

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 81  
3114372

BETWEEN      AAINA JINDAL  
Applicant

AND              RKM SMITH ENTERPRISES LIMITED  
Respondent

Member of Authority:      David G Beck

Representatives:              Paul Mathews, advocate for the Applicant  
Kishorkumar Patel for the Respondent

Investigation Meeting:      On the papers

Submissions Received:      4 February 2021 from the Applicant  
16 February 2021 from the Respondent

Date of Determination:      2 March 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      Aaina Jindal applied to the Authority for an order pursuant to section 137(1)(a)(ii) of the Employment Relations Act 2000 (“the Act”) requiring RKM Smith Enterprises to comply with the terms of a settlement agreement made with her. The settlement agreement in dispute was signed by both parties and an MBIE mediator pursuant to s 149 of the Act on 22 June 2020. It provided Ms Jindal be paid within fourteen days:

- (i) outstanding wages owed in the sum of \$661.50 gross;
- (ii) outstanding holiday pay owed in the sum of \$1,242.00 gross;

(iii) a compensatory payment under s 123(1)(c)(i) of the Act in the sum of \$3,000 without any deductions; and:

(iv) a written certificate of service be provided “which will include dates of service, position held and a general description of duties”.

[2] Mr Mathews asserted that the above amounts have to date not been paid in full and as remedies Ms Jindal seeks:

- A compliance order.
- Costs.
- A penalty for continued non-compliance.

### **The Authority Investigation**

[3] RKM Enterprises claimed insufficient funds to comply with the terms of settlement. It was agreed the matter be determined by written submissions.

[4] Ms Jindal detailed unsuccessful attempts to contact RKM Enterprises to resolve outstanding payments after three payments were made in the period 13 July - 24 July 2020 totalling \$3,215.39. Each payment had no contextual information provided as to whether PAYE deductions had been made.

[5] No certificate of service has been provided. Once the matter was filed in the Authority on 8 August 2020, RKM Enterprises made two further payments – one of \$845 and another of \$240. Ms Jindal has indicated that these payments appear to satisfy the financial compensatory elements of the record of settlement. Ms Jindal says that the continuing lack of a certificate of service has hampered her ability to secure alternative employment.

[6] Kishorkumar Patel, a director of RKM Enterprises, submitted that his company had insufficient funds to make payments on time and that Covid-19 had caused a business downturn. He set out a table of payments made (six in total in the period 13 July 2020 – 10 August 2020) that detailed the difference between the gross and net amounts but provided no information on PAYE deductions having been made. Mr Patel claimed that he had obtained permission, during a telephone conversation with an MBIE mediator, to pay outstanding amounts by instalments and that the payments have now all been made. Mr Patel provided no

supporting documentation to reinforce his claim of financial difficulties that RKM Enterprises has experienced. He indicated the imposition of a penalty would be unfair.

[7] Mr Patel gave no explanation for failing to provide a record of service to Ms Jindal.

### **Order for Compliance**

[8] The terms of settlement are clear, that RKM Enterprises must provide Ms Jindal with a written record of service and has not done so without explanation. I accordingly under s 137(iii) of the Act order RKM Enterprises to issue a written certificate of service on company letterhead to Ms Jindal and that such to specify: the period of Ms Jindal's employment, the position she held and a general description of the duties she undertook.

### **Imposition of a penalty and whether it should be awarded to Ms Jindal?**

[9] Failure to fulfil, without adequate explanation, the terms of a settlement agreement is a serious breach of the Act. The Authority under s 133 of the Act has the jurisdiction to award a penalty against a defaulting party. In the situation of a company, the maximum penalty is \$20,000 for each breach and I must consider matters set out in s 133A of the Act in determining what amount I can impose including whether the penalty should be paid to the Crown or apportioned.

[10] Generally the approach I must take has to be consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited*<sup>1</sup>. *Preet* identified a four-step framework to fixing penalties:

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalizable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.

Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each

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<sup>1</sup> *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

final penalty is just in all the circumstances.<sup>2</sup>

### **The nature and extent of the breaches**

[11] Mr Mathews acknowledged that the breach of the settlement agreement “was short lived” in respect of not paying the agreed compensatory amounts within 14 days of the agreement being signed by an MBIE mediator on 22 June 2020. I observe whilst this is so, RKM Enterprises were in breach, as all payments fell due before 27 June and were not met until 10 August after Ms Jindal went to the expense of filing this matter with the Authority. It is not trite to state that agreements made under s 149 of the Act are compromises in which each party gives up something. For the employee this usually involves a resignation in return for compensation and a commitment to give up personal grievance options. The employer gains finality of the matter. In this context, RKM Enterprises appears to have entered agreement knowing full well it was unable to meet the terms of such.

[12] The failure to provide a written record of service is a simple task and it is inexplicable why this has not been fulfilled. I accept Ms Jindal’s assertion that this has caused her distress and may well have hampered her ability to secure alternative employment.

### **Were the breaches intentional, inadvertent or negligent?**

[13] Given that Mr Patel has chosen to ignore the request made to provide a record of service and provided no explanation I can only infer his actions are intentional.

### **What steps have been taken in mitigation?**

[14] Whilst Mr Patel on RKM Enterprises has remained uncommunicative I acknowledge that the amounts due fell within a very difficult period for businesses and he has now fully addressed compensatory payment issues. However no steps have been taken to provide a certificate of service.

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<sup>2</sup> At [151].

## Severity of breaches

[15] On top of statutory considerations (the aims of the Act), I am obliged following *Preet*, to examine the extent of RKM's culpability and take the public interest factor of using the penalty regime as a legitimate deterrent to others into account.

[16] Whilst the breach here may appear minor I have to consider that Ms Jindal is in a vulnerable bargaining position and that a certificate of service has some value to her.

## Means and ability of the respondent to pay?

[17] I was provided with no information in submissions to accurately assess the respondent's ability to pay and the onus to provide supporting information is on the respondent company RKM Enterprises.

## Proportionality

[18] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breach and the context of such. In considering similar cases of breaches of certified settlement agreements, a penalty in this matter would likely fall in the range of \$2,000 to \$3,000.<sup>3</sup> However, given the breaches have been partly resolved and the other factors I have considered, the totality of the ongoing breach in my view warrants a modest deterrent penalty against RKM Enterprises that I fix at \$1,000 of which \$500 should be paid to the Crown and \$500 to Ms Jindal.

## Conclusion on penalty

[19] **Within 28 days of the date of this determination being issued RKM Enterprises Limited must pay a penalty in the sum of \$1,000 of which \$500 is to be to a Crown bank account and \$500 is to be paid to Aaina Jindal.**

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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).

## **Compliance order**

[20] Pursuant to s 137(iii) of the Employment Relations Act 2000 I order RKM Enterprises to issue a written certificate of service on company letterhead to Aaina Jindal and that such to specify: the period of Ms Jindal's employment, the position she held and a general description of the duties she undertook.

## **Costs**

[21] Costs are at the discretion of the Authority and here Aaina Jindal was successful in her action for a compliance order and has sought a modest costs contribution of \$1125. I consider that she should recover this amount and her Authority application fee.

[22] **Within 28 days of the date of this determination RKM Enterprises must pay Aaina Jindal \$1125 as a contribution to costs and \$71.56 in reimbursement of the application filing fee.**

David Beck  
Member of the Employment Relations Authority