

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 463  
5516823

BETWEEN

CHINTANA SINCLAIR  
Applicant

AND

DATUM CONNECT LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: Dean Organ for the Applicant  
No attendance on behalf of the Respondent

Investigation Meeting: 12 November 2014

Determination: 13 November 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Within 14 days of the date of this determination Datum Connect Limited (DCL) must complete payment of the amounts due to be paid under the terms of settlement agreed with Chintana Sinclair and certified under s 149 of the Employment Relations Act 2000 (the Act) on 30 July 2014. This order is made under ss 137, 138 and 151 of the Act.**
- B. DCL must also, within 14 days of the date of this determination, pay Ms Sinclair the further sums of:**
- (i) \$500 as a penalty under 149(4) of the Act for its breaches of terms of settlement made with her; and**
  - (ii) \$1000 as a contribution to her costs of representation in seeking the orders made; and**
  - (iii) \$71.56 in reimbursement of the fee paid to lodge her application in the Authority.**

## **Employment relationship problem**

[1] Chintana Sinclair sought an order for compliance, penalty and interest in relation to payments due under the terms of a settlement agreement made in mediation with her former employer, Datum Connect Limited (DCL). The agreement was certified by a Ministry of Business mediator under s149 of the Employment Relations Act 2000 (the Act) on 30 July 2014.

[2] Ms Sinclair's application to the Authority stated DCL had not paid a settlement sum due by 13 August 2014 and an invoice for her legal costs that DCL had also agreed to pay.

[3] In reply DCL proposed making partial payments over time and further mediation on that proposal.

[4] By the time that the Authority was able to convene a case management conference with the parties I did not consider mediation would contribute constructively to resolving the matter. Rather the matter was best resolved, according to its substantial merits, by inquiry into whether the financial position of DCL required an order for payment by instalment of the amounts remaining due to Ms Sinclair. Under s 138(4A) of the Act the Authority has discretionary powers to make such orders where a compliance order relates to payment to an employee of a sum of money.

[5] DCL's general manager Bill Smith was provided with an opportunity to lodge a witness statement giving information about the company's income, cash flow, expenses and other payment obligations as well as its assets, ability to mortgage any property or other assets and its ability to raise a loan for the amount due. Mr Smith was directed to include corroborating documents to confirm that information.

[6] By email on 31 October Mr Smith provided a cash flow report for recent months and a profit and loss spreadsheet with forecasts through to 2016. He also stated that current funds were not sufficient to see DCL through another trading month and a substantial sum was also owed to other creditors. He said DCL expected to receive investment funds, although that was not guaranteed, and its bank was not willing to lend more than DCL's existing overdraft facility.

[7] Through a memorandum then lodged by her representative in advance of the investigation meeting Ms Sinclair submitted DCL appeared to have had funds available to pay her but had chosen to favour other creditors. She also advised that since her compliance order application was set down for an Authority investigation meeting DCL had paid her \$4350 of the sum owed but \$5650 remained due, along with \$3500 plus GST in the invoice for legal costs.

### **Investigation and issues**

[8] No representative of DCL attended at the appointed time for the Authority investigation meeting. An Authority support officer attempted to speak to DCL general manager Bill Smith by telephone and the call went to his voice mail where the support officer left a message. The support officer also sent Mr Smith an email at 10.07am to which he responded at 10.19 am. Mr Smith's message was that he apologised as he "*didn't have this [investigation meeting] in my calendar*" and was unwell and not working today. He asked that another time be organised.

[9] The investigation meeting was notified to the parties on 17 October 2014 after a case management conference by telephone which Mr Smith attended and the date of the meeting was agreed. I was not satisfied that Mr Smith's belated explanation, gained only when sought by Authority, amounted to showing good cause for DCL's failure to attend or be represented at the investigation meeting. I exercised the Authority's discretion to proceed and act as fully in the matter before it as if the absent party had duly attended or was present.

[10] Under affirmation Ms Sinclair confirmed DCL had paid three instalments of the money due to her into her personal bank account over the last three weeks but more than half the amount due remained unpaid and the invoice to DCL from her representative had also not yet been paid. Based on the memorandum he had lodged and served in advance of the investigation meeting, Mr Organ also made brief submissions about the issues involved.

[11] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from DCL and Ms Sinclair but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

- [12] In determining this matter I considered the following issues:
- (i) Whether the financial position of DCL required an order for payment by instalments of the amounts remaining due to Mr Sinclair?
  - (ii) Whether interest and/or a penalty should be imposed in respect of delay in payments there were due by 13 August (some three months earlier)?
  - (iii) Whether DCL should pay costs to Mr Sinclair on this application?

