



[3] Mr Sharma seeks costs.

### **The Investigation**

[4] As it was not possible to achieve the parties' agreement as to a mutually acceptable investigation date, on 21 April 2011 I directed this matter to an investigation on the following Thursday, 28 April.

### **Background**

[5] It is common ground that that parties entered into a record of settlement executed by the mediations service under s. 149 of the Act.

[6] As part of that record, Mr Gandhi, agreed to "... *personally guarantee*" almost all of the settlement payment to Mr Sharma (par 5 of the record of settlement signed off by the mediator on 10 March 2011; attachment to statement of problem).

[7] The settlement agreement also stipulated that, "*If called on to make payment under this personal guarantee ... Mr Gandhi will make payment at the rate of at least \$150 per week until the full sum guaranteed has been paid*" (above).

[8] In his statement in reply received on 11 April, Mr Gandhi says he "*entered into the agreement in good faith*" and that, at the time of signing the record of settlement, he was relying on the sale of the business which did not eventuate, and the respondent company subsequently went into liquidation. Mr Gandhi has also suggested he did not understand what he agreed to and that he was pressured to reach an agreement: I do not accept either claim as the respondent was represented at the time and I have every confidence the significance of his agreement would have been explained to him by the Department of Labour Mediator.

[9] The settlement payment was to be made immediately if sufficient funds were available, otherwise by way of weekly payments. No payments were made. When called on to make payment Mr Gandhi said he had no money and would not pay the settlement.

[10] Mr Gandhi properly accepts he gave a personal guarantee but says that (verbatim):

*My position is clearly I don't have any money as a result of my business venture going into liquid and have applied for the unemployment benefit. ... I have nothing of significant value in my name ... .*

(email received by the Authority dated 21 April 2011)

[11] In evidence to the Authority on 28 April Mr Gandhi confirmed the above, said he was looking for a job, that he was receiving support from his wife, brothers-in-law, friends and family and, while he has a house, its “*equity was sucked into the (liquidated) business*” (oral evidence). Mr Gandhi says he has two children, aged 7 & 12.

[12] Mr Gandhi admitted to involvement with another business but says it is owned and operated by a friend and he has received no payment for his help and was not working there.

[13] Mr Gandhi agreed that he owned three other companies and they remained on the Companies Office record but, he said, they were not operating, earned no income and had no assets.

[14] The rent from a property owned by one of the companies went to the property managers: it was not making any money, there was no equity in the property and that company was overdrawn to the extent of \$6,000.

[15] Mr Gandhi said, “*I am going to pay (Mr Sharma) but can't until I find work; I may end up bankrupt*” (oral evidence).

[16] While the record of settlement refers to the possibility of sale of Mr Gandhi's business, it is not clear why he agreed to personally guarantee the settlement if the sale did not proceed.

[17] Mr Gandhi advised he was taking steps to apply for the unemployment benefit.

[18] In an email received by the Authority on 4 May, Mr Sharma's counsel, Mr Guido Ballara, rejected an offer made by email on the preceding day from Mr Gandhi to pay the applicant "\$20-\$25 weekly" (Authority file).

### **Discussion and Findings**

[19] I accept Mr Ballara's submissions on behalf of his client: inability to pay is not determinative as to the issue of enforcement and that part 15 of the District Court Rules 2009 provides for orders for examination of judgement debtor. Mr Gandhi's offer to pay \$20-\$25 weekly is also evidence of some ability on the respondent's part to pay.

[20] I also note from the offer of 4 May that Mr Gandhi has some ability to pay what he owes.

[21] In the absence of clear evidence as to Mr Gandhi's inability to make payment at the agreed rate, and because I am satisfied on a balance of probability basis that the respondent understood the nature of the agreement he entered into, I am satisfied the application for compliance should succeed.

### **Penalty**

[22] A penalty is claimed against Mr Gandhi for breaching the record of settlement.

[23] In *Xu v McIntosh* [2004] 2 ERNZ 448, 451 the Employment Court found that:

*In determining the quantum of penalties to be imposed for the breaches of the ERA ... the first question to ask was, how much harm had the breach occasioned? Further, how important was it to bring home to the party in default that such behaviour was unacceptable, or to deter others from it? The next question ... was: was the breach technical or inadvertent, or was it flagrant and deliberate?*

[24] The importance of adhering to records of settlement is fundamental if not self-evident. The harm occasioned Mr Sharma is not clear as he was not present at the Authority's investigation as he is, I understand, out of New Zealand in search of work.

He does not seek interest on the monies he is owed. Mr Gandhi admits to the breach. A penalty will bring home to Mr Gandhi that his behaviour was and is unacceptable. It will clearly deter others also. The breach was not technical or inadvertent, but was deliberate.

[25] On balance, and by way of applying *Xu* (above), I am satisfied a penalty of \$250 is appropriate and that, in lieu of interest, all of it be paid to the applicant: s 136 (2) of the Act applied.

### **Costs**

[26] Costs are sought by the applicant on the ground they typically follow the event, and as per other principles set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

[27] Solicitor-client costs are also sought. Excluding the costs arising out of the time of the investigation, they currently total \$1,448.00 plus GST.

[28] As this matter took a half day I am satisfied that, in all the circumstances and by way of application of *Da Cruz* (above), costs of \$1,500 should be awarded in favour of Mr Sharma.

### **Determination**

[29] Mr Gandhi is to comply with his personal undertaking as recorded in the record of settlement: ss. 137 & 151 of the Act applied. He is to do so no later than 28 days from the date of this determination: ss 137 (3) of the Act applied. Mr Gandhi is also to pay a penalty of \$250, all of which is to go the applicant.

[30] Mr Gandhi is also to pay as a contribution to Mr Sharma's fair and reasonable costs the sum of \$1,500 (fifteen hundred dollars).

### **Denis Asher**

Member of the Employment Relations Authority