

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 48
3079758

BETWEEN TALWINDER SINGH
Applicant

AND JASPREET SINGH
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Nathan Santesso, advocate for the Applicant
Deep Purusram, counsel for the Respondent

Investigation Meeting: 30 January 2020 at Auckland

Date of Determination: 03 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 16 July 2019, the parties signed an agreement in settlement of an employment relationship problem (the settlement agreement). On 22 July 2019, a mediator employed by the Ministry of Business Innovation and Employment (MBIE) certified the agreement under the requirements of s149 of the Employment Relations Act 2000 (the Act). In the process of certifying the agreement the mediator had the parties confirm that they understood the terms of settlement were final, binding, enforceable and could not be brought before the Authority except for enforcement purposes.

The applicant's claims

[2] In the statement of problem filed in the Authority on 30 October 2019, the applicant, Mr Talwinder Singh claims that the respondent, Mr Jaspreet Singh has failed to adhere to the terms of the settlement agreement to pay him \$35,000 in 14 monthly instalments of \$2500 in

the months from August 2019 to September 2020. Mr Jaspreet Singh has paid just the first instalment of \$2500 which was due on 5 August 2019.

[3] Mr Talwinder Singh further claims that Mr Jaspreet Singh has not complied with a term of the settlement agreement that he will pay \$2000 plus GST to Mr Talwinder Singh's representative for legal costs incurred, within 14 days of the settlement agreement being signed. Mr Jaspreet Singh has paid just \$1000 towards those costs.

[4] Mr Talwinder Singh sought orders from the Authority requiring Mr Jaspreet Singh to pay;

- (a) him the outstanding amount of \$12,500, being 5 instalments which fell due in the months of September 2019 to January 2020,
- (b) him the instalments of \$2500 each as they fall due on the 5th of each of the months of February to September 2020,
- (c) his representative the remainder of his costs of \$1300,
- (d) a penalty for breach of the settlement agreement and,
- (e) costs for making this application.

The respondent's response

[5] In a statement of reply filed in the Authority on 26 November 2019, Mr Jaspreet Singh says the claim should not be against him, it should be against J & P Pelia Foods Limited, which was the company that employed Mr Talwinder Singh and that he was coerced to sign the settlement agreement by Mr Talwinder Singh's representative at the time.

Investigation meeting

[6] Mr Talwinder Singh and Mr Jaspreet Singh each gave evidence before the Authority and either swore on oath or affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[7] As permitted under s174E of the Act this determination does not set out all the evidence or submissions received. The determination states findings of fact and law and makes conclusions on issues necessary to dispose of the matter.

Settlement agreement

[8] The parties to the settlement agreement are J & P Pelia Foods Limited, J & Pelia Trucking Limited and Jaspreet Singh, all of whom are cited as the Employer, and Mr Talwinder Singh, the employee.

[9] Mr Jaspreet Singh is the director of J & P Pelia Foods Limited. J & P Pelia Trucking Limited is the sole shareholder of J & P Pelia Foods Limited. Mr Jaspreet Singh is the sole director and shareholder of J & P Pelia Trucking Limited.

[10] Mr Jaspreet Singh signed the settlement agreement on behalf of each of these entities and on behalf of himself as Mr Talwinder Singh's employer.

[11] I do not accept that Mr Jaspreet Singh was incorrectly included as a party to the settlement agreement or was coerced to sign it. Mr Jaspreet Singh signed the settlement agreement in his own capacity and on behalf of both J & P Pelia Foods Limited and J & P Pelia Trucking Limited. Mr Jaspreet Singh is a director of both companies. There was no evidence that Mr Jaspreet Singh was coerced into signing the settlement agreement.

[12] The record of settlement agreement records the following:

2. This agreement is in full and final settlement of all claims the Employee has or may have against the Employer, and its director and all claims that the Employer has or may have against the Employee, and whether arising out of the Employee's employment with the Employer and the termination thereof or otherwise.
3. Jaspreet Singh will pay the Employee compensation in the sum of \$35,000 (without deduction for tax) pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.
4. Jaspreet Singh will pay the sum referred to in clause 3 to the Employee's nominated account in 14 monthly instalments of \$2,500 on:
 - 4.1 5 August 2019
 - 4.2 5 September 2019
 - 4.3 5 October 2019
 - 4.4 5 November 2019
 - 4.5 5 December 2019
 - 4.6 5 January 2020
 - 4.7 5 February 2020
 - 4.8 5 March 2020
 - 4.9 5 April 2020
 - 4.10 5 May 2020
 - 4.11 5 June 2020
 - 4.12 5 July 2020
 - 4.13 5 August 2020
 - 4.14 5 September 2020

5. The Employer will pay \$2,000 plus GST to the Employee's representative within 14 days of this agreement being signed, and on receipt of a GST invoice, as a contribution to the Employee's legal fees...
7. Should any of the instalments in clause [4] fail to be made on the dates specified, Jaspreet Singh undertakes to meet any reasonable costs, legal or otherwise, associated with the collection of the amount due.

