

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 404
3123714

BETWEEN

YUMING ZHU
Applicant

AND

EXCEEDING
INTERNATIONAL LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Nathan Santesso, advocate for the Applicant
Hui (Robert) Xu, for the Respondent

Investigation Meeting On the papers

Information timetabled 18 May 2021 from the Applicant
1 and 14 July 2021 from the Respondent

Date: 14 September 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In the last quarter of 2020 Yuming Zhu and Exceeding International Ltd (“EIL”) agreed to settle an employment relationship problem that had previously occurred. They entered into a settlement agreement which was subsequently certified by a Mediator on 19 October 2020 under s 149 of the Employment Relations Act.

[2] Despite the existence of a confidentiality provision within the settlement agreement, it is necessary to refer to several terms of their agreement as these form the basis on which Mr Zhu brings his claim.

[3] The settlement agreement required EIL to pay Mr Zhu a lump sum of “\$3,000 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act 2000.” Payment was to be made by way of direct credit “within seven (7) days of the date of this agreement”. The terms contained in the settlement agreement were confidential, and in full and final settlement of all matters arising out of their employment relationship.

[4] Unfortunately, the monies due were not paid within the agreed timeframe, being on or by 25 October 2020.

[5] On 27 October Mr Zhu contacted EIL’s director Mr Hui (Robert) Xu but says the conversation was fruitless. Mr Zhu’s representative then contacted EIL. Mr Xu says he obtained advice and re-committed to making the payment.

[6] However, monies were not credited to Mr Zhu’s bank account until 5 days later, on 2 November 2020, and the sum deposited was short. The evidence is that \$2343.20 was deposited into Mr Zhu’s account by EIL. The deposit was recorded as “... *Wages Salary*”. A dispute then followed as to whether EIL should have deducted PAYE from the payment.

[7] On 3 November 2020, Mr Zhu, through his representative, lodged a statement of problem in the Authority seeking payment of the sum remaining due under the settlement agreement, a penalty, and costs.

[8] On 9 November 2020 the sum outstanding was paid by EIL.

[9] Consequently, Mr Zhu’s claim has proceeded in the Authority on the basis of obtaining a penalty and costs.

[10] By consent this determination has been dealt with on the papers having provided each party with an opportunity to provide a written statement and any supporting documents they wished the Authority to consider.

Should a penalty be ordered?

[11] There can be no real dispute that the sum agreed under the settlement agreement was not paid in full by EIL until 15 days after it was contractually due. It follows that I must find EIL breached the settlement agreement.

[12] The failure by one party to comply with an agreed term of settlement affirmed by a mediator under s 149(3) is a serious matter. This is illustrated by s 149(4) of the Act which empowers the Authority to impose a penalty against a person in breach of such an agreement. Section 133A then sets out factors the Authority should take into account when considering penalties. A single breach by an individual may attract a penalty up to \$10,000; for a company a penalty not exceeding \$20,000 may be awarded for a solitary breach.¹

[13] I have first considered whether a penalty should be ordered.

[14] EIL's explanation for postponing the payment has two parts.

[15] First, EIL suggests Mr Zhu breached both confidentiality provision as well as the agreement to full and final settlement. It appears to have formed this view when it EIL received correspondence on 20 October 2020 from the Ministry of Social Development (MSD) which led it to conclude Mr Zhu had made a spurious complaint about it after they had agreed to the terms contained in the settlement agreement. When Mr Zhu subsequently contacted Mr Xu on 27 October 2020 I understand Mr Xu told him EIL would not be making the payment until he [Mr Zhu] provided an explanation to EIL and the mediator on those matters.

[16] The second part concerns the dispute whereby EIL deducted PAYE from the sum it had agreed to pay under the settlement agreement.

[17] Concerning the alleged MSD complaint, I have some doubts that Mr Zhu would have been able to lay a complaint with MSD and have it actioned in less than 24 hours, albeit I note Mr Zhu's written statement does not address EIL's allegation and is silent on the matter.

[18] In any event, the difficulty with this aspect of EIL's explanation is that there are no provisions within the settlement agreement which allowed it to ignore its obligations under the settlement agreement because it perceived Mr Zhu had not complied with his. If EIL genuinely believed Mr Zhu was in breach of the settlement agreement it was open to it to make inquiry on the matter, or lodge a claim against Mr Zhu with the Authority. It was not, however, simply able to withhold payment of the sum it had agreed to pay and wait for Mr Zhu to contact it.

¹ Employment Relations Act 2000, s 135(2)(a) and (b) respectively.

[19] I note also that the concern regarding the MSD complaint appears to have been either set aside or resolved between the parties on 27 October 2020, however the first payment was not made until 5 days later, on 2 November 2020.

[20] Turning to the dispute about taxation, there is an email exchange between Mr Xu and the mediator after Mr Zhu's representative raised concerns about deductions having been made on the sum agreed. I have no reason to find Mr Xu's inquiry with the mediator on this issue was not genuine. It is clear from email trail that the issue was also immediately clarified by the mediator on 3 November 2020. However the remaining sum owed was not made until 6 days later, on 9 November 2020.

[21] I have accepted there were several matters that impacted on EIL's perception as to its obligations under the settlement agreement. However those matters were quickly addressed once the parties communicated on the issue.

[22] No further reasons were given by EIL to explain the additional delays to completing payment despite prompt resolution of the matters said by EIL to have impeded payment. While I do not consider the delay to be severe nor do I find it to be minor.

[23] Public confidence in records of settlement will be undermined if it is perceived that parties are permitted to breach settlements without consequences.

[24] I find a penalty is warranted in the circumstances of this matter.

[25] I must now assess the quantum of the penalty.²

[26] There is no evidence that EIL has engaged in prior similar conduct.

[27] I accept Mr Zhu experienced some financial hardship by EIL's failure to pay the agreed payment on time. However the duration of the breach was relatively short lived.

[28] After considering the principles that govern the imposition of penalties, and other similar cases in which penalties have been ordered I consider a penalty of \$600 is proportionate and appropriate to this matter.

² Neither party expressly referred to the considerations listed at s 133A of the Act or case law concerning the application of those considerations when assessing the quantum of a penalty order.

Orders

[29] Exceeding International Limited is ordered to:

- (a) pay a total penalty of \$600.00 in full and without deduction – payment is to be made no later than 21 days after the date of this determination with \$300 payable to Mr Yuming Zhu and \$300 to the Crown via the Authority, and;
- (b) reimburse Mr Zhu the sum of \$71.56 as the filing fee paid to bring this claim.

Costs

[30] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority