may not be brought before the Authority or the court. “Enforcement purposes” in s 149(3)(b) of the Act refers to the procedures for enforcing the terms of agreements and orders or directions, such as the procedures for recovery of wages, and for compliance orders or penalties. A person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority under s 149(4) of the Act.

[14] Based on the evidence before the Authority, which includes witness statements, bank records and most importantly, acknowledgement by the directors of the default in payment, and the debt owed to Ms Rupali, I conclude Mr Rarichan and Mr Shijo have breached the Settlement and \$5,000.00 remains outstanding.

[15] If Mr Rarichan and Mr Thomas had made the instalment payments they had agreed to under the Settlement, Ms Rupali would have been paid in full by 15 August 2023. It has now been almost a year since that date.

Should the Authority order compliance?

[16] Under s 137 of the Act, the Authority has a broad discretion to order compliance with a range of matters including any terms of settlement.¹ The Authority may, by order require a person to do any specified thing for the purpose of preventing further non-compliance. In so doing, the Authority must specify a time within which the order is to be obeyed.² The Authority must exercise the power in a principled way.

[17] I am satisfied the respondents have not complied with the terms of Settlement. The Settlement provided for the full amount outstanding to become immediately payable and enforceable on default. The directors provided personal guarantees the instalments would be met. They take full responsibility for the overdue amount owing

¹ Employment Relations Act 2000, s 137(1)(a)(iii).

² Employment Relations Act 2000, s 137(2) and s 137(3).

to Ms Rupali. There is no dispute that there has not been compliance with the terms of the Settlement. The breach is both accepted and proved. I am satisfied it is appropriate and in the interests of justice for the Authority to exercise its discretion to order Mr Rarichan and Mr Shijo to comply with the terms of the Settlement.

[18] Section 138(4A) of the Act provides if the compliance order relates in whole or in part to payment of a sum of money, the Authority may order payment by instalments but only if the financial position of the employer requires it. I have no information about Mr Rarichan's and Mr Shijo's ability to pay other than a proposed payment plan from submissions in May 2024. The payment plan proposed the entire amount owing to Ms Rupali would be paid by the end of August 2024 (if interest and costs are less than \$1,000.00) and by the end of September 2024 (if interest and costs are more than \$1,000.00). While there is insufficient information to conclude Mr Rarichan's and Mr Shijo's financial situations require an order for payment by instalments, it would appear the full amount owing to Ms Rupali under the Settlement should be able to be paid within a period of 28 days from the date of this determination, and other amounts should be able to be paid within 56 days.

[19] For the sake of completeness, I note the Authority is able to extend the time specified to obey a compliance order on the application of the person required to obey the order under s 138(3) of the Act. However, given the respondents proposed to pay amounts owed to Ms Rupali by the end of August, there would need to be compelling supporting information about a change in their financial positions provided within the timeframe for compliance (28 days) to enable any application to be considered.

[20] Mr Rarichan and Mr Thomas are ordered to comply with the terms of the Record of Settlement and pay the outstanding amount of \$5,000.00 to Ms Rupali within 28 days of the date of this determination.

Should the Authority order interest?

[21] Ms Rupali claims payment of interest on sums owed to her. The Authority has discretion to order interest in any matter involving the recovery of any money, such interest to be calculated in accordance with Schedule 2 of the Interest on Money Claims

Act 2016.³ The court has confirmed interest is payable on sums sought for breach of a Record of Settlement.⁴

[22] Interest is payable on the sum and is sought by Ms Rupali. The Settlement was signed on 20 May 2022. Ms Rupali says interest should be calculated for two discrete periods of breach:

- (a) Between 14 February 2023 (being the first date of default) and 30 April 2024 (being the date a further lump sum was paid) on the outstanding amount of \$7,500.00, of \$495.00; and
- (b) Between 1 May 2024 and 31 July 2024 on the outstanding amount of \$5,000.00, of \$75.13.

[23] The total amount of interest sought by Ms Rupali is \$570.13 and I find it is appropriate to order that amount. Mr Rarichan and Mr Thomas are ordered to pay \$570.13 to Ms Rupali within 28 days of the date of this determination.

Should the Authority order a penalty?

