IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 263
3052712

	BETWEEN	DAVID ELLIOT Applicant
	AND	ALL COAT PAINTERS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Nathan Santesso, advocate for the Applicant Kim Hobson, director of the Respondent
Investigation Meeting:	On the papers
Determination:	3 May 2019

SECOND DETERMINATION OF THE AUTHORITY

A. By no later than Friday, 17 May 2019 All Coat Painters Limited (ACPL) must pay a penalty of $2,000 for failure to pay David Elliot the sum of $1601.01 due to him on 29 March 2019 under a settlement agreement certified under s 149 of Employment Relations Act 2000 (the Act).

B. ACPL must pay the penalty of $2,000 in full to Mr Elliot.

B. Earlier orders of the Authority in relation to other earlier breaches of the certified agreement about other payments due, and imposing a penalty for those other breaches, remain in force.

[1] In a determination issued on 21 March 2019 the Authority ordered All Coat Painters Limited (ACPL) to pay David Elliot three missed instalments of amounts due

under a settlement agreement and a penalty of $3,000 for breaching the term requiring those payments.[1]

[2] The penalty was imposed because the settlement agreement, made on 8 November 2018, was an agreement that, at the request of the parties, had been certified by a Ministry of Business employment mediator under s 149 of the Employment Relations Act 2000 (the Act). The terms of a certified agreement are final, binding and enforceable. Under s 149(4) of the Act, "a person" who breaches an agreed term of settlement is liable to a penalty. In this context a person includes a legal personality, such as a company like ACPL.

[3] The 21 March determination was issued before a fourth and final instalment of agreed payments was due to be paid on 29 March 2019. The determination reserved leave to Mr Elliot to revert to the Authority for further orders if that instalment was not paid on time. It noted failure to pay the instalment would render ACPL liable to a further penalty and, if that situation occurred, ACPL would be a repeat offender, a factor that could then affect the level of any penalty imposed.[2]

[4] On 12 April Mr Elliot applied for a further determination and penalty because ACPL had not paid the fourth instalment. Under directions issued in an Authority Minute on 18 April ACPL director Kim Hudson was given an opportunity to respond in writing to that application. The parties were also advised that if either wished to be heard in person before a determination was made on Mr Elliot's request for further orders, they were to advise the Authority by 29 April. If either sought a hearing in person, an investigation meeting was to be called, likely by telephone conference. However, if neither party sought any further hearing, a determination would be made on the basis of whatever information the Authority had by 29 April.

[5] Mr Hobson responded, on ACPL's behalf, with a brief email. He did not seek a hearing. His written response was that ACPL had started paying Mr Elliot $100 a week and "the business simply is not in a position to pay any more than that at this time".

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[1] *Elliot v All Coat Painters Limited* [2019] NZERA 165.
[2] *Elliot*, above n 1, at [26].

Orders

[6] Mr Elliot's application for further orders is granted. For reasons given below in this determination ACPL must pay a penalty of $2000 for failing to pay an agreed instalment of $1,601.01 on an agreed due date of 29 March 2019. The whole of the penalty must be paid by ACPL to Mr Elliot by 17 May 2019.[3]

Reasons for the penalty

[7] The amount of a penalty is determined by considering factors set by s 133A of the Act and guidance found in decisions of the Employment Court.[4] In the circumstances of this case, the following matters were relevant.

Object of the Act

[8] The Act promotes mediation as the primary problem-solving mechanism.[5] That mechanism includes the s 149 provision for certified final and enforceable settlement agreements. Such agreements are the means by which most employment relationship problems are resolved in our statutory dispute resolution system. Some 11,000 or so such agreements are certified each year. A breach by any party of those final, binding and enforceable terms undermines the integrity, finality and certainty that system is intended to provide workers and employers.

