

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 668
3178659

BETWEEN

LAURA POWICK
First Applicant

STACY CUREEN
Second Applicant

EVE SMITH
Third Applicant

AND

EMMA HURLSTONE
Respondent

Member of Authority: Marija Urlich

Representatives: Ted Hipkiss, advocate for the Applicant
Ms Hurlstone, in person,

Investigation Meeting: 28 October 2022 (by audio-visual link)

Further information and submissions received: 28 October - 6 December 2022, from the Applicants
5 December - 8 December 2022, from the Respondent

Determination: 16 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Laura Powick, Stacy Cureen and Eve Smith (the applicants) seek to enforce a record of settlement entered with their former employer Mindset PLD Ltd (Mindset) and certified by a mediator on 7 June 2022. In the record of settlement Ms Hurlstone, the sole director of Mindset, provided a personal guarantee for the sums of money it agreed to pay the applicants to settle the employment relationship problem. Mindset has

not paid the sums due under the record of settlement. Mr Hurlstone has not paid the outstanding sums. The applicants apply to enforce Ms Hurlstone's guarantee by way of compliance order.

[2] By statement of reply lodged on 3 August 2022 Mindset accepted it was in breach of the record of settlement and that the breach had been caused by extenuating circumstances. On 30 August 2022 Mindset was placed into voluntary receivership. On 12 September 2022 the applicants lodged an amended statement of problem removing Mindset as a respondent party and adding Ms Hurlstone as a respondent party seeking to enforce the personal guarantee she had provided to pay the settlement sum in the event of Mindset's default. Ms Hurlstone has not lodged a statement in reply within the 14-day statutory period or sought leave to lodge outside that time frame.

The Authority's investigation

[3] The investigation meeting was held by audio-visual link. This had been proposed to the parties by directions dated 6 October 2022 with the opportunity to provide any comment. Ms Hurlstone did not reply. I am satisfied that she was personally served with the relevant documentation including the statement of problem dated 14 July 2022, the amended statement of problem dated 12 September 2022, the notice of investigation meeting and the notice of directions dated 6 October 2022. This is supported by an affidavit from a professional service agent.

[4] A request to adjourn the investigation meeting was made on behalf of Ms Hurlstone within an hour of the scheduled commencement of the investigation meeting. The request was declined because it was not supported by relevant information. This was communicated to the applying party along with that the investigation would proceed in Ms Hurlstone's absence. For the avoidance of doubt the supporting information Ms Hurlstone provided following the investigation meeting would have been insufficient for the purposes of the adjournment request because it is not clear she was unable to attend the investigation meeting.

[5] The investigation meeting proceeded as scheduled. The applicants gave evidence under affirmation. At the investigation meeting an apparent and relevant issue with the record of settlement dated 7 June 2022 was identified. Directions were made

on 1 November 2022 including a direction to mediation. Following the expiration of the mediation direction period the parties were given a further opportunity to provide relevant information prior to the Authority determining the issues arising from the compliance application.¹ Further information has been provided by the parties.

[6] 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

[7] The issues requiring investigation and determination were:

- a. Has the record of settlement dated 7 June 2022 been breached?
- b. If so, should a compliance order be made?
- c. Should interest be ordered on any monies due under the record of settlement?
- d. If the record of settlement has been breached should a penalty be ordered and should the penalty sum or part thereof be awarded to the applicants?
- e. Is the successful party entitled to a contribution to costs incurred in pursuing this application including reimbursement of the filing fee of \$71.56 incurred in lodging the application?

The settlement agreement - variation

[8] As stated above at the investigation meeting an apparent and relevant issue with the record of settlement dated 7 June 2022 was identified – clause 7 of the record of settlement sets out Ms Hurlstone’s personal guarantee. It reads:

Emma Hurlstone (“Guarantor”) personally guarantees the payments under clause 7 such that they will become jointly and severally liable for any payment(s) which Mindset PLD Limited does not pay on time. In agreeing, the Guarantor confirms that they had a reasonable opportunity to seek independent legal advice about their obligations under this agreement in advance of signing.

¹ Refer direction of the Authority 6 December 2022.

[9] Clause 13 of the record of settlement contains the parties' signatures. Ms Hurlstone has signed in two places – as the employer and as guarantor.

[10] The applicants say the reference to clause 7 in clause 7 of the record of settlement is an error and the clause reference in clause 7 should be clause 5 of the record of settlement because:

- (i) clause 5 contains the payment amounts and payment schedule Mindset agreed to settle their personal grievances;
- (ii) Mindset has failed to pay all the amounts due under the payment schedule;
- (iii) Ms Hurlstone, having provided a personal guarantee, is liable to them for the balance of payments owing under the payment schedule; and
- (iv) Ms Hurlstone has not paid the outstanding sum or any part thereof.

[11] The applicants say the record of settlement should be varied to correctly record what the parties agreed that is, if Mindset did not make all the payments it agreed to in clause 5 of the record of settlement dated 7 June 2022 Ms Hurlstone was jointly and severally liable for the amounts outstanding.

