

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 473
3176247

BETWEEN

NICOLA BOW
Applicant

AND

PACIFIC-ASIA
INVESTMENT
MANAGEMENT LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Roland Samuels, advocate for the Applicant
Alex Constable, Respondent director

Investigation Meeting: 16 September 2022

Determination: 20 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Bow says Pacific-Asia Investment Management Limited (PAIML) has breached obligations owed to her under a record of settlement entered by the parties and certified by a mediator on 8 June 2022.¹ She seeks a compliance order, interest on the unpaid sums agreed under the record of settlement, a penalty a portion of which to be paid to her and a contribution to costs incurred in seeking compliance including reimbursement of the filing fee incurred in lodging this application.

[2] PAIML says it is currently unable to meet the obligations entered under the record of settlement due to its financial circumstances.

¹ Employment Relations Act 2000, s 149.

The Authority's investigation

[3] The investigation meeting was held with Mr Constable attending in person and Ms Bow and her representative attending, by consent by audio-visual link. Mr Constable and Ms Bow gave evidence under affirmation. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

- [4] The issues requiring investigation and determination were:
- a. Has PAIML breached the record of settlement dated 8 June 2022 by failing to pay monies owed within the agreed timeframe?
 - b. If so, should a compliance order be made?
 - c. Should interest be ordered on any monies due under the record of settlement?
 - d. If PAIML has breached the record of settlement should a penalty be ordered and should the penalty sum or part thereof be awarded to Ms Bow?
 - e. Is Ms Bow entitled to a contribution to costs incurred in pursuing this application including reimbursement of the filing fee of \$71.56 incurred in lodging her application?

The settlement agreement

[5] The record of settlement includes PAIML will pay Ms Bow \$3500 without deduction within seven days of it being signed by a mediator.² It also includes within the same timeframe PAIML will pay Ms Bow a contribution to costs of \$1500.³

[6] The record of settlement was agreed to by both parties, as indicated by their respective signatures and all statutory requirements have been met by the mediator's

² Clause 3 Record of settlement 8 June 2022.

³ Clause 4.

certification. The record of settlement includes it is enforceable in the event of breach and records liability to a penalty may arise in such circumstances.

Compliance order

[7] Section 137(1)(iii) of the Act empowers the Authority to order a party to comply with any terms of settlement which s 151 of the Act provides may be enforced by a compliance order. Section 151 applies to any agreed terms of settlement enforceable by the parties under s 149(3) of the Act.

[8] There is no dispute PAIML has not paid to Ms Bow either sum or part thereof within the agreed timeframe or following. Mr Constable apologised to Ms Bow for the situation but says a series of actions by a third party have impeded PAIML's ability to generate funds so that the agreed amounts can be paid. He said he is hopeful funds will soon become available to meet the obligations owed to Ms Bow. PAIML provided an extract from its bank account which shows on that date it was in overdraft. Mr Constable said any ability of the company to borrow funds had been used to meet wages of current staff who were a priority.

[9] I accept PAIML has failed to comply with the record of settlement and exercise my discretion under s 137(1)(b) of the Act to order compliance with the sums outstanding.

[10] Within 21 days of the date of this determination Pacific-Asia Investment Management Limited is ordered to comply with the record of settlement and pay Nicola Bow the sums contained therein.

[11] Imposition of a compliance order is a serious matter. Should Pacific-Asia Investment Management Limited fail to comply with the compliance order as set out in [7], Ms Bow is entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or impose a sentence of imprisonment not exceeding 3 months⁴. Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.

⁴ Section 139 and 140(6) Employment Relations Act 2000

Penalty

[12] Section 149(4) of the Act enables a party to seek the imposition of a penalty in respect of any established breach of a corresponding settlement agreement. The imposition of a penalty is discretionary and is generally imposed for the purpose of punishment as well as discouragement of others. A single breach of a settlement agreement 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 breach⁵.

[13] As a matter of public policy, in this case a penalty is necessary to uphold the integrity of the full, final, binding and enforceable agreements allowed under s 149 of the Act.

[14] The level of penalty is determined by an assessment of the factors set out in s 133A of the Act. Having regard to the statutory criteria alongside the guidance provided in judgments of the Employment Court I make the following comments.⁶

[15] There is no basis on which I can reasonably conclude that breach of the record of settlement by PAIML was inadvertent, minor or technical.

[16] Mr Constable signed the record of settlement on behalf of PAIML. He was authorised to do so as its sole director. The record of settlement records PAIML had the opportunity to take independent legal advice as to its meaning and terms. It must be taken to have been aware of its obligations under the record of settlement.

[17] Since the date the settlement monies were due under the record of settlement the documents before the Authority suggest PAIML made repeated assurances to Ms Bow that it would pay the settlement monies.⁷ No payments were made. The assurances PAIML have failed to honour have contributed to the adverse effects of the breach.

[18] Mr Constable has described in broad terms financial difficulties which have impacted PAIML's ability to pay the settlement monies. The evidence provided in

⁵ Section 135(2)(a) and (b) respectively.

⁶ For example *Nicholson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

⁷ Refer emails 15, 17 and 22 June 2022.

support is very limited however I accept PAIML faces financial difficulties and this is a factor relevant in assessing the appropriate level of penalty.

[19] I am unaware of any previous proceedings for similar breaches involving PAIML.

[20] Taking all the factors into account I find PAIML is liable for a penalty of \$1,000, which is within the range of penalties currently imposed for failure to pay monies due under a record of settlement and is proportionate to the seriousness of the breach and harm caused.

[21] In the circumstances of this matter it is just for half the penalty sum (\$500) to be paid to Ms Bow by PAIML, the remainder must be paid to the Authority for payment into a Crown bank account.

[22] Within 21 days of the date of determination Pacific-Asia Investment Management Limited is to pay the Authority \$1,000 as a penalty under s 137 and s 149(4) of the Act for breach of an agreed record of settlement. On recovery of that penalty the Authority is to pay \$500 to Ms Bow and \$500 to the Crown Account.

Interest

[23] Ms Bow seeks interest on the settlement monies. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[24] It is appropriate where a person has been deprived of the use of money to make an award for interest. PAIML is ordered to calculate and pay interest within 21 days of the date of this determination on the sum of \$5,000 (being the total settlement sum) until it is paid in full.

[25] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.

Costs and reimbursement of filing fee

[26] Ms Bow has incurred costs exceeding \$600 in enforcing the record of settlement. When the Authority considers costs, it exercises a discretion. In exercising that discretion it does so in a principled way. Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. In the Authority, costs are usually awarded on the basis of a daily tariff which is currently \$4,500 for the first day. This matter was able to be investigated within one hour.

[27] Ms Bow is entitled to a contribution to the costs of representation incurred in seeking compliance with the record of settlement. I consider a fair and reasonable award of costs to be \$400. Pacific-Asia Investment Management Limited is to pay Ms Bow \$400 as a contribution towards those costs and the filing fee of \$71.56 within 21 days of the date of determination.

Marija Urlich
Member of the Employment Relations Authority