

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 634  
3244679

BETWEEN

NATHAN JANE  
Applicant

ROBERTS NZ LIMITED  
First Respondent

COLIN ROBERTS  
Second Respondent

Member of Authority: Marija Urlich

Representatives: Ruth Pettengell, advocate for the Applicant  
Colin Roberts, for the Respondents

Investigation Meeting: On the papers

Determination: 30 October 2023

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**DETERMINATION OF THE AUTHORITY**

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[1] Mr Jane seeks compliance orders with a record of settlement certified by a mediator on 15 June 2023. He also seeks the award of a penalty, a portion of any to be paid to him, an award of interest on the outstanding sum and a compliance order against Mr Roberts to require him to take the necessary steps to enable Roberts NZ Ltd to comply. An award of costs is also sought.

[2] By way of joint statement in reply Roberts NZ Limited (Roberts) and Mr Roberts say the business is in a parlous financial state and is unable to pay the sums outstanding to Mr Jane.

## **The Authority's investigation**

[3] By consent this matter is determined on the papers. Mr Jane filed a statement dated 24 May 2022 in support of his application and submissions in compliance with the timetable set by direction of the Authority. Roberts and Mr Roberts have filed some information.

[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.

## **Issues**

[5] The issues for investigation and determination are whether:<sup>1</sup>

- (i) a compliance order should be made against Roberts NZ Limited to comply with the record of settlement;
- (ii) if so, a penalty be ordered, a portion of which awarded to Mr Jane;
- (iii) interest on the outstanding amount;
- (iv) whether a compliance order should be made against Colin Roberts to take the necessary steps to enable Roberts NZ Limited to comply; and
- (v) is either party entitled to an award of costs.

## **The record of settlement**

[6] Mr Jane and Roberts entered a record of settlement to resolve an outstanding costs issue between them arising from a determination of the Authority issued on 23 May 2023 in which awards were made in Mr Jane's favour and to agree a payment schedule for the total amount.<sup>2</sup>

[7] Clause 2 of the record of settlement provides that Mr Jane and Roberts agreed the total owed to him was \$19,375.00 made up of the \$16,000 award of the Authority in Mr Jane's favour of compensatory damages under s 123(1)(c)(i) of the Act and a contribution to the costs of professional representation of \$3,375.00.

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<sup>1</sup> As identified to the parties in Authority direction 5 September 2023.

<sup>2</sup> *Nathan Jane v Roberts NZ Limited* [2023] NZERA 256.

[8] Clause 3 provides the total of \$19,375.00 would be paid at the rate of seven monthly installments of \$2,500.00 commencing 30 June 2023 and continuing every month thereafter with the final about of \$1,875.00 due on or before 30 January 2024.

[9] The record of settlement was signed by Mr Jane and a representative of Roberts on 12 June 2023 and certified by a mediator pursuant to s 149 of the Act on 15 June.

[10] The record of settlement provided the terms and conditions of the record of settlement were final, binding and enforceable and were to remain confidential between the parties except in circumstances including Roberts not paying the settlement sum as agreed.

[11] To date Roberts has paid Mr Jane \$2,500 of the settlement sum. This payment was made on 29 June. The balance of the settlement sum of \$16,875 remains outstanding.

#### **Compliance order – Roberts NZ Limited**

[12] Section 137(1)(iii) of the Act empowers the Authority to order a party to comply with any terms of settlement which s 151 of the Act provides may be enforced by a compliance order. Section 151 applies to any agreed terms of settlement enforceable by the parties under s 149(3) of the Act.

[13] Roberts has failed to comply with the record of settlement and it is appropriate to exercise my discretion under s 137(1)(b) of the Act to order compliance with the sums outstanding. While it is accepted Roberts has provided reasons for the default and offered an apology, it is not released from the obligation it freely entered with Mr Jane to pay him the agreed settlement sum.

[14] Within 28 days of the date of this determination Roberts NZ Limited is ordered to comply with the record of settlement and pay to Nathan Jane the total outstanding sum of \$16,875 without deduction.

[15] Imposition of a compliance order is a serious matter. Should Roberts NZ Ltd fail to comply with the compliance order as set out in [14] Mr Jane is entitled to pursue

the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or impose a sentence of imprisonment not exceeding 3 months<sup>3</sup>. Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.

### **Should a compliance order be made against Colin Roberts?**

[16] Under s 137 of the Act the Authority has a broad discretion to order compliance with a range of matters including determinations issued by the Authority. A compliance order may be made against a person who is not an original party to the proceedings for the purpose of ensuring earlier decisions are complied with.

[17] Under s 221(a) the Authority may join parties to the proceedings in order to make compliance orders against them.<sup>4</sup> The terms of any such compliance orders would usually be to ensure that the original party complies with the orders being enforced, not that the joined parties should themselves comply by, for example, personally paying sums of money ordered. In cases where an incorporated employer has failed to pay a sum of compensation to an employee, the Authority may order a director to use his or her position of control to ensure that the liability is met by the employer company.<sup>5</sup> There may be cases where joining should be declined because it would serve no useful purpose.<sup>6</sup>

[18] Mr Roberts is aware of the claim Mr Jane has made against him and the nature of the claim. He is also aware Roberts is in default of the obligation owed to Mr Jane to pay the outstanding settlement sum. I am satisfied Mr Roberts has had a fair opportunity to provide information relevant to whether the order sought against him should be made.

[19] Mr Roberts is the sole director and shareholder of Roberts. He has sufficient connection to and the necessary power to arrange for Roberts to secure and provide the

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<sup>3</sup> Section 139 and 140(6) Employment Relations Act 2000

<sup>4</sup> *New Zealand Performance and Entertainment Workers Union v Infrass Holdings Ltd* (LC) Auckland ALC85/90, 26 July 1990.

