

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 34

3094172

3105613

BETWEEN                      TE MOANA TAI-RAKENA  
   Applicant/Respondent

AND                              DANNY PAKEHO trading as  
   Danny's Flooring NZ  
   Respondent/Applicant

Member of Authority:        Eleanor Robinson

Representatives:             Alex Kersjes, advocate for Mr Tai-Rakena  
   Pavi Singh, counsel for Mr Pakeho

Investigation Meeting:        On the papers

Submissions and/or further    22 December 2020 from Mr Pakeho  
evidence                         25 January 2021 from Mr Tai-Rakena

Determination:                29 January 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     On 28 February 2020 Mr Danny Pakeho filed a Statement of Problem (File No: 3094172) with the Authority claiming that Mr Te Moana Tai-Rakena had breached clause 1 of the Record of Settlement.

[2]     On 20 May 2020, Mr Te Moana Tai-Rakena, filed a Statement of Problem (File No: 3105613) claiming that Mr Danny Pakeho, trading as Danny's Flooring NZ (DFNZ), had breached the terms of a Record of Settlement, by failing to adhere to clauses 2 and 3 of a mediated settlement agreement (the Record of Settlement).

## *The Record of Settlement*

[3] On 15 January 2020 a Record of Settlement was entered into under s. 149 of the Employment Relations Act 2000 (the Act). The Record of Settlement was signed by Mr Tai-Rakena and by Mr Pakeho, on behalf of DFNZ. The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE).

[4] The Record of Settlement contained the following clauses:

1. These terms of settlement and all matters discussed in mediation shall remain, as far as the law allows, confidential to the parties.
2. DFNZ shall pay Te Moana the sum of \$5000 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 as follows: one payment of \$1500 within seven (7) days of the date of this agreement, one payment of \$1000 on or before 30 January 2020; one payment of \$1000 on or before 28 February 2020; one payment of \$1000 on or before 31 March 2020 and a final payment of \$500 on or before 30 April 2020.
3. DFNZ shall pay costs of \$2,500 plus GST on receipt of a GST invoice as follows: one payment of \$500 plus GST on or before 30 April 2020; one payment of \$1000 plus GST on or before 31 May 2020 and a final payment of \$1000 plus GST on or before 30 June 2020.

[5] The Record of Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

### **Note**

[6] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, and by means of a telephone investigation.

### **Background**

[7] Mr Tai-Rakena and Mr Pakeho entered into the Record of Settlement on 15 January 2020 acknowledging that it was: “a full and final settlement of all matters between the parties” as set out in clause 8 of the Record of Settlement.

[8] On 28 February 2020 Mr Pakeho filed a Statement of Problem (File No: 3094172) with the Authority claiming that Mr Tai-Rakena had breached clause 1 of the Record of Settlement, which stated that the terms of settlement and all matters discussed in mediation: “shall remain, so far as the law allows, confidential to the parties”.

[9] Mr Pakeho claimed that Mr Tai-Rakena had breached clause 1 of the Record of Settlement by posting a video on Instagram (a social media platform) on 15 January 2020. The video was of himself standing in front of the Ministry of Business Innovation and Business (MBIE) offices with the comment: “#truthbetold”.

[10] Mr Pakeho claimed the video had been posted on Instagram between 10.00 a.m. and 12.00 p.m. which was during the time of the mediation taking place.

[11] In the Statement of Problem filed on 17 March 2020 Mr Tai-Rakena claimed that the video had been posted prior to the mediation taking place, before he had been advised of confidentiality requirements or had entered into any agreement with Mr Pakeho.

[12] Mr Tai-Rakena also claimed that Mr Pakeho had raised the claim: “in an attempt to avoid paying the agreed terms”.

[13] The Authority held a case management conference in relation to File No: 3094172 on 28 April 2020 and directions were made for the filing of witness statements and evidence. However before the date set for filing the applicant’s witness statements arrived, the Authority received the following email from Mr Pakeho’s representative, Ms Singh. The email stated:

As you are aware the Authority has received claims from our client and Te Moana’s representative regarding alleged breaches of the Record of Settlement. This email is to advise you that Te Moana’s representative made an offer to our client on the 1<sup>st</sup> of May 2020 to withdraw both parties’ claims. The offer has been accepted and paid. Therefore, both claims have now been withdrawn.

[14] Later that same day the Authority received an email from Mr Tai-Rakena’s representative, Mr Kersjes, in which he stated:

That is not the case. I won’t descend into the issue at this stage but Mr Tai-Rakena in this matter does not withdraw the Statement of Problem.

