

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 220  
3097092

BETWEEN JONATHAN SCHAARE  
Applicant

AND RETAINING WAIKATO  
LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Carleton Mateer, Advocate for the Applicant  
Heath Breen, for the Respondent

Investigation Meeting: By telephone on 28 May 2020

Determination: 04 June 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Jonathan Schaare, claims that the Respondent, Retaining Waikato Limited, failed to adhere to clauses 2, 3 and 4 of a mediated settlement agreement (the Record of Settlement).

[2] On 3 February 2020 the Record of Settlement was entered into under s. 149 of the Employment Relations Act 2000 (the Act). The Record of Settlement was signed by the Applicant and by Mr Heath Breen, sole director and shareholder, on behalf of Retaining Waikato Limited. The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 7 February 2020.

[3] Under clause 2 of the Record of Settlement Mr Schaare was to be paid a total sum of \$1,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and under clause 3, \$800.00 was to be paid towards Mr Schaare's legal costs. A certificate of service was also to be provided to Mr Schaare as set out in clause 4 of the Record of Settlement.

[4] The issue which had been brought before the Authority by the Applicant is that the Respondent has not complied with clauses 2, 3 and 4 of the Record of Settlement, which state:

2. Retaining Waikato Limited shall, without admission of liability, pay Jonathon Schaare, within 7 days of the date of this agreement, the sum of \$1,000 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid by direct credit.

3. Retaining Waikato Limited agrees to pay \$800 (plus GST) towards Jonathon's legal costs within 7 days of a receipt of a tax invoice from his representative.

4. Retaining Waikato Limited will issue within 7 days hereof a certificate of service for Jonathon to cover dates of employment, position held, description of duties and confirming that he resigned.

[5] The Record of Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

#### **Note**

[6] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, and by means of a telephone investigation.

#### **Issues**

[7] The issue for determination is whether or not Retaining Waikato Limited failed to comply with clauses 2, 3 and 5 of the Record of Settlement.

#### **Background**

[8] The payments set out in clauses 2 of the Record of Settlement was to be paid to Mr Schaare within 7 days of the date of the agreement which was 3 February 2020, therefore the payment was to be paid by 14 February 2020.

[9] The certificate of service provision set out in clause 5 of the Record of Settlement should have been provided within 7 days, therefore also on 14 February 2020.

[10] The payment towards Mr Schaare's legal costs set out in clauses 3 of the Record of Settlement became payable within 7 days of the receipt of a tax invoice. This was provided to

Retaining Waikato Limited on 11 February 2020 and was therefore due for payment on 17 February 2020.

[11] In respect of the legal costs set out in clause 3 of the Record of Settlement, payment was not made and Mr Mateer wrote to the legal firm instructed by Retaining Waikato Limited on 19 February 2020 requesting payment be made. He was advised that a response to his request would be provided by the end of that day.

[12] No payment has been made to date and it is still outstanding.

[13] In respect of the payment set out in clause 2 and the certificate of service provision set out in clauses 2 and 4 of the Record of Settlement, Retaining Waikato Limited has provided evidence that the payment to Mr Schaare of \$1,000.00 as set out in clause 3 of the Record of Settlement was paid on 28 February 2020.

[14] Mr Breen stated that he had sent a certificate of service to Mr Schaare at the same time as he made the payment due under clause 3 of the Record of Settlement to Mr Schaare.

[15] Mr Schaare confirmed that he had received payment of the amount due under cause 2. It has also been confirmed on behalf of Mr Schaare that the certificate of service has been received.

[16] In regard to the Payment of \$800.00 plus GST to be paid to Mr Schaare's legal representative in accordance with clause 3 of the Record of Settlement, Mr Breen stated that he did not intend to comply with the agreed term and make payment.

### **Compliance Order**

[17] The Record of Settlement refers in clauses 2 and 4 to the dates when the payment should be made and the certificate of service provided. I find that the payment was made and the certificate of service provided as supported by the documentary evidence provided by Retaining Waikato Limited. However this was not by the date as agreed by the parties and set out in the Record of Settlement.

[18] The Record of Settlement refers in clause 3 to the payment of legal expenses. Retaining Waikato Limited has confirmed that payment has not been made.

[19] From the evidence available to the Authority, I am satisfied that Retaining Waikato Limited has failed to comply with clause 2, 3 and 4 of the Record of Settlement.

[20] **In order to effect compliance with the Record of Settlement, I therefore order Retaining Waikato Limited, no later than 7 days from the date of this determination, to pay the sum of \$800.00 plus GST to Mr Schaare in respect of his legal costs.**

### **Penalty**

[21] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Record of Settlement represents such a resolution and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[22] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[23] Having considered the principles which should govern the imposition of a penalty<sup>1</sup>, I determine that a penalty of \$400.00 is appropriate in all the circumstances of this case given the intentional nature of the breach of a term of a Record of Settlement freely entered into by the parties.

[24] **I order that Retaining Waikato Limited is to pay a penalty of \$400.00, to be paid to the MBIE Trust Account. Payment is to be made within 14 days of the date of this Determination.**

### **Filing Fee**

[25] **Retaining Waikato Limited is also ordered to pay Mr Schaare the filing fee of \$71.56 within 7 days of the date of this Determination.**

### **Costs**

[26] Mr Schaare has applied for costs.

[27] Costs are at the discretion of the Authority. The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>3</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

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<sup>1</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143.

<sup>2</sup> [2005] 1 ERNZ 808.

<sup>3</sup> [2001] ERNZ 305.

[28] The matter was considered via telephone conferences with no investigation meeting taking place, and I take this into consideration in assessing costs.

[29] The telephone conferences occupied approximately half an hour of hearing time and based on the Authority's usual notional tariff based approach<sup>4</sup>, and adopting as a starting point the notional daily tariff of \$4,500.00, this would equate to \$321.00.

[30] **Accordingly, Retaining Waikato Limited is ordered to pay to Mr Schaare the sum of \$321.00 as a contribution towards costs within 14 days of the date of this Determination.**

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>4</sup> *Cliff v Air New Zealand Ltd* (AC47A/06, (unreported) per Judge Shaw at para [10].