

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 236  
3077632

BETWEEN IAN NEIL BAKER  
Applicant

AND ADRIAAN JACOBUS VAN DER  
WESTHUIZEN  
Respondent

Member of Authority: Philip Cheyne

Representatives: Applicant in person  
Respondent in person

Investigation Meeting: 12 June 2020

Date of Determination: 18 June 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Pursuant to section 137 of the Employment Relations Act 2000, I order Adriaan Van der Westhuizen to comply with the record of settlement dated 9 October 2018 by paying Ian Neil Baker a compensatory sum of \$2,000.00 and a contribution to legal costs of \$1,500.00 plus GST. These payments are to be made by no later than 31 July 2020.**
- B. Adriaan Van der Westhuizen is to pay Ian Neil Baker a penalty of \$2,000.00, pursuant to section 149 of the Employment Relations Act 2000. This payment is to be made by no later than 31 July 2020.**

**C. Adriaan Van der Westhuizen is to pay \$71.56 in costs on this application.**

**This payment is to be made by no later than 31 July 2020.**

**Employment relationship problem**

[1] Ian Baker was employed by a company. Adriaan Van der Westhuizen was previously a director of that company.

[2] Employment relationship problems arose between Mr Baker and the company. The problems were resolved and there is a record of settlement signed by Mr Baker and for the company. Mr Van der Westhuizen is separately identified in the record of settlement as the second respondent. He also signed above his type written name. The record of settlement was signed by a Mediator on 16 October 2018.

[3] The present claim against Mr Van der Westhuizen is for payment of amounts in accordance with the record of settlement. Mr Baker also claims penalties for breaches of the Act. The problem refers to s 133 – 138 and s 149 of the Act, breach of settlement and breach of good faith.

[4] The record of settlement includes a clause regarding confidentiality, with terms not to be disclosed except for enforcement purposes. Other exceptions need not be mentioned. The company is not a respondent to the present claim. It is unnecessary to name the company in this determination.

[5] Mr Van der Westhuizen did not lodge a statement in reply. When phoned several hours before the meeting by the Authority Officer, Mr Van der Westhuizen claimed to be unaware of the investigation meeting and declined to participate by phone, saying that he was no longer a company director and was not involved with the company since his directorship ceased. Despite that, when I phoned him at the start of the meeting, Mr Van der Westhuizen did participate.

[6] I am satisfied from the file that Mr Van der Westhuizen has been served with both the statement of problem and a notice of the present investigation meeting.

### **Determination**

[7] I heard from Mr Baker and from Mr Van der Westhuizen.

[8] I find that there is a record of settlement under s 149 of the Act, signed by Mr Baker, for the company and separately by Mr Van der Westhuizen, which required the company and Mr Van der Westhuizen to pay Mr Baker \$2,000.00 compensation and to pay him a further \$1,500 plus GST towards costs. The record of settlement was signed by a Mediator on 16 October 2018. Each payment clause creates the obligation for the “Respondents” (my emphasis).

[9] The agreed terms became final, binding and enforceable by effect of the mediator’s signature on 16 October 2018. Both the company and Mr Van der Westhuizen personally were then subject to a binding promise to pay the specified amounts by 30 October 2018. Section 151 of the Act makes the terms enforceable by compliance order under s 137 of the Act.

[10] Because neither the company nor Mr Van der Westhuizen made any payment, I find that Mr Van der Westhuizen has not complied with the record of settlement. The Act permits me, by order, to require Mr Van der Westhuizen to do any specified thing to prevent further non-compliance.

[11] Mr Van der Westhuizen told me that the company has no funds, that he and others involved lost substantial amounts of money, that he is not involved with the company now and that he personally cannot afford to pay anything to Mr Baker. Mr Van der Westhuizen referred to present economic circumstances.

[12] This application was lodged in October 2019 and Mr Van der Westhuizen has not responded to various attempts to engage him since then, until my call. Against this history, in

the absence of any corroboration, I do not accept Mr Van der Westhuizen's assertions about his personal ability to pay.

[13] Mr Baker's application refers to penalties for various breaches by the company. Those are matters which Mr Baker cannot now pursue because of the record of settlement dated 9 October 2018 was expressed as a full and final settlement of all claims. However, there is also a claim for penalties for the breach of the settlement agreement, being the failure by Mr Van der Westhuizen to make the specified payments.

[14] Hearing from Mr Baker, I find he is aggrieved by the long standing non-compliance with the agreed settlement payments, despite attempts directed to Mr Van der Westhuizen to obtain the payments. Mr Baker has established grounds for a compliance order and Mr Van der Westhuizen has not established grounds to persuade me that I should not order compliance. I will enforce the payment obligations against Mr Van der Westhuizen by compliance order.

[15] I am obliged to specify a time within which the order must be obeyed. Mr Van der Westhuizen claimed that he is not able to pay the agreed amounts even on an instalment basis. Given his failure to properly engage with the Authority, I do not accept that assertion without supporting evidence. However, the total owed is not negligible. I will allow Mr Van der Westhuizen a little over a month to make the payment in full.

[16] A person who breaches a record of settlement is liable to a penalty by effect of s 149(4) of the Act. In the case of an individual, the maximum penalty is set at \$10,000.00. In determining the appropriate penalty, the Act requires me to have regard to all relevant matters, including those identified at s 133A.

[17] Objects of the Act include promoting mediation as a primary problem-solving mechanism and reducing the need for judicial intervention. These objects are undermined by long standing non-compliance with agreed terms of settlement. Setting the appropriate penalty must deter such non-compliance. I distinguish between the company's non-

compliance and that of Mr Van der Westhuizen personally. I will approach his breach on the basis that the primary obligation was the company. However, Mr Van der Westhuizen accepted responsibility for payment under the settlement so his breach over a long time cannot be regarded as inadvertent. Mr Van der Westhuizen has had the benefit of the money while Mr Baker has been deprived of it for more than a year and a half. I am not aware of any other cases where Mr Van der Westhuizen has previously been found in breach. Mr Van der Westhuizen claims an inability to pay even the agreed sums but has not provided evidence to substantiate that claim. Present trading difficulties, if they restrict Mr Van der Westhuizen's current ability to earn an income, could not explain the breach from the end of October 2018 to the date the claim was lodged or some months after, during which he took no steps to remedy the breach. I proceed on the basis that Mr Van der Westhuizen will now remedy the breach by complying with the agreed terms.

[18] These factors lead me to determine that a penalty of \$2,000.00 should be ordered.

[19] I accept Mr Baker's evidence that he is affected by the breach of settlement because it forces him to relive the underlying dispute. I find that the whole of the penalty should be paid to Mr Baker.

[20] I will align the time for payment of the penalty with the time for complying with the compliance order.

### **Costs**

[21] Mr Baker dealt with this claim personally. He is entitled to an order to cover the lodgement fee he paid on this application.

### **Comment**

[22] A copy of section 140 of the Act is attached to this determination. I draw Mr Van der Westhuizen's attention to subsection (6) which sets out the powers available to the

Employment Court, on Mr Baker's application, if Mr Van der Westhuizen does not comply with the compliance order I have made.

Philip Cheyne  
Member of the Employment Relations Authority