

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 428  
3213279

BETWEEN                      JUDITH (JODI) ISAACSON  
   Applicant  
  
AND                                MELANIE JILL SMITH (TATANA)  
   Respondent

Member of Authority:        Antoinette Baker  
  
Representatives:              Paul Mathews, for Applicant  
   Respondent in person  
  
Investigation Meeting:        22 June 2023  
  
Submissions received:        5 August 2023 from Applicant  
   7 August 2023 from Respondent  
  
Determination:                9 August 2023

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**DETERMINATION OF THE AUTHORITY**

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[1]     The Applicant, Ms Isaacson seeks a compliance order against the respondent, Ms Smith for breach of a record of settlement (ROS) made under s 149 of the Employment Relations Act 2000 (the Act). The ROS was signed by a mediator on 5 August 2022. The parties to the ROS were Ms Isaacson, Ms Smith and Asia Pacific Group Limited, now in

liquidation (APG). Ms Smith is a sole director of APG. APG had been Ms Isaacson's employer.

[2] The ROS records that the parties agreed that the then solvent APG would pay Ms Isaacson:

- a. \$9,000.00 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in three instalments<sup>1</sup>
- b. \$6,000.00 plus GST for costs
- c. the employer 3% contribution to Inland Revenue.

[3] APG was placed into liquidation on 23 September 2022. It had not paid the first two agreed instalments under the ROS by that date. Since then, Ms Smith has also not paid but does not dispute that she is now personally liable for the \$9,000.00 and \$6,000.00 (plus GST) under the ROS, a total of \$15,900.00.

[4] Ms Isaacson seeks a compliance order that Ms Smith now pays her the above together with the following:

- a. interest on the above unpaid amounts
- b. an award of costs for bringing this application for compliance
- c. reimbursement of the \$71.55<sup>2</sup> filing fee for this application
- d. a penalty against Ms Smith for continued failure to comply with the ROS.

[5] Ms Smith says that while she agrees that she is now liable for the money owed under the ROS she is unable to pay due to her financial situation which is linked to the liquidation of APG.

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<sup>1</sup> 22 August 2022, 22 September 2022, 22 October 2022.

<sup>2</sup> All applications lodged in the Authority after 1 December 2022 attract a \$71.55 filing fee and not the previous \$71.56 fee.

## **The Authority's investigation**

[6] The investigation meeting lasted just on one hour. I adjourned to allow Ms Smith to provide more written information to support her claim that she could not pay, in particular that she had become personally liable for matters relating to the liquidation of APG. Her explanation included that she did not really understand this and that she was instructing a lawyer to legally challenge her situation.

[7] I timetabled for Ms Smith to provide this further evidence allowing for a response from Ms Isaacson and at the same time timetabled for written submissions to follow.<sup>3</sup> Ms Smith provided further information. Mr Matthews for Ms Isaacson provided a response to that information and submissions as timetabled. Ms Smith provided what I take were her submissions after this with information about her personal circumstances.

[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.

[9] After the investigation meeting and as discussed with the parties I directed that the intituling for these proceedings be amended to more accurately record each party's name.

## **The issues**

[10] The issues for determination are:

- a. Should the Authority order Ms Smith to comply and pay Ms Isaacson the unpaid money due in the ROS?
- b. If so, is Ms Isaacson entitled to interest from the date that Ms Smith became personally liable for the money owed under the ROS?

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<sup>3</sup> Directions of the Authority dated 22 June 2023

- c. If so, is Ms Smith liable for a penalty for noncompliance with the ROS and if so, how much and is any part to be paid to Ms Isaacson?
- d. Is there to be an order for costs including the filing fee?

**Should the Authority order Ms Smith to comply and pay Ms Isaacson the unpaid money due in the ROS?**

[11] The Authority may order compliance against a person who has not complied with a settlement made under s 149(3) of the Act<sup>4</sup>. The person does not have to be the other party's employer. A settlement made under s 149(3) is one where the parties reach their own agreement and then ask an authorised mediator<sup>5</sup> with the Ministry of Business Innovation and Employment (MBIE) to sign the settlement after pointing out the effect of signing to the parties<sup>6</sup>. The effect of this process is that the terms become final and binding, they cannot be cancelled, and except for enforcement processes neither party can bring the terms before the Authority (or Court) in any proceedings.<sup>7</sup>

[12] I am satisfied that APG in insolvency has defaulted on its obligations under the ROS. Ms Smith by her own acknowledgement has now not complied with the term that she agreed to pay in this eventuality.

