IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2025] NZERA 9
3327020

	BETWEEN	ROYDEN BROWN Applicant
	AND	BROADLANDS FARM NZ LIMITED Respondent

Member of Authority:	Antoinette Baker
Representatives:	Janet Copeland, Kate Sinclair counsel for the Applicant Arsalan Abdollahi, counsel for the Respondent
Investigation Meeting:	29 November 2024
Submissions received:	29 November, 9 and 10 December 2024.
Determination:	14 January 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Brown brought an application for compliance, interest, penalties, costs against the respondent (Broadlands) due to alleged breaches of a final settlement of all employment relationship problems (the settlement). The now remaining issues for consideration and determination are penalties, costs and special damages.

[2] Mr Brown finished in his employment with Broadlands in August 2023, approximately ten months prior to the settlement. By the time of the settlement Mr Brown had

lodged proceedings in the Authority alleging unpaid statutory entitlements in the context of working for related family members across many years in the rural sector.

[3] The co-directors of Broadlands are husband and wife, Robert James Auld and Toni Sheree Auld[1].

[4] The settlement was signed by the Aulds on the 29 May 2024 and by Mr Brown on 31 May 2024. An MBIE[2] mediator signed the settlement on 18 June 2024 under s 149 of the Employment Relations Act 2000 (the Act).

[5] The settlement included a sizeable payment that was expressed as representing 'payment for public holidays and annual holidays'. This was to be paid in equal instalments (less PAYE) commencing on 20th July 2024 and continuing to fall due on the 20th of each subsequent month until payment in full. Default payments were to incur interest. Mr Brown also agreed in the settlement to withdraw his then live substantive claims in the Authority which he did so on 19 June 2024. The settlement included agreement to pay Mr Brown's legal costs directly to counsel for Mr Brown which was complied with.

[6] On 24 September 2024 after the first three settlement instalment payments remained unpaid, Mr Brown lodged these proceedings.

[7] From the first payment default by Broadlands just after 20 July 2024, counsel for Mr Brown had been regularly challenging the nonpayment through Broadland's then counsel. Mr Brown provided, upon Broadland's request in July 2024, his bank details. Payment was not made. Broadlands through its then counsel then referred to a 'mix up' with paperwork and or asked for IRD information to process the PAYE deductions for the payments. Mr Brown supplied IRD information in August 2024. By 20 September 2024 the first three instalments payments remained outstanding with little or no further explanation as to why. Mr Brown lodged these proceedings on 24 September 2024.

[1] https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/6661478.
[2] Ministry of Business Innovation and Employment.

[8] On Monday 30 September 2024 the proceedings were couriered to the registered address for Broadlands. On 2 October 2024 then counsel for Broadlands confirmed to the Authority that they no longer had instructions to represent Broadlands in this matter. A further repeat of service on the directors occurred on 2 October 2024.

[9] On or soon after 30 September 2024 Ms Auld for Broadlands deposited the full settlement figure into the business account of Mr Brown's counsel. This was the account included on the legal fee invoice that Broadlands had paid under the settlement terms. Counsel for Mr Brown very soon after communicated to counsel for Broadlands that the money needed to be returned because they did not operate a trust account. On 4 October 2024, if not before, Mr Auld was contacted by Broadland's then counsel. He was told that the money was to be returned and was asked for the Broadland's bank account details to enable this to happen. Mr Auld instructed Broadlands counsel not to do anything further. The timing had an unfortunate context. Mr Brown's father had died on 29 September 2024.

