

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 173
3088413

BETWEEN JASHANDEEP SINGH
 Applicant

AND RAVSAN ELECTRICAL
 LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person
 Ravin Lal, on behalf of the Respondent

Investigation Meeting: 28 April 2020

Submissions and further 29 April 2020 from the Respondent
Information Received:

Date of Determination: 30 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jashandeep Singh alleges that Ravsan Electrical Services Limited (Ravsan) breached the terms of a record of settlement entered into with him on 4 December 2019. His application for a compliance order was withdrawn following payment of outstanding amounts by Ravsan Electrical. However, Mr Singh maintains his application for an order that Ravsan Electrical pay a penalty.

[2] No Statement in Reply was filed by Ravsan Electrical.

The Authority's process

[3] Prior to the investigation meeting a minute setting out, inter alia, the date of the investigation meeting was served on Ravsan Electrical. In addition it was served with the notice of investigation meeting. The minute advised that, pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, Ravsan Electrical would require the leave of the Authority to reply or respond to Mr Singh's application. Ravsan Electrical was advised that if an application for leave was filed this must explain the delay in filing the Statement in Reply on time and file a copy of the proposed Statement in Reply.

[4] No application for leave was received from Ravsan Electrical.

[5] On 20 April 2020 the Authority was advised by the parties that Ravsan Electrical had attended to payment of the amounts owing to Mr Singh under the record of settlement. However, Mr Singh advised the Authority that he wanted the Authority to continue to investigate his application for a penalty for Ravsan Electricals' breach.

[6] On 22 April 2020 the Authority issued a minute confirming the investigation meeting scheduled for 28 April 2020 by telephone would proceed. The minute also advised that during the investigation meeting the Authority would be considering whether to order Ravsan Electrical to pay a penalty and set out what considerations it would take into account.

[7] Mr Singh provided evidence on his behalf at the investigation meeting. Ravin Lal, a director of Ravsan Electrical, appeared and gave evidence on its behalf.

[8] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The Issues

[9] The issues identified for investigation and determination are:

- a. Did Ravsan Electrical breach the record of settlement by failing to make payment of the amounts agreed?

- b. If so, should a penalty be ordered under s 149 (4) of the Act?
- c. Should either party contribute towards the costs of representation of the other party?

Issue One: Breach of the record of settlement

[10] The relevant terms of the record of settlement were these:

2. The parties have agreed that Ravsan Electrical Services Limited was required to pay Jashandeep Singh \$4540.05 gross wages for his period of employment with the Company.
3. Ravsan Electrical Services Limited shall pay Jashandeep Singh three sums of \$942.51 nett for outstanding wages. The first payment shall occur on or before 15 January 2020; the second payment on or before 15 February 2020; and the last payment on or before 15 March 2020. These amounts will be paid by way of direct credit and are subject to the deduction of PAYE tax. Should any payment not be made by the due date then the outstanding balance shall be immediately due and payable.
4. On or before 15 March 2020 Ravsan Electrical Services Limited shall pay Inland Revenue Department the PAYE tax owing on the gross amount of \$4540.05.

[11] I am satisfied Ravsan Electrical breached Clauses 2-4 of the Record of Settlement. It did not attend to payment of the first instalment of wages until 20 January 2020, the second and third instalments of wages until 17 April 2020, and the payment of PAYE to the Inland Revenue Department until 29 April 2020.

Issue Two: Penalty

[12] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.

[13] Section 133A provides mandatory considerations for the Authority in determining an appropriate penalty, including whether the breach was intentional, inadvertent or negligent and the nature and extent of any loss or damaged suffered by the person in breach or the person involved in the breach. In addition, the Court has set out additional considerations in its judgments in *Borsboom v Preet PVT Limited* and *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.¹

¹ *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]; *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

[14] Having considered the mandatory and other considerations, I reach the following findings:

- a. A penalty is necessary to ensure, as a matter of public policy, that settlement agreements under s 149 of the Act are enforceable. A key object of the Act is to promote mediation as a primary problem solving mechanism, which includes the s 149 provision for final and enforceable certified agreements. Ravsan Electrical's breach of the settlement agreement has undermined this objective.
- b. Ravsan Electrical breached the Record of Settlement on four occasions; however I consider these matters are sufficiently interrelated such that it is appropriate to deal with them as one breach. The maximum total penalty available in respect of this breach is \$20,000.²
- c. The nature of the breach is serious. Ravsan Electrical agreed to pay Mr Singh to resolve his employment relationship problem on particular dates. The agreement enabled Ravsan Electrical to gain an extension on payment of wages that ought to have been paid on the dates they were due between March and May 2019. It also enabled the delay of PAYE on those wages.
- d. Ravsan Electricals' failure to make payment of the amounts it agreed to pay to Mr Singh on the due dates resulted in Mr Singh losing the use of the money he was entitled to at the time it became due. Ravsan Electrical on the other hand has gained financially by retaining use of these monies enabling it to continue to operate and to pay other expenses it had incurred.
- e. Ravsan Electrical has now paid all amounts due under the Record of Settlement. However, this was not until after Mr Singh filed these proceedings with the Authority and after the Authority questioned Mr Lal on the timing of payment of the outstanding PAYE due to the Inland Revenue Department.
- f. I am aware of no other previous conduct by Ravsan Electrical.
- g. It is important that a penalty is set at a level where it deters employers from breaching s 149 agreements. However, it is not appropriate to

² Employment Relations Act, s 135 (2)(b).

penalise Ravsan Electrical so heavily that it is unable to continue to operate. Mr Lal advised the Authority that Ravsan Electrical will have difficulty paying a penalty. He explained that his business had been significantly affected by the restrictions that had been put in place by the New Zealand Government to restrict the spread of COVID-19. While his business was deemed an essential service, he said Ravsan Electrical had received very little work. He said it had applied for the Government Wage Subsidy scheme to pay his wages and that of its other employee's wages. He anticipated that the downturn in business would continue for a period of time.

[15] Taking into account the foregoing, I order Ravsan Electrical to pay a sum of \$1,500 by way of penalty for its breach of the record of settlement. This sum is proportionate to the seriousness of the breach; the harm occasioned, and is just in all the circumstances. In addition, this sum is consistent with penalties imposed by the Authority in similar cases.

[16] Payment of the sum of \$1,500 must be made within 28 days of the date of this determination to the Employment Relations Authority.

[17] I consider it appropriate that part of this penalty be paid to Mr Singh. By order under s 136(2) of the Act, \$1,000 of the penalty is to be paid to Mr Singh once the full amount of the penalty has been recovered by the Employment Relations Authority. The remaining \$500 is to be transferred to the Crown account.

Issue four: Costs

[18] Mr Singh applies for an order that Ravsan Electrical reimburse him for the filing fee he paid to the Authority on this application. I agree this is appropriate.

[19] Ravsan Electrical is ordered to pay Mr Singh the sum of \$71.56 within 7 days of the date of this determination.

Outcome

[20] The overall outcome that I have reached is:

- a. Ravsan Electrical Services Limited breached clauses 2-4 of the record of settlement dated 4 December 2019.

- b. Ravsan Electrical Services Limited is ordered to pay a penalty of \$1,500 for its breach of the record of settlement. Payment is to be made within 28 days of the date of this determination to the Employment Relations Authority. The Employment Relations Authority is then to pay \$1,000 of the penalty to Jashandeep Singh and the remaining \$500 is to be transferred to the Crown Bank account.

- c. Ravsan Electrical Services Limited is ordered to pay Mr Singh costs in the sum of \$71.56 within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority