

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 143
3202899

BETWEEN	ROBYN MORTIMER Applicant
AND	MATHEW KEVIN DOCHERTY Respondent

Member of Authority:	Antoinette Baker
Representatives:	Robert Thompson, advocate for the Applicant The Respondent in person
Investigation Meeting:	16 March 2023
Submissions received:	On the day
Determination:	22 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Mortimer applies for a compliance order against Mr Docherty for breach of a record of settlement (ROS) under s 149 of the Employment Relations Act 2000 (the Act). She seeks the unpaid balance on the ROS (\$11,700.00) together with costs and the Authority filing fee. She also seeks a penalty for breach of the settlement under s149(4) of the Act.

[2] Mr Docherty denies he is personally liable under the ROS.

The Authority's investigation

[3] An investigation meeting was held and lasted just over an hour. Evidence of an email chain between Mr Docherty and Mr Thompson leading up to the signing of the ROS was provided to my investigation by the representative for Ms Mortimer and with Mr Docherty's consent after he sought advice. Mr Docherty provided a brief of evidence which was largely setting out his position about the claim. He was questioned about his evidence. He provided a further submission document on the day before the investigation meeting. Mr Thompson on behalf of Ms Mortimer provided a synopsis of his submissions on the day of the investigation meeting, both he and Mr Docherty gave oral submissions.

[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.

The issues

[5] The issues for determination are:

- a. Has Mr Docherty agreed in the ROS to be personally liable for any unpaid balance of the total sum that SKT agreed was to be paid to Ms Mortimer?
- b. If so, should the Authority order compliance with the unpaid balance in the ROS against Mr Docherty and if so for what amount?
- c. If so, is Mr Docherty liable for a penalty for non-compliance with the ROS?
- d. Is there to be an order for costs including the filing fee?

Background to the bringing of this compliance order

[6] On 9 September 2022, in separate proceedings to the present, the Authority determined that the applicant (Ms Mortimer) had been unjustifiably disadvantaged and dismissed from her employment with her now former employer, Sun Kissed Tan (SKT). SKT was ordered to pay Ms Mortimer (within 28 days) a total of \$22,321.41

representing compensation and reimbursement for lost earnings after a percentage reduction for contribution.¹

[7] The Authority further determined costs in the same proceedings and made an award in favour of Ms Mortimer on 5 October 2022 for a total of \$4,571.56.²

[8] No money was paid to Ms Mortimer by SKT pursuant to either of the above-mentioned Determinations. The parties entered a Record of Settlement (ROS) under s149 of Employment Relations Act 2000 (the Act) dated 6 October 2022, signed by a mediator on 19 October 2022.

[9] The ROS recorded the following:

Parties

Employee: Robyn Mortimer

Employer/Principal: Sun Kissed Tan Limited (SKT) and Mathew Docherty

Agreed terms of settlement to employment relationship problem:

1. The parties have a determination from the Employment Relations Authority dated 9 September 2022. The purpose of this document is to resolve the remedies contained within the written determination.
2. SKT or Mathew Docherty will pay the sum of \$19,500 to Robyn Mortimer in terms of the provisions of s123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid by way of direct credit to [bank account] on the following terms.
3. Five equal instalments of \$3,900.00 per month.
 - First payment on or before 30 October 2022.
 - Second payment on or before 30 November 2022.
 - Third payment on or before 30 December 2022.
 - Fourth payment on or before 30 January 2023.
 - Fifth payment on or before 28 February 2023.

¹ *Robyn Mortimer v Sun Kissed Tan Limited* [2022] NZERA 449

² *Robyn Mortimer v Sun Kissed Tan Limited* [2022] NZERA 507

4. If any of the payments detailed in clause 3 are not paid on the due date, all sums become payable and recoverable.
5. Mathew Docherty agrees that if any payment at clause 2 or 3 above is not fully satisfied (paid) to Robyn Mortimer that he will become liable to make payment on behalf of SKT.
6. This agreement overrides the determination dated 9 September 2022 and costs determination dated 6 October 2022.
7. In reaching this agreement the parties confirm that neither has agreed to forego minimum entitlements (monies payable under the Minimum Wage Act 1983, the Holidays Act 2003, or the Home and Community Support (Payment for Travel between Clients) Settlement Act 2016) as specified in s 148A(3) of the Employment Relations Act 2000.
8. This is a full and final settlement of all matters between the parties arising out of their employment relationship problem.

We confirm that we fully understand that once the Mediator signs the agreed terms of settlement:

1. The settlement is final and binding on and enforceable by us; and
2. Except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether by action, appeal, application for review, or otherwise; and
3. The terms of settlement cannot be cancelled under section 137 of the Contract and Commercial Law Act 2017; and
4. That s149(4) of the Employment Relations Act 2000 provides that a person who breaches an agreed term of settlement to which subs (3) applies is liable to a penalty imposed by the Employment Relations Authority.

