

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 251
3014531

BETWEEN SUKHPREET KAUR
Applicant

A N D DIRECT AUTO IMPORTERS
(NZ) LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Arunjeev Singh, Counsel for Applicant
Vishal Kumar Sharma, Director of the Respondent

Investigation Meeting: 24 August 2017 by telephone conference

Date of Determination: 25 August 2017

DETERMINATION OF THE RELATIONS AUTHORITY

Failure by respondent to file a statement in reply

[1] Direct Auto Importers (NZ) Limited (DAIL) failed to file a statement in reply to the statement of problem and also failed to seek leave from the Authority to reply.

[2] I am satisfied that DAIL was properly served with the statement of problem and subsequent correspondence from the Employment Relations Authority together with a notice of the investigation meeting.

The investigation meeting

[3] The investigation meeting was conducted by telephone conference on Thursday, 24 August 2017 at 1.30pm. The applicant, Ms Sukhpreet Kaur participated in the telephone conference. She was represented by counsel, Mr Arunjeev Singh. DAIL's director, Mr Vishal Kumar Sharma also participated. Ms Kaur and Mr Sharma affirmed their evidence was true and correct.

[4] As allowed under s.174E of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence; relevant facts and legal issues are set out along with the Authority's conclusions.

Employment relationship problem

[5] On 29 March 2017, a Record of Settlement (the settlement) was signed under s.149 of the Act. The applicant, Ms Kaur, and the respondent, DAIL, were parties to the settlement. The settlement was signed by Ms Kaur. Her signature was witnessed by counsel, Mr Singh. The settlement was also signed by Mr Sharma for DAIL.

[6] The settlement was signed by a mediator employed by the Ministry of Business Innovation and Employment (MBIE) and certified on 29 March 2017.

The issue

[7] The issue brought to the Authority by Ms Kaur relates to non-payment by DAIL of sums agreed to be paid by it under the settlement.

[8] Ms Kaur seeks a compliance order requiring DAIL to comply with the settlement immediately.

Settlement agreement

[9] The settlement states:

2. Direct Auto Importers (NZ) Limited shall pay Sukhpreet Kaur the sum of \$16,500.00 in terms of s.123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid to the applicant in the following instalments:
 - (a) An initial payment of \$3,500 paid within 14 days of the date of execution of this agreement;
 - (b) Five subsequent payments of \$2,200.00 and one of \$2,000.00 to be paid monthly no later than the final day of each subsequent month. If the final day of the month falls on a weekend or public holiday then the payment may be made on the next business day after the last day of that month.
3. In reaching this agreement the parties confirm that neither has agreed to forego minimum entitlements (monies payable under the Minimum Wage Act 1983 or the Holidays Act 2003, as defined by the Employment Relations Act 2000).
4. This is the full and final settlement of all matters between the Applicant and Respondent arising out of their employment relationship.

[10] The settlement was certified under s.149 of the Act by the mediator. That certification confirmed that, before signing the agreement, the parties were advised and accepted they understood the effect of ss.148A, 149(1) and (3) of the Act and affirmed their request that the mediator should sign the agreed terms of settlement.

[11] Section 149(3) of the Act states that the effect of that section is that the agreed settlement:

1. Is final and binding and enforceable;
2. Could not be cancelled; and
3. Could not be brought before the Authority or the Court for review or appeal, except for the purposes of enforcing the terms of the settlement.

[12] On 4 July 2017, a statement of problem was filed in the Authority by Ms Kaur claiming that despite requests, DAIL had failed to comply with the terms of the settlement and pay her all the moneys owing under it.

[13] DAIL has not filed a statement in reply despite follow up correspondence from Ms Kaur's counsel and the Authority. Ms Kaur says no instalments have been made under the settlement and the sum of \$16,500 remains payable under the settlement. Mr Sharma says because of financial difficulties he has not been able to focus on paying Ms Kaur. Mr Sharma accepts DAIL has not paid Ms Kaur in accordance with the settlement.

[14] I am satisfied that DAIL has not complied with the terms of the settlement.

Determination

[15] There has been no correspondence from DAIL in respect of the statement of problem filed. Counsel for Ms Kaur sent emails to the solicitor acting for DAIL on two occasions prior to filing the statement of problem. In the email of 28 April 2017, Mr Singh states:

I have emailed you twice regarding non-compliance with the settlement agreement by your client and in my last email I had put your client on notice of enforcement proceedings in case he failed to comply with the terms of settlement of payment of the first instalment. Can you please acknowledge that you received my two emails and also that whether or not you are authorised to accept

service of notice of proceedings which my client intends to file on Monday for enforcement of the settlement agreement ...

[16] DAIL's solicitor responded on 1 May 2017 confirming that he had received the emails, was waiting for instructions from DAIL and was unable to accept service of proceedings until he had received instructions.

[17] No details have been provided to the Authority concerning DAIL's financial situation. Mr Sharma says that DAIL is under financial pressure as a result of proceedings taken against DAIL by the Labour Inspector. No supporting financial information was provided to the Authority.

[18] In the circumstances, I make an order that DAIL pays Ms Kaur within 21 days of the date of this determination the sum of \$16,500 being the entire moneys owing under the settlement. This amount is to be paid by DAIL directly into Ms Kaur's bank account.

[19] For the information of DAIL, failure to comply with an order such as this one made by the Authority under s.137 of the Act may provide a basis for an application to be made by Ms Kaur to the Employment Court. Where the Court is satisfied that any person has failed to comply with a compliance order under s.137 of the Act, the Court may, under s.140 of the Act, order remedies, including an order that the person in default be sentenced to imprisonment for a term not exceeding three months and/or a fine not exceeding \$40,000.

[20] Mr Sharma told the Authority that DAIL's financial situation was being considered by its accountants. Mr Sharma says DAIL may be able to pay the amount owing to Ms Kaur by instalment. The Authority will only consider this if DAIL's financial position requires it as set out in s138(4A) of the Act. The Authority will require full disclosure of DAIL's financial situation including assets and liabilities.

Costs

[21] Costs are reserved. Ms Kaur has 7 days from the date of this determination to file a memorandum as to costs and DAIL has 7 days within which to reply.

Certificate of determination

[22] I direct that pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, Ms Kaur be provided with a Certificate of Determination, sealed

with the seal of the Authority, recording respectively that DAIL is ordered within 21 days of the date of this determination to pay Ms Kaur the sum of \$16,500.

Anna Fitzgibbon

Member of the Employment Relations Authority