....

[13] Mr Talwinder Singh says he received payment of the first instalment of \$2,500 shortly after the settlement agreement was signed. Mr Talwinder Singh says Mr Jaspreet Singh has not made any further payments under the settlement agreement. This is not disputed by Mr Jaspreet Singh.

[14] Further, Mr Talwinder Singh says that pursuant to clause 5 of the record of settlement Mr Jaspreet Singh has only paid the sum of \$1,000 towards his costs leaving an outstanding amount of \$1,300 due and payable under the record of settlement. This is not disputed by Mr Jaspreet Singh.

[15] Mr Talwinder Singh says Mr Jaspreet Singh is in breach of the terms of paragraphs 3, 4 and 5 of the settlement agreement.

Mr Jaspreet Singh's failure to make payments under the settlement agreement

[16] At the Authority's investigation meeting, Mr Jaspreet Singh accepted he owed Mr Talwinder Singh money under the settlement agreement but said he could not afford to pay the instalment amounts of \$2500 each month. Mr Jaspreet Singh was questioned about his financial affairs. Mr Jaspreet Singh informed the Authority that J & P Pelia Foods Limited and J & P Pelia Trucking Limited were about to be placed into liquidation. A letter from a tax agent was provided to the Authority stating that to be the case. As at the date of this determination both companies remain registered at the Companies Office in New Zealand.

[17] Mr Jaspreet Singh and his wife own their home in Takanini, Auckland. Mr Jaspreet Singh was not able to provide the Authority with a valuation as he had not obtained one. Mr Jaspreet Singh provided a bank statement showing details of a mortgage on his home. Mr and Mrs Singh own 2 vehicles which Mr Jaspreet Singh says are subject to loans. Mr Singh has had work over Christmas and is beginning a new role in early February 2020. Mr Jaspreet Singh's wife works.

[18] In my view, Mr Jaspreet Singh has the means to pay Mr Talwinder Singh the monies currently due to him and the monies falling due in the months from February to September 2020 as agreed by him under the settlement agreement.

Compliance orders

[19] Mr Jaspreet Singh is in breach of the terms of the record of settlement. Under s137(1)(iii) of the Act, the Authority may order a party to comply with any terms of settlement that s151 provides may be enforced by compliance order. Section 151 includes any agreed terms of settlement that are enforceable by the parties under s149(3) of the Act.

[20] Mr Jaspreet Singh is in breach of clauses 3,4 and 5 of the settlement agreement. A compliance order is necessary.

[21] Mr Jaspreet Singh is ordered to comply with the terms of the settlement agreement and;

- (a) pay the outstanding sum of \$12,500 to Mr Talwinder Singh within 14 days of the date of this determination under s137 of the Act,
- (b) pay the remaining \$20,000 owing under the settlement agreement and becoming due in instalments of \$2,500 to Mr Talwinder Singh. Payment of each instalment is to be made on the fifth of each month from 5 February 2020 until 5 September 2020,
- (c) pay Mr Talwinder Singh's representative within 14 days of the date of this determination the remainder of the legal costs owing to him pursuant to clause 5 of the settlement agreement in the amount of \$1,000 plus GST (\$1,300).

Penalty for breach of a certified settlement agreement

[22] Under s 149(4) of the Act, a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.

[23] There was no dispute that breaches occurred and Mr Jaspreet Singh has, excepting on one occasion, failed to pay Mr Talwinder Singh the agreed amounts by the agreed dates under the settlement agreement. Mr Jaspreet Singh further failed to pay the remainder of representative costs in accordance with the settlement agreement. Mr Jaspreet Singh is liable to a penalty.

Factors to consider when assessing and fixing a penalty

[24] The factors for assessing and fixing a penalty are contained in s 133A of the Act, and in various Court judgments including the full Court in *Borsboom v Preet* and more recently in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*¹. I have considered these.

[25] As an individual Mr Jaspreet Singh is liable to a penalty of up to \$10,000. A penalty is necessary to ensure as a matter of public policy that settlement agreements under s149 of the Act are enforceable. The nature of the breach is serious. Mr Jaspreet Singh agreed to pay Mr Talwinder Singh to resolve his employment relationship problem and agreed to do so by way of instalment. Mr Talwinder Singh agreed to be paid by way of instalment which delayed the payment to him of monies agreed to be owing. Mr Jaspreet Singh failed to pay all but one of the instalments to Mr Talwinder Singh. A key object of the Act is to promote mediation as a primary problem solving mechanism, which includes the s149 provision for final and enforceable certified agreements. Mr Jaspreet Singh's breach of the settlement agreement has undermined this object.

[26] A suitable adjustment to the provisional level of the penalty is \$5,000. The starting point therefore is \$5,000. Two further factors require assessment before finalising the penalty. Mr Jaspreet Singh says he cannot pay the amount of each instalment agreed to under the settlement agreement. He wants to reduce each instalment by \$1000. This of course would mean Mr Talwinder Singh would be waiting a significant period of time for payment of what is due to him. Mr Talwinder Singh has already waited for a considerable period of time.

[27] When questioned by the Authority, Mr Jaspreet Singh accepted he had two companies, but claimed they were about to go into liquidation, a house subject to a mortgage which is not unusual, two vehicles which are subject to loans, also which is not unusual. In my view, on the evidence available to the Authority, Mr Jaspreet Singh has the ability to pay Mr Talwinder Singh monies due to him under the settlement agreement. No reduction of the level of penalty has been established as necessary on the ground of financial capacity².

¹ *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138] –[151], *Nicholson v Ford* [2018] NZEmpC132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC12 at [19]

² *Daleson Investment Limited*, above n 1, at [44] –[46]

[28] The proportionality of the provisional level of a penalty is checked against the amounts in issue and the gravity of their conduct subject to the penalty. Considering the range of penalties in other cases, an adjustment of the penalty to \$4,000 I believe to be appropriate for the breaches in this case. This amount is sufficient to punish Mr Jaspreet Singh for the breaches and to act as a deterrent generally to parties who breach agreed terms of settlement.³

[29] The penalty must be paid by Mr Jaspreet Singh to the Authority within 28 days of the date of this determination.

Costs

[30] Mr Talwinder Singh is entitled to an order for a contribution to his costs of representation. The Authority's usual daily tariff for costs is \$4,500. The investigation meeting lasted just over one hour. The appropriate award of costs is \$1000.

[31] Mr Jaspreet Singh must also reimburse Mr Talwinder Singh for the Authority fee of \$71.56.

Summary of orders

[32] By no later than 14 days from the date of this determination, Mr Jaspreet Singh is to pay Mr Talwinder Singh \$12,500 being the balance owing to him under the settlement agreement.

[33] Mr Jaspreet Singh is to pay Mr Talwinder Singh the remaining \$20,000 owing under the settlement agreement and becoming due in instalments of \$2,500 on the fifth of each month from 5 February 2020 until 5 September 2020. Payments must be made on the fifth of each month in accordance with the terms of the settlement agreement.

[34] By no later than 14 days from the date of this determination, Mr Jaspreet Singh is to pay Mr Talwinder Singh's representative \$1,300 being the balance owing to him under the settlement agreement for the costs of representation.

³ See, for example, *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 383 (penalty \$2,000); *High Might Rocket Properties Limited* [2018] NZERA Wellington 111 (penalty \$6,000); *Mangos v Metro Floor Contracting Limited* [2018] NZERA Christchurch 46 (penalty \$1,500); *Masjedi v Phoenix Publishing Limited* [2018] NZERA Auckland 161 (penalty \$10,000); *Singh v Mega Civil Limited* [2020] NZERA 21 (penalty of \$3000 and Employment Relations Act 2000, s 136(2)).

[35] By no later than 28 days from the date of this determination, Mr Jaspreet Singh must pay to Mr Talwinder Singh \$1000 as a contribution to his costs of representation and \$71.56 in reimbursement of the fee paid to lodge his application in the Authority.

[36] By no later than 28 days from the date of this determination, Mr Jaspreet Singh must pay to the Authority \$4000 as a penalty under s 137 and s149(4) of the Act for breach of an agreed term of settlement.

Anna Fitzgibbon
Member of the Employment Relations Authority