

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 686  
3068992

BETWEEN                      NATASHA MARSHALL  
Applicant

AND                              7KIDS LIMITED  
First Respondent

AND                              ERIC OTTOW  
Second Respondent

Member of Authority:       Michele Ryan

Representatives:            Gayaal Iddamalgoda, counsel for the applicant  
Eric Ottow, director of the first respondent and in person  
as the second respondent

Investigation Meeting:     On the papers

Submissions received and   16 October 2019 from the applicant  
additional information:    22 October 2019 from the second respondent  
21 November 2019 from the applicant  
22 November 2019 from the second respondent

Date of Determination:     29 November 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Natasha Marshall was employed by 7Kids Limited (7Kids) trading as Waikanae Hot Bread Shop. In late May 2019 7Kids stopped paying Ms Marshall's wages.

[2] The parties attended mediation on 22 July 2019 but matters were not resolved. Relatively soon after the meeting concluded, the parties, with the assistance of the mediator acting as intermediary by phone, separately agreed to terms of settlement. A settlement

agreement was certified later in the day (22 July 2019) by the mediator under s 149 of the Employment Relations Act (the Act).

[3] Ms Marshall now claims 7Kids has failed to pay any of the payments set out in settlement agreement. She seeks a compliance order against 7Kids and its director, Mr Eric Otto. Ms Marshall further asks for a penalty to be awarded for breach of the settlement agreement, and costs.

[4] Mr Otto says the business is in financial difficulty, no longer trading, and up for sale.

### **The Authority's investigation**

[5] A case management conference was held between the parties on 4 September 2019. During the call the parties arranged to engage in further discussions.

[6] Mr Ottow advised he no longer wished to pursue the defence of duress, as had been intimated in the statement of reply, as regards the circumstances in which he signed the settlement agreement, and the parties agreed the matter could be determined "on the papers". A timetable for information to be lodged with the Authority was put in place should the parties be unable to reach consensus. In that event Mr Ottow was asked to provide financial records for 7Kids.

[7] The parties were not able to reach agreement. Counsel for Ms Marshall subsequently lodged an amended statement of problem on 10 October 2019 citing Mr Ottow as a second respondent. In accordance with the timetable Ms Marshall furnished a sworn affidavit which was accompanied by additional information. Mr Ottow provided copies of 7 Kids' banking transactions and a written statement.

[8] In an email dated 22 October 2019 Mr Ottow responded to the application to have him joined as a respondent. He referred briefly again to the events leading to the settlement agreement and said he had since received legal advice. No further substantive information or submissions on that issue was provided, nor was a request made for the Authority to determine that issue.

[9] As is permitted by s 174E of the Employment Relations Act 2000 this determination does not set out a record of all material provided to the Authority, although all information received has been carefully considered.

[10] I have proceeded to determine Ms Marshall's application as agreed in the case management conference, and have allowed Mr Ottow to be joined as a party.

**The issues**

[11] The Authority needs to determine whether 7Kids has breached the record of settlement, and if so:

- whether should a compliance order be made and if so, should payment be ordered by way of instalment payments;
- who should orders be made against;
- whether a penalty be ordered.

***Has the record of settlement been breached?***

[12] The record of settlement contains a confidentiality clause. However, for the purposes of enforcement action it is necessary to refer to the material provisions of the settlement agreement, as follows:

2. The employer shall, without admission of liability, pay the employee, within seven days of the date of this agreement, the sum of \$6,000 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act. This amount will be paid by way of direct credit. This payment will be made in the following way:
  - \$1600 within seven days of this agreement
  - \$100 every Friday by 5 pm beginning 2 August 2019 until the remaining \$4400 is paid
  - If the employer sells '7 Kids Limited' trading as 'Waikanae Hot Bread Shop' the employer will pay the employee within seven days of the sale of the business the balance remaining.
3. The employer agrees to pay all holiday pay owing by 5 pm on 2 August 2019.

[13] There is no dispute Ms Marshall has not been paid the monies as agreed or that 7Kids was unaware that the terms of settlement agreement were binding and enforceable. 7Kids has breached the settlement agreement.

***Should a compliance order be made?***

[14] I am satisfied compliance should be ordered.

