

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 21  
3150983

BETWEEN XINXIN GUO  
Applicant

AND BEST CHOICE LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person  
No attendance for the Respondent

Investigation Meeting: 28 January 2022

Determination: 28 January 2022

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**SECOND DETERMINATION OF THE AUTHORITY**

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- A. Best Choice Limited (BCL) has not paid \$13,321 which remained due to Xinxin Guo under the terms of a certified settlement agreement. BCL has also failed to comply with an order of the Authority to pay that amount to Ms Guo by no later than 21 January 2022.**
- B. For its breach of the terms of the certified agreement BCL must pay a penalty of \$4,000 to the Authority by no later than Friday, 25 February 2022. On recovery of the penalty from BCL the Authority must pay one half to Ms Guo and transfer the other half to the Crown account.**
- C. In a further order for compliance with the terms of the agreement, BCL must pay \$13, 321 to Ms Guo by no later than Friday, 4 February 2022.**

**D. BCL must reimburse Ms Guo for the fee of \$71.56 paid to lodge her application in the Authority, also by no later than Friday, 4 February 2022.**

**Employment Relationship Problem**

[1] By determination on 15 December 2021 the Authority ordered Best Choice Limited (BCL) to complete payments due to Xinxin Guo under a record of settlement signed by the parties on 23 April 2021.<sup>1</sup> A Ministry of Business mediator had certified the agreement on 7 May 2021. Certification, made under s 149 of the Employment Relations Act 2000 (the Act), confirmed that the parties has told the mediator that they understood the terms of the agreement were final, binding and enforceable.

[2] At the time of the Authority's determination BCL had made some payments but still owed Ms Guo \$13,321. It was ordered to pay her that amount by 21 January 2022.

[3] During the Authority's investigation of her application for a compliance order Ms Guo also sought a penalty against BCL for failing to pay the settlement amount due to her by the earlier agreed date. Consideration of the penalty claim was adjourned until 28 January 2022. Ms Guo indicated she would not pursue that claim if BCL paid the settlement amount due to her by the ordered date.

[4] On 24 January 2022 Ms Guo advised the Authority that the payment due to be paid by 21 January had not been made. An Authority Officer was able to contact BCL's director Jingli Dong who told the officer that the payment had been made by transfer to Ms Guo's bank account on 21 January. On 25 January Ms Guo advised the Authority that she still had not received the payment. An Authority Officer again contacted Ms Dong and asked her to send a copy of transaction details. Ms Dong agreed to do so but by 26 January had not provided any evidence to the Authority confirming payment had been made.

[5] In light of that information the parties were advised by telephone and email that the Authority would proceed with the 27 January investigation meeting that had been notified on 15 December.

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<sup>1</sup> *Guo v Best Choice Limited* [2021] NZERA 560.

### **Authority investigation**

[6] No representative of BCL was present at the notified starting time of the investigation meeting. An Authority Officer attempted to contact Ms Dong by telephone but the call was not answered. The officer left a voice mail message advising Ms Dong that the meeting would proceed. The Notice of Investigation Meeting advises parties that the Authority may proceed to determine the matter if one or other party does not attend.

[7] Ms Guo attended the investigation meeting. She answered questions under affirmation, with interpretation assistance from her husband, Johnny Wang.

[8] During the meeting Ms Guo was able to check her bank account online. She confirmed the payment due to her had not been received into her account. Her bank account number was included in the settlement agreement. Ms Guo confirmed BCL had previously made part payments of the amounts due to her to that account. The most recent was one made on 3 December 2021.

### **The law**

[9] Many employment relationship problems in New Zealand are resolved by settlement agreements certified by a Ministry of Business mediator under s 149 of the Act. The certification process gives those agreements a special status. It confirms the terms of those agreements are final, binding, enforceable and cannot be appealed or reviewed in the Authority or the Employment Court. This statutory provision is intended to provide finality and certainty. Only two additional forms of legal action are permitted about the parties' agreement to solve the employment relationship problem. The first is to allow either or both parties to enforce the terms they agreed. The second is to allow either or both parties to seek a penalty against a person who breaches an agreed settlement. The word "person" in this context includes the legal entity of a company.

[10] A company which breaches an agreed term of a settlement agreement certified under s 149 of the Act is liable to a penalty of up to \$20,000.