[10] By the end of 4 October 2024, counsel for Mr Brown returned the above referred money into the trust account of the firm that then counsel for Broadbands worked in. Emails from this time onwards show that the then counsel for Broadlands communicated to Mr Brown's counsel's requests for compliance saying they were having difficulty getting instructions to release the money to Mr Brown. When it became clear that the then counsel for Broadlands did not have instructions, Ms Auld responded to counsel for Mr Brown by challenging why they returned the money to their now former counsel. Ms Copeland for Mr Brown emailed a clear explanation about what I accept are the rules governing legal practitioners and trust accounts and about not contacting another counsel's client directly. Despite engaging that day by email it then took Ms Auld a further two weeks to reply that she had 'actioned it.' It is unclear what she actioned. It was not until the day before the investigation meeting in this matter on 28 November 2024 that Broadlands through the Aulds instructed new counsel who quickly arranged the above referred funds into his firm's trust account to pay Mr Brown that day an amount representing (by then) the five unpaid instalment payments under the settlement, the further instalment payment due on 20

December 2024 and interest under the settlement in accordance with the late instalment payments. The interest calculation was disputed by counsel for Mr Brown as being $154.00 short.

[11] The investigation meeting continued the following day with Broadlands represented by its new counsel. After the investigation meeting commenced the parties took time without my involvement to consider settlement. This resulted in my issuing a consent determination[3] that resolved the agreed amounts to satisfy the remaining instalment payments in the settlement to the last projected payment due on 20 February 2025. This also dealt with the dispute about the interest calculation from the payment made the day before on 28 November 2024. Payment pursuant to this consent determination was made later that day based on an undertaking from counsel for Broadlands. The settlement however was only partial. The issue of penalties for noncompliance with the delayed payments remained as did the issue of costs and a claim for special damages. The investigation meeting continued in order to deal with hearing evidence and submissions about these matters.

[12] For Mr Brown it is submitted that I should consider multiple penalty breaches at the higher end for each instalment payment not paid because the nonpayment was intentional, ongoing and a 'flagrant disregard for its obligations.' I am asked to consider the undermining of the certainty and finality of s149 agreements that the public can rely on; that Broadlands had the benefit of legal advice and that the settlement represented unpaid employment standards which aggravates the seriousness of the continued nonpayment of instalments which in turn were for Broadland's benefit. It is submitted that it is unreasonable and unfair to Mr Brown that Broadlands did nothing to rectify the non-payments until 'the eleventh hour.' I am further asked to remit the whole of any penalties awarded to Mr Brown.

[13] Broadlands through its directors says that the reason for nonpayment of the first instalments was due to confusion about how to pay and deduct PAYE on the instalment payments because Mr Brown had by then left its employment. Ms Auld says they were not getting any answers as to how they should do this. It is submitted for Broadlands that there

[3] *Brown v Broadlands Farm NZ Limited* [2024] NZERA 712.

was never an intent not to comply with the settlement. Broadlands says that this is supported by the payment of the legal costs within time and then the lump sum gross payment for the entire settlement amount on or about 30 September 2024 which meant three instalments were satisfied early. It is submitted that this intention meant that with that lump sum payment Broadlands had complied with the settlement. Broadland's directors say they were dealing with a bereavement at the time, were busy with lambing, and or it was not their problem that counsel for Mr Brown did not operate a trust account.

[14] Accordingly, this matter deals with the remaining issue of penalties, costs, special damages and the filing fee.

The Authority's investigation

[15] After Mr Brown lodged these proceedings on 24 September 2024, Broadlands responded in a limited fashion. This was in several emails from Ms Auld. This included that the settlement money had been paid, the directors were being 'harassed' and the matter was at an end. In response to me seeking to have the matter set down for a phone conference call to discuss progression of the application Ms Auld indicated on 10 October 2024 she was on 'bereavement leave' but gave no further details.

[16] I eventually held a phone conference call on 21 October 2024, Broadlands by then had not provided any phone contact details as the Authority requested. The purpose of the conference call had been communicated to Broadlands and could have benefited someone speaking on the Company's behalf. In these circumstances and particularly that this was a company and not an individual respondent with the directors indicating they considered the matter at an end, I continued with the phone conference call.

[17] Counsel for Mr Brown attended the phone conference call.

