

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 188  
3097672

BETWEEN

ZHANNA TEN  
Applicant

AND

SYCRONICITY LIMITED  
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Kam Bailey advocate for the Applicant  
No appearance for the Respondent

Investigation Meeting: 07 May 2020

Date of Determination: 08 May 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Zhanna Ten and Synchronicity Limited (Synchronicity) entered into a record of settlement on 30 September 2019. Pursuant to that agreement, Synchronicity agreed to make various payments to Ms Ten.

[2] Ms Ten alleges Synchronicity has breached the record of settlement by failing to make payment of any of the amounts agreed. She seeks a compliance order pursuant to sections 137 and 151 of the Employment Relations Act 2000 (the Act), interest, and the imposition of a penalty.

[3] No Statement in Reply was filed by Synchronicity.

## **The Authority's process**

[4] Prior to the investigation meeting a minute setting out, inter alia, the date of the investigation meeting was served on Synchronicity. In addition it was served with the notice of investigation meeting. The minute advised, inter alia that, pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, Synchronicity would require the leave of the Authority to reply or respond to Ms Ten's application. It 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.

[5] No application for leave was received from Synchronicity. In addition, there was no appearance for or on behalf of Synchronicity at the investigation meeting that was conducted by telephone. This was despite the Authority Officer contacting Synchronicity by email the day prior to the investigation meeting to remind it of the investigation meeting and to again provide the details for connection to the investigation meeting.

[6] As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Synchronicity had duly attended or been represented.

[7] As permitted by 174E of 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**

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

- a. Did Synchronicity breach the record of settlement by failing to make payment of the agreed amounts?
- b. If so:
  - i. Should a penalty be ordered under s 149 (4) of the Act?
  - ii. Should a compliance order be made under s 137 of the Act?
  - iii. Should Synchronicity be ordered to pay interest on the amounts outstanding?

- c. Should either party contribute towards the costs of representation of the other party?

### **Issue one: Breach of the record of settlement**

[9] The record of settlement executed by the parties complied with the requirements of s 149 of the Act.

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

2. Synchronicity shall, without admission of liability, pay Zhanna, on 25 October 2019, the sum of \$5,000.00 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid by way of direct credit into Zhanna's bank account.
3. Synchronicity shall pay Zhanna \$8,640.00 plus holiday pay less PAYE into her nominated bank account on 25 November 2019.

[11] Under questioning Ms Ten explained that the sum of \$8,640, agreed to in Clause 3, was for outstanding wages owed to her for the period she was employed by Synchronicity. Namely, from 28 March 2019 to 26 May 2019.

[12] In terms of holiday pay, Ms Ten said the holiday pay agreed at Clause 3 was holiday pay due on the sum of \$8,640. She confirmed she took no annual leave during her employment. Ms Ten worked less than 12 months. I accept the amount of holiday pay that she was to be paid was 8% of her gross earnings i.e. \$691.20.

[13] I am satisfied Synchronicity has breached Clauses 2-3 of the record of settlement by failing to pay the agreed amounts by the due date.

### **Issue two: Penalty**

[14] 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.

[15] Section 133A of the Act 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*.<sup>1</sup>

[16] 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. Synchronicity's breach of the settlement agreement has undermined this objective.
- b. Synchronicity breached the record of settlement on two 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.<sup>2</sup>
- c. The nature of the breach is serious. The record of settlement enabled Synchronicity to gain an extension on payment of wages and holiday pay that ought to have been paid on the dates they were due. Email correspondence I have viewed shows Ms Ten making numerous demands for payment when Synchronicity breached the record of settlement. It is likely that the failure to pay in these circumstances was intentional.
- d. Synchronicity's failure to make payment of the amounts it agreed to pay to Ms Ten under the record of settlement resulted in her losing the use of the money she was entitled to at the time it became due and her suffering financial hardship. She was forced to borrow money from her family to pay her bills. Synchronicity on the other hand has gained financially by retaining use of these monies.
- e. I am aware of no steps taken by Synchronicity to mitigate its breach. It has not paid any of the amounts due to Ms Ten. This is despite making promises

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<sup>1</sup> *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.

<sup>2</sup> Employment Relations Act, s 135 (2)(b).

to do so on numerous occasions after its execution of the record of settlement. It took no steps in the Authority's investigation.

- f. I am aware of no other relevant previous conduct by Syncronicity.
- g. Deterrence is high. It is important that parties to s 149 records of settlement have confidence that terms agreed will be complied with. Amongst other things, the imposition of a penalty under s 149(4) is to punish a party who reneges on such agreements.
- h. 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 penalise Syncronicity so heavily that it is unable to continue to operate.
- i. There are several aggravating factors. For example, the intentional nature of the breach, the quantum of the amount outstanding, Ms Ten's loss of use of the money she was entitled to at the time it became due, and Syncronicity's financial gain by retaining the funds.
- j. I am aware of no ameliorating factors or any inability by Syncronicity to pay a penalty.

