

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 294
3203099

BETWEEN	JULIE CAMPBELL Applicant
AND	RUSTY RADIATOR LIMITED Respondent

Authority Member:	Natasha Szeto
Representatives:	Alex Kersjes, for the Applicant No appearance for the Respondent
Investigation Meeting:	On the papers
Submissions received:	19 April 2023
Determination:	7 June 2023

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Ms Campbell seeks orders for compliance, costs, and penalties against her former employer Rusty Radiator Limited (RRL) for failing to pay an agreed contribution to costs under a Record of Settlement (Settlement).

[2] The Settlement was signed by Ms Campbell on 5 August 2022, and RRL on 12 August 2022. It was certified by a Ministry of Business Innovation and Employment Mediator under s 149 of the Employment Relations Act 2000 (the Act) on 19 August 2022. The effect of certification is that the agreed terms are final and binding and can only be brought before the Authority for the purposes of enforcement.

[3] While the parties agreed the terms of the Settlement were to be confidential to them, the term in dispute must be disclosed for the purposes of this determination. I prohibit from publication the balance of the Settlement.

[4] The Settlement required – amongst other terms – payment of an agreed sum directly to Ms Campbell, which it has made. Ms Campbell says that as at the date of filing for compliance, RRL has not paid the contribution to costs.

The Authority's investigation

[5] RRL has not participated in these proceedings. However, I am satisfied that RRL received advance notice of the case management conference held on 22 February 2023, a copy of subsequent directions which contained - among other matters - advice that Ms Campbell consents to this matter being determined on the papers and notice that the matter would proceed to be determined on the papers in the event of non-response from RRL by 18 May 2023.

[6] No response was received from RRL.

[7] The Authority's investigation was conducted on the papers. All material provided to the Authority was considered including evidence and submissions lodged by Ms Campbell.

[8] As permitted by s 174E of 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.

The Issues

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

- a. Has there been a breach of the Settlement?
- b. If there has been a breach of the Settlement, should a compliance order be made?
- c. Should the Authority award penalties?
- d. Should there be an order for costs?

Has there been a breach of the Settlement?

[10] Clause 5 of the Settlement provided that RRL would pay, within 7 days of receipt of an invoice from Ms Campbell's representative, the sum of \$1,000 plus GST by way of a contribution to costs.

[11] Section 150A of the Act requires payment of costs to be made directly to Ms Campbell.

[12] An invoice was generated on 19 August 2022, with payment due by 26 August 2022. Ms Campbell has confirmed that no payments have been made to her representative.

[13] I find that there has been a breach of clause 5 of the Settlement, in that RRL has not paid the contribution to Ms Campbell's costs.

If there has been a breach of the Settlement, should a compliance order be made?

[14] A compliance order may be made when a person has not complied with any terms of settlement enforceable under s149(3) of the Act.

[15] Imposing a compliance order is a serious matter. If RRL fails to comply with the compliance order, Ms Campbell can pursue the breach in the Employment Court or the District Court. The Employment Court has significant powers including that it can fine the person up to \$40,000, and order property to be sequestered. Alternatively, Ms Campbell could obtain a certificate of determination from the Authority and obtain enforcement in the District Court.

[16] I have found that RRL has breached the terms of the Settlement. I am satisfied that a compliance order is necessary to ensure that RRL honours the terms that it agreed to in the Settlement.

Should the Authority award penalties?

[17] Ms Campbell has asked the Authority to impose a penalty for RRL's failure to meet its obligations under the Settlement.

[18] A person who breaches an agreed term of a s 149 agreement is liable to a penalty not exceeding \$20,000 in the case of a company. Ms Campbell submits that a penalty of not less than \$2,000 should be imposed.

[19] I have taken into account the relevant matters the Authority must have regard to in s 133A of the Act and the guidance in the case of *ITE v ALA*¹ which was a case taken on appeal to the Employment Court, concerning compliance orders and a breach of obligations under a settlement agreement. There was also a challenge to penalties that had been imposed by the Authority.

[20] The predominant argument for imposing a penalty in this matter would be to punish RRL's behaviour and to deter others from engaging in similar breaches. RRL's conduct has put Ms Campbell to the cost of enforcing this matter at the Authority, and RRL has not engaged with the Authority's investigation. This conduct warrants the imposition of a penalty. However, the breach was at the minor end of the scale. Other monies agreed under the Settlement were paid to Ms Campbell, and this breach – although continuing – was a one-off.

[21] Taking a proportionate approach to the nature and extent of the breach, I consider an appropriate penalty to be \$200.

Should there be an order for costs?

[22] Costs are at the discretion of the Authority.

[23] Ms Campbell has been successful to the extent that a compliance order has now been made against RRL. The need to file for a compliance order has been caused by RRL's default.

¹ *ITE v ALA* [2016] NZEmpC 42 at [61].

[24] Ms Campbell seeks indemnity costs. There is no evidence before the Authority of the kind of conduct that would justify indemnity costs being awarded. This matter was able to be determined expeditiously on the papers without the need for an investigation meeting.

[25] Looking at the circumstances, I consider a contribution of \$400 towards costs incurred is appropriate.

Orders

[26] Given my findings above, I order:

- a. Under s 137(2) of the Act, Rusty Radiator Limited is to comply with the Settlement and to pay Julie Campbell \$1,000 plus GST by way of a contribution to costs, within 14 days of the date of this determination.
- b. Rusty Radiator Limited to pay Julie Campbell \$400 towards costs incurred within 14 days of the date of this determination.
- c. Rusty Radiator Limited to pay Julie Campbell \$71.55 on account of the filing fee within 14 days of the date of this determination.

[27] I also order Rusty Radiator Limited to pay a penalty of \$200 to the Employment Relations Authority within 28 days of the date of this determination. In accordance with s 136 of the Act, that amount will be paid to the Crown bank account.

Natasha Szeto
Member of the Employment Relations Authority