<sup>5</sup> *Northern Clerical IUOW v Lawrence Publishing Co of NZ Ltd* (1990) ERNZ Sel Cas 667 (LC); *Allen Chambers Ltd v Pelabon* [2019] NZEmpC 45 at [43]–[58].

<sup>6</sup> at [17].

funds to meet the obligation owed to Mr Jane. This is not a situation where the corporate veil is lifted and an order made against Mr Roberts personally to put Roberts into funds to meet the obligation it entered with Mr Jane.

[20] As to whether the order will serve no useful purpose, on the information before the Authority, that cannot be said with certainty. While Roberts and Mr Roberts have raised issues as to the strained financial circumstances of the business, they have also put information before the Authority of unrelated litigation Roberts initiated in late July 2023 concerning an alleged breach of contract for which it claims substantial damages to meet its losses which are understood to have significantly contributed to its financial strain. Roberts and Mr Roberts have not provided further information to the Authority as to the progress of that litigation. Without that information or other relevant information, it cannot be said with certainty that making the compliance order sought would serve no useful purpose.

[21] Under s 137(2) of the Act Colin Roberts is ordered to take the steps necessary to ensure Roberts NZ Limited meets its obligations to make payment in full of the amount of \$16,875 due to Mr Jane within 21 days of the date of this determination.

### **Interest**

[22] Mr Jane seeks interest on the settlement monies. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[23] It is appropriate where a person has been deprived on the use of money to make an award for interest. Roberts is ordered to calculate and pay interest within 28 days of the date of this determination on the sum of \$16,875.

[24] Interest is to be calculated from the date of this determination until the sum is paid in full.

[25] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.

## **Penalty**

[26] Section 149(4) of the Act enables a party to seek the imposition of a penalty in respect of any established breach of a corresponding settlement agreement. The imposition of a penalty is discretionary and is generally imposed for the purpose of punishment as well as discouragement of others. A single breach of a settlement agreement by an individual may attract a penalty up to \$10,000 and for a company a penalty not exceeding \$20,000 may be awarded for a solitary breach.<sup>7</sup>

[27] Mr Jane submits a penalty should be imposed and paid to him given Robert's breach of the record of settlement undermines the integrity and security of s 149 settlement agreements which are intended to give parties certainty and finality, that Roberts is solely responsible for a knowing and repeated breach of the record of settlement, the nature and extent of the loss and damage suffered by Mr Jane and the benefit to Roberts of retaining the settlement monies over an extended period.

[28] As a matter of public policy, in this case a penalty against Roberts is necessary to uphold the integrity of the full, final, binding and enforceable agreements allowed under s 149 of the Act.

[29] The level of penalty is determined by an assessment of the factors set out in s 133A of the Act alongside judgments of the Employment Court.<sup>8</sup>

[30] The record of settlement was signed on behalf of Roberts by a representative. The record of settlement records Roberts understood it's binding and enforceable nature and had the opportunity to take independent advice as to its meaning and terms. It must be taken to have been aware of its obligations under the record of settlement. There is no basis on which to reasonably conclude that Roberts' breach of the record of settlement was inadvertent, minor or technical.

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<sup>7</sup> Section 135(2)(a) and (b) respectively.

<sup>8</sup> For example *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

[31] Mr Jane has been put to considerable inconvenience to enforce the settlement he entered with Roberts and has suffered serious embarrassment as a consequence of not receiving the settlement sums.

[32] Roberts has described financial difficulties it says have impacted its ability to pay the settlement sum. Some information has been provided to support this claim. Weight can be given to this as a factor relevant in assessing the appropriate level of penalty.

[33] Roberts has expressed regret at not paying the settlement amount as agreed with Mr Roberts. A search of the relevant databases has not revealed previous proceedings for similar breaches involving Roberts.

[34] Taking all the factors into account Roberts is liable for a penalty of \$2,000, which is within the range of penalties currently imposed for failure to pay monies due under a record of settlement and is proportionate to the seriousness of the breach and harm caused.

[35] In the circumstances of this matter it is just for half the penalty sum (\$1000) to be paid to Mr Jane by Roberts, the remainder must be paid to the Authority for payment into a Crown bank account.

### **Summary of orders**

[36] The Authority orders as follows:

- (i) Within 21 days of the date of determination Colin Roberts is ordered to take all steps necessary to ensure Roberts NZ Limited is put in funds to make full payment to Mr Jane of the outstanding settlement sum of \$16,875.
- (ii) Within 28 days of the date of determination Roberts NZ Limited is ordered to:

- (a) pay Nathan Jane the outstanding settlement sum of \$16,875 without deduction;
- (b) calculate and pay Nathan Jane interest on the outstanding settlement sum; and
- (c) pay \$2,000 penalty half of which is to be paid to Nathan Jane and half to the Crown.

### **Costs and reimbursement of filing fee**

[37] Mr Jane has incurred costs exceeding \$2,000 in seeking to enforce the record of settlement. Supporting information has been provided. He is the successful party and is entitled to a contribution to the actual costs of professional representation. When the Authority considers costs it exercises a discretion. In exercising that discretion, it does so in a principled way. Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. In the Authority, costs are usually awarded on the basis of a daily tariff which is currently \$4,500 for the first day. This matter was able to be investigated on the papers.

[38] Mr Jane is entitled to a contribution to the costs of representation incurred in seeking compliance with the record of settlement which included the preparation the application, affidavit evidence and written submissions. A fair and reasonable award of costs is \$1000.

[39] Roberts NZ Limited and Colin Roberts are jointly and severally liable and ordered to pay Mr Jane \$1000 as costs and the filing fee of \$71.55 within 21 days of the date of determination.