[18] After the phone conference call my detailed directions[4] included a timetable for evidence, date of an AVL investigation meeting and strong encouragement to the parties to resolve matters given by then I understood a significant payment of money owed under the settlement remained in a trust account but none of it was getting to Mr Brown.

[19] As noted above, the day before the investigation meeting, the Aulds instructed new legal counsel, Mr Abdollahi and Mr Brown was paid the defaulted payment instalments, interest and the instalment next due in December 2024.

[20] The investigation took approximately one day by AVL finishing at 3.30pm. As noted above, this included a pause for the parties (without me) to discuss payment resulting in the above mentioned Consent Determination.

[21] At the investigation meeting I heard on oath and affirmation evidence from Mr Brown who had, as directed, lodged a brief prior, and from the Aulds who had not, as directed, lodged briefs. Respective counsel had the opportunity to ask the witnesses questions which they did. Counsel for Mr Brown chose to speak to her submissions providing a written synopsis as had been directed. Given the timing of counsel for Broadland's involvement I timetabled for him to provide response submissions in writing and gave Mr Brown time for a written right of reply. Counsel for Mr Brown was also asked to provide further details on invoice narrations for the application for costs. All further information received, I reserved my determination on 10 December 2024.

[22] As permitted by s 174E of the Act, this determination has stated findings, expressed conclusions on the issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[23] The remaining issues for me to determine are:

[4] Directions of the Authority, 21 October 2024.

a. Has the s149 settlement been complied with?
b. If not, what if any penalty is to be ordered against the respondent for the fact of noncompliance with the settlement considering factors under s 133A of the Act?
c. Should any portion or all of any penalty ordered be paid to Mr Brown?
d. Should any costs be ordered one to the other including if appropriate the filing fee?
e. Should the Authority also consider special damages?

Has the s149 settlement been complied with?

[24] I am satisfied that by the time Broadlands finally instructed payments to be arranged to be paid to Mr Brown this was not until 28 November 2024. It submits that it had complied before that on or about 30 September 2024 by paying the full settlement amount to Mr Brown's legal counsel's business account. I accept as likely that Ms Auld thought she was paying the money to the right place because that was the account they had paid the settlement legal fees' invoice to. The Settlement document did not include any account references for payment.

[25] However, I do not accept that there was compliance by 30 September 2024. Broadlands was clearly in default by then of three instalment payments. Beyond this, Broadlands then failed to rectify and mitigate the situation when, based on messaging between Mr Auld and Broadlands' then counsel on 4 October 2024, he clearly refused to give instructions to do anything further. This was in response to a request for Broadland's bank details to enable the return of the money. Mr Auld at the time laid the blame on the lawyers involved. While I accept he was suffering an immediate bereavement this was unreasonable and further exacerbated a continued noncompliance after this when, as messaging shows, Mr Brown's counsel's attempts to seek clarity about the money from then Broadland's counsel were unsuccessful because they appeared not to be able to get instructions in relation to making overdue payments from the Broadland's money held in their trust account.

[26] Accordingly, I find that there was noncompliance of the settlement agreement in that five instalment payments were delayed in monthly succession. There is no need for compliance orders now as explained above. However, the fact of the noncompliance opens Broadlands to potential penalties. This means that the noncompliance was for five delayed payments and associated default interest that were progressively late by 4 months and 9 days[5]; 3 months and 9 days[6]; 2 months and 9 days[7]; 1 month and 9 days; and 9 days. The payment in full on 29 November 2024 obviously also meant that the instalments by then not yet due were paid in advance.

What if any penalty is to be ordered against the respondent for the fact of noncompliance with the settlement considering factors under s 133A of the Act? Should any part of a penalty be paid to Mr Brown?

[27] The Authority under ss 149(4), 133 and 135 of the Act has the jurisdiction to award a maximum $20,000.00 penalty against a company for breaches 'of an agreed term' of a s149 settlement. Section 136(2) of the Act says the Authority may order the whole or part of any penalty be paid to any person.

