

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 108
5442189

BETWEEN MANDEEP KAUR MOMI
 Applicant

A N D INDIQUE NZ LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: May Moncur for the Applicant
 Premal Patel for the Respondent

Investigation Meeting: 24 March 2014

Date of Determination: 25 March 2014

DETERMINATION OF THE AUTHORITY

- A. By no later than 14 days from the date of this determination Indique NZ Limited (INZL) must comply with the terms of its settlement agreement with Mandeep Kaur Momi (Ms Momi) by paying her the sum of \$3,500.**
- B. Under s.149(4) of the Employment Relations Act 2000 INZL must pay a penalty of \$500 for breaching an agreed term of settlement.**
- C. INZL must pay the penalty ordered directly to Ms Momi.**
- D. INZL must also pay Ms Momi the sum of \$500 as a contribution to her costs of representation and \$71.56 in reimbursement of the fee she paid to lodge this matter in the Authority.**

Employment relationship problem

[1] Mandeep Kaur Momi sought a compliance order because Indique NZ Limited (INZL) had not paid her all the amounts due under a settlement agreement made between them on 28 March 2013. The agreement was certified by a mediator under s149 of the Employment Relations Act 2000 (the Act).

[2] While INZL had paid some amounts due under the settlement agreement, it admitted that one monthly instalment was only part paid and three further monthly instalments were not paid at all. Those unpaid amounts totalled \$3500. INZL director Premal Patel said the company always intended to pay the money eventually but proposed that this now be done by instalments over a further six month period.

[3] Ms Momi opposed a further scheme of instalments for money that should have been paid to her in full by 1 November 2013 under a certified agreement that was final, binding and enforceable. She sought a penalty and her costs in bringing this application along with a compliance order for immediate payment.

Issues

[4] As there was no dispute that the terms of the settlement agreement were breached and \$3500 remained due, the issues left for the Authority to determine were:

- (i) On what terms should a compliance order be made for INZL to pay the outstanding amount – immediately; or by further monthly instalments; and
- (ii) Whether a penalty should be imposed on INZL for its failure to comply with the terms of the settlement agreement; and
- (iii) If a penalty were imposed, should that amount be payable solely to the Crown or should some or all of it be paid to Ms Momi; and
- (iv) Should INZL be ordered to contribute to Ms Momi's costs of representation and reimburse her for the Authority fee to lodge her application?

Investigation

[5] At the investigation meeting Mr Patel had the opportunity to provide information about INZL's financial position to support its argument that a compliance order should be on the basis of payment by instalments. He and Ms Moncur also had the opportunity to make oral submissions on the issues to be decided.

Are instalments "required"?

[6] Under s.137 of the Act the Authority has the power to order compliance with terms of settlement made under s.149 of the Act. Section 138(4A) also allows the Authority to order payment to an employee a sum of money under such a term to be made by instalments, "*but only if the financial position of the employer requires it*".

[7] Such a discretion to order payment by instalments seems at odds with the provision at s.149(3) that terms in a certified settlement agreement are final, binding and enforceable and may not (except for enforcement purposes) be brought before the Authority for action or review. The discretion does, however, allow the Authority to address in a practical way where there has been some real or unexpected change in the circumstances of the employer between the time of the settlement agreement being made and the time of the Authority considering a compliance order application.

[8] The use of the word 'require' in s.138(4A) sets an objective measure on whether or not to allow payment by instalments. It means, taking the ordinary definition of *require* as "to need or depend on", that the employer's business must need or depend on payments being by instalments over time rather than being made immediately.¹ It is a measure, I hold, that demands a high standard of proof in order for the Authority to exercise its discretion to effectively change what were final and binding terms agreed by the parties earlier and certified under s.149.

[9] Mr Patel proposed that the outstanding amount of \$3,500 be paid in monthly instalments over six months from the date of any compliance order made. In affirmed oral evidence to the Authority he said INZL had to borrow money last year from members of his extended family and the company's bank in order to make a substantial payment to IRD and avoid liquidation. He said tax liability and financial management problems were caused by a third person but, as a result of the

¹ Concise Oxford Dictionary, 11th edition (2004).

arrangements made, IRD provided confirmation on 4 September 2013 that INZL had no overdue tax liabilities. In the last quarter of 2013 Mr Patel had worked as a chef himself in the restaurant run by the company but had to stop after having an accident in February 2014 and had to hire another chef and another waiter, which increased costs. He had sold his house and used the proceeds to clear his personal debt but was left with no surplus funds. Both he and his wife had jobs outside of the business to generate income. Payments to suppliers for consumable items for the restaurant were made on a week by week cash basis.