[15] As at the date of this determination the sum of money owed to Ms Marshall under cl. 2 and 3 of the settlement agreement is \$3,400<sup>1</sup> and holiday pay said to be “*just below \$500*”. Ms Marshall is entitled to be paid these sums pursuant to s 137 of the Act. I shall return to the question of instalment payments not yet due later in this determination.

[16] At issue is whether an order for immediate compliance should be made or whether 7Kids should meet the debt by instalment payments. Section 138(4A) of the Act allows the Authority to order payment of a debt by instalments “*but only if the financial position of the employer requires it*”.

[17] To demonstrate 7Kids’ straitened finances, Mr Ottow provided bank records for a period of 5 months up to early September 2019 corresponding to an account named ‘7Kids Ltd’ as well as several supplier invoices which he says have not been paid.

[18] Ms Marshall’s affidavit challenges Mr Ottow’s written statement on several fronts. Firstly she notes there is an absence of transactions recorded in the transaction statements that are usual for a commercial business (such as internet for the eftpos terminal and the telephone land line) which may indicate other company accounts exist.

[19] She points also to a range of recorded transactions to support an assertion that the account is used for Mr Ottow’s personal affairs. She say the information provided has been selective where there is no information regarding 7Kids assets or the value of these and cash sales are not been accounted.

[20] Mr Ottow says 7Kids has some assets (such as ovens and two cars) but these have debts against them or are of negligible value. He accepts he uses the ‘7Kids Ltd’ account for “*some of my own needs*” and that the business has another bank account. He advises he will provide that material “*to the employment court*”.

[21] It is unfortunate that Mr Ottow has not furnished this material to the Authority. While I have no reason to doubt 7Kids is no longer trading, without complete financial information I have an insufficient basis on which I can meaningfully assess whether 7Kids’ financial situation requires the debt to be paid by instalments. I am unwilling to make orders to that effect in these circumstances.

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<sup>1</sup> Being the payment of \$1,600 due on 29 July 2019 plus 18 weekly payments beginning on 2 August 2019 to 29 November 2019 inclusive at \$100 each.

***Should an order for compliance be made against Mr Ottow?***

[22] Section 151 of the Act provides that terms of settlement enforceable under s 149(3), as is the case in this matter, may be enforced by s 137 which provides jurisdiction for the Authority to order compliance.

[23] Mr Ottow objects to being named as a respondent. He says a director can only be cited where s/he had acted fraudulently or recklessly during the time of directorship.<sup>2</sup> However I do not understand Ms Marshall seeks to make Mr Ottow liable for the debt, rather she seeks an order to have him take the necessary steps to have 7Kids meet the liability.

[24] In the 1990 judgement of *Northern Clerical IUOW v Lawrence Publishing Co of New Zealand Ltd*<sup>3</sup> the Labour Court found a director of the defendant publishing company (and its parent company) was in a position of power and control to compel the publishing company to meet a judgement debt previously made against it. The Labour Court said the focus should be on “*who is responsible to carry out the act [the employer] had been ordered to perform but had not so far performed.*” It referred to a number of similar cases and said:

In each of those cases third persons were bound by compliance orders, not to make payment of a respondent’s debt from their own pockets, but to take the steps which were in their power to ensure the liability was met by the person upon whom the liability fell.<sup>4</sup>

[25] More recently, in *Allen Chambers Ltd v Pelabon*<sup>5</sup> the Employment Court confirmed both that; the statutory provisions under which *Lawrence Publishing* was decided are materially identical to those now contained at s137 of the Act,<sup>6</sup> and the principles outlined in the case remain relevant.<sup>7</sup> It follows the Authority has jurisdiction to order a third party in control of an entity to ensure the entity complies with its obligations.

[26] There is nothing in the Companies Office Register to indicate 7Kids has been placed into liquidation or wound up. Mr Ottow is the sole director and shareholder of the company. The records provided support the suggestion that 7Kids’ finances are controlled by Mr Ottow. His concession regarding use of the account further leads me to conclude that company funds are at Mr Ottow’s disposal for personal as well as business expenses. I am more than

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<sup>2</sup> Email dated 22 October 2019

<sup>3</sup> [1990] 1 NZILR 171

<sup>4</sup> Above at 722

<sup>5</sup> [2019] NZEmpC 45 at [37]

<sup>6</sup> Above at [37]

<sup>7</sup> Above at [38]

satisfied the financial arrangements between the first and second respondent are inextricably linked.

