

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 187  
3196759

BETWEEN	RANDY REN Applicant
AND	AA TAXATION & ACCOUNTING SERVICE LIMITED First Respondent
AND	TOM LEE Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	May Moncur, advocate for the Applicant Simon Graham, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions:	22 February 2023 from the Applicant 15 March 2023 from the Respondent
Determination:	17 April 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The Applicant, Mr Randy Ren, claims that the Respondent, AA Taxation & Accounting Service Limited (AA Taxation) has not complied with clauses 4 and 5 of a mediated Record of Settlement.

[2] AA Taxation opposes the application for compliance on the basis that (i) the Authority lacks jurisdiction to determine the matter; (ii) there has been no breach of the terms of settlement; and (iii) there are no justifiable grounds for ordering a penalty.

**The Authority's investigation**

[3] During a case management conference call held on 8 February 2023 it was agreed by the parties that this matter would be heard 'on the papers'. The Applicant advised that no

submissions would be filed by it and that the statement of problem set out its claims. The respondent filed submissions on 16 January 2023.

[4] As permitted by s 174E of the Employment Relations Act 2000 (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, although these have been fully considered prior to the finalisation of this determination.

### **Issues**

[5] The issues requiring investigation are:

- Does the Authority have jurisdiction to determine this matter?

If so:

- Has there been a breach of the terms of the Record of Settlement?

If there was a breach:

- Should compliance be ordered?
- Should penalties be awarded against the First and/or Second Respondents, and in what quantum?

### **Relevant Background**

[6] The First Respondent, AA Taxation, is a specialist accounting and tax advisory service. The Second Respondent, Mr Tom Lee, is the sole director and shareholder.

[7] Mr Ren was engaged by AA Taxation between 9 March and 3 June 2021. Mr Ren was not paid during this period, nor did he receive holiday pay upon termination.

[8] Mr Ren lodged a Statement of Problem with the Authority dated 15 September 2022 claiming that he had been unjustifiably dismissed and unjustifiably disadvantaged by AA Taxation.

[9] AA Taxation claimed in response that Mr Ren was not an employee but a volunteer.

[10] The matter was set down for an Investigation Meeting on 4 October 2022. However on 29 August 2022 the parties entered into the Record of Settlement under s 149 of the Employment Relations Act 2000 (the Act). The Record of Settlement was signed by the Applicant and by Mr Li (or Lee) as the authorised signatory of the Respondent.

[11] The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE).

[12] 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.

[13] The relevant clauses of the Record of Settlement in respect of this issue are:

4 In acknowledgment of the parties' different views with respect to the dispute, it is agreed that the Respondents will make the following payments to the Applicant:

- a) compensation in the amount of \$8,000; and
- b) payment of a contribution towards legal costs in the amount of \$2,000 plus GST. This amount will be paid to the Applicant's advocate upon receipt of a tax invoice.

5. The above sums will be paid in weekly instalments of \$500.00 starting on the date of this agreement being signed by a mediator, until the payment is completed.

[14] The date the Record of Settlement was signed by the Mediator was 31 August 2022. The weekly instalments were due to start on that date in accordance with clause 5 of the Record of Settlement. However they actually commenced on 14 September 2022.

[15] Payment of the amount of \$8,000.00 set out in clause 4a. of the record of Settlement was made as follows:

Wed, 14 Sep 2022	\$1,500.00
Mon, 26 Sep 2022	\$500.00
Fri, 30 Sep 2022	\$500.00
Fri, 7 Oct 2022	\$500.00
Fri, 14 Oct 2022	\$500.00
Fri, 21 Oct 2022	\$500.00
Mon, 31 Oct 2022	\$500.00
Fri, 4 Nov 2022	\$500.00
Fri, 11 Nov 2022	\$500.00
Fri, 18 Nov 2022	\$500.00
Fri, 25 Nov 2022	\$500.00
Fri, 2 Dec 2022	\$500.00

Fri, 9 Dec 2022	\$500.00
Fri, 16 Dec 2022	\$500.00

[16] The final payment amount set out in clause 4a. of the Record of Settlement was made on 16 December 2022 and the full amount paid therefore was paid by 16 December 2022. There are no monies outstanding.

[17] The costs contribution as set out in clause 4b. of the Record of Settlement was not paid in full upon receipt of a tax invoice, but was paid in instalments: the first instalment of \$1,500.00 being paid on 14 September 2022 and the second instalment of \$800.00 being paid on 23 December 2022. There are no monies outstanding.

**Does the Authority have jurisdiction to determine this matter?**

[18] In clause 3 of the Record of Settlement it states: "... The parties agree that during the period in dispute, the Applicant was engaged as a volunteer and not as an employee of the Respondents."

[19] The issue is therefore whether or not the Authority has the jurisdiction to determine an application for compliance with an agreement reached by parties who are not in an employment relationship.

[20] The Mediation Services provided by the Ministry of Business, Employment and Innovation (MBIE) are focused in s144 of the Act primarily on employment relationships. However clause 144A(1) of the Act states:

Nothing in this Act prevents the chief executive from providing dispute resolution services to parties in work-related relationships that are not employment relationships.