**Did DCL’s financial position “require” an order for payment by instalments?**

[13] Section 138(4A) sets a high threshold for the exercise of the Authority’s discretion to order payment by instalments. Such an order is permitted not simply where the employer *desires* to pay by instalments but where the employer’s financial position *requires* it. The appropriate test is more than one of the the employer’s convenience or preference even when the employer’s financial position is not strong.<sup>1</sup>

[14] The primary definition of the verb ‘require’ is to “*need or depend on*”.<sup>2</sup> Its use in this section of the Act suggests an objective standard, involving proof to the balance of probabilities and more than the employer’s subjective interests or analysis of the situation. It implies that the employee’s right to be paid money due ought to be weighed with sufficiently proven likely consequences to the employer’s business. To the extent it relates to the financial position of the employer’s business, that weighing exercise could take account of legitimate interests or priorities in relation to other people (such as other former or present employees or suppliers or other creditors) competing for the limited funds available to the employer.

[15] I was not satisfied the financial information provided by Mr Smith was sufficient to cross the high threshold of establishing that DCL’s financial position required payment by instalments of the money due. The spreadsheets he provided were not corroborated in any way by supporting documentation. He did not address the question of whether DCL had any property or assets that might be used to realise necessary funds. Neither did it address why payments were made to some creditors and not others. A bare assertion from Mr Smith (in his email accompanying the

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<sup>1</sup> [Stein v Garrard’s \(NZ\) Ltd](#) (ERA Auckland, AA287/08, 8 August 2008) at [8].

<sup>2</sup> Concise Oxford English Dictionary (11<sup>th</sup> edition, 2004).

financial information) that DCL's bank would not extend the company's current overdraft facility was also insufficient to satisfy the 'requirement' threshold.

[16] In those circumstances I was not persuaded DCL's financial position required any order for compliance should allow DCL to pay the amount remaining due by instalments.

[17] The public interest in having terms of a settlement agreement, made and certified in mediation, honoured by the parties to that agreement favoured making the order for compliance set out at the head of this determination. The particular circumstances in this case were that DCL should have completed its side of the agreement by no later than 13 August but, because of the time taken to bring the matter to an investigation meeting, had gained another three months to pay the amount due. The Act states that settlement agreements certified under s 149 are "*final, binding ... and enforceable*" and it was appropriate for the compliance order sought to be made.

### **Were orders for interest and a penalty appropriate?**

[18] Ms Sinclair sought a separate penalty of \$1000 for each the two breaches of the agreement terms – payment of a compensation sum by 13 August and payment of her representative's invoice issued on 5 August. She also sought interest on the amounts due.

[19] I concluded a penalty of \$500 should be imposed on a global basis for the two breaches and the whole of the penalty should be paid to Ms Sinclair but not to make an award of interest in those circumstances.<sup>3</sup> I did so for these reasons.

[20] DCL's failure to pay the amounts due to Ms Sinclair on time was a deliberate action. The harm caused, in putting Ms Sinclair out of the use of money to which she was entitled, was self-evident. The financial information provided showed DCL had chosen to pay some creditors in preference to the agreed payments to Ms Sinclair and her representative. The company was free to do so but by that choice it breached solemn obligations it had entered as part of a statutory dispute resolution process.

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<sup>3</sup> Sections 133(1)(b), 135(2)(b), 136(2) and 149(4) of the Act applied.

And that process clearly warns of liability to a penalty for breaches of an agreed term of settlement.<sup>4</sup> The form of the record of settlement confirms that the parties have understood that liability before the mediator certified the agreement. DCL's choice must have some real consequence in order to maintain, in the public interest, confidence in the binding nature and enforceability of such agreements and to express disapproval of parties who do not keep their promises.

[21] As Ms Sinclair was the party that was most directly harmed by DCL's failure to keep its promise, it was appropriate the penalty be paid to her.

[22] I did not award interest on the overdue amount for two reasons. Firstly, its calculation required a complex exercise (given recent part-payments made) that would have been out of proportion to the potential approximate result (probably about \$100). Secondly, in a practical sense, the award of the penalty addressed the harm to Ms Sinclair (that included loss of the use of the money) that an award of interest would also have addressed. If the penalty had gone solely to the Crown instead, that consideration would have altered.

[23] There was a third potential reason not to award interest. It concerned whether the Authority had jurisdiction to award interest as part of a compliance order for money due under the terms of a certified settlement agreement. I concluded the Authority did have that jurisdiction although it was not appropriate to exercise in the particular circumstances of the outcome in Ms Sinclair's case. My conclusion on that point was based on the following reasons.