[28] Section 133A of the Act sets out that in determining the amount of a penalty I must have regard to 'all relevant factors' including:

(a) the object of the Act
(b) the nature and extent of the breach
(c) whether the breach was intentional, inadvertent, or negligent
(d) the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person in breach
(e) whether the person in breach has taken steps to mitigate the potential adverse effects of the breach

[5] Payment due 20 July 2024
[6] Payment due 20 August 2024
[7] Payment due 20 September 2024

(f) the circumstances in which the breach occurred including the vulnerability of the employee

(g) whether the person involved in the breach has previously been found by the Authority or the court to have been engaged in similar conduct.

[29] The Employment Court has set out guidance when considering whether a penalty is to be awarded in the context of statutory breaches. This includes the number and nature of the breaches; the severity of each breach; the ability of the person in breach to pay; and proportionality to ensure that any final penalties awarded are 'just in all the circumstances.'[8] There is also the need to consider deterrence and to award penalties consistent with similar cases.[9] In the latter case Chief Judge Inglis noted that in relation to breaches of settlement agreements:

> There is a broader public interest in deterring parties from reneging on s 149 settlement agreements, and of underscoring the importance of compliance, however inconvenient that might prove to be. [10]

Object of the Act

[30] The Employment Court[11] has referred to the intention of Parliament in relation to s149 settlement agreements. The Court linked this to the object of the Act under s3(a)(v) which promotes mediation as a 'primary problem-solving mechanism' over enforcement litigation :

> The underlying policy intention is plain, namely to facilitate the full and final settlement of employment relationship issues at an early stage via a mediated process. That reflects the broader legislative scheme, which actively encourages parties to resolve such issues themselves and without the intervention of the Authority and Court.

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[8] *Borsboom v Preet PVT Limited* [2016] NZEmpC43 at [151]
[9] *Lumsden v Skycity Management Limited* [2017] NZEmpC 30
[10] As above at [66].
[11] *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [11].

[31] The Authority has referred to this intention many times when applying to the consideration of penalties and I will return to it below when considering deterrence.

[32] It has been submitted for Broadlands that in effect the penalty application is a moot point now because the settlement money has been paid with the inbuilt 'penalty' sanction in the settlement of interest. However, this submission is misguided and ignores the above mentioned object of the Act and the clear intent that s149 settlements are to be certain to avoid the situation Mr Brown has ended up in here.

*The nature and extent of the breach*es *(severity, number and nature of breaches)*

[33] I have been asked to separate out all breaches as individual breaches. To do so would be largely inconsistent with other matters that seek penalties for noncompliance with s149 settlements where payments had been made but prior to this instalments remained unpaid. I find it appropriate to consider this matter as one penalty. That the settlement figure was to represent a sizeable amount for employment standards entitlement is a serious aspect in terms of the nature of the delayed instalment payments. As noted above, Mr Brown had left his employment almost 10 months prior to the settlement. He would have been entitled to payment of statutory entitlements at the end of his employment. Continued delay in making the payments by instalment as agreed further extended this time. He gave up his right to have an investigation into these alleged statutory non-payments immediately (as agreed) upon the mediator's sign off on the settlement.

Whether the breach was intentional, inadvertent, or negligent

[34] I consider this breach was not inadvertent. I find it was intentional to the extent that the directors of Broadlands appear not to have taken the matter as serious enough to more reasonably sought to understand how they should pay the PAYE deducted instalments. They

remained legally advised. They now complain that their advisor did not explain adequately how to make the payments and yet at the time this was apparently not being communicated by their advisor to Mr Brown's counsel. Rather there were communications that bank details were required, and then when the reasonable expectation that payment would be made and wasn't, that there was a 'mix-up' and then that IRD information was required of Mr Brown. All of this could have been resolved at the time of agreeing to the settlement. It leans strongly to a lack of attention to the seriousness of meeting the instalment obligations and I find this shows me a level of intent not to comply.

