

**Attention is drawn to the order  
prohibiting publication of certain  
information in this Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 762  
3257839

BETWEEN	STEVEN HAYES First Applicant
AND	KUKUPA CONSTRUCTION LIMITED Second Applicant
AND	FORMCRETE CONSTRUCTION LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Naoimh McAllister, counsel for the Applicant Nicholas Franklin and Marty Price, advocates for the Respondent
Investigation Meeting:	18 December 2023 by audio visual
Submissions Received:	5 December 2023 from the Applicant 12 December 2023 from the Respondent 18 December 2023 from both Applicant and Respondent
Determination:	19 December 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Steven Hayes and Kukupa Construction Limited (Kukupa) entered into a record of settlement under s 149 of the Employment Relations Act 2000 (the Act) with Formcrete Construction Limited (Formcrete). Mr Hayes is the sole director of Kukupa.

[2] The record of settlement was signed by both parties. A mediator employed by the Chief Executive of the Ministry of Business, Innovation and Employment certified on 11 October 2023 the effect of ss 148A, 149(1) and (3) of the Act had been explained to the parties. The mediator was satisfied that the parties had understood the effect of those sections and had affirmed their request that the agreed terms of settlement should be signed.

[3] Clause 8 of the settlement agreement provides that the agreement and all discussions leading up to it are strictly confidential between the parties. The Authority will need to refer to clause 2 of the record of settlement but prohibits from publication those parts of the record of settlement that it has not been required to refer to. There is no other application for non-publication.

[4] There was a delay in the signing of the record of settlement. The mediator was not provided with the record of settlement until 10 October and did not sign until 11 October 2023. The first payment to be made under the record of settlement pre-dated 11 October 2023.

[5] Clause 2 of the record of settlement agreement provides Formcrete will pay Kukupa as follows:

- A. A payment of \$20,000 including GST by 29 September 2023.
- B. A further payment of \$8,400 including GST by 31 October 2023.
- C. A further payment of \$8,400 including GST by 30 November 2023.

[6] Mr Hayes and Kukupa say that Formcrete breached clause 2 of the agreed terms of the record of settlement. There is no dispute that the obligations in clause 2 have not been complied with.

[7] A statement of problem was lodged with the Authority on 19 October 2023 for compliance with the record of settlement, imposition of a penalty award with payment to Mr Hayes and costs. An amended statement of problem was lodged on 28 November 2023 to join Kukupa as a second applicant in line with the record of settlement.

[8] On 5 December 2023 Formcrete made a \$10,000 payment to Kukupa in reduction of the obligations in clause 2.

[9] There is a balance owing to Kukupa under the record of settlement of \$26,800.00.

[10] Mr Hayes and Kukupa seek an order that there be compliance with clause 2 of the record of settlement, that a penalty be awarded for a breach the record of settlement under s 149(4) of the Act, and that it be paid to Kukupa and that there be a contribution towards legal fees.

[11] Formcrete acknowledges that it is in breach of the record of settlement in its statement in reply but says that it has not received expected drawdowns from its international bank and is facing significant financial difficulties as a result. It does not accept that it is a situation that there was an intentional failure to pay Kukupa but that there have been no funds to do so.

[12] Formcrete in submissions said that it should be in a position to pay the balance owing under the record of settlement by close of business 20 December 2023 when it gets a significant payment from the bank. During the Authority investigation meeting Mr Franklin and Mr Price enlarged the possible payment period to between 20 December 2023 and 22 December 2023.

[13] Formcrete does not accept there should be an award of a penalty or costs because of its financial position.

### **The Investigation Meeting**

[14] The Authority was asked to give this matter priority. It scheduled a meeting by Teams and made timetabling directions for lodging submissions in advance of that meeting.

[15] Formcrete was at the time of the case management conference represented by counsel however a notice of change of representative was lodged and the Authority was advised that Formcrete would be representing itself.

[16] Mr Hayes attended the investigation meeting and Formcrete was represented by its sole director Nicholas Franklin and its general manager Marty Price.

[17] The Authority heard some evidence from Mr Franklin about the circumstances that led to the breach and difficulties with the bank. Ms McAllister and Mr Franklin and Mr Price made submissions.

### **The issues**

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

- (a) Should an order be made that Formcrete comply with clause 2 of the record of settlement?
- (b) Should a penalty be awarded for the breach of the record of settlement under s 149(4) and if so, who should the penalty be paid to?
- (c) Are the applicants entitled to an award of costs and, if so, in what amount?

### **Should an order be made that Formcrete comply with clause 2 of the record of settlement?**

[19] The Authority has the power to order compliance under s 137 of the Act with the terms of settlement in the record of settlement.<sup>1</sup>

[20] There has been a breach of clause 2 of the record of settlement by Formcrete.

[21] Formcrete has indicated that it should be in a position to pay the balance owing under clause 2 of the record of settlement by the end of this week and possibly earlier.

[22] Ms McAllister asked for a compliance order effective from the date of the investigation meeting. That would put Formcrete into immediate breach when payment is anticipated to be made later this week. I do not conclude that would be appropriate.

[23] It is appropriate in the circumstances of this matter to exercise my discretion and make an order for compliance. There has been some indication on behalf of

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<sup>1</sup> Section 151 of the Act provides that agreed terms of settlement enforceable under s 149(3) of the Act may be enforced by a compliance order under s 137 of the Act.