[15] On 19 May 2020 the Authority received a Statement of Problem (File No: 3105613) filed by Mr Tai-Rakena in which he claimed that Mr Pakeho had breached clauses 2 and 3 of the Record of Settlement by not paying the sums set out in clause 2 until after the date dates, and that the final payment of \$500.00 which had not been made at all.

[16] Clause 3 had been breached by Mr Pakeho failing to make any payments to Mr Tai-Rakeno's representative.

[17] Mr Pakeho filed a Statement in Reply on 18 June 2020 denying that there had been any attempt to avoid paying the agreed terms, and claiming that Mr Tai-Rakena had breached the agreed term set out in clause by the posting of the video on Instagram as claimed in File No: 3094172.

[18] In addition Mr Pakeho stated that the claim by Mr Tai-Rakeno should not be presented before the Authority given the offer made by Mr Tai-Rakena to settle both matters which had been accepted by him and payment made in accordance with the offer by making a payment of \$500.00 towards Mr Tai-Rakena's costs and full payment of all monies owed to him in accordance with the Record of Settlement, and instructing his representative to withdraw his claim (File No: 3094172).

[19] Both claims are still before the Authority and this determination therefore addresses both claims.

#### **Did Mr Tai-Rakeno breach clause 1 of the Record of Settlement?**

[20] The mediation between the parties was held on 15 January 2020. The Confirmation of Mediation Assistance sent by an officer of MBIE confirmed that the mediation would be held between 9.00 a.m. and 12.00 p.m.

[21] The video posted by Mr Tai-Rakeno on Instagram identified it as having been made on MBIE premises and posted on Instagram on the morning of 15 January 2020. It remained on Instagram and was available to be viewed for a significant period of time following the mediation.

[22] The confidentiality provisions under which mediation services are provided to parties and which apply to the mediator, the parties and their representatives, is set out in s148 (1) of the Act which states that these persons:

... must keep confidential any statement, admissions, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

[23] I do not find that the posting of the video by Mr Tai-Rakena breached the confidentiality provisions of the Act, although there is an expectation that parties will attend mediation and attempt in good faith to resolve their difficulties, and I find that the posting of the video does not reflect this expectation.

[24] I determine that Mr Tai-Rakena did not breach clause 1 of the Record of Settlement.

**Did Mr Pakeho breach clauses 2 and 3 of the Record of Settlement?**

[25] The Record of Settlement required Mr Pakeho to make payments by instalments. Of these payments three were paid one day after the due date, one three days after the due date, and Mr Tai-Rakena subsequently submitted that the final two, not one as stated in the statement of Problem, payments had not been paid.

[26] Mr Pakeho stated that the reason for the instalment plan was that his business and ability to pay was dependent on client payments, which were disrupted due to the Covid-19 global pandemic.

[27] The Record of Settlement required Mr Pakeho to make payments in accordance with an agreed timetable, however he failed to make some payments on the due dates, and two payments being those due on 31 May and 20 June 2020, have not been paid and are still outstanding.

[28] The payment due under clause 3 of the Record of Settlement was also not paid in its entirety.

[29] I determine that Mr Pakeho breached clauses 2 and 3 of the Record of Settlement.

**What is the effect of the offer to settle the parties' claims?**

[30] Mr Kersjes sent an email to Ms Singh dated 1 May 2020. The email stated:

You are aware of the matters before the Authority relating to alleged breaches of the Recorded Settlement between our clients.

Our client did not breach the Recorded Settlement as the image you point to was made prior to the commencement of mediation, and even if it wasn't is not a breach (sic), and yours clearly did as we can evidence. They have failed to make several payments as per the agreement.

Your client has no prospect of success.

Accordingly our client will accept \$500 towards his costs and full payment of all monies as owed to him as per the section 149 agreement as settlement of this matter. This offer is open for acceptance for 7 days from today. This offer is made on a *Calderbank* basis and on the even (sic) that we are successful in the Authority shall be presented to the Authority in conjunction with an application for an uplift in costs.

[31] Ms Singh replied by letter dated on 7 May 2020 stating:

Our client has accepted your offer and variation of the Record of Settlement as per your email dated 1<sup>st</sup> May 2020 (attached) and has paid the \$500.00 as requested for

your costs, and all moneys owed to Te Moana as per cause 2 of the Record of Settlement.

[32] On 11 May 2020 Ms Singh advised the Authority:

As you are aware, the Authority has received claims from our client and Te Moana's representative regarding alleged breaches of the Record of Settlement. This email is to advise you that Te Moana's representative made an offer to our client on the 1st of May 2020 to withdraw both parties claims. The offer has been accepted and paid. Therefore, both claims have now been withdrawn.