[35] I find I could have accepted there was a genuine mistake about how the money was paid into the wrong account as mitigation here but soon after there was a deliberate decision to tell Broadland's then counsel not to take steps that could have easily rectified the situation. It is submitted for Broadlands that at this point the matter could plausibly and easily have been rectified by counsel for Mr Brown. I do not agree with that submission. Broadland's had the benefit of their own legal advice at the time. That surely included what the situation was in relation to the strict rules governing trust accounts and holding money on behalf, communicating directly with another counsel's client and the reason why the money had to be returned. The mistake was on Ms Auld for Broadlands and could have been easily rectified at this stage with the help of their legal counsel or perhaps as submitted for Mr Brown the business accountant or IRD, this even if the Broadland's directors were dealing with a bereavement. They simply needed to provide bank details and then resolve as I am satisfied they reasonably could have done the not complicated nett payments, something that is not unusual as is Broadland's claim now. Both Authority Determinations and settlements include gross payment orders or conditions that require PAYE to be deducted and forwarded. The settlement is clear that this was Broadland's responsibility. I agree with the submission for Mr Brown that the directors could have obtained advice and assistance about this when they agreed to the s149 settlement and its statutory certainty.

[36] There is nothing to satisfy me that noncompliance of the four instalment payments was inadvertent. This supports the ordering of a penalty.

The nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person in breach

[37] I accept Mr Brown's evidence that the ongoing nonpayment of instalments put him at a financial disadvantage, and he had been relying on those instalments for other things. Equally Broadlands delayed payment to its financial benefit until at least 4 October 2024 and then knowingly did not cooperate with what could have been simply instruction to release the funds paid to its then counsel to satisfy the settlement either in full or make good on the defaulted payments with interest. It is not a stretch to accept that Mr Brown must have felt at the very least frustrated by this behaviour and likely in a very difficult position. I understand he had close historic links to the Auld family situation and their recent bereavement.

Whether the person in breach has taken steps to mitigate the potential adverse effects of the breach

[38] Based on my findings about I find that little was reasonably done to mitigate the continued noncompliance until, as I accept is submitted for Mr Brown, the 'eleventh hour'. After hearing from the Aulds I find they lack considerable insight into accepting they have done anything wrong for Broadlands here. I am sorry for Ms Auld's distress about the recent family bereavement, but I find it likely she was also distressed because she was affronted at being in these proceedings, something entirely in my view the result of Broadland's own making. Mr Auld equally appeared to blame counsel for Mr Brown not working matters out in terms of the full settlement money paid. While I accept a lay person may not understand the serious rules around the administration of lawyers' trust accounts this is not a situation where the directors could not have listened to and been guided by advice from their then own legal counsel at the time.

[39] I find minimal mitigation in the resolution of payments by 29 November 2024. By then Mr Brown had to go to some lengths and expense and time to get this resolution when he ought to have been able to rely on the certainty of the instalment payments commencing on 20 July 2024.

The circumstances in which the breach occurred including the vulnerability of the employee

[40] I have little to consider before me about the sort of vulnerability often contemplated here such as migrant employees. However, in general terms Mr Brown was vulnerable in that he was powerless to do anything other than to continue to try through increasing legal costs to have the matter resolved. In particular the lack of instructions given by Broadlands to its then counsel to release the funds paid until it appears the day before the investigation meeting put Mr Brown in a powerless position.

Whether the person involved in the breach has previously been found by the Authority or the court to have been engaged in similar conduct

[41] I have nothing before me to show that Broadlands has previously been the subject of noncompliance proceedings.

Ability to pay

[42] I have nothing before me to show that Broadlands has an inability to pay a penalty. On or about 30 September 2024 it was able to deposit a considerable sum and again on 28 and 29 November 2024 managed to pay money to satisfy the whole settlement.