Formcrete from in or about October 2023 that payment will be made once the company is in a position to make payment. There was partial payment only after the matter had been set down for an investigation meeting and even on the day of the investigation meeting some change to the date in submissions when final payment is to be made.

[24] Formcrete is ordered to comply with clause 2 of the settlement agreement and pay to Kukupa the balance owing under the record of settlement of \$26,800 by close of business Friday 22 December 2023.

[25] Formcrete through Mr Franklin and/or Mr Price is ordered to update the Authority and Ms McAllister on Wednesday 20 December 2023 and by midday 22 December 2023 whether payment will be or has been made. This is to address concerns with the upcoming holiday season and issues that may arise if payment is not made.<sup>2</sup>

### **Penalty**

[26] Mr Hayes and Kukupa seek a penalty for a breach of the settlement agreement. Section 149(4) of the Act enables a party to seek the imposition of a penalty in respect of a breach of the settlement agreement.

[27] The imposition of a penalty is discretionary. A penalty is designed to punish and discourage similar breaches.

[28] Formcrete say that a penalty should not be imposed because of its financial position and that the ability to pay was out of its control.

[29] Public policy requires the upholding and protection of s 149 records of settlement. I accept Ms McAllister's submission that when records of settlement are breached it undermines their integrity, certainty, and finality that the public rely on in entering these settlements. A breach puts a party to a settlement agreement who thought matters were at an end to the additional stress and inconvenience of enforcement.

[30] A penalty should be imposed for the breach of the settlement agreement.

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<sup>2</sup> The Authority discussed this at the investigation meeting. The order is made under s 137(2) of the Act to prevent further non-compliance.

[31] In determining the quantum of the penalty I consider matters that I must have regard to under s 133A of the Act.

[32] The extent and nature of the breach was a single breach of clause 2 of the record. For this breach a maximum penalty not exceeding \$20,000 may be awarded.<sup>3</sup>

[33] Formcrete do not accept that the breach was intentional but say that it was the direct result of a lack of finances to pay. Formcrete say that the non-compliance and financial difficulties were due in part to the defective work of Kukupa and Mr Hayes, discovered after the settlement agreement was entered into. Ms McAllister submits this is an unfounded allegation and that it appeared that the non-compliance was intended to punish which is an aggravating factor.

[34] The parties in the settlement agreement turned their minds to the aspect of any defective work in clause 6 of the settlement agreement. Formcrete agreed to make the payment in clause 2 to Kukupa. Both parties were legally represented. Formcrete should not have entered into a settlement agreement if there was doubt that it could make the payments it agreed to make. There had been ongoing communication with its international bank for payments since August 2023.

[35] There was an absence of information provided to the Authority or to Ms McAllister to conclude that a third party, Formcrete's bank, was solely responsible for the breach and that no funds could have been obtained from elsewhere. I do not conclude that the breach was inadvertent or negligent. The settlement agreement may not have been entered into with the deliberate intention to breach it however in the absence of cogent information I do not conclude other than an intentional decision not to pay.

[36] I weigh that Formcrete has paid \$10,000 in reduction of the amounts owing and has indicated that it will pay the balance very shortly. Formcrete has not been involved in previous proceedings for similar breaches from a search of the database.

[37] I weigh all the relevant factors and conclude that a penalty of \$2,000 should be imposed which is within the range for penalties imposed for failure to pay money under

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<sup>3</sup> Section 135(2)(b) of the Employment Relations Act 2000.

a record of settlement and proportionate to the seriousness of the breach and harm caused. I have taken into account the financial position of Formcrete and the award reflects the financial difficulties the company face.

[38] Ms McAllister asked that a portion of the penalty be paid to Kukupa. I do not consider that payment of a portion of the penalty to Kukupa would be appropriate. Mr Hayes was a party to the record of settlement and as the sole director of Kukupa, failure to pay the amounts in clause 2 to Kukupa as anticipated contributed to financial difficulties and inconvenience to Mr Hayes. It is appropriate that half of the penalty be paid to Mr Hayes and the balance to the Crown.

### **Costs**

[39] Mr Hayes and Kukupa have been successful in their application and are entitled to consideration of a contribution towards their costs in enforcing the record of settlement. The meeting took a little over half an hour. It is appropriate as a starting point to assess costs on the basis of one quarter of the daily tariff of \$4,500 which is \$1,125. There was preparation of the statement of problem, submissions, and attendance at a case management conference in addition to the attendance at the investigation meeting.

[40] I do not consider that the financial position for the company or other factors support a reduction or an increase to that amount.

[41] Mr Hayes and Kukupa are entitled to an award for costs in the sum of \$1,125 and reimbursement of the filing fee of \$71.55.

### **Summary of orders made**

[42] Formcrete Construction Limited is ordered to:

- (a) Comply with clause 2 of the settlement agreement and pay to Kukupa Construction Limited the balance owing under clause 2 of the record of settlement of \$26,800 by close of business Friday 22 December 2023.

- (b) Update the Authority and Ms McAllister on Wednesday 20 December 2023 and by midday 22 December 2023 whether payment will be or has been made.
- (c) Pay a \$2,000 penalty within 28 days with half payable to Mr Hayes and half payable to the Crown.
- (d) Pay costs in the sum of \$1,125 and reimburse the filing fee of \$71.55.

Helen Doyle

Member of the Employment Relations Authority