[17] Taking into account the foregoing, I order Syncronicity to pay a sum of \$3,000 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.<sup>3</sup>

[18] Payment of the sum of \$3,000 must be made within 28 days of the date of this determination to the Employment Relations Authority.

[19] I consider it appropriate that part of this penalty be paid to Ms Ten. By order under s 136(2) of the Act one half of the penalty is to be paid to Ms Ten once the full amount of the penalty has been recovered by the Employment Relations Authority. The other half is to be transferred to the Crown account.

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<sup>3</sup> See, for example: Elliot v All Coat Painters Limited [2019] NZERA 165 (\$3,000), Singh v Mega Civil Limited [2020] NZERA 21 (\$3,000), Elmer Isidro v BF7 Holdings Limited [2020] NZERA 43 (\$3,000).

### **Issue three: Compliance order**

[20] For the same reasons as I have particularised when discussing penalties, I consider it appropriate to exercise my discretion and make a compliance order.<sup>4</sup> A compliance order is necessary to prevent further non-observance of, or non-compliance with, clauses 2-3 of the record of settlement.

[21] Synchronicity is ordered to comply with the record of settlement by doing the following within 14 days of the date of this determination.

- a. Synchronicity must pay Ms Ten the sum of \$5,000.00 due pursuant to clause 2 of the record of settlement.
- b. Synchronicity must pay Ms Ten the sum of \$9,331.20 gross due pursuant to clause 3 of the record of settlement being made up of the outstanding wages of \$8,640 plus outstanding holiday pay of \$691.20.

[22] For the information of Synchronicity, a 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 Ten to the Employment Court for enforcement of the order. Under s 140 of the Act, where the Court is satisfied that any person has failed to comply with a compliance order made under s 137, the Court may order remedies, including term of imprisonment not exceeding 3 months, and/or a fine not exceeding \$40,000 and/or the seizure of property and for the proceeds of sale to be distributed to the person enforcing the Authority's order.

### **Issue four: Interest**

[23] It is appropriate that Synchronicity be ordered to pay interest on the monies it agreed to pay Ms Ten.

[24] Synchronicity is ordered to pay interest, using the Civil Debt interest calculator, as follows:<sup>5</sup>

- a. Interest on the sum of \$5,000 from 25 October 2019 until the date payment is made in full.

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<sup>4</sup> Employment Relations Act, s 137(2) and 138.

<sup>5</sup> Employment Relations Act 2000, Schedule 2 clause 11 and [www.justice.govt.nz/finances/civil-debt-interest-calculator](http://www.justice.govt.nz/finances/civil-debt-interest-calculator).

- b. Interest on the sum of \$8,640 from 25 November 2019 until the date payment is made in full.
- c. Interest on the sum of \$691.20 from 25 November 2019 until the date payment is made in full.

#### **Issue five: Costs**

[25] In light of her success in bringing this application, Ms Ten is entitled to an order for a contribution towards her costs of representation and for reasonable disbursements associated with the bringing of her claim to the Authority.

[26] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500 for the first day of an investigation meeting.<sup>6</sup> The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[27] The starting point in this case is \$750.

[28] Applying the principles deemed appropriate by the Court, I am satisfied that no adjustment to the starting figure is warranted.<sup>7</sup> I note there were no attendances outside of those anticipated by the daily tariff, there was no case management conference, and witness statements and submissions were not required.

[29] Synchronicity is ordered to pay Ms Ten the sum of \$750 towards her legal costs together with a sum of \$71.56 representing the filing fee she paid to the Authority when making this application. These amounts must be paid within 14 days of the date of this determination.

#### **Outcome**

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

- a. Synchronicity Limited breached clauses 2-3 of the record of settlement dated 30 September 2019.

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<sup>6</sup> Practice Note 2, Costs in the Employment Relations Authority.

<sup>7</sup> *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

- b. Syncronicity Limited is ordered to comply with the Record of Settlement by doing the following within 14 days of the date of this determination.
  - i. Syncronicity Limited must pay Zhanna Ten the sum of \$5,000.00 due pursuant to clause 2 of the record of settlement.
  - ii. Syncronicity Limited must pay Zhanna Ten the sum of \$9,331.20 gross due pursuant to clause 3 of the record of settlement being made up of the sum of \$8,640 plus outstanding holiday pay of \$691.20.
- c. Syncronicity Limited is ordered to pay a penalty of \$3,000 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 one half of the penalty to Zhanna Ten and the other half is to be transferred to the Crown Bank account.
- d. Syncronicity is ordered to pay interest, using the Civil Debt interest calculator, as follows:
  - i. Interest on the sum of \$5,000 from 25 October 2019 until the date payment is made in full.
  - ii. Interest on the sum of \$8,640 from 25 November 2019 until the date payment is made in full.
  - iii. Interest on the sum of \$691.20 from 25 November 2019 until the date payment is made in full.
- e. Syncronicity Limited is ordered to pay Zhanna Ten costs and disbursements in the sum of \$821.56 within 14 days of the date of this determination.

Jenni-Maree Trotman  
Member of the Employment Relations Authority