Deterrence – consistency with other penalty awards

[43] I have considered other matters where penalties have been awarded for noncompliance of s149 settlements and in particular where there have been delayed instalment payments.[12]

[12] *Hare-Huru v Corporate Scaffolding Ltd* [2024] NZERA 161; *Jane v Roberts NZ Ltd & or* [2023] NZERA 634; *Wang v Big Sky Food Ltd & or* [2023] NZERA 621; *RBB v Beannco The Palms Ltd* [2024] NZERA 513 (applicant had withdrawn substantive claims as agreed, employer had paid legal fees, employee hardship and sense of resolution dismissed as time went by without commission); *Walker v Marngairoa C4 Incorporation* [2023] NZERA 449 (only paid when proceedings lodged); *Rupal v Rarichan* [2024] NZERA 465; *Parvinder Singh v Roadstar* [2024] NZERA 566 (employment standards, sustained delay, 4 months delay, deterrence).

While all turn on their facts, I am satisfied that penalties are generally aggregated for a series of delayed instalment payments and that the penalties awarded are generally less than what is submitted for Mr Brown for a total sum on a series of separate breaches. I find that aggravating features here that support the amount of the penalty are that this situation involved settlement for employment standards; that the directors of Broadlands were legally represented and have continued not to acknowledge they have done anything wrong despite access to legal advice; that mitigation was minimal and only after proceedings had been filed and or eventually at the 'eleventh hour'; that there is a strong need to deter similar behaviour by an employer party because of the clear statutory aim of having s149 settlements as a certain end to employment relationship problems.

[44] I find that an appropriate penalty is $3,000.00 with 75% of this paid to Mr Brown. The reason for this level of remission to Mr Brown is because I accept he should not have had to take the steps he has to get resolution. While I have not ignored the genuine disturbance of the family bereavement for the directors of Broadlands, I consider overall that the steps needed to be taken were not complicated for a company experienced in business and legal represented.

Should any costs be ordered one to the other including if appropriate the filing fee?

[45] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall.[13]

[46] The Authority uses a notional daily tariff adjusting this up or down as appropriate depending on the case. Such an adjustment may take into consideration a liable party's means to pay costs, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs. The current tariff applied for a one-day Authority investigation meeting is $4,500.00 with subsequent days at $3,500.00. This amount is considered a starting point for assessing a reasonable contribution to the legal costs incurred

[13] Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

by a party preparing for and taking part in an investigation meeting but not including preparation for and attendance at mediation. [14]

[47] While it is submitted for Mr Brown that there should be a small uplift for his costs to take into account the preparation and lodging of documents, the above explains this is already part of the Authority's consideration in setting the daily tariff. To the extent that Mr Brown has been put to trouble further that the financial costs, I have already considered this as part of the remission of the penalty awarded to him. I find in these circumstances that $4,500.00 is the appropriate contribution that Broadlands should pay towards Mr Brown's legal costs.

Special Damages claim

[48] For Mr Brown I am asked to further consider special damages I take from the cases provided that this is a high threshold and clear distinction from other relief. I need to also take care 'that such costs have not already been incorporated within another head of relief.'[15] I am not satisfied that this case attracts consideration of special damages.

Summary of findings and outcome

[49] Broadlands Farm NZ Limited has breached the record of settlement entered into under s 149 of the Act with Royden Brown by failing to pay four settlement instalments due within the time agreed.

[50] Broadlands Farm NZ Limited is ordered to pay a penalty of $3,000.00 under s149(4) of the Act.

[51] Payment of the above penalty is to be made as follows. The sum of $750.00 is to be paid to the Crown and the sum of $2,250.00 is to be paid to Royden Brown into his bank

[14] https://www.era.govt.nz/determinations/awarding-costs-remedies/.
[15] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC at [96].

account as previously provided to Broadlands Farm NZ Limited's then legal counsel in July 2024 under s136 of the Act.

[52] Broadlands Farm NZ Limited is ordered under clause 15 of the second schedule of the Act to pay Royden Brown costs in the sum of $4,500.00 and to reimburse the filing fee of $71.55.

Antoinette Baker
Member of the Employment Relations Authority