

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 436
3143182

BETWEEN	EMILLE VAN WYK Applicant
AND	INGAME BUILDERS LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Applicant in person Chantel and Freddie Boshoff, directors for the respondent
Investigation Meeting:	On the papers and by case management conference
Determination:	06 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 29 January 2021, Emille Van Wyk and Ingame Builders Limited (Ingame) entered into a full and final settlement of all matters between them arising out of their working relationship and the ending of that relationship. The terms of their agreement was certified by a Ministry of Business, Innovation and Employment mediator under s 149 of the Employment Relations Act 2000 (the Act).

[2] On 11 June 2021, Mr Van Wyk lodged a statement of problem with the Authority which recorded that Ingame had failed to comply with the record of settlement because it had not paid him the monthly instalment payments on the 28th of each month until the full amount was paid.

[3] On 29 June 2021, Ingame lodged a statement in reply in which it stated that Mr Van Wyk was trying to enforce an agreement that had not been broken. While he

may not have been paid on the 28th of each month, he had nevertheless been “paid up to date in full”. If payments were received late, consideration needed to be given to bank processing times and ‘human error’.

The record of settlement

[4] Briefly stated, the record of settlement required Ingame to pay \$5,000 to Mr Van Wyk in full and final settlement. This was to be paid by an initial lump sum of \$2,000 with the remaining balance to be paid by way of \$200 instalments commencing on 28 February 2021 and, thereafter, on the 28th of each month until the full amount was paid. The parties also agreed not to make disparaging remarks about each other.

[5] Mr Van Wyk received the initial lump sum payment of \$2,000. However, the 28 February payment was not received until 1 March 2021. Similarly, the 28 March instalment payment was not received until 31 March 2001 and the 28 April instalment was received on 3 May 2021. At the time of filing the statement of problem, Mr Van Wyk had yet to receive the 28 May 2021 instalment.

The Authority’s investigation

[6] A case management conference was held with the parties on 16 July 2021 during which time Mr Van Wyk confirmed that he had since received the May and June instalment payments on 15 and 28 June 2021 respectively.

[7] Chantal Boshoff attributed Ingame’s previous late payments to human error and bank processing times which she rectified by setting up an automatic payment. To monitor Ingame’s compliance with the record of settlement, I have held back from releasing my determination until now in order to see how it went.

No evidence of a disparaging comment

[8] During the case management conference, Mrs Boshoff alleged that Mr Van Wyk had breached the settlement agreement by telling other people about it. I note that she did not plead this in her company’s statement in reply and no counterclaim has been lodged against Mr Van Wyk who denies the assertion. I find no evidence that he breached the record of settlement by making a disparaging comment against Mr and Mrs Boshoff.

Ingame is complying

[9] Mr Van Wyk has recently advised the Authority that he has received the August and September instalment payments on time. It appears that the company is taking its obligations seriously and is complying with the record of settlement.

[10] However, I am still left with Ingame's earlier non-compliance with the record of settlement when it failed to pay its February, March, April and May 2021 instalments on time. The delay here was in the order of a few days to a couple of weeks. It is clear that there has been a breach of the agreed timeframes with respect to these payments.

Orders

[11] Having breached the record of settlement, Ingame is liable for a penalty. Factors to weigh in determining an appropriate penalty are identified in s 133A of the Act and in Employment Court decisions applying the statutory criteria and other relevant considerations.¹

[12] Certified agreements are the primary mechanism by which most employment relationship problems are resolved every year. It is important that public confidence in s 149 agreements is not undermined and that parties have certainty with which to structure their affairs around such agreements.

[13] However, not all breaches will result in a penalty being imposed and for that reason it is relevant to assess how much harm the breach has occasioned, to impress upon the party in default that such behaviour is not acceptable, and to act as a deterrent to others.

[14] Here, Ingame breached the record of settlement on four separate occasions because its instalment payments for February, March, April and May were not made on time. While there have been no further breaches since, this is likely due to the enforcement steps undertaken by Mr Van Wyk and ongoing monitoring by the Authority.

¹ *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

[15] I acknowledge that Ingame has put in place an automatic payment which has rectified its late payment issues. I also accept that, as a construction business, the impact of COVID-19 pandemic on Ingame's operations at this time.

[16] A penalty in my view however is necessary as a deterrence to parties generally from failing to do what they have agreed to do in a certified agreement. However, I take into consideration that Mr Van Wyk is not out of pocket and Ingame's recent history of compliance with its obligations under the record of settlement. I impress upon it to continue until it crosses the finish line which is near.

[17] Weighing the relevant factors, \$175 is an appropriate amount in this case to mark the breach and to act as a deterrence to others from failing to comply with agreed timeframes. The penalty must be paid to the Authority within 90 days of the date of this determination and, on recovery of that amount, paid by the Authority to the Crown Bank Account.²

Expenses

[18] Mr Van Wyk incurred the expense of paying \$71.56 to lodge his application in the Authority. Ingame must reimburse him for that amount which is to be paid within the next 28 days.³

Peter Fuiava
Member of the Employment Relations Authority

² Employment Relations Act 2000, s 136(1).

³ Employment Relations Act 2000, Schedule 2, clause 15(1).