



\$500.00. Payments of the \$500 will be made on or before 30/8/22, 30/9/22, 30/10/22, 30/11/22 & 30/12/22.

[4] There was subsequent agreement by Ms Yates to Ms Day's request that the first payment of \$500 was to be made two weeks after 30 August 2022 which is 13 September 2022. There was no agreement that the instalment sequence thereafter would change.

[5] A statement of problem was lodged with the Authority on 10 January 2023 seeking an order for compliance with clause 2 and payment of the amount of \$2,500, interest, a penalty, and a contribution towards costs.

[6] Ms Day did not lodge a statement in reply but did participate in a case management conference. She did not dispute that she had not complied with clause 2 of the record of settlement but said that she was unable to pay until a business she owns sold. I will not elaborate more about the nature of that business save as to say that Ms Day also lives on the business site.

### **The investigation meeting**

[7] The Authority held an investigation meeting on 19 April 2023 by way of Microsoft Teams. Ms Yates attended the meeting with her representative, Mr McLaughlan. Ms Day also attended. The Authority heard evidence from Ms Yates and Ms Day.

[8] The Authority heard some brief closing submissions from both parties.

### **The Issues**

[9] The Authority needs to determine the following issues:

- (a) Did Ms Day breach clause 2 of the record of settlement?
- (b) Should the Authority make an order for compliance with clause 2?
- (c) Should the Authority award interest?
- (d) Should a penalty be imposed?
- (e) If so what should the quantum of the penalty be?
- (f) Who should the penalty be payable to?
- (g) Should there be an award of a contribution towards costs?

**Did Ms Day breach clause 2 of the record of settlement?**

[10] Ms Day did not pay to Ms Yates the agreed compensatory amount set out in clause 2 of the record of settlement. She breached the record of settlement.

**Should the Authority make an order for compliance with clause 2?**

[11] The Authority has the power to order compliance with any terms of settlement that are enforceable by the parties under s 149(3) of the Act.<sup>1</sup> There is a discretion whether to order compliance or not. The discretion must be exercised by the Authority in a principled way.

[12] In her evidence Ms Day said the reason that she did not make payment was because she could not afford to do so until she was able to sell her business. There are some underlying issues that need to be resolved before selling the business set out in correspondence Ms Day provided after the investigation meeting. As at the date of the investigation meeting the business had not been advertised for sale.

[13] Ms Day's view was that the Authority could not order her to make a payment when she is unable to make such a payment.

[14] In August 2022 Ms Day entered an arrangement with Ms Yates to make payment of \$2,500 by instalments. Her request to make the first payment two weeks after 30 August was agreed to but thereafter she failed to make any payments whatsoever and breached the agreement.

[15] Before lodging the statement of problem Mr Mclaughlan asked the mediation service to see if the agreed payment in the record of settlement could be achieved without the need to seek a compliance order. That was unsuccessful. Such attempts before lodging in the Authority is consistent with the Act. The object of the Act is to promote good faith in all aspects of the employment environment and relationship.<sup>2</sup> This is to be achieved in several ways including by promoting mediation as the primary problem-solving mechanism for most employment relationship problems.

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<sup>1</sup> Sections 137(1)(a)(iii) and 151 of the Employment Relations Act 2000.

<sup>2</sup> Section 3(a)(v) of the Act.

[16] Ms Day is waiting to be able to sell her business. It is likely on sale she will achieve a reasonably significant financial outcome.

[17] The amount in the settlement agreement by contrast is modest. The Authority was not provided with any financial information for the business. The focus was on matters preventing its sale. I am not satisfied on the evidence before the Authority that Ms Day is not able to pay the amount rather, I conclude payment was inconvenient and perhaps difficult on occasion to make, and other payments took priority.

[18] I am satisfied from the evidence that a compliance order is appropriate and necessary.

**Should the Authority award interest?**

[19] Clause 11 of the second schedule to the Act provides that in any matter involving the recovery of money the Authority may order the inclusion of interest calculated in accordance with schedule 2 of the Interest on Money Claims Act 2016.

[20] It is appropriate to make an award of interest where Ms Yates has not been paid as agreed.

[21] I have checked Mr McLaughlan's calculation of interest from 14 September 2022 being the day after the agreed date for the first instalment payment using the civil debt calculator provided by the Justice Department. Interest is payable as calculated below:

(a)	14 September – 31 December 2022	\$500	\$4.46
(b)	30 September – 31 December 2022	\$500	\$3.88
(c)	20 October – 31 December 2022	\$500	\$2.72
(d)	30 November – 31 December 2022	\$500	\$1.42
(e)	1 January – 24 April 2023	\$2,500	\$31.10

[22] The total interest payable as at the date of this determination is the sum of \$43.58.

**Should a penalty be imposed?**

[23] Section 149(4) of the Act provides that the Authority may impose a penalty of up to \$10,000 on an individual for a breach of a record of settlement.

[24] Section 133A of the Act sets out factors that the Authority should consider when determining penalties.

[25] Ms Day is operating her business essentially on her own and has faced some difficult circumstances. She agreed terms of settlement but decided quite early on she did not intend to keep to those terms. After Ms Yates was agreeable to an extension of time for the first payment which was never made, there was a dearth of communication about why there was no payment.

[26] It is important that public confidence is maintained that there will be compliance with records of settlement entered into under s 149 of the Act. I conclude this is an appropriate case in which to impose a penalty to provide deterrence to non-compliance generally and in this matter.<sup>3</sup>

### **Quantum of the penalty**

[27] The nature of the breach in this matter was the failure to provide payment of the sum of \$2,500 in clause 2, in accordance with the agreed instalment payment schedule, or at all.

[28] Ms Yates has not had the benefit of the money.

[29] The breach was intentional and is ongoing. No steps have been taken to mitigate the adverse effects of the breach on Ms Yates.

[30] There is no evidence that Ms Day has engaged in similar conduct to this in the past.

[31] I am satisfied that currently Ms Day is facing financial constraints that have prevented her from moving on in the manner that she would like to. I weigh the award of interest and the financial circumstances of Ms Day. But for those factors a higher award would have been justified. Standing back however and with a measure of common sense in the circumstances of this matter I conclude a penalty of \$250 is appropriate.

### **Who should the penalty be payable to?**

[32] Penalties are usually payable to the Crown however Mr Mclaughlan has asked that the penalty be payable to Ms Yates.

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<sup>3</sup> *David Lumsden v Sky City Management Limited* [2017] ERNZ 96 at [55].

[33] Section 136(2) of the Act enables the Authority to award some or all of the penalty imposed to any person other than the Crown. Ms Yates has been deprived of the benefit of the terms of settlement. I consider it appropriate to award 75% of the penalty to her and 25 % to the Crown.

### **Costs**

[34] Ms Yates has been successful in her application for compliance and a penalty. Mr Mclaughlan seeks a contribution towards costs in the sum of \$590. I accept that claim for costs in the sum of \$590 together with reimbursement to the filing fee of \$71.56 is reasonable.

### **Orders made**

[35] I order Lee-Anne Day:

- (a) Comply with clause 2 of the record of settlement and pay to Novina Yates the sum of \$2,500 within 28 days of the date of this determination.
- (b) Pay the sum of \$43.58 being interest on the unpaid amount.
- (c) Pay a penalty of \$250 within 28 days of the date of this determination by:
- (d)
  - (i) Payment of the amount of \$187.50 to Novina Yates.
  - (ii) Payment of the amount of \$62.50 to the Authority for payment to the Crown bank account.
- (e) Pay a contribution towards costs incurred by Ms Yates in the sum of \$590 together with reimbursement of the filing fee of \$71.56.