[21] The Record of Settlement was signed by a mediator who certified that he was employed by the Chief Executive of MBIE to provide mediation services and stated that he held:

a current general authority from the Chief Executive to sign for the purposes of section 149 of the Employment Relations Act 2000, agreed records of settlement.

[22] The certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms were subject to the effect of sections 148A, 149(1) & (3) of the Act, i.e. that they:

- 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.

[23] I find that the Record of Settlement entered into under s149 of the Act is enforceable by the parties under s 149(3)(a) of the Act. Accordingly they can be brought for the Authority for enforcement purposes pursuant to s149(3)(c) of the Act.

[24] I determine that the Authority does have jurisdiction to determine this matter.

**Has there been a breach of the terms of the Record of Settlement?**

*(i) The Compensatory payment clause 4a*

[25] I observe that the payments set out under clause 4 a. and b. of the Record of Settlement have been paid in full, there are no outstanding sums of monies owing.

[26] I find that the compensatory payments in clause 4a. were not been made in accordance with the payments schedule set out in clause 5 of the Record of Settlement in that they commenced on 14 September 2022 rather than 31 August 2022.

[27] However the delay in commencing payments was somewhat ameliorated by a payment totalling \$1,500.00 being made on 14 September 2022 which helped reduce any shortfall in payments, and regular instalments of \$500.00 continued thereafter weekly until the amount owing as compensation had been extinguished.

[28] I find therefore that any breach has been in minor in nature.

*(ii) The costs contribution clause 4b*

[29] It is submitted on behalf of AA Taxation that the costs contribution was also to be paid in accordance with clause 5 of the Record of Settlement, i.e. by weekly instalments, and on that basis, there has been no default in payments.

[30] Clause 5 of the Record of Settlement states: “The above sums will be paid in weekly instalments of \$500.00 ...”.

[31] I find that the reference to “the above sums” is to the payments set out in clause 4a. and b. of the Record of Settlement, that is, to the clause 4a. compensatory sum of \$8,000.00 and the clause 4b. costs contribution. Consequently both were to be covered by the \$500.00 instalments specified in clause 5 of the Record of Settlement.

[32] I find that there has been a breach of the payment terms set out in clauses 4b and 5 of the Record of Settlement to the extent that the instalment payment commenced on 14 September rather than 31 August 2022, however any breach has been in minor in nature.

**Should compliance be ordered?**

[33] Terms of Settlement which are enforceable and have been breached may be enforced by means of a compliance order pursuant to s 151(2)(a) and s137 of the Act.

[34] However as payment of the sums set out in clause 4 of the Record of Settlement have been made on full, I make no order for compliance.

**Should Penalties be awarded against the First and/or Second Respondents, and in what quantum?**

[35] Mr Ren has sought penalties in respect of the breach of the Record of Settlement against the First and Second Respondents.

[36] It is submitted for AA Taxation that there are no cogent reasons for justifying the filing of a Statement of Problem in that on the date the Statement of Problem was lodged with the Authority on 26 October 2022, Mr Ren was receiving regular instalment payments and was in advance of the schedule for payments as set out in the agreed terms of settlement. As such it is submitted that the lodging of the Statement of Problem is an abuse of process.

[37] In considering this matter I acknowledge that the instalment payments did not start on the due date of 31 August 2022, but two weeks after that, on 14 September 2022. However that payment on 14 September 2022, being in the amount of \$1,500.00, represented three weeks payments of \$500.00.

[38] I find that whilst there was a delay, AA Taxation was back on target with the installed payments by that date, and there was no further default after that date.

[39] Whilst the initial delay of two weeks may have caused some inconvenience to Mr Ren, at the date of lodging the Statement of Problem there was no ongoing breach.

[40] Pursuant to s150 (4) of the Act, a person who breaches a Record of Settlement is liable to a penalty.

[41] However, having considered the particular circumstances of this case, and the principles which should govern the imposition of a penalty, I determine that a penalty of \$100.00 is appropriate in all the circumstances of this case.<sup>1</sup>

[42] In regard to Mr Lee, although he was the authorised signatory to the Record of Settlement, that fact alone does not make him liable to a penalty and there is no evidence that he aided and abetted the breach by AA Taxation.

**[43] I order that AA Taxation is to pay a penalty of \$100.00, to be paid to the Authority to be paid to the Crown Trust Account. Payment is to be made within 14 days of the date of this Determination.**

**[44] There is no separate penalty awarded against the Second Respondent.**

#### **Costs**

[45] Mr Ren has applied for costs.

[46] Costs are at the discretion of the Authority.

[47] The matter was considered on the papers with no investigation meeting taking place, and in the circumstances of this case, I consider that costs should lie where they fall.

#### **Filing Fee**

**[48] AA Taxation is to pay Mr Ren the filing fee of \$71.56 within 14 days of the date of this Determination.**

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

---

<sup>1</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143