

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 780
3246419

BETWEEN

MARIA LEE KING
Applicant

PREMIER FORWARDING
NZ LIMITED
First Respondent

KATALINA WHITE
Second Respondent

Member of Authority: Marija Urlich

Representatives: Kim Ahern, advocate for the Applicant
No appearance for the Respondents

Investigation Meeting: 21 December 2023, By audio-visual link

Determination: 22 December 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By application lodged on 21 August 2023 Maria King seeks, by way of compliance order, to enforce a record of settlement entered with her former employer Premier Forwarding NZ Limited (Premier Forwarding) and certified by a mediator on 6 July 2023. Orders are also sought under sections 137(2) and 142Y of the Employment Relations Act 2000 against Katalina White, the sole director and shareholder of Premier Forwarding and a non-party to the record of settlement. Penalties are sought for the breach as is a contribution to costs.

The Authority's investigation

[2] Premier Forwarding and Ms White did not attend the investigation meeting. On 29 August 2023 the statement of problem was couriered to Premier Forwarding and Ms White at the addresses for service they provided to the companies office register. On 17 November Rory White, who signed the record of settlement on behalf of Premier Forwarding, emailed the Authority asking how the respondents could reply to the application. Relevant information was provided to him by reply email along with a copy of the statement of problem. Authority directions dated 5 December 2023 (the directions) and the notice of investigation meeting were served on Premier Forwarding and Ms White's addresses for service. This information was also emailed to the email address with which Mr White had corresponded with the Authority on this matter. The directions identified the issues to be investigated and determined and an investigation meeting date.

[3] Soon after the scheduled start time of the investigation meeting, when neither Premier Forwarding nor Ms White were in attendance, at my direction an Authority officer emailed and rang Mr White on the contact details provided to the Authority to advise the investigation meeting was to proceed, the start would be delayed until 1.20pm to accommodate any lateness on the part of the respondents and that no adjournment application had been received. No reply was received before the investigation meeting commenced 20 minutes after the scheduled commencement time. Ms King gave unchallenged evidence under affirmation to the Authority. After the conclusion of the investigation meeting at 2.23pm that day Mr White emailed the Authority advising he has "...COVID so I am currently not in the office. Do you want me to send you a Dr Cert?".

[4] Premier Forwarding and Ms White were aware of the investigation meeting and have had a fair opportunity to attend and provide information to the Authority which is relevant to the investigation and determination of this employment relationship problem. It is appropriate that the investigation meeting proceeded in their absence.¹ 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

¹ Employment Relations Act 2000, schedule 2, clause 12.

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:
- (i) a compliance order is made against Premier Forwarding to comply with the record of settlement;
 - (ii) interest is awarded on the outstanding amount;
 - (iii) a penalty is ordered a portion of which awarded to Ms King;
 - (iv) leave should be granted under s 142Y to claim minimum entitlements from Ms White;
 - (v) a compliance order should be made against Ms White under s 137(2) of the Act to take the necessary steps to ensure Premier Forwarding NZ Limited complies; and
 - (vi) either party entitled to an award of costs.

The record of settlement

[6] Clause 5 of the record of settlement provides Premier Forwarding agreed to pay the following sums to Ms King to settle the employment relationship problem:

- (i) that within 14, 40, 60 and 90 days of certification by a mediator Premier Forwarding would pay Ms King \$8,000 under section 123(1)(c)(ii) of the Act in four lots of \$2,000;
- (ii) pay Ms King \$2,050.00 (gross) in outstanding wages within 14 days of mediator certification; and
- (iii) pay \$4,000 plus GST towards Ms King's costs within 14 days of receiving an invoice from her representative.

[7] On 5 July 2023 the record of settlement was signed by Ms King and Mr White, who is recorded on that document as an authorised signatory of Premier Forwarding.

On 6 July the record of settlement was certified by a mediator pursuant to s 149 of the Act.

[8] Ms King told the Authority she has complied with all she was required to do under the record of settlement including returning all Premier Forwarding property in her possession and providing an invoice of advocacy costs. The Authority is satisfied Ms King has fulfilled her obligations to Premier Forwarding under the record of settlement.