[24] The Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties under s 133 of the Act. The Authority is able to order a penalty for breaching an agreed term of Settlement.⁵ Ms Rupali submits the exercise of the Authority's jurisdiction to order penalties is not precluded by the existence of the Settlement and any attempt to circumvent provisions of the Act (including in a Record of Settlement) will have no effect.⁶

[25] Ms Rupali asks the Authority to impose a penalty against the respondents because the matter has been ongoing for a considerable length of time, and because the breaches were deliberate and made knowingly. She seeks a penalty of \$1,000.00.

[26] In deciding whether to impose a penalty, and if I decide to, how much the penalty should be, I need to consider the factors in s133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.⁷ These principles have been elaborated on and followed since.

³ Employment Relations Act 2000, clause 11, Schedule 2.

⁴ *Crichton v Dig & Tip Earthworks Limited & Selwyn Torrance* [2024] NZEmpC 98.

⁵ Employment Relations Act 2000, s 149(4).

⁶ Employment Relations Act 2000, s 238.

⁷ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

[27] The law in respect of quantification is well established given the content of s 133A of the Act and requires that regard is had to the object of the Act; the nature and extent of any breach; whether the breach was intentional, inadvertent or negligent; the nature and extent of any loss or damage; steps taken to mitigate the effects of the breach, circumstances of the breach, including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations. The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[28] The breach by Mr Rarichan and Mr Shijo is inconsistent with the object of the Act to promote mediation as the primary problem-solving mechanism. The Act contains provisions encouraging parties to resolve their employment relationship issues between themselves and the Settlement represents such a resolution. The failure by a party to honour the terms of a settlement is a serious matter because public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[29] In determining the penalty claim I follow the four-step approach as set out by the Employment Court in *Borsboom v Preet*.⁸

[30] The first step is to assess the nature and extent of the breaches. There is one (admitted) breach of the Settlement. An individual who breaches an agreed term of Settlement is liable to a penalty of up to \$10,000.00.⁹

[31] The second step is to assess the severity of the breach. While I am not persuaded the failure to comply with the terms of the Settlement was intentional, it is clear Mr Rarichan and Mr Shijo negligently agreed to make instalment payments to Ms Rupali when they did not have the funds available. They failed to meet the terms of payment plans proposed by them, on more than one occasion. The impact on Ms Rupali has not been insignificant. She feels unfairly treated and it has been difficult to put what happened behind her because matters have been ongoing for so long. Ms Rupali has now been without agreed compensation for a considerable amount of time after her

⁸ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [137] to [151].

⁹ Employment Relations Act 2000, s 149(4).

employment ended. Mr Rarichan's and Mr Shijo's non-compliance with the Settlement has also put Ms Rupali to the cost of bringing this matter to the Authority.

[32] In terms of mitigating factors, there is no evidence before the Authority regarding any previous conduct by Mr Rarichan and Mr Shijo. However, there is a need for specific deterrence to ensure they appreciate the significance of their obligations to comply with the Settlement. In terms of general deterrence, a message should be sent to other like-minded individuals who might be tempted to treat payment obligations under a Record of Settlement as optional.

[33] The third step is to consider the financial circumstances of the person paying the penalty. In May 2024, Mr Rarichan submitted his mother's passing had significantly impacted his financial situation and he was struggling to meet his obligations. As noted above however, the failure to pay Ms Rupali what is owed to her is not a recent issue – she should have been paid in full almost a year ago. Mr Rarichan and Mr Shijo have not provided any supporting evidence about their respective financial situations. Accordingly, there is no basis to reduce an otherwise appropriate penalty based on ability to pay.

[34] The fourth and final step is the proportionality or totality test. Penalties should be set at a level which both punishes a person for their breach and deters them from future non-compliance but should also be in proportion to the gravity of the breach. A penalty should not be set at a level that creates a significant risk of non-payment.¹⁰ I have considered an appropriate figure in comparison to other cases. Standing back and looking at the matter in totality and taking a proportionate approach, I agree with Ms Rupali's submission that a fair and appropriate penalty in this matter is \$1,000.00.

[35] Ms Rupali has been directly affected by Mr Rarichan's and Mr Shijo's failures because she was a party to the Settlement and the intended recipient of payments made under it. In this case, the breach has resulted in a non-compensable loss to Ms Rupali, and costs will not adequately compensate her.¹¹ On that basis, I consider it appropriate to award 50 per cent of the penalty to Ms Rupali.