[33] Three minutes later Mr Kersjes advised the Authority:

That is not the case. I won't descend into the issue at this stage but Mr Tai-Rakena in this matter does not withdraw the Statement of Problem.

[34] I find that the email from Mr Kersjes is ambiguous in its wording, and Mr Pakeho has genuinely understood it as meaning that \$500 would be accepted by Mr Tai-Rakena in settlement of the payments due under clauses 2 and 3 and in respect of the claim by Mr Pakeho of a breach of clause 1 of the Record of Settlement by Mr Tai-Rakena.

[35] The email also referred to the claim before the Authority in respect of an alleged breach by Mr Tai-Rakena of the Record of Settlement and I find the words: "in settlement of this matter" were clearly understood by Mr Pakeho as being that the payment of \$500 meant that he would withdraw his claim of breach as indicated in his email to the Authority which stated: "..both claims have now been withdrawn".

[36] I accept that there has been a genuine misunderstanding between the parties as to what was intended by the wording in Mr Kersjes email dated 1 May 2020. That misunderstanding on Mr Pakeho's part was the reason for his acceptance of the offer outlined in his acceptance of the offer by Mr Tai-Rakena in the email dated 7 May 2020. He then paid the acceptance sum of \$500 and advised the Authority that claims by the parties had been withdrawn.

[37] Turning to consider if there has been accord and satisfaction between the parties as a result of the offer to settle, I note out the classic definition of accord and satisfaction, defined in the case of *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* as referred to in *Cabletalk Astute Network Services Limited v Cunningham* by Judge Shaw:

Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of valuable consideration, not being the actual performance of the obligation itself.<sup>1</sup>

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<sup>1</sup> *Cabletalk Astute Network Services Limited v Cunningham* [2004]1 ERNZ 506; *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, at 643-644

[38] Chief Judge Colgan in *Graham v Crestline Pty Limited* explained that:

whether accord and satisfaction has been made is a question of fact requiring a finding of a meeting of the parties' minds or that one of them must act in such a way as to induce the other to think that money (or other consideration) is taken in satisfaction of the claim.<sup>2</sup>

[39] Having fully considered the matter I find that in this case whilst Mr Pakeho believed that the payment of \$500 was satisfaction in respect of the settlement of all claims, there had not been a true meeting of the parties' minds such that accord and satisfaction existed.

[40] Accordingly I determine that the effect of the offer to settle the parties' claims is that the outstanding payments due to Mr Tai-Rakeno in clause 2 of the Record of Settlement are to be paid by Mr Pakeho, but that the payment due under clause 3 of the Record of Settlement has been satisfied by the payment of \$500.

### **Remedies**

#### **Compliance Order**

[41] From the evidence available to the Authority, I am satisfied that D W C Pakeho trading as Danny's Flooring NZ (DFNZ) has failed to comply with clause 2 of the Record of Settlement.

[42] **In order to effect compliance with the Record of Settlement, I therefore order D W C Pakeho trading as Danny's Flooring NZ (DFNZ), no later than 14 days from the date of this determination, to pay the sum of \$1,500 to Mr Tai-Rakena.**

#### **Penalty**

[43] In this case whilst parties should adhere to settlements made to have effect as a resolution of the matters between them, this particular matter has been convoluted and the 'settlement offer' has been a contributing factor.

[44] I also accept that 2020 has been a difficult year for businesses affected by the global pandemic. I also appreciate that Mr Pakeho had made the initial payments but not the final payments because he believed Mr Tai-Rakena had breached the Record of Settlement. I have determined that Mr Tai-Rakena did not breach clause 1 of the Record of Settlement, but even had he done so, that would not have given rise to an avoidance of the obligation entered into by Mr Pakeho.

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<sup>2</sup> *Graham v Crestline Pty Limited* [2006] ERNZ 848 at [49]

[45] Parties and the public should be able to have confidence in mediated settlements reached by agreement, and Mr Pakeho has breached the agreed terms of settlement.

[46] Having considered the principles which should govern the imposition of a penalty<sup>3</sup>, I determine that a penalty of \$100.00 is appropriate in all the circumstances of this case.

**[47] I order that D W C Pakeho trading as Danny's Flooring NZ (DFNZ) is to pay a penalty of \$100.00, to be paid to the MBIE Trust Account. Payment is to be made within 14 days of the date of this Determination.**

#### **Costs**

[48] I consider that this is a case in which costs should lie where they fall.

[49] However if the parties wish to make an application for costs Mr Tai-Rakeno may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Pakeho would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[50] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>3</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143