[10] The settlement was signed by Mr Docherty 'for and on behalf of Sun Kissed Tan Limited' on 13 October 2022; by Mr Docherty as himself on 13 October 2022; by Ms Mortimer on 14 October 2022.

[11] A mediator employed by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) signed the document on 19 October 2022 after the following words:

Before I signed the agreed terms of settlement, I explained to the parties the effect of section 148A, 149(1) & (3). I am satisfied that the parties understand the effect

of sections 148A, 149(1) & (3), they have advised me that no minimum entitlements have been foregone in the reaching of this settlement and have affirmed their request that I should sign the agreed terms of settlement.

[12] SKT paid the first instalment of \$3,900.00 due on 30 October 2022 on 4 November 2022. It was late due to an error in not entering bank details correctly. SKT paid the second instalment of \$3,900.00 on the 30 November 2022 when it became due.

[13] No further payments under the ROS have been made by either SKT or Mr Docherty.

[14] SKT and Mr Docherty instructed a lawyer to respond to Ms Mortimer's representative on 2 December 2022 objecting to Ms Mortimer's representative looking to pursue remedies in relation to the ROS. That letter included that there was a likely pending liquidation of SKT and that Mr Docherty personally "does not currently have the personal means or assets to meet the outstanding payment."

[15] Ms Mortimer lodged a Statement of Problem (SOP) in the Authority on 2 December 2022 seeking "urgent" compliance due to the "publicised financial position of the respondents." On or about this time there had been media coverage about the businesses run by SKT.

[16] The respondents named in this application were initially SKT and Mr Docherty.

[17] SKT was placed into liquidation by resolution of its shareholders on 1 February 2023 and Ms Mortimer withdrew her claim for compliance against SKT soon after.

[18] Mr Docherty in a Statement in Reply dated 20 December 2022 (when SKT was still solvent) said that SKT was not liable because all payments to that stage were up to date (which was correct); that the Authority has no jurisdiction to make him personally pay money that relates to the liability of Ms Mortimer's *employer*; that he agreed to the ROS on the basis that SKT would continue to be viable as a business but that soon after agreeing to the ROS this situation unexpectedly changed with the closure of a number of SKT's salons causing financial problems.

[19] In his brief of evidence dated 2 March 2023 Mr Docherty says the ROS is ‘poorly written’ and is ‘ambiguous and unclear and subsequently creates uncertainty regarding the scope liability if any and undermines the agreements enforceability.’ He says clause 5 of the ROS refers to his liability being ‘on behalf of SKT’ and not as a ‘stand-alone personal guarantee’ which would require consideration and need to be referred to as a ‘guarantee’. He says that because SKT is in liquidation his personal liability is now ‘limited or non-existent.’

[20] In his submissions provided in writing on 15 March 2023, Mr Docherty raises a further reason why the ROS is unenforceable against him in that it is a frustrated contract with the frustration being the liquidation of SKT as an unexpected unforeseeable event.

Has Mr Docherty in the ROS agreed to be personally liable for any unpaid balance of the total sum that SKT agreed was to be paid to Ms Mortimer?

[21] The Authority may order compliance against a person who has not complied with a settlement made under s 149(3) of the Act³. The person does not have to be the other party’s employer. A settlement made under s 149(3) is one where the parties reach their own agreement and then ask an authorised mediator⁴ with the Ministry of Business Innovation and Employment (MBIE) to sign the settlement after pointing out the effect of signing to the parties⁵. The effect of this process is that the terms become final and binding, they cannot be cancelled, and except for enforcement processes neither party can bring the terms before the Authority (or Court) in any proceedings.⁶

Is the ROS ambiguous or unclear to the point that it cannot be interpreted that Mr Docherty was agreeing to pay any unpaid settlement money to Ms Mortimer if SKT did not?

[22] Clause 5 of the ROS says, ‘Mathew Docherty agrees that if any payment [as agreed in the earlier clauses] is not fully satisfied (paid) to Robyn Mortimer that he will become liable to make payment on behalf of SKT.’

³ Sections 137 and 151 Employment Relations Act 2000.

⁴ Section 149(1) Employment Relations Act 2000

⁵ Section 149(2) Employment Relations Act 2000

⁶ Section 149(3) Employment Relations Act 2000

[23] Mr Docherty says the wording ‘on behalf of’ means that when SKT ceased to exist through liquidation he could not then make payment ‘on behalf of’ and his agreement to liability was extinguished. In effect Mr Docherty is putting forward a second meaning from the one Ms Mortimer submits which is the opposite, that he agreed to become liable in the event SKT did not pay.

