

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2017] NZEmpC 29
EMPC 50/2015**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN AKKARANEE MAHAMAI
Plaintiff

AND EVA BELLEY (LABOUR INSPECTOR)
Defendant

Hearing: 24 September 2015
(heard at Christchurch)

Appearances: Ms A Mahamai, plaintiff in person
A McIlroy, counsel for the defendant

Judgment: 13 March 2017

JUDGMENT (NO 2) OF JUDGE B A CORKILL

[1] On 30 September 2015,¹ I dealt with a challenge which Ms Akkaranee Mahamai had brought against a determination of the Employment Relations Authority (the Authority).² At issue was whether compliance and penalty orders should be made as a result of the non-payment of wages to an employee.

[2] The judgment should be referred to for the details of the challenge, but the main issue related to the ability of the employer, Ms Mahamai, to pay. After reviewing her circumstances, I made the following order:³

¹ *Mahamai v Belley (Labour Inspector)* [2015] NZEmpC 170.

² *Belley (Labour Inspector) v Mahamai* [2015] NZERA Christchurch 8.

³ *Mahamai v Belley (Labour Inspector)*, above n 1, at [48] – [49].

- a) \$1,153 gross for unpaid wages and holiday pay was to be paid by Ms Mahamai to Ms Belley, (the Labour Inspector), for disbursement to the employee who had been unpaid.
- b) She was also to pay to the Labour Inspector the further sum of \$56.07 being interest owed at the date of the Authority's determination, increased by 15 cents with each calendar day after 29 January 2015 and until the date of payment.
- c) Final payment of those sums was to be made within 12 months of the date of the Court's judgment of 30 September 2015, subject however to a review of the order as to payment of instalments six months after the date of the judgment.

[3] Ms Mahamai was directed to pay \$30 per week to discharge the above liability, with the first payment to be made on 1 October 2015; that direction was to apply at least until the six-monthly review.⁴

[4] The Authority had made a compliance order directing payment of the unpaid wages; it also imposed a penalty of \$750. On the challenge, the Labour Inspector also sought the imposition of a penalty. As provided for by s 138(5) of the Employment Relations Act 2000 (the Act) I adjourned the proceeding without imposing any penalty or making a final determination in that regard, so as to enable the compliance order to be complied with during the period of the adjournment.

[5] Subsequent reviews of the terms of the compliance order were conducted by the Court on 21 March 2016 and 7 February 2017. In summary, Ms Mahamai experienced considerable difficulty in maintaining the payments which she was directed to make. The total liability was not met within 12 months, as had been directed. However, the compliance order has now been satisfied.

[6] The issue which I am now required to resolve is whether a penalty should be imposed, an order which the Labour Inspector again urges the Court to make.

⁴ At [43] – [44].

[7] There is no doubt that there has been a completely unacceptable delay by Ms Mahamai in meeting her financial obligations to the affected employee. The employee was unpaid for at least 19 months,⁵ and only paid thereafter on an intermittent basis. I am also in no doubt that the Authority was entirely correct on the information it had before it to impose the penalty of \$750.

[8] However, the Court when considering the challenge received more detailed information regarding Ms Mahamai's circumstances than did the Authority. That is because Ms Mahamai did not participate properly in the Authority's investigation meeting; but did attend the hearing of the challenge when she belatedly gave evidence as to her means.

[9] I summarised Ms Mahamai's circumstances in the following passage:

[16] ... [I]t emerged in the course of the hearing that Ms Mahamai is present in New Zealand on a visitor's Visa, which means she is not permitted to work in New Zealand. Ms Mahamai has a child attending school in New Zealand; the father of the child is resident overseas, and is not paying child support. Therefore, Ms Mahamai sole income is monetary support provided by family members who reside in Thailand. These realities have to be taken into account. However, I must also take into account the fact that [the employee] was employed and was not adequately paid, so that there is a debt due. It is these circumstances which the Court must balance.

[10] Later I referred to this topic as follows:

[40] In the course of her evidence, Ms Mahamai produced a budget which had been prepared with the assistance of the North Shore Budget Service. It showed weekly outgoings significantly in excess of weekly income.

[41] As described earlier, Ms Mahamai is not in employment; indeed, because she is the subject of a visitor's Visa, she is not permitted to work in New Zealand. She is in receipt of income from her parents. Ms Mahamai is supporting her daughter, whose father is also overseas and does not pay child support despite being employed, a matter about which Ms Mahamai might wish to seek assistance from a Citizen's Advice Bureau or other suitable advisor.

[42] On the basis of her strained financial circumstances, Ms Mahamai stated that she was willing to reduce the debt at \$30 per week. In my judgment s 138(4A) applies since the debt is in relation to payment to an employee, albeit via the Labour Inspector. Ms Mahamai's financial

⁵ That is, from February 2017 when payment fell due, to September 2015 when the compliance orders were made by this Court.

circumstances require the making of an order that the debt be paid by instalments. The alternative is to order a payment by way of a lump sum, which if enforced could result in a petition for bankruptcy being brought before the High Court. I do not consider such a possibility, at this stage, to be appropriate.

[11] Had it not been for the difficulties which were finally explained by Ms Mahamai to the Court, I would have imposed a penalty of at least \$750, given the significant breach of obligations which occurred. I would have considered it appropriate for half this sum to be paid to the employee. That would not have been a compensatory payment, but one which recognised the affront to the employee's rights. The balance would have been payable to the Crown to mark the affront to the public interest arising from non-compliance with an Improvement Notice which the Labour Inspector served on Ms Mahamai in an attempt to obtain payment of the sum which was due.

[12] However, as a full Court has recently confirmed, there are a range of factors which should be taken into account in considering whether a penalty should be imposed in any given case.⁶ One of those relates to the financial circumstances of the person who is in breach of his or her obligations.⁷

[13] All the competing contentions have to be weighed and assessed. In this particularly unusual case, I consider that Ms Mahamai's financial circumstances are such that, having complied ultimately with the compliance order, it would now be inappropriate to impose the penalty which I would otherwise have imposed. I accordingly allow the challenge in that respect.

[14] That finding, therefore, finally resolves this challenge. This judgment and the previous judgment of 30 September 2016 replace the Authority's determination.

[15] I note that the Labour Inspector has made no application for costs in her recent memorandum; in the circumstances which I have described, that is appropriate.

⁶ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

⁷ At [80] – [81].

[16] For the avoidance of doubt this matter is now concluded.

B A Corkill
Judge

Judgment signed at 10.55 am on 13 March 2017