[13] Ms Smith says that she cannot pay because her finances are linked to claims in the liquidation but under cross examination gave evidence that she now receives a salary in a managerial role and that the security interest she says she is subject to is not against her income.

[14] It is submitted for Ms Isaacson that Ms Smith has been given time to provide evidence of her financial position and that what she has provided in her emails is scant. I agree with this. Ms Smith submits that the liquidator's report for APG refers to Inland Revenue holding

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<sup>4</sup> Sections 137 and 151 Employment Relations Act 2000.

<sup>5</sup> Section 149(1) Employment Relations Act 2000

<sup>6</sup> Section 149(2) Employment Relations Act 2000

<sup>7</sup> Section 149(3) Employment Relations Act 2000

a security interest over her finances, but a reading of the liquidator report refers to this being in relation to the company's 'present and after acquired assets'. This appears to relate to the company and not Ms Smith or if it does, I cannot presume this is what is meant or as above she has acknowledged it does not relate to her income.

[15] Overall, I find it reasonable to order compliance against Ms Smith personally for the amounts she is obliged to pay under the ROS being a total of \$15,900.00 being \$9,000.00 for compensation and \$6,900.00 in costs.

**If so, is Ms Isaacson entitled to interest from the date that Ms Smith became personally liable for the money owed under the ROS?**

[16] The Authority may order interest 'in any matter involving the recovery of any money.'<sup>8</sup> This application is for a compliance order on money agreed to under a ROS. I am not satisfied I can order interest and decline to do so.

**If so, is Ms Smith liable for a penalty for noncompliance with the ROS and if so, how much and is any part to be paid to Ms Isaacson?**

[17] The relevant principles for the Authority to follow when assessing the level of penalty are guided by 133A of the Act. The Employment has also set out guiding principles<sup>9</sup> which include protecting the finality and integrity of s 149 settlement agreements by deterring the individual person in breach and others from similar breaches. I need to also consider consistency with penalties imposed on others in similar circumstances, the nature and extent of the breach and whether it was deliberate, one-off or sustained, whether the person in breach has sought to remedy the situation and proportionality in the circumstances.

[18] I am not satisfied this situation is suitable for the award of a penalty. While I find deterrence is an important aspect in that s 149 settlement agreements need to be trusted by the public as reliable, I have no information that Ms Smith has personally not complied before

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<sup>8</sup> Employment Relations Act 2000 Schedule 2, clause 11.

<sup>9</sup> *ITE v ALA* [2016] NZEct at [61]

with an ROS. I also accept there is a likelihood that she has had family and health issues as set out in her submissions.

### **Costs**

[19] It is submitted for Ms Isaacson that she should receive a \$2,000.00 contribution to her costs for this application together with the filing fee of \$71.55. The current tariff for a quarter day investigation meeting is \$1,125.00. Ms Isaacson seeks an uplift to take into account the adjournment and extra work needed to respond to the material beyond the meeting which did not eventuate in the evidence expected. I accept this uplift is appropriate and order payment of \$2,000.00 as a contribution to Ms Isaacson's costs together with the filing fee incurred.

### **Summary of orders**

[20] Within 28 days from the date of this determination Melanie Jill Smith (Tatana) is ordered to:

- a. comply with the Record of Settlement dated 5 August 2022 between herself and Judith (Jodie) Isaacson by paying \$15,900.00 to Judith (Jodi) Isaacson
- b. to pay \$2,000.00 to Judith (Jodi) Isaacson as a contribution to costs in this matter
- c. to pay \$71.55 to Judith (Jodi) Isaacson for the Authority filing fee in this application.

Antoinette Baker  
Member of the Employment Relations Authority