The nature and extent of the breach

[9] The missed instalment comprised, in part, payment of holiday pay and, in part, compensation for humiliation and injury to feelings under s 123(1)(c)(i) of the Act. The holiday pay component, which had been due to be paid at the end of the employment, therefore arose from a breach of the Holidays Act 2003.[6]

[10] The breach committed by not paying that fourth instalment was a further breach of the same term for which a penalty had already been imposed for not paying the first three instalments on their agreed due dates.

[11] The further penalty relates only to the fourth breach, not the three previous breaches. It was however a repeated breach, made in the knowledge that a further

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[3] Employment Relations Act 2000, s 136(2).
[4] Employment Relations Act 2000, s 133A and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19] and *Nicholson v For*d [2018] NZEmpC 132 at [18].
[5] Employment Relations Act 2000, s 3(a)(v).
[6] Holidays Act 2003, s 27(2).

penalty was in prospect if that breach was committed. Having engaged in earlier similar conduct, the nature of ACPL's further breach was more serious.[7]

Intentional, inadvertent or negligent breach?

[12] The breach was intentional in two respects. Mr Hobson knew the terms because he had attended the mediation and signed the certified agreement on 8 November 2018 that required payment of the fourth instalment by 29 March 2019. Through the earlier stage of this proceeding he also knew ACPL failing to pay the fourth instalment would comprise a further breach with a liability to a penalty. While Mr Hobson stated the business was not in a position to pay any more than $100 a week "at this time", ACPL provided no information on why it could not have sought to arrange funds by, for example, seeking a loan from friends, family or financial institutions to pay the instalments committed to in the certified agreement.

Nature and extent of any loss, damage or gain made

[13] Mr Elliot was deprived of the use of money he was entitled to have the use of by the agreed fourth instalment date. ACPL, by contrast, gained the benefit of deferral of a financial commitment.

Any steps to avoid or mitigate the effects of the breach

[14] ACPL had paid two other amounts that were due under its settlement agreement – some wages that were paid in the week after the agreement was made and a contribution to Mr Elliot's fees for representation. Its breach, in that sense, was a partial breach of the terms of the settlement agreement, rather than all of it.

Circumstances of the breach

[15] Having occurred in the context of a certified, final and enforceable agreement, the breach took place in circumstances where Mr Elliot was thereby deprived of the certainty and security on which he should have been able to rely. He was fortunate, by having gained new work and income, not to be in a particularly vulnerable state of relying entirely on the fourth instalment being made on time. That was not a circumstance for which ACPL could be given any credit.

[7] Employment Relations Act 2000, s 133A(g).

Previous conduct

[16] As already noted the latest breach occurred after a penalty was imposed for the previous breaches relating to earlier unpaid instalments. In that respect ACPL is a repeat offender.

Deterrence

[17] A significant penalty was warranted to mark the repeated and ongoing nature of the breach and to deter both ACPL and, more generally, any other parties to such agreements from not honouring terms they freely agreed. Such breaches corrode the certainty of such agreements. They are contrary to the public interest in the benefits that flow from the finality and enforceability of those agreements, both for employers and workers.

Culpability

[18] ACPL was entirely responsible for the breach. Its director, Mr Hobson, made the deal in November 2018 and could reasonably be expected to be aware of ACPL's likely capacity to meet the agreed terms.

Consistency

[19] The earlier determination in this matter considered the range of penalties in similar cases and settled on the amount of $3,000, treating the three breaches of not paying instalments on time as a single breach of the agreement.[8] While the latest breach is a further single breach, its nature as a repeated breach required a higher penalty of $2,000 for the purposes of punishment and deterrence.