[27] I note Mr Ottow also says he is “*happy to pay what is owing*”, but says this cannot be more than \$2,000.<sup>8</sup> It is unclear whether this purported caveat is based on Mr Ottow’s objection with the terms of the settlement agreement, or a result of strained funds. On the very limited information provided I have considerable doubt that Mr Ottow was subjected to circumstances that amount to duress as defined by law<sup>9</sup> but that is not an issue to be determined in this case, and the terms of that agreement remain enforceable. Nor am I persuaded that an order to have Mr Ottow make arrangements for 7Kids to pay its debt would be meaningless where funds are said not to be available. That assertion has not been adequately established.

[28] I am satisfied Mr Ottow has sufficient power and control over 7Kids to ensure it makes the payments due.

***Should penalties be ordered?***

[29] Section 149(4) of the Act provides, to the effect, that that a person who breaches a term of settlement affirmed by a mediator is liable to a penalty imposed by the Authority. In the case of a breach by a company, a penalty not exceeding \$20,000 maybe awarded.<sup>10</sup> The imposition of a penalty is at the discretion of the Authority. Penalties are generally paid into a Crown Bank Account, although the Authority has discretion to order the whole of part of a penalty to any person.

[30] The circumstances of this matter lead me to conclude that it is appropriate, pursuant to s138(5), to adjourn making a determination on penalties at this point in time so as to enable the compliance order to be complied with. This approach is a pragmatic response to 7Kids’ purported financial situation and where I wish to enable it to prioritise payment of monies owed directly to Ms Marshall under the settlement agreement.

[31] Should the first and second respondents not comply with the orders contained in this determination by the timeframe specified at [35](i), or in the event 7Kids does not meet

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<sup>8</sup> Email dated 22 October 2019

<sup>9</sup> See *McIntyre v Nemesis DBK Ltd* [2019] NZCA 329; [2010 1 NZLR 463

<sup>10</sup> Employment Relations Act 2000, s135(2)(b)

future payments in accordance with the terms of the settlement agreement - \$2,600 in total<sup>11</sup> - Ms Marshall may immediately reactivate the claim and the issue of penalties will be considered and determined. It is further open for Ms Marshall to return to the Authority at the conclusion of the period by which compliance must occur for a determination on penalties concerning the breaches established in this claim.

[32] The respondents need to be aware that efforts by them to mitigate the losses incurred by Ms Marshall may reduce the sum of a future penalty. Conversely, ongoing and repeated failures to meet the obligations under the settlement agreement are factors which may increase the quantum of a penalty awarded.

### ***Comment***

[33] The imposition of a compliance order is a serious matter.

[34] Should the respondents not comply with any of the orders set out below, Ms Marshall would be entitled to pursue that matter in the Employment Court. Where the Court is satisfied that any person has failed to comply with a compliance order made under s 137 of the Act, the Court has powers to impose a fine not exceeding \$40,000, order property to be seized and the proceeds of sale to be distributed to the person seeking to enforce the order, or impose a sentence of imprisonment not exceeding 3 months.<sup>12</sup> Alternatively, Ms Marshall may obtain a certificate of determination from the Authority and enforce it through the mechanisms and remedies available under the *District Courts Act 1946* and *District Courts Rules 2014*.

### **Orders**

[35] Pursuant to 137 of the Act,

- (i) 7Kids Limited is ordered to comply with clause 2 and 3 of the settlement agreement of 22 July 2019 on or by 5 December 2019 and pay Ms Marshall the sum of \$3,400 and all outstanding holiday pay on or by 5 December 2019;

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<sup>11</sup> To be paid in weekly instalments between 6 December 2019 and 29 May 2020 inclusive, or the entire balance remaining within seven days of the sale of the business.

<sup>12</sup> Employment Relations Act 2000, s 140(6)

(ii) Mr Eric Ottow is ordered, as the agent of 7Kids, to ensure the payments referred to above at [34](i) are made in accordance with the time frame stipulated.

[36] As observed in *Lawrence Publishing*, orders once made have the effect of prohibiting any action by 7Kids Limited or Mr Otto which would have the result of preventing 7Kids from making the payments.

[37] 7Kids Limited must also reimburse Ms Marshall the sum of the \$71.56 filing fee paid to lodge her application. Costs are otherwise reserved.

Michele Ryan  
Member of the Employment Relations Authority