[24] I find Mr Docherty’s argument about the words ‘on behalf’ in clause 5 inconsistent with the ordinary meaning of someone saying they will pay if another does not. This is because the wording of clause 5 says Mr Docherty agreed to ‘become liable’ if SKT did not pay, he was a clearly named party to the ROS, and he initialled each page and signed twice against ‘for and on behalf of Sun Kissed Tan Limited’ as well as himself. Mr Docherty says the separate signing as himself could mean anything. I find it clearly shows me that he personally signed as himself agreeing to clause 5 and then separately as the human director of SKT. I do not find this ambiguous or unclear.

[25] Even if I did find it unclear the context of the emails leading to the ROS show Mr Docherty agreed to be personally liable. This is because in those emails Mr Docherty initially removed the clause that meant he would pay the amount to Ms Mortimer in the event SKT did not. The email from Ms Mortimer’s representative says: ‘It appears that you have taken out the personal commitment to meet the funds if not paid by SKT. Unfortunately to obtain a discount and payment overtime, this was our condition because if we seek enforcement, we will seek to obtain a personal liability for the wages.’

[26] Mr Docherty then responded as follows:

I have no intention to miss any payments. A personal guarantee is not something I agree to lightly nobody in business should. That said happy to work with you. How about

Option 1 Personal Guarantee included however settlement sum reduced to \$16,500.00

or

Option 2 Personal Guarantee removed, and settlement remains at \$18,500.00

[27] The response to this by Ms Mortimer’s representative was, ‘I can’t get her to agree to that, but have added an extra month for payment. So 5 payments. If you plan

to pay the guarantee should not be a problem. While I understand it is a big step, it is somewhat common.’

[28] Mr Docherty then replied with ‘I, love a good negotiation!! I’ll agree to this however I’m back home now so won’t be able to sign until tomorrow I assume that’s ok.’

[29] Mr Docherty in his oral evidence confirmed that the document he refers to signing the next day was the ROS that is before me.

[30] Mr Docherty gave oral evidence that “Robyn and Robert wanted a personal guarantee”. This further supports that he understood this was what was being proposed and discussed in the emails. Even if he had a confusion about this or thought he was only agreeing to SKT having an extra month to pay, he was sent the draft to read and would have had a mediator from MBIE call him to check he understood the effect of the agreement. It is implausible to me in these circumstances that Mr Docherty would not have known that clause 5 said he was agreeing to pay if SKT could not pay.

Is the ROS unenforceable against Mr Docherty because it falls short of being a personal guarantee in contract law?

[31] Mr Docherty has submitted that I should consider this matter based on the law relating to contracts of guarantee. He says as well as the poor drafting making his personal liability unenforceable, there is nothing in the ROS to say this was a ‘guarantee’ or that he was a ‘guarantor’.

[32] Section 27 of the Property Law Act 2007 which requires that contracts of guarantee be in writing and signed by the guarantor. However, this agreement is one that has its own statutory basis under s 149 of the Act, a section enacted to give finality to employment relationship problems. Parties are known to agree in a s149 settlement to include that a third person may become liable if the employer party defaults. I do not understand there is any magic in the wording. For example, other Authority matters where compliance has been sought for breaches of s 149 settlements reflect various

wording that include a person agreeing to be ‘joined’ in the event of default or ‘undertakes’ to pay⁷ in the event of a default.

[33] I find that the ROS is enforceable based on its plain wording that Mr Docherty agreed to pay if SKT does not.

Is the ROS unenforceable because Mr Docherty has not provided any consideration (value in exchange) for paying what was SKT’s debt.

[34] It is submitted for Ms Mortimer that Mr Docherty got the benefit of delayed payments and a reduced sum from the Authority Determinations in exchange for his personal guarantee. The emails support this. I accept the submission for Ms Mortimer that she wanted certainty and to bring an end to her employment relationship problem. I will return to this when considering a penalty. For now, I note that this shows me Mr Docherty made a decision to agree to be responsible for SKT’s debt and this could foreseeably be that he would end up paying the amount owed. This was the risk he took.

Is the ROS unenforceable because it would be ‘unfair and unconscionable’ on Mr Docherty to have to make payment when SKT was in liquidation.

[35] I asked Mr Docherty to explain to me why he said to order compliance against him personally would be ‘unfair and unconscionable’. He explained to me that it would not be fair because SKT was in liquidation and his liability was contingent on SKT. I found this argument circular and do not find it changes my interpretation of the agreement that was made that Mr Docherty would be liable should SKT default.