¹⁰ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [147].

¹¹ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

[36] Mr Rarichan and Mr Shijo are ordered to pay a penalty of \$1,000.00 within 56 days of the date of this determination, with \$500.00 being paid to the Crown and \$500.00 to Ms Rupali.

Should the Authority order costs and disbursements?

[37] The power of the Authority to award costs is set out in Schedule 2, clause 15 of the Act. Costs are at the discretion of the Authority and must be reasonable.¹² The Authority has adopted a daily tariff approach as the starting point for considering costs, being \$4,500 for the first day of hearing.¹³ The parties can expect the Authority to apply the daily tariff unless there is good reason to depart from it.

[38] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*¹⁴ as confirmed in *Fagotti v Acme and Co Limited*.¹⁵ Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

[39] This matter was heard on the papers, without the need for an investigation meeting. I accept a significant amount of work has gone into producing evidence and submissions, but the starting point for assessing costs would be something less than the full daily tariff for a one-day investigation meeting.

[40] As the successful party, Ms Rupali is entitled to a contribution to her costs actually and reasonably incurred. Ms Rupali's counsel acts on a pro bono basis, which means that Ms Rupali has not personally incurred any legal costs, and the cost has been incurred by Community Law Wellington & Hutt Valley (CLWHV) on her behalf. Ms Rupali seeks a contribution to costs of \$500.00 to be paid to CLWHV.

[41] Ms Rupali's counsel referred to the decision of the Employment Court in *Innovative Landscapes (2015) v Celia Popkin*¹⁶ in support of her submission that an

¹² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

¹³ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf.govt.nz>

¹⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* EMC Auckland AC28/06, 12 May 2006.

¹⁵ [2015] NZEmpC 135 at [114].

¹⁶ [2020] ERNZ 262.

order for costs should be made notwithstanding Ms Rupali has not herself actually incurred legal costs. While the decision in *Innovative Landscapes* concerned the application of the Employment Court's discretion, the reasoning is applicable to the discretion to be exercised by the Authority.

[42] I find that making a costs order in these circumstances is consistent with the Authority's broad discretion informed by the underlying purposes and objectives of the statutory scheme. I consider an award of costs in the amount of \$500.00 is both modest and appropriate in the circumstances.

[43] I order Mr Rarichan and Mr Shijo to make payment of \$500.00 to Ms Rupali as a contribution towards costs within 56 days of the date of this determination. It is a condition of my order that the full amount of \$500.00 be paid by Ms Rupali to CLWHV within 14 days of payment being received by her. I also order Mr Rarichan and Mr Shijo to reimburse Ms Rupali the two filing fees amounting to \$143.10 within 28 days of the date of this determination.

Orders

[44] In his submissions, Mr Rarichan requested a further month (to the end of September 2024) to pay any interest and costs over \$1,000.00. I have taken this into account in ordering the amounts due to Ms Rupali (other than the penalty) to be paid within 28 days of the date of this determination. The penalty and costs are to be paid within 56 days of the date of this determination.

[45] Based on the above, I make the following orders:

- (a) Pursuant to s 137(1)(a), and s 137(2) of the Employment Relations Act 2000, Arun Rarichan and Shijo Thomas are ordered to comply with the terms of the Record of Settlement and pay \$5,000.00 to Rupali Rupali within 28 days of the date of this determination.
- (b) Arun Rarichan and Shijo Thomas are ordered to pay interest of \$570.13 to Rupali Rupali within 28 days of the date of this determination.
- (c) Arun Rarichan and Shijo Thomas are ordered to reimburse Rupali Rupali \$143.10 for two filing fees within 28 days of the date of this determination.

- (d) Arun Rarichan and Shijo Thomas are ordered to pay a total penalty of \$1,000.00 within 56 days of the date of this determination as follows:
- (i) \$500.00 is to be paid to the Employment Relations Authority. In accordance with s 136 of the Act, that amount will be paid to the Crown bank account.
 - (ii) \$500.00 is to be paid to Rupali Rupali.
- (e) Arun Rarichan and Shijo Thomas are ordered to pay Rupali Rupali \$500.00 towards the cost of Ms Rupali's legal fees within 56 days of the date of this determination, which is to be paid by Ms Rupali to CLWHV within 7 days of payment being received by her.

Natasha Szeto
Member of the Employment Relations Authority