

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 73
3144863

BETWEEN	HAYDEN KOTUA First Applicant
AND	WILLIAM LOVERSIDGE Second Applicant
AND	LIAM FITZSIMMONS COOPER Third Applicant
AND	COOTEHILL ASSETS LIMITED Respondent

Member of Authority: Sarah Kennedy

Representatives: Adrian Plunkett, advocate for the Applicants
Scott McKenna, counsel for the Respondent

Investigation Meeting: On the papers

Submissions [and further Information] Received: 7 December 2021 from the Applicant
6 December 2021 from the Respondent

Date of Determination: 7 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Respondent, Cootehill Assets Limited (Cootehill), was in the business of repairing foundations of buildings, primarily residential homes. The three Applicants were employed to provide labour in relation to that work.

[2] On 20 and 24 May 2021, the parties entered into three records of settlement (the settlement agreements) in accordance with s 149 of the Employment Relations Act 2000 (the Act). A Ministry of Business, Innovation and Employment mediator certified the agreements under s 149 of the Act. The effect of certification is that the terms agreed were final and binding and could only be brought before the Authority for the purposes of enforcement.

[3] The Applicants claimed initially that no payment had been made, however, at a case management conference held with the parties on 8 November 2021, the parties agreed to discuss resolution and to advise the Authority as soon as possible if the matter was able to be resolved. The matter of payment was subsequently resolved; however, the Applicants now seek penalties, a compliance order (in relation to the certificates of service) in relation to the certificates of service and costs.

[4] Cootehill accepts it initially failed to pay money owing under the settlement agreements or to provide certificates of service confirming the nature of the work undertaken as required under the settlement agreements but it has now complied with the clause requiring financial payment. It says nothing material turns on the issue regarding the certificates of service and given the unprecedented circumstances of Covid-19 and the flow on financial impact on business, no penalty should be ordered or if one is, it should be nominal.

The Authority's investigation

[5] The Authority's investigation was conducted on the papers. All material provided to the Authority was considered. The representatives provided written submissions.

[6] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The Authority needs to determine the following issues:

- (a) Has there been a breach of the settlement agreements?
- (b) If there has been a breach of the settlement agreements, should the Authority award penalties?
- (c) Should a compliance order be made?

(d) Should there be an order for costs?

Has there been a breach of the settlement agreements?

[8] While the parties agreed their terms of settlement agreements were to be confidential, the following had to be disclosed for the purposes of this determination. I prohibit from publication the balance of the settlement agreements.

[9] Cootehill rightly conceded during the at the case management call on 9 November 2021 that a commitment had been made to pay money under a settlement agreement in accordance with s 149 and had not been honoured.

[10] Payment should have been made on in June 2021 and evidence provided to the Authority shows the payments were made on 2 December 2021. Cootehill accepts payment was not made by the date it was due and that means it was in breach of Clause 2 of the settlement agreements for 6 months.

[11] Clause 4 of the Settlement agreements states:

Cootehill Assets Limited will provide the applicant with a certificate of service confirming the dates of employment and the nature of the work undertaken. This will be provided within seven days of the date of execution of this agreements.

[12] The Applicants allege that the certificate of service provided does not provide a description of the nature of work undertaken as required by clause 4, and this appears to be correct.

[13] The Applicants submit the Respondent has dragged its feet in relation to how these matters have been dealt with and says this is unacceptable, and it was unacceptable that the settlement agreements were not complied with. They also say that the Cootehill's reasons for not complying, being financial issues and the impact of COVID-19 lockdowns, do not stack up and that no evidence of financial issues has been provided.

[14] Cootehill acknowledges that parties ought to have confidence in s 149 agreements and that in this case there was non-compliance. It is, however, submitted that the financial challenges in the current environment were undeniable and that the Respondent's director was being frank about this. Cootehill submits it is reasonable to expect that at this time in history

one could be expected to wear a small portion of the greater economic pain by waiting a little longer than normal for payment of a debt.

[15] There is conflicting information in the submissions regarding whether or not Cootehill received requests for new certificates of service to be issued but the certificates that have been issued only confirm the period of employment and not the nature of the work undertaken, so while there has been partial compliance with Clause 4, it is not yet fully satisfied.

Should the Authority award penalties?

[16] The Applicants seek penalties of not less than \$8,000.00 for each respective breach.

[17] In submitting that no penalty should be imposed, Cootehill says the breaches have all now been remedied with no evidence of any adverse impact

[18] Given that there is no dispute that Clause 2 was breached, and Clause 4 was partially breached, Cootehill is therefore liable to a penalty.

[19] A person who breaches an agreed term of a s 149 agreement is liable to a penalty.¹ The maximum penalty is \$20,000 in the case of a company.² The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.³

[20] The Respondent acknowledges that parties ought to have confidence in a s 149 agreement and that in this case it has not been complied with. Taking into account the relevant matters the Authority must have regard to in s 133 A of the Act and the guidance in *ITE v ALA*,⁴ despite payment now made, in order to protect the finality and integrity for s 149 agreements by deterring the individual transgressor and others from similar breaches.

[21] In circumstances where there is no actual evidence of financial hardship before the Authority and taking into account that unpaid wages formed part of the original grievance but noting that steps have been taken to remedy the breach, I consider that a penalty is appropriate in the circumstances to mark the fact that the s149 agreements were not complied with.

¹ Employment Relations Act 2000, s 149(4).

² Employment Relations Act 2000, s 135(2)(a).

³ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁴ *ITE v ALA* [2016] NZEmpC 42 at [61].

[22] There were 3 breaches, one for each employee. Taking all of the factors into account, standing back and considering the overall merits of the case, the Authority considers it appropriate to impose a penalty on Cootehill of \$700 for each breach.

Should a compliance order be made?

[23] A compliance order may be made when any person has not observed or complied with the provision of an employment agreements or any terms of settlement or a decision that is a breach of s 149(3) and s 151 provides may be enforced by compliance order.

[24] I have already dealt with the issue of breach. I am satisfied the compliance order is necessary given that the Applicants note that the certificate of service is not complete.

[25] Cootehill is ordered to comply with all the obligations under the terms of the Settlement agreements and the timeframe for compliance is within 7 days.

Orders

[26] Cootehill Assets Limited is ordered to pay a penalty of \$2,100.00 of which \$1,350.00 is to be paid to the Employment Relations Authority by way of the Crown and \$250.00 to Hayden Kotua, \$250.00 to Liam Cooper and \$250.00 to William Loversidge.

[27] Cootehill Assets Limited is ordered to comply with clause 4 of the settlement agreements and the period for compliance is within 7 days of this determination.

Costs

As this investigation was conducted on the papers, Cootehill Assets Limited is ordered to pay \$200.00 each to Hayden Kotua, Liam Cooper and to William Loversidge as a contribution to their costs and \$71.56 for the Authority's filing fee within 21 days of the date of this determination.

Sarah Kennedy
Member of the Employment Relations Authority