### **The breach**

[11] The terms of the certified settlement agreement required BCL to complete payments of certain amounts to Ms Guo by no later than 31 July 2021. By 15 December

2021 more than half of the agreed amount still remained unpaid. Despite the compliance order issued on 15 December 2021, requiring payment in full by 21 January 2022, the overdue amount remained unpaid at the date of this determination.

[12] BCL has therefore breached a term of its agreement that it had agreed was final, binding and enforceable. Because this was a breach of a certified agreement, BCL was liable to a penalty imposed by the Authority.

### **The penalty**

[13] For its breach of a term of a certified settlement agreement BCL was liable to a penalty of up to \$20,000. In setting a penalty for BCL's breach I have had regard to the factors identified in s 133A of the Act and case law about the application of those factors.<sup>2</sup> For the following reasons I have concluded BCL must pay a penalty of \$4,000 for its breach of the terms of its settlement agreement with Ms Guo to the date of this determination.

[14] *Objects of the Act:* The Act promotes mediation as the primary problem-solving mechanism. This is reflected in the provisions of s 149 which establish settlement agreements made in mediation are agreements made to be kept. It provides for a penalty to punish and deter parties who breach agreed terms. This factor weighs in favour of imposing a significant penalty in this case.

[15] *Nature and extent of the breaches and involvement in them:* BCL entered into the commitment to complete payment of certain amounts to Ms Guo by no later than 31 July 2021. It breached that term. The breach has continued from that date.

[16] *Intentional breach:* This is not a situation where the failure to pay resulted from oversight or a lack of care in making the payments due. The fact some part payments were made prior to and up to 3 December confirm the failure to pay the full amount due has been deliberate.

[17] *Loss or gain resulting for either party:* The breach has resulted in Ms Guo being denied use of a substantial amount of money that she was entitled to the use of from 31 July 2021. BCL has, conversely, gained by having the use of that money.

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<sup>2</sup> *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

[18] *No mitigation steps*: Part payments of the total amount due under the agreement do not amount to compensation for or mitigation of the effects of the breach. Ms Guo's evidence was that Ms Dong had been evasive in responding to her requests for completion of the payments due to her.

[19] *Previous conduct*: There was no evidence BCL had previously breached an agreement of this type.

[20] *Deterrence, both particular and general*: A penalty was necessary to deter BCL, in this particular case, and, in general, any employer or employee who is party to a certified settlement agreement from breaching its terms.

[21] *Culpability*: BCL was culpable for the breaches.

[22] *Consistency of penalty awards in similar cases*: In similar cases of breaches of certified settlement agreements, penalties imposed have typically ranged from between \$2,000 to \$6,000.<sup>3</sup>

[23] *Ability to pay*: There was no evidence from BCL that it was not able to pay a penalty.

[24] *Proportionality of outcome to breach*: As a final cross check, a penalty of \$4,000 appeared proportionate to the nature of the breach and what evidence there was regarding the actual or potential level of damage or loss resulting. At 20 per cent of the maximum liability for a single breach, it was a relatively moderate amount while also meeting the public policy requirements of upholding the solemnity, finality and enforceability of these agreements. Such agreements are made to be kept. As the Act allows, there is a price for not doing so. This is the price BCL must pay, as well as completing its obligation to pay the full settlement amount it agreed to pay Ms Guo.

## Orders

[25] BCL must pay the penalty of \$4,000 to the Authority by no later than 28 days from the date of this determination. On recovery of the penalty, the Authority must pay half of that amount to Ms Guo and transfer the other half to the Crown Account.<sup>4</sup>

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<sup>3</sup> See, for example, *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 383 (\$2,000); *High v Mighty Rocket Properties Limited* [2018] NZERA Wellington 111 (\$6,000); *Mangos v Metrofloor Contracting Ltd* [2018] NZERA Christchurch 46 (penalty \$1,500); and *Elliot v All Coat Painters Limited* [2019] NZERA 165 (\$3,000) and *Singh v Mega Civil Limited* [2020] NZERA 21 (\$3,000).

<sup>4</sup> Employment Relations Act 2000, s 136.

[26] In a further order for compliance with the terms of the settlement agreement, BCL must pay Ms Guo the outstanding sum of \$13,321 by no later than Friday, 4 February 2022.<sup>5</sup>

[27] BCL must also, by 4 February 2022, reimburse Ms Guo \$71.56 for the fee paid to lodge her application to the Authority.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>5</sup> Employment Relations Act 2000, s 137(1) and (3).