

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 50  
3198519

BETWEEN

CHRISTINE MAREE  
Applicant

AND

SANEM DIGITAL LIMITED  
Respondent

Member of Authority: Eleanor Robinson  
Representatives: David Prisk, advocate for the Applicant  
Kathryn Dalziel, counsel for the Respondent  
Investigation Meeting: On the papers  
Submissions: None from the Applicant  
16 January 2023 from the Respondent  
Determination: 1 February 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Christine Maree, claims that the Respondent, Sanem Digital Limited has not complied with clauses 2, 3 and 4 of a mediated Record of Settlement (Record of Settlement).

[2] Sanem Digital Limited does not oppose the application.

**The Authority's investigation**

[3] During a case management conference call held on 10 January 2023 it was agreed by the parties that this matter would be heard 'on the papers'. The Applicant advised that no submissions would be filed by it and that the statement of problem set out its claims. The respondent filed submissions on 16 January 2023.

[4] 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, although these have been fully considered prior to the finalisation of this determination.

### **Issues**

[5] The issues requiring investigation are whether or not Sanem Digital Limited has complied with clauses 1, 2, 3 and 4 of the Record of Settlement.

### **Relevant Background**

[6] Ms Maree was an employee of Sanem Digital Limited. An employment relationship problem arose in the course of a redundancy.

[7] On 20 October 2022 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 Michael Moran. The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE).

[8] 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.

[9] The relevant clauses of the Record of Settlement in respect of this issue are:

2. ... Sanem Digital Limited agrees to provide of (sic) \$12,500 gross (less IRD deductions) which the parties agree covers both the notice period and any holiday leave entitlements. This shall be paid within 14 days from the date of the record of settlement by way of direct credit into Christine Maree's nominated bank account.
3. Sanem Digital Limited also agrees to pay on(sic) an ex-gratia payment the sum of \$47,500 as a gross (less IRD deductions) and paid on or before the 31<sup>st</sup> of December 2022. This shall be paid by way of direct credit into Christine Maree's nominated bank account.
4. Upon receipt of an invoice for legal fees, Sanem Digital Limited agrees to pay \$3500 plus GST to Christine Maree's legal advisor on or before the 20<sup>th</sup> of November 2022.

[10] Ms Maree claims that despite requests to Sanem Digital Limited, neither she nor her advisors have received payment of the sums due under clauses 2, 3 and 4 of the Record of Settlement.

[11] Sanem Digital Limited submits that it wishes to comply with the Record of Settlement but it has been suffering from cashflow problems. However it anticipates that it will receive a payment in February 2023 as a result of which it will be able to comply with clauses 2, 3 and 4 of the Record of Settlement.

**Has there been compliance with clauses 2,3 and 4 of the Record of Settlement?**

[12] Having considered this matter I am satisfied that Sanem Digital Limited has not complied with clauses 1, 2(a), 2 (b), 3 and 4 of the Record of Settlement.

**Remedies**

*Compliance Order*

[13] I am satisfied that none of the payments itemised under clauses 2, 3 and 4 in the Record of Settlement have been paid.

[14] In order to effect compliance with clauses 2 and 3 of the Record of Settlement, I therefore order Sanem Digital Limited to pay Ms Maree, **no later than 24 February 2023, the following amounts:**

- i. The sum of \$12,500 gross (less IRD deductions) pursuant to clause 2 of the Record of Settlement.
- ii. The sum of \$47,500 gross (less IRD deductions) pursuant to clause 3 of the Record of Settlement.
- iii. In order to effect compliance with clause 4 of the Record of Settlement, I therefore order Sanem Digital Limited to pay Ms Maree's advocate the sum of \$3500.

[15] The payments are to be made no later than **24 February 2023**.

**Penalties**

[16] Ms Maree has sought a penalty in respect of the breach of the Record of Settlement by Sanem Digital Limited.

[17] It is submitted for Sanem Digital Limited that there is effectively only one breach of the ROS being non-payment of monies and costs to Ms Maree. Accordingly the maximum penalty to be awarded is \$20,000.00 pursuant to s 135 ((2)(b) of the Act.

[18] The relevant principles for the Authority to follow when assessing the level of penalty are set out in *ITE v ALA* as being

- To protect the finality and integrity of [s 149](#) settlement agreements by deterring the individual transgressor and others from similar breaches;
- To punish the transgressor;
- Consistency with penalties imposed on others in similar circumstances;
- An assessment of the nature and extent of the breach, including whether it was deliberate, one-off or sustained, with the maximum penalty being reserved for the worst cases;
- Any steps taken by the transgressor to remedy the breach;
- Proportionality in the circumstances.<sup>1</sup>

[19] It is submitted for Sanem Digital Limited that it accepts the monies are owing and it offers no defence to the application made. It is confident that the monies due and owing will be paid in February 2023.

[20] It is also submitted for the Respondent that penalties should be proportionate and reflect that Sanem Digital Limited is doing its best to pay the monies owed. Citing *Mahieu v Gilbert & Associates Ltd* as a case in which there were similar circumstances to this case, it is submitted that penalties should be set at \$3,000.00.<sup>2</sup>

[21] I find that the breaches were intentional, however there is no evidence on how the breach may have affected her from Ms Maree, nor does the Statement of Problem seeking penalties ask that a proportion of any penalties awarded be applied for Ms Maree's benefit.

[22] In determining whether or not penalties should be awarded, I have regard to the Act which 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.

[23] 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.

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<sup>1</sup> *ITE v ALA* [2016] NZEmpC 42 at [61].

<sup>2</sup> *Mahieu v Gilbert & Associates Ltd* [2017] NZERA 79 at [45] – [51].

**[5] I order that Sanem Digital Limited is to pay a penalty of \$2,500.00 to the Authority to be paid to the Crown Trust Account. Payment is to be made within 14 days of the date of this Determination.**

**Filing Fee**

**[6] Sanem Digital Limited must also reimburse Ms Maree the filing fee of \$71.56 within 14 days of the date of this Determination.**

**Costs**

[7] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[8] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[9] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[10] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>3</sup>

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

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<sup>3</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].