

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 249
5632145

BETWEEN

CRISTINA VASILE

Applicant

AND

ROLLERFLEX LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Michal Ciganek for the Respondent

Investigation: By telephone conference and on the papers

Determination: 25 July 2016

DETERMINATION OF THE AUTHORITY

- A. Within 14 days of the date of this determination Rollerflex Limited (Rollerflex) must pay to Cristina Vasile:**
- (i) the sum of \$3000 already due to her under terms of a certified settlement agreement; and**
 - (ii) \$500 as a penalty for breach of a term of a settlement agreement certified under s 149 of the Employment Relations Act 2000; and**
 - (iii) \$71.56 in reimbursement of the fee she paid to the Authority to lodge her application for a compliance order and a penalty.**
- B. On 20 August, 20 September, 20 October and 20 November 2016 Rollerflex must also pay to Ms Vasile the agreed further instalments due to her under their settlement agreement.**

Employment Relationship Problem

[1] On 21 April 2016 Cristina Vasile and Rollerflex Limited (Rollerflex) resolved an employment relationship problem on terms set out in a settlement agreement

certified by a Ministry of Business mediator on 27 April 2016 under s 149 of the Employment Relations Act 2000 (the Act). The mediator's certification confirmed the parties had told her they understood the terms were final, binding and enforceable and could only be brought before the Authority for the purpose of enforcement, not for review or appeal.

[2] While the settlement terms were agreed to be confidential to the parties it was necessary for the purposes of this determination, and the orders made in it, to disclose that one of those terms required Rollerflex to pay Ms Vasile compensation of \$7000 in seven monthly instalments of \$1000, starting on 20 May 2016 and then continuing on the twentieth day of each of the following six months.

[3] On 28 June 2016 Ms Vasile applied to the Authority for a compliance order because Rollerflex had not paid her the amounts due on 20 May and 20 June 2016. She also sought a penalty for breach of the agreement, to be paid to her, and an order for Rollerflex to refund the Authority fee charged to lodge her application.

[4] A statement in reply from Rollerflex accepted the instalments were not paid. It said this was because the company had "no money on account" and would pay Ms Vasile "later once we get some money". It proposed making monthly payments of \$20 a month – a proposal that would require 29 years to make the full payment due.

[5] Before determining whether any compliance order should be made and, if so, whether an order should be on the basis of Rollerflex's proposal for much lower instalments than the agreed term, Rollerflex was given an opportunity to provide information on whether its financial position required such an arrangement.¹

[6] By email on 22 July 2016 Rollerflex provided copies of documents showing an amount due to IRD and amounts due as "aged payables" to 26 other creditors, along with a profit and loss account to 20 July 2016 showing its expenses exceeded its income. In the email Rollerflex director Michal Ciganek, said he knew the company needed to pay Ms Vasile \$7000 and would respect anything that the Authority decided. Mr Ciganek's note said he hoped that as the winter period finished, the company's cash flow would improve and it could pay all its debts, including the amount owed to Ms Vasile and "if not we might need to close down". He also stated

¹ Employment Relations Act 2000, s 138(4A).

that Rollerflex did not own any property, re-sellable assets or stock and the bank would not give the company a loan if it saw the company's financial situation. He said he had previously tried to apply for a bank loan.

[7] In a telephone conference with Ms Vasile and Mr Ciganek on the afternoon of 22 July Ms Vasile confirmed Rollerflex had not paid the instalment due to her on 20 July as well as those dues on 20 May and 20 June. Mr Ciganek said the company's circumstances had changed since he agreed to pay the instalments set out in the settlement agreement with Ms Vasile. Some expected cash flow had not eventuated. He then proposed instalments at the level of \$200 a month as an amount that the company could afford.

[8] Having considered the financial information from Rollerflex and the written and verbal comments of Mr Ciganek I was not persuaded the company's financial position required an order for instalments different from what it had agreed to in the settlement agreement of 21 April 2016. The amounts showing in its accounts as owed to IRD and other creditors were not disproportionate for a business with its level of income and annual wage bill. Mr Ciganek had not established Rollerflex would honour any lower level of instalments as it had not previously made or offered any part payments to Ms Vasile of the amounts due to her. Neither did he establish that funds to meet the debt to her could not be borrowed from other sources, including other businesses, financial institutions, family or friends.

[9] Settlement agreements certified under s 149 of the Act are entered into voluntarily after the parties have confirmed to a Ministry of Business mediator that they understand the agreed terms are final, binding and enforceable. Those agreed terms are not a starting point for later bargaining. Strong public interests of certainty and finality require parties to be held to their agreements.

[10] If Rollerflex does not comply with the orders made at the head of this determination and set out below, Ms Vasile has a number of options. She could file this determination and the settlement agreement in the District Court where it is enforceable by the court's bailiffs in the same manner as a judgment of the court.² She could apply to the Employment Court for further orders including for the property

² Employment Relations Act 2000, s 141 and s 151(2)(b)(ii).

of Rollerflex to be sequestered or fines to be imposed.³ Alternatively, if the company is unable to pay its debts, she or other creditors could apply to the High Court for Rollerflex to be placed in liquidation.⁴

Compliance order

[11] Ms Vasile has established the grounds for an order requiring Rollerflex to comply with the terms of the settlement agreement it made with her on 21 April 2016 but has not yet done. It must pay the instalments already due within 14 days of the date of this determination and make the further instalments due in subsequent months.

A penalty for breach of a term of a certified settlement agreement

[12] A party that breaches the terms of a certified settlement agreement is liable to a penalty imposed by the Authority.⁵ Rollerflex admitted its breach of the agreed term. It was liable for a penalty at a level to be determined under the criteria stated at s 133A of the Act. Its actions undermined the Act's provisions for prompt and binding resolution of employment relationship problems. The failure to pay money due to Ms Vasile was a deliberate rather than inadvertent act which caused her to lose the immediate benefit of the agreed amounts. It took no steps to mitigate actual or potential adverse effects on her, such as by offering or making even part payments of the amount due. The failure to pay the agreed instalments was repeated on three occasions. There was no evidence Rollerflex had engaged in similar previous conduct.

[13] Having regard to the range of penalties awarded in similar cases and the statutory criteria for determining the amount of penalty, \$500 was an appropriate amount to impose in the circumstances. The whole of the penalty must be paid directly to Ms Vasile, not the Authority.⁶

Robin Arthur
Member of the Employment Relations Authority

³ Section 138(6) and 140(6).

⁴ Companies Act 1993, s 241(4)(a).

⁵ Employment Relations Act 2000, s 149(4).

⁶ Section 136(2).