Ability to pay

[20] No reduction or waiving of the penalty was warranted on the grounds of an ability to pay. Firstly, there was only an assertion by Mr Hobson about that situation, with no evidence to support it. Secondly, there was no explanation as to why ACPL could not have raised the funds to meet its solemn, legally binding commitment to Mr Elliot by borrowing from a financial institution or other sources or by liquidating assets. The $100 a week that Mr Hudson said the business was in a position to pay

[8] See for example *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 383 ($2000); *High v Mighty Rocket Properties Limited* [2018] NZERA Wellington 111 ($6000); *Mangos v Metrofloor Contracting Ltd* [2018] NZERA Christchurch 46 (penalty $1,500); *Masjedi v Phoenix Publishing Ltd* [2018] NZERA Auckland 161 ($10,000).

could have been used to service a loan rather than effectively making Mr Elliot an unwilling lender to ACPL by failing to pay him the agreed amounts.

[21] At the date of issue of this determination ACPL remained registered and there was nothing to indicate it was not still trading. Even if there were some difficulty in immediately meeting a $2,000 penalty, a company's fortunes may ebb and flow and liability is different from subsequent enforcement.[9]

Proportionality

[22] A final cross check considers, among other things, the amount of the contemplated penalty ($2,000) in relation to the amount that was subject to the breach in payment ($1,601.01). This penalty was not a disproportionate amount given the breach was a repetition of earlier breaches. At 10 per cent of the maximum liability for a company, $2,000 was a relatively moderate penalty. A lesser amount would risk being an insufficient deterrent.

[23] A further consideration regarding proportionality arose from ACPL's position that it could unilaterally impose a new instalment regime by paying only $100 a week of the amounts due to Mr Elliot. What ACPL agreed to in the certified agreement was to pay the sum of $6,404.04 for outstanding holiday pay and compensation in four instalments of $1601.01 on dates between 31 December 2018 and 29 March 2019. The time span for payment was therefore 13 weeks. ACPL's unilateral decision to make payments at the rate of only $100 a week would expand the time span to complete the agreed payments to 64 weeks, this is five times longer than promised. The penalties imposed are the price for breaking that promise.

Summary of amounts due to be paid by ACPL to Mr Elliott

[24] As a result of the terms of the certified settlement agreement and the orders made in the Authority determinations (of 21 March 2019 and this one), ACPL is obliged to pay Mr Elliot a total amount of $12,475.60 comprising the following sums:

(i) $6,404.04 for four agreed instalments of $1601.01 not paid on time;[10] and

[9] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [45].
[10] Under the terms of the settlement agreement certified on 8 November 2018 and enforceable under s 151(2) of the Employment Relations Act 2000.

(ii) $3,000 as a penalty for failing to pay the first three instalments on time;[11] and

(i) $2,000 as a penalty for failing to pay the fourth instalment on time;[12] and

(ii) $1,071.56 for costs and expenses incurred in applying to the Authority.[13]

[25] The total sum presently due is less whatever payments ACPL has made to date towards those sums, which Mr Hobson has said are being made at the rate of $100 a week.

Penalty paid to whom?

[26] The Authority has a discretionary power to order that some or all of any penalty imposed be paid to any person, rather than to the Authority for transfer to the Crown Account.[14]

[27] In the circumstances of this case the public interest in the deterrent element of the penalty imposed is still effective if some or all of the penalty is awarded to Mr Elliot. He is also, with his representative's assistance, likely to be able to pursue payment of the penalty if he has to also pursue further enforcement action for the instalment payments due to him. He may do so by use of the District Court enforcement procedures, available under s 151(2)(b)(ii) and s 141 of the Act, or through proceedings to liquidate ACPL.

[28] ACPL must pay the whole of the penalty of $2,000 to Mr Elliot.

Costs

[29] There was no indication any further costs of representation were incurred in pursing the further orders sought. No further order for costs is made.

Robin Arthur
Member of the Employment Relations Authority

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[11] By order made on 21 March 2019 in *Elliot v All Coat Painters Limited* [2019] NZERA 165.
[12] By order made in this determination.
[13] By order made on 21 March 2019 in *Elliot v All Coat Painters Limited* [2019] NZERA 165.
[14] Employment Relations Act 2000, s136(2).