[9] Under the record of settlement Premier Forwarding was to make the first payment to Ms King on 20 July. On 21 July Ms King's representative contacted Premier Forwarding's then representative to advise no payment had been received. A payment of \$2,000 was then made that day to Ms King by Premier Forwarding. No other payments have been received despite Ms King's representative seeking and receiving assurances from Premier Forwarding's then representative that they had followed up the defaulted payments with Premier Forwarding and advice to Ms King on 10 August that Premier Forwarding would meet its obligations by 11 August after Ms King advised her intention to lodge an application seeking compliance orders. The balance of the settlement monies remains outstanding.

[10] 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 Premier Forwarding not paying the settlement monies.

[11] Ms King seeks an order for \$2,160 (gross) in outstanding holiday pay. She relies on clause 10 of the record of settlement which records the parties to the agreement have in reaching settlement not agreed to forgo minimum entitlements including holiday pay. This claim cannot succeed because Ms King has also agreed the record of settlement is in full and final settlement of all matters between the parties. Ms King is bound by the agreement made in settling her employment relationship problem with Premier Forwarding that minimum entitlements were not forgone and all matters between the parties were resolved.

Compliance order – Premier Forwarding 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] Premier Forwarding 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.

[14] Within 21 days of the date of this determination, Premier Forwarding NZ Limited is ordered to comply with clauses 5, 6 and 7 of the record of settlement and make the following payments without deduction to Maria Lee King:

- (i) \$6,000 without deduction;
- (ii) \$2,050 in wage arrears; and
- (iii) \$4,000 plus GST towards the costs of representation.

[15] Imposition of a compliance order is a serious matter. Should Premier Forwarding fail to comply with the compliance order as set out above, Ms King 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.² Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.

Is Katalina White a person involved in Premier Forwarding (NZ) Limited's breaches of employment standards?

[16] Given the record of settlement and Premier Forwarding's failure to date to pay the balance of the settlement sums to Ms King, it is appropriate to consider her application for leave to recover the wage arrears component from Ms White.

² Section 139 and 140(6) Employment Relations Act 2000

[17] Under s 142Y(2)(a) and (b) of the Act, an employee seeking to recover money from a person who is not their employer can only do so with prior leave of the Authority (or court) and, to the extent the employer is unable to pay the money owing.

[18] The first matter the Authority must be satisfied of is whether there has been default in payment of the wage arrears. This is the case. Ms King has not received the wage arrears Premier Forwarding (NZ) Limited agreed to pay her under the record of settlement.

[19] Next, I must be satisfied the default involves a breach of employment standards.³ Employment standards include the requirement to pay wages without deduction under the Wages Protection Act 1983. Ms King's wages of \$2,050 (gross) due under her employment agreement remain outstanding in breach of this employment standard.

[20] Ms White's involvement in the breach is now to be considered.⁴ Premier Forwarding entered a record of settlement with Ms King which included agreement to pay wage arrears of \$2,050 (gross) outstanding since late May 2023. Ms White is the sole director and shareholder of Premier Forwarding. Ms White is a person involved in a breach of employment standards under s 142W of the Act.

[21] Premier Forwarding must be unable to pay the wage arrears.⁵ The only payment made under the record of settlement was in July 2023 and did not include the arrears of wages. Premier Forwarding subsequently represented to Ms King that the then overdue payments would be made which did not occur without explanation. I am satisfied there is reasonable grounds for concluding Premier Forwarding is unable to pay the wage arrears owing.

³ Employment Relations Act 2000, s 5.

⁴ Employment Relations Act 2000, s 142W.

⁵ Employment Relations Act 2000, s 142Y(2)(b).

Should Ms King be granted leave to recover arrears of wages from Ms White personally?

[22] Ms White has proposed no reason why leave should not be granted to recover the wage arrears directly from her. Ms King is granted leave to bring a claim to recover her wage arrears against Ms White under s 142Y of the Act.

Can Ms King recover the wages Premier Forwarding owes her from Ms White?

[23] Yes. Given the above findings Ms King can recover the wage arrears from Ms White personally.

[24] If Premier Forwarding fails to comply with the order in full at [14] above within the set timeframe Ms White is liable to pay Ms King the arrears of wages within a further 14 days of that expiry of that timeframe.

Should a compliance order be made against Ms White for the balance of the sums agreed under the record of settlement?

