

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 766
3251019

BETWEEN

ALEXANDER COOKSON
First Applicant

DANNY MORGAN
Second Applicant

RIGHT HEIGHT
SCAFFOLDING LIMITED
First Respondent

ALLAN KAYSER
Second Respondent

Member of Authority: Marija Urlich

Representatives: Lawrence Anderson, advocate for the Applicants
Allan Kayser, for the Respondents

Investigation Meeting: On the papers

Determination: 20 December 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By application lodged on 14 September 2023 Alexander Cookson and Danny Morgan seek, by way of compliance order, to enforce a record of settlement entered with their former employer Right Height Scaffolding Limited (Right Height) and certified by a mediator on 4 September 2023. A compliance order is also sought against Alan Kayser, a non-party to the record of settlement under s 137(2) of the Act. They seek a contribution to costs.

The Authority's investigation

[2] Right Height and Mr Kayser have not filed statements in reply or sought leave to do so out of time. They have not otherwise engaged with the Authority process. I am satisfied service has been effected in accordance with regulations – the statement of problem was sent to them respectively by courier to the address for service provided in the companies office register for that purpose at 2.23pm on 10 September 2023 and 9.12am on 21 September 2023.¹ The Authority direction dated 10 November 2023, which set out a proposal for party comment on the investigation of this employment relationship problem and a further copy of the statement of problem was served on the respondents at the provided address for service by courier on 13 November 2023.

[3] Mr Cookson and Mr Morgan consented to this matter being determined on the papers, as proposed in the direction and filed affidavit evidence and information in accordance with the confirmed timetable.²

[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 requiring investigation and determination are:³

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

¹ Employment Relations Authority Regulations 2000, clause 16.

² Refer Authority direction 10 November 2024.

³ Ibid.

The record of settlement

[6] Clause 8 of the record of settlement provided that within seven days of certification by a mediator, Right Height would pay Mr Cookson and Mr Morgan \$3,800 each under section 123(1)(c)(ii) of the Act and pay directly to No Win No Fee Kiwi Limited as a contribution to their advocacy costs \$3,000 (plus GST).

[7] The record of settlement was signed by Mr Kayser on behalf of Right Height and in his own capacity as an “interested party” on 22 August 2023. On 25 August Mr Cookson signed the record of settlement, and Mr Morgan signed it on 28 August. On 4 September it was certified by a mediator pursuant to s 149 of the Act. The payments were due on 11 September.

[8] The record of settlement provided the terms and conditions of the record of settlement were final, binding on and enforceable, and were to remain confidential between the parties except in circumstances including Right Height not paying the settlement monies.

[9] In an affidavit dated 25 November 2023 and 28 November 2023, Mr Cookson and Mr Morgan averred Right Height has paid none of the settlement monies it agreed to pay them to resolve their employment relationship problem.

Compliance order – Right Height Scaffolding Limited

[10] 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.

[11] Right Height 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.

[12] Within 28 days of the date of this determination Right Height Scaffolding Limited is ordered to comply with clause 8 of the record of settlement and make the following payments without deduction:

- (i) pay Alexander Cookson \$3,800; and
- (ii) pay Danny Morgan \$3,800.

[13] Imposition of a compliance order is a serious matter. Should Right Height fail to comply with the compliance order as set out above Mr Cookson and Mr Morgan are 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 months⁴. 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 Allan Kayser?

[14] 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.

[15] Under s 221(a) the Authority may join parties to the proceedings in order to make compliance orders against them.⁵ 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.⁶ There may be cases where joining should be declined because it would serve no useful purpose.⁷

[16] Mr Kayser is a director and shareholder of Right Height. He is aware of the record of settlement entered with Mr Cookson and Mr Morgan and the terms thereof because he signed the document on behalf of Right Height and in his own capacity as

⁴ Employment Relations Act 2000, section 139 and 140(6).

⁵ *New Zealand Performance and Entertainment Workers Union v Infrass Holdings Ltd* (LC) Auckland ALC85/90, 26 July 1990.

⁶ *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].

⁷ at N6.

“an interested party”. The record of settlement does not define “interested party” and Mr Kayser has not provided a personal guarantee to meet Right Height’s obligations in the event of default.

[17] Though Mr Kayser has sufficient connection to and likely has the necessary power to arrange for Right Height to secure and provide the funds to meet the obligations owed to Mr Cookson and Mr Morgan, the information before the Authority currently is insufficient to warrant the exercise my discretion and make a compliance order against Mr Kayser under s 137(2) of the Act. This issue is adjourned pending further relevant information being provided which may include information relevant to how and why the default has occurred and Mr Kayser’s involvement, if any in the default.

Interest

[18] Mr Cookson and Mr Morgan seek 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.

[19] It is appropriate where a person has been deprived of the use of money to make an award for interest. Right Height is ordered to calculate and pay interest within 28 days of the date of this determination on the two sums of \$3,800 (total \$7,600).

[20] Interest is to be calculated from the date of this determination until the sums ordered are paid in full.

[21] 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

[22] 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.⁸

[23] Mr Cookson and Mr Morgan submit a penalty should be imposed and paid to them given Right Height'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 Right Height is solely responsible for a knowing and ongoing breach of the record of settlement, the nature and the extent of the loss and damage suffered by them and the benefit to Right Height of retaining the settlement monies over an extended period.

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

[25] 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.⁹

[26] Mr Kayser signed the record of settlement on behalf of Right Height as a director. The record of settlement records Right Height understood the binding and enforceable nature of the record of settlement and must be taken to have been aware of its obligations under the record of settlement. Right Height has paid the advocacy fees agreed under the record of settlement. There is no basis on which to reasonably conclude that Right Height's breach of the record of settlement was inadvertent, minor or technical.

[27] Mr Cookson and Mr Morgan have been put to considerable inconvenience to enforce the settlement they entered with Right Height and have suffered as a consequence of not receiving the settlement sums.

⁸ Section 135(2)(a) and (b) respectively.

⁹ 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.

[28] A search of the relevant databases has not revealed previous proceedings for similar breaches involving Right Height.

[29] Taking all the factors into account Right Height is liable for a penalty of \$2,500, 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.

[30] In the circumstances of this matter it is just for half the penalty sum (\$1,250) to be paid to Mr Cookson and Mr Morgan in equal share by Right Height, the remainder must be paid to the Authority for payment into a Crown bank account.

Summary of orders

[31] The Authority orders as follows:

Within 28 days of the date of determination Right Height Scaffolding Limited is ordered to:

- (i) pay Alexander Cookson the settlement sum of \$3,800 without deduction;
- (ii) pay Danny Morgan the settlement sum of \$3,800 without deduction;
- (iii) calculate and pay Alexander Cookson and Danny Morgan interest on the settlement sum in accordance with [20] above; and
- (iv) pay a \$2,500 penalty half of which is to be paid to Alexander Cookson and Danny Morgan in equal share and half to the Crown.

[32] The application for a compliance order against Allan Kayser is adjourned.

Costs and reimbursement of filing fee

[33] Mr Cookson and Mr Morgan have incurred costs in seeking to enforce the record of settlement. They are the successful party and are 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.

[34] Mr Cookson and Mr Morgan are 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 provision of written information. A fair and reasonable award of costs is \$1000.

[35] Right Height Scaffolding Limited is to pay to Mr Cookson and Mr Morgan \$500 each as a contribution towards those costs and the filing fee of \$71.56 within 21 days of the date of determination.

Marija Urlich
Member of the Employment Relations Authority