

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 607  
3174802

BETWEEN	KANE TE TAI Applicant
AND	KIND & GENTLE LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Glenn Finnigan, counsel for the applicant Semisi Hutchison for the respondent
Investigation Meeting:	On the papers
Information/submissions received:	14 October 2022 from the applicant None for the respondent
Determination:	18 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] The applicant Kane Te Tai was previously employed by the respondent Kind & Gentle Limited, trading as Little & Brave (K&G). Semisi Hutchison is a co-founder and managing director of K&G and is one of its two shareholders.

[2] On 3 December 2020 the parties signed a Record of Settlement (the settlement agreement) to resolve issues arising in the employment relationship. On 8 December 2020 a Ministry of Business, Innovation and Employment mediator certified the settlement agreement under s 149 of the Employment Relations Act 2000 (the Act). The effect of certification was that the terms agreed were final and binding and could only be brought before the Authority for the purposes of enforcement.

[3] Mr Te Tai says while K&G otherwise complied with the settlement agreement, it failed to pay all the agreed legal costs. Mr Te Tai now seeks a compliance order from the Authority for the balance of legal costs owing, \$2,750.

[4] Mr Te Tai also seeks indemnity costs or a portion of the Authority's costs daily tariff in relation to this application. Further, he asks for reimbursement of the Authority filing fee and the costs of using a process server to serve the statement of problem on K&G.

**What has the Authority's process been?**

[5] The Authority attempted to serve the statement of problem on K&G but was unable to confirm service was made. The Authority directed Mr Te Tai, through counsel, to arrange service of the statement of problem. The Authority subsequently received a sworn affidavit of service confirming service on K&G at its registered office. The affidavit stated Mr Hutchison acknowledged the documents and readily accepted service on behalf of K&G. I am satisfied K&G was appropriately served.

[6] K&G did not file a statement in reply nor has it sought leave to file a statement out of time.

[7] The Authority emailed the parties requesting a case management conference by telephone to progress this matter. Mr Hutchison responded by saying the documents had not been reviewed yet and would be sent to his lawyers, who would reply. K&G failed to later confirm its availability to attend the conference and it was set down.

[8] On 30 September 2022 I held the conference. An Authority officer called Mr Hutchison on the phone number contained in his email signature, but he failed to answer the call. I was satisfied K&G was aware of the date and time of the conference, due to other email correspondence from Mr Hutchison regarding it. I held the conference with counsel for Mr Te Tai in K&G's absence. As Mr Te Tai also sought a penalty against K&G for its failure to comply with the settlement agreement, I issued directions to give K&G a final opportunity to provide relevant information and/or submissions in response to the application. Predictably, K&G did not file a response or otherwise engage with the Authority.

[9] Mr Te Tai has since provided a sworn affidavit from counsel about their firm's attempts to recover the balance of legal costs under the settlement agreement. Brief written submissions were also filed in support of the application for a compliance order. Mr Te Tai no longer seeks a penalty against K&G.

[10] I have determined this matter on the papers at Mr Te Tai's request.

**What are the issues?**

[11] I need to determine the following issues:

- a. Has there been a breach of the settlement agreement?
- b. Should a compliance order be made?
- c. Should there be an order for costs?

**Has there been a breach of the settlement agreement?**

[12] The settlement agreement between the parties required K&G to contribute \$5,000 plus GST towards Mr Te Tai's legal costs. This was to be paid within 14 days of certification of the settlement agreement by a mediator and upon receipt of a GST invoice from his solicitors, Jackson Russell. An invoice for the legal costs was sent to K&G on 10 December 2020.

[13] I accept the evidence of Mr Te Tai's counsel about the attempts made to recover the legal costs.

[14] On 12 May 2021, following numerous attempts to secure payment of the legal costs, Jackson Russell received \$3,000 from K&G. On that date, Mr Hutchison emailed counsel saying he would pay the balance of \$2,750 in two instalments on 21 May 2021 and 28 May 2021. Despite that agreement, K&G made no further payments and did not provide an explanation for failing to do so.

[15] K&G have clearly breached the settlement agreement by failing to pay the balance of Mr Te Tai's legal costs.

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

[16] A compliance order may be made when any person has not observed or complied with any enforceable agreed terms of settlement.<sup>1</sup>

[17] Counsel says after numerous attempts to chase K&G for the outstanding sum, on 9 May 2022 they eventually advised Mr Hutchison of Mr Te Tai intended to bring compliance order proceedings. This application was filed on 13 June 2022. I am satisfied a compliance order is necessary given the amount of time that has passed.

[18] I accordingly order, effective immediately, Kind & Gentle Limited to comply with clause 3 of its settlement agreement with Kane Te Tai by paying \$2,750 in legal costs. Payment should be made in accordance with Jackson Russell's invoice dated 10 December 2020.

### **Should there be an order for costs?**

[19] Counsel seeks full indemnity costs of \$2,846. He says this reflects the time cost for the preparation, filing and service-related attendances in this matter. This includes attendances with the Authority over progressing the case in the absence of a statement in reply, attendance at the conference on 30 September 2022 and preparing an affidavit and submissions.

[20] In the alternative, counsel says the matter could be dealt with on the basis of half the usual daily tariff of \$4,500 – being \$2,250.

#### *Costs principles*

[21] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.

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<sup>1</sup> Employment Relations Act 2000, sections 149(3) and 151.

- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.<sup>2</sup>

### *Costs analysis*

[22] Mr Te Tai is the successful party. It is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. He should receive a contribution to costs incurred. In assessing an appropriate costs award the notional daily tariff is a starting point. As this matter was determined on the papers, I accept the starting point should be half the applicable first day notional tariff.

[23] The next step in the assessment is to consider whether there are factors warranting an increase or decrease in the starting point. There are no matters to warrant a decrease in the starting point.

[24] Weighing all the relevant factors I find a reasonable contribution to Mr Te Tai's costs is \$2,250, being half the daily tariff.

[25] He is also entitled to recover the filing fee of \$71.56 and process server's fees of \$212.75 for serving the statement of problem.

### *Costs orders*

[26] Kind & Gentle Limited is ordered to pay Kane Te Tai a contribution to costs of \$2,250, the filing fee of \$71.56 and process server's fees of \$212.75 within 21 days of the date of this determination.

Sarah Blick  
Member of the Employment Relations Authority

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<sup>2</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.