[12] The Authority has the power to make the variation sought if it is satisfied it is just to do so and the requirements of s 164 of the Act have been met including that the Authority has:

- (i) identified the problem to the parties; and
- (ii) directed the parties to attempt in good faith to resolve the problem by using mediation.

[13] To satisfy the requirements of s 164 the parties were directed to attend mediation by 1 December 2022, the Authority having identified the problem to the parties in the direction dated 1 November 2022. I understand from the information provided by the parties to the Authority the mediation could not be scheduled as directed because Ms Hurlstone did not think it was necessary. It is a serious matter not to comply with a direction of the Authority.

[14] Notwithstanding, I am satisfied the s 164 requirement to direct parties to mediation has been fulfilled. I am also satisfied Ms Hurlstone was served with the Authority direction 2 November 2022 - it was emailed to her that day at the email address with which she corresponded with the Authority prior to and subsequent to that date.

[15] In her various communications with the Authority Ms Hurlstone has raised no issued with the variation to clause 7 of the record of settlement.

[16] Having considered the information in respect of the variation sought to clause 7 of the record of settlement I find it is just to do so because the variation is able to be made, it is necessary to give true effect to the parties' record of settlement, and it is just to do so.² Clause 7 of the record of settlement is varied accordingly:

Emma Hurlstone (Guarantor") personally guarantees the payments under clause 5 such that they will become jointly and severally liable for any payment(s) which Mindset PLD Limited does not pay on time. In agreeing, the Guarantor confirms that they had a reasonable opportunity to seek independent legal advice about their obligations under this agreement in advance of signing.

Breach of the record of settlement?

[17] Ms Hurlstone's personal guarantee is enforceable as a term of the record of settlement. She has not complied with the guarantee because she has not paid the sums outstanding on Mindset's default. This is a breach of a term of the record of settlement.

Compliance order

[18] Section 137(1)(a)(iii) of the Act empowers the Authority to order any person, by way of compliance order, who has not observed or complied with any terms of settlement which s 151 of the Act provides may be enforced by a compliance order to do so. Section 151 provides any agreed terms of settlement are enforceable by the parties under s 149(3).

[19] As stated above, Ms Hurlstone raised no issue with the variation. This is consistent the information before the Authority as to the parties' shared understanding

² Contract and Commercial Law Act 2017 s 28.

of the personal guarantee. The issue Ms Hurlstone does raise is as to the reasonableness of the applicants having made a claim to the receiver as creditors of Mindset for the outstanding settlement sum as well as this application.

[20] Ms Hurlstone agreed as a term of the record of settlement to become jointly and severally liable for any outstanding settlement sum on the default of Mindset. Mindset is in default. Having bound herself jointly and severally liable for that sum, and the condition fulfilled, the applicants are entitled to bring joint action against both her and Mindset, as well as a separate action against each to enforce the debt.³ This does not mean they can recover the sums twice. The application against Ms Hurlstone is properly brought.

[21] I accept Ms Hurlstone has failed to comply with the record of settlement and exercise my discretion under s 137(1)(b) of the Act to order her to comply with the sums outstanding.

[22] Within 21 days of the date of this determination Emma Hurlstone is ordered to comply with clause 7 of the record of settlement and pay the following outstanding gross sums to the applicants:⁴

Laura Powick	\$5,934.00
Stacy Cureen	\$2,534.00
Eve Smith	\$334.00
Costs	\$750.00

[23] Imposition of a compliance order is a serious matter. Should Ms Hurlstone fail to comply with the compliance order as set out in [22] the applicants 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 months⁵. Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.

³ *LC Fowler & Sons Limited v Stephens College Board of Governors* [1991] 3 NZLR 304 at 309.

⁴ The sums set out in clause 5 of the record of settlement less payments made.

⁵ Section 139 and 140(6) Employment Relations Act 2000

Penalty

[24] The applicants seek an award of penalty against Ms Hurlstone under s 149(4) of the Act. 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; for a company a penalty not exceeding \$20,000 may be awarded for a solitary breach⁶.

[25] Mindset is in breach of the record of settlement and Ms Hurlstone is liable for the consequences of that breach because she has agreed to step into its shoes to meet the outstanding obligation. Given this and the other relevant factors before the Authority including the circumstances of Mindset's breach, I decline to exercise my discretion and award of a penalty.

Interest

[26] The applicants 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.

[27] It is appropriate where a person has been deprived on the use of money to make an award for interest. Ms Hurlstone is ordered to calculate and pay interest to each of the applicants within 21 days of the date of this determination on the sums for which compliance has been ordered until it is paid in full.

[28] 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.

Costs and reimbursement of filing fee

[29] I am satisfied that the applicants have incurred costs exceeding \$750 in bringing a claim against Ms Hurlstone to enforce her personal guarantee under the record of

⁶ Section 135(2)(a) and (b) respectively.

settlement. 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 within one hour.

[30] The applicants are entitled to a contribution to the costs of representation incurred in seeking compliance with the record of settlement. I consider a fair and reasonable award of costs to be \$500. Ms Hurlstone is to pay the applicants \$500 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