Is the ROS unenforceable because it is frustrated because SKT is in liquidation being an event Mr Docherty could not have predicted before signing the ROS.

[36] Just before the investigation meeting Mr Docherty raised a further issue about why he should not be liable under the ROS: frustration of contract. I do not accept this. The nature of his liability here is clear. SKT’s default by way of insolvency has triggered his liability because Mr Docherty agreed this would happen. If the insolvency

⁷ *Armstrong v MTS Energy Limited and Tingsong Qui* [2023] NZERA 72; *Sunde v Neralcm Holding Limited* [2022] NZERA 405

was triggered by something Mr Docherty did not in his business predict this was the risk he took when agreeing to be personally liable for SKT's non-payment to Ms Mortier under the ROS. In these circumstances I do not accept some form of frustration has occurred here.

Should compliance be ordered against Mr Docherty?

[37] Based on the above I am satisfied it is appropriate to order Mr Docherty to comply with the ROS in that he is to now pay Robyn Mortimer \$11,700.00 as agreed under clause 5 of the ROS.

[38] Imposition of a compliance order is a serious matter. Should Mr Docherty fail to comply with the compliance order (as set out in [51] below) Ms Mortimer will be entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or impose a sentence of imprisonment not exceeding 3 months⁸. Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.

Is Mr Docherty liable for a penalty for noncompliance with the ROS?

[39] I have found that Mr Docherty agreed under the ROS to be personally liable for any unpaid amount under the agreement if SKT did not pay when SKT did not and eventually could not as a result of the liquidation. The breach means that Mr Docherty is liable to pay a penalty under s 149(4) of the Act. Whether a penalty is ordered is discretionary.

[40] It has been submitted for Ms Mortimer that a penalty of \$7,000.00 would be appropriate. Mr Docherty disagrees and says he has personal financial problems.

[41] The relevant principles for the Authority to follow when assessing the level of penalty are guided by 133A of the Act. The Employment Court has also set out guiding principles⁹ which include protecting the finality and integrity of s 149 settlement

⁸ Sections 139 and 140(6) Employment Relations Act 2000.

⁹ *ITE v ALA* [2016] NZECt at [61]

agreements by deterring the individual person in breach and others from similar breaches. I need to also consider consistency with penalties imposed on others in similar circumstances, the nature and extent of the breach and whether it was deliberate, one-off or sustained, whether the person in breach has sought to remedy the situation and the proportionality in the circumstances.

Protecting the finality and integrity of s 149 settlement agreements as a deterrence

[42] Records of settlement under s149 form a corner stone of resolving employment relationship problems. There is a public interest in parties being able to be secure in the finality of such settlements. I accept the submission for Ms Mortimer that having the backstop of payment by Mr Docherty in the event of SKT's non payment was crucial to her entering the ROS. The emails support this.

The nature and extent of the breach, including whether it was deliberate, one-off or sustained

[43] I accept Mr Doherty's evidence that in fact when he was controlling SKT as director, SKT made two payments towards the ROS and would have continued to do so but for the economic issues that arose and caused SKT to be liquidated. I accept to some extent this goes against a situation of sustained and intentional non-compliance. I further note this is not a situation where there are multiple breaches. I also have no information to show that Mr Docherty himself has been ordered to pay a penalty in this jurisdiction before.

Whether the person in breach has sought to remedy the situation

[44] There has been no attempt to remedy the situation. However, I note that Mr Docherty appears to have genuinely believed he had an argument to be heard against his personal liability.

The financial circumstances of Mr Docherty

[45] I have little information to support this. It was submitted for Ms Mortimer that Mr Docherty continues with new business interests. I have nothing more concrete than

this statement and it can only be speculative. However, I accept that a letter from Mr Docherty's lawyer to Mr Thompson dated 2 December 2022 refers to Mr Docherty having no ability to make payments personally. I accept that Mr Docherty consistent with this said to me under oath that he is personally liable on guarantees given on some of SKT's loans and this affects his personal financial position to pay. This would lean away from awarding a penalty.

Consistency with penalties imposed on others in similar circumstances

[46] In *ITE v ATA*¹⁰ a penalty of \$6,000.00 was awarded in circumstances where there was deliberate non-compliance by a party to a s149 Record of Settlement to the extent that both the Authority and the Court found it was 'fundamentally contrary' to what the party had agreed to in relation to extended confidentiality undertakings as to what had occurred during the employment disciplinary process. The penalty was awarded in the context of a party with little insight and no remorse to the significant impact multiple communications had on others. In a more recent determination, the Authority awarded \$6,000.00 in a situation where an individual breached a record of settlement multiple times and caused distress to a number of people as a result. The breaches were described as 'serious, intentional, extensive.'¹¹

[47] On the other