[10] That information did not persuade me the present financial position of INZL required an order for any further payment to Ms Momi be made by instalments rather than the single overdue amount.

[11] Mr Patel was able to raise money by way of loans for INZL from family members and the company's bank but there was no evidence that he had made any effort to include the amount due to Ms Momi in the loans and extended overdraft that he secured before September 2013. INZL left Ms Momi in the position of being effectively an unwilling lender to the company while she waited for the August, September, October and November instalments of money that the company had agreed on 28 March 2013 to pay to her in those coming months. There was insufficient evidence, against the high standard of proof I consider is necessary, that the financial position of INZL required her to wait rather than that really being a matter of commercial convenience for the company (in the sense that it had to pay less interest on money borrowed to meet its commitments).

[12] There was also insufficient evidence to establish that INZL lacked the means or realistic prospect of raising the funds due to Ms Momi (by further loan or overdraft if necessary).

[13] I was also influenced in reaching this view by the fact that the original settlement agreement included a scheme of instalments so INZL has already had the chance to spread the burden of meeting payments it agreed were due to Ms Momi. Mr Patel submitted INZL should be given latitude for having made some of the other payments due earlier under the settlement (including an amount for wages and holiday pay). However I was not persuaded that simply doing what it had to do, by law and by its own agreement, was relevant to the test set in s.138(4A).

[14] Accordingly, the compliance order under s.137 of the Act for INZL to pay the full amount of remaining compensation due to Ms Momi is to be on the basis of paying the full amount rather than by any scheme of instalments. I note too that the practical effect of INZL's actions and the order now made by the Authority is that INZL has already gained a 'break' of more than five months (from 1 November 2013 to 8 April 2014) in the time it has had to fully meet its commitments to Ms Momi.

[15] Under s.150A of the Act the payment ordered to be made to Ms Momi must be paid directly to her by INZL. Mr Patel confirmed he had Ms Momi's bank account number for that purpose.

Should a penalty be imposed?

[16] The terms of settlement included the following term:

This will be the full and final settlement of all matters between the Employer and Employee arising out of their employment relationship when the last payment referred to above has been paid. This clause has been explicitly discussed and agreed to by the Employer.

[17] On 1 August 2013 Ms Momi got only half the instalment due to her and from 1 September 2013 she did not receive any of the three further monthly instalments her former employer had solemnly committed to make in the March agreement. Neither did INZL pay any of the smaller monthly instalments it later proposed in its statement in reply on this matter (lodged in the Authority on 30 January 2014) between then and the date of the Authority investigation meeting.

[18] These circumstances warrant a penalty for failure to comply with the terms of a settlement agreement certified under s.149. The default in payments to Ms Momi from 1 August 2013 to the date of the investigation meeting was a deliberate and calculated choice by the company in order to best manage its funds or access to funds in the way that was most convenient and least costly for it, rather than any technical or inadvertent breach of those terms. It caused the self-evident harm of denying Ms Momi the benefit of \$3,500 for more than four months.

[19] Public policy supports ordering a penalty in such circumstances for two reasons. Firstly, it expresses disapproval of the actions of INZL. Secondly, it may deter other parties who agree to make payments under s.149 of the Act on a full, final,

binding and enforceable basis from later seeking to further delay meeting those commitments.

[20] The penalty of \$500 awarded against INZL is modest given that section 135 of the Act allows for penalties of up to \$20,000 to be awarded against a company. It is an amount which I consider is at the very low end of what could reasonably be ordered for such a breach of a certified s.149 settlement agreement.

[21] In order to recognise the harm done to Ms Momi by INZL's breach of its settlement agreement with her, I have also determined that the full amount of the \$500 penalty should be paid directly to her under s.136 of the Act.

Costs

[22] Ms Momi is also entitled to an order for the costs of representation she has incurred in bringing her application to the Authority. Those are costs she would not have incurred if INZL had made more effort to keep its side of the bargain. Those costs are set at \$500 (inclusive of GST) and reimbursement of the Authority lodgement fee of \$71.56.

Robin Arthur
Member of the Employment Relations Authority