

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 813
3366323

BETWEEN	MARCUS DE THIERRY Applicant
AND	KAIMAI KAURI LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Alex Kersjes, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	On the papers
Submissions and other information received:	Up to and including 2 December 2025
Determination:	16 December 2025

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr De Thierry lodged a statement of problem claiming that Kaimai Kauri Limited (KKL) had breached terms of a settlement reached pursuant to s 149 of the Employment Relations Act 2000 (the Act). The claimed breach related to the non-payment of sums agreed to be paid to Mr De Thierry in accordance with the settlement agreement. Mr De Thierry sought compliance orders and penalties.

[2] On 1 October 2025, I issued a determination¹ making compliance orders and reserving the issue of penalties pending any compliance. Mr De Thierry now seeks to progress the issue of penalties.

¹ *Marcus De Thierry v Kaimai Kauri Limited* [2025] NZERA 613.

[3] KKL has not engaged with the Authority in relation to the issue of penalties.

The Authority's investigation

[4] KKL has not lodged a statement in reply and have not otherwise meaningfully engaged with the Authority's investigation.

[5] I am satisfied the KKL were served with the relevant notices and other material relating to this matter, including the statement of problem, affidavit, submissions, and notice of directions.

[6] On 1 October 2025, I issued a determination² making compliance orders and reserving the issue of penalties pending any compliance. Mr De Thierry says that payment was not made and sought to progress the issue of penalties.

[7] On 4 November 2025, further directions were issued including timetable directions providing KKL a further opportunity to provide any response to the issue of penalties and advising that the Authority considered the matter should be dealt with 'on the papers' based on the material previously lodged and any additional information to be provided. Further submissions were received from Mr De Thierry, but no further communication was received from KKL.

[8] 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.

Issue

[9] The issue for investigation whether any penalties should be imposed upon KKL for breach of the terms of settlement?

Consideration

Has KKL breached the terms of the settlement agreement?

[10] As recorded in the previous determination, I was satisfied that there is a binding settlement agreement for the purposes of s 149 of the Act. That settlement agreement was signed, on 24 February 2025, for both parties and by a Mediator from the Ministry of Business, Innovation, and Employment.

² *Marcus De Thierry v Kaimai Kauri Limited* [2025] NZERA 613.

[11] Clauses 2 and 3 of the settlement agreement required KKL to make payment to Ms De Thierry of \$2,500 (in terms of s 123(1)(c)(i) of the Act) and \$3,000 plus GST (upon receipt of an invoice), within 14 days.

[12] I am satisfied, based on Mr De Thierry's affidavit and the relevant correspondence, that the sums were due have not been paid.

Penalty

[13] Mr De Thierry seeks the imposition of a penalties against KKL for breach of the terms of settlement.

[14] Section 149(4) of the Act provides that any person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority. I have applied the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*³ and had regard to the mandatory considerations at s 133A of the Act.

[15] In this case, being a company, KKL is liable to a penalty not exceeding \$20,000 in relation to any one breach.⁴ While the breach relates to two separate payments due under the terms of settlement, I consider the actions should be considered a single breach for the purposes of penalty.

[16] I have previously noted that there is considerable importance in the reliance on s 149 settlement agreements. The failure to comply with obligations reached in terms of such settlements is a serious matter. It is also the case that the settlement agreement was reached some significant time ago and that the sums remain due. While not strictly in evidence, there is some suggestion that KKL has had difficulty in securing the sums necessary to make payment.

[17] On the evidence, I am unable to conclude that the breach was other than intentional and deliberate. The breach has deprived Ms De Thierry the benefit of the sum that was agreed to be paid, and no steps have been taken to rectify the breach. However, I also take into account the proportionality of the non-compliance with the sums that remain due. I am satisfied that an appropriate penalty is \$2,000. However, it

³ [2016] NZEmpC 143.

⁴ Employment Relations Act 2000, s 135(2)(b).

is noted that compliance issues have already been ordered and that further non-compliance may result in further proceedings being issued.

Order

[18] Kaimai Kauri Limited are ordered to make payment of a penalty of \$2,000 within 28 days of the date of this determination. \$1,000 of that sum is to be paid to Mr De Thierry. The remaining \$1,000 is to be paid to the Authority via the Crown account.

Costs

[19] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[20] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr De Thierry may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum KKL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[21] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis for a half day⁵ unless circumstances or factors, require an adjustment upwards or downwards.⁶

Rowan Anderson
Member of the Employment Relations Authority

⁵ Taking into account the costs associated with both the compliance and penalty proceedings.

⁶ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1