[24] The learned authors of one employment law text suggest the Authority's jurisdiction, under s 138(4)(a) of the Act – to make compliance orders subject to such terms and conditions as the Authority thinks fit – “*does not extend to ordering the payment of interest on the payment of moneys that the compliance order concerns (such as moneys owed under an agreed settlement)*”.<sup>5</sup> The authority given for that proposition is an Employment Court decision made about provisions of the Employment Contracts Act 1991 (the ECA): [Wolfenden v The New Zealand Film and Television School Ltd.](#)<sup>6</sup> Elsewhere the commentary in the same text discusses the

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<sup>4</sup> Section 149(4) of the Act.

<sup>5</sup> Brookers *Employment Law* commentary (online looseleaf ed, Brookers) at ER138.06 Payment of interest.

<sup>6</sup> [\[1999\] 2 ERNZ 21](#) at 31.

Authority's power to award interest on any matter involving "*the recovery of any money*". It notes that "*interest may also be awarded on money payable under a mediated settlement*".<sup>7</sup> It cites one Authority determination as an example.<sup>8</sup> In that case the compliance order issued by the Authority, for a payment due under a record of settlement made in mediation, included a requirement to pay interest.

[25] Authority determinations appear to have twice relied on the Court's decision in *Wolfenden* to refuse to include an award for interest when issuing compliance orders for payments due under settlement agreements.<sup>9</sup> However the Authority has also, at least twice, made interest orders in those circumstances – including an earlier determination of mine.<sup>10</sup>

[26] The Court's decision in *Wolfenden* analysed the extent of the Employment Tribunal's powers to order interest under s49 of the ECA. The power to award interest under that section was only on money found to be due as "*arrears*" under s48 of the ECA and those arrears were defined in the section as "*wages or other money payable ... under an employment contract or a contract of apprenticeship*". The particular money at issue in *Wolfenden* was \$10,000 that the mediated settlement agreed would be paid as compensation under s40(1)(c)(i) of the ECA – the equivalent of a payment for humiliation, loss of dignity and injury to the feelings of any employee under s123(1)(c)(i) of the present Act. It was not wages or other money due under the employment contract. Having found the award of interest was not authorised by s49, the Court concluded that a provision at s55(5)(a) of the ECA allowing the Tribunal to make a compliance order "*subject to such terms and conditions as the Tribunal thinks fit*" did not authorise the Tribunal to make payment of interest a term or condition of any compliance order made about an unpaid or overdue amount in a mediated settlement agreement.

[27] The present Act does not limit awards of interest only to wages or other money due under an employment agreement (unlike s49 of the ECA). Instead clause 11 of Schedule 2 of the Act provides a discretionary power to award interest "*in any*

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<sup>7</sup> *Employment Law* (online looseleaf ed, Brookers) at ERSch2.11.01 Power to award interest.

<sup>8</sup> [House v Independent Power NZ Ltd](#) (ERA Auckland AA250/04, 10 August 2004) at [14].

<sup>9</sup> [Warburton v Pethybridge](#) (ERA Auckland AA279/08, 5 August 2008) and *Harrison v Black Magic Composite Company NZ Limited* (ERA Auckland, AA311/07, 5 October 2007).

<sup>10</sup> [Smith v Virtual Infrastructure Professionals Ltd](#) (ERA Auckland AA390/08, 13 November 2008) at [18]-[21] and [House v Independent Power NZ Ltd](#) (ERA Auckland AA250/04, 10 August 2004) at [14].

*matter involving the recovery of any money*". The underlined emphasis is mine. As a matter of construction of the meaning of the Act the phrase 'any matter' includes an application for a compliance order and 'any money' includes a compensation amount agreed in a record of settlement, not just wages.<sup>11</sup> The application for a compliance order in these circumstances is also a matter of seeking 'recovery' of money due and consequently clearly within the scope of the Authority's statutory power to award interest.

### **Costs**

[28] Ms Sinclair sought a contribution to her costs of representation in making the application for compliance and other orders. Those costs were said to total \$2254 for preparing and lodging the statement of problem, participating in a case management conference with the Authority member and attending the investigation meeting.

[29] While Ms Sinclair sought an award for the full amount of her costs so she was not 'out of pocket' as a result of having to seek enforcement measures, I concluded costs consistent with the Authority's usual daily tariff were sufficient in the circumstances of this case. An award of \$1000 reflected an appropriately modest and reasonable contribution to what would be reasonably incurred costs for the length and complexity of investigation meeting required (even if DCL had attended and participated).

[30] Ms Sinclair was also entitled to have DCL meet the expense of the fee of \$71.56 that she paid to lodge her application in the Authority.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>11</sup> Clause 1 of Schedule 2 of the Act.