[25] 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 compliance with earlier decisions.

[26] Under s 221(a) the Authority may join parties to the proceedings in order to make compliance orders against them.⁶ 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.⁷ There may be cases where joining should be declined because it would serve no useful purpose.⁸

⁶ *New Zealand Performance and Entertainment Workers Union v Infrass Holdings Ltd* (LC) Auckland ALC85/90, 26 July 1990.

⁷ *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].

⁸ at [17].

[27] Ms White is the sole director and shareholder of Premier Forwarding. It is likely she is aware of the record of settlement entered with Ms King because it was signed by an authorised signatory, her company has made a payment to Ms King of \$2,000 towards the total amount it agreed to pay her under that settlement and subsequently represented to Ms King that the balance of overdue payments would be made which has not occurred.

[28] Though Ms White likely has sufficient connection to and the necessary power to arrange for Premier Forwarding to secure and provide the funds to meet the obligations owed to Ms King, the information before the Authority currently is insufficient to warrant the exercise my discretion and make a compliance order against her 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 Ms King's involvement, if any in the default.

Interest

[29] Ms King 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.

[30] It is appropriate where a person has been deprived of the use of money to make an award for interest. Premier Forwarding is ordered to calculate and pay interest within 21 days of the date of this determination on the total outstanding settlement sums of \$12,050.

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

[32] 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

[33] 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.⁹

[34] Ms King says a penalty should be imposed and paid to her given Premier Forwarding'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 Premier Forwarding 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 her and the benefit to Premier Forwarding of retaining the settlement monies over an extended period.

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

[36] 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.¹⁰

[37] Mr White signed the record of settlement on behalf of Premier Forwarding as its authorised signatory. The record of settlement records Premier Forwarding 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. Premier Forwarding has paid \$2,000 of the total sum it agreed to pay Ms King under the record of settlement and represented to her that overdue payments would be made which has not occurred without explanation. There is no basis on which to reasonably conclude that Premier Forwarding's breach of the record of settlement was inadvertent, minor or technical.

⁹ Employment Relations Act 2000, section 135(2)(a) and (b).

¹⁰ 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.

[38] Ms King has been put to considerable inconvenience to enforce the settlement she entered with Premier Forwarding and has suffered as a consequence of not receiving the settlement sums. She told the Authority that she was relying on the settlement sums to meet day to day needs while she looked for another job and the failure to pay has caused ongoing financial and emotional strain to her and her family.

[39] A search of the relevant databases has not revealed previous proceedings for similar breaches involving Premier Forwarding.

[40] Taking all the factors into account Premier Forwarding is liable for a penalty of \$3,000, 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.

[41] In the circumstances of this matter it is just for half the penalty sum (\$1,500) to be paid to Ms King by Premier Forwarding, the remainder must be paid to the Authority for payment into a Crown bank account.

Summary of orders

[42] The Authority orders as follows:

Within 21 days of the date of this determination Premier Forwarding NZ Limited is ordered to comply with the record of settlement and make the following payments without deduction to Maria Lee King:

- (i) \$6,000 without deduction;
- (ii) \$2,050 (gross) in wage arrears; and
- (iii) \$4,000 plus GST towards the costs of representation.
- (iv) calculate and pay interest on the total above settlement sums; and
- (v) pay a \$3,000 penalty half of which is to be paid to Ms King and half to the Crown.

[43] If Premier Forwarding (NZ) Limited fails to comply within 21 days, within a further 14 days Katalina White must pay Maria Lee King arrears of wages of \$2,050

(gross) and calculate and pay interest on those arrears from date of this determination until those sums are paid in full.

[44] The application for a compliance order under s 137(2) of the Employment Relations Act 2000 against Katalina White is adjourned.

Costs and reimbursement of filing fee

[45] Ms King has incurred costs in seeking to enforce the record of settlement of \$2,500. She 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 by audio-visual link and took hearing time of 1 hour.

[46] Ms King 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, provision of written information, preparation and attendance at the investigation meeting. A fair and reasonable award of costs is \$1,500.

[47] Premier Forwarding NZ Limited is to pay to Maria Lee King \$1,500 as a contribution towards the costs and the filing fee of \$71.56 within 21 days of the date of determination.

Marija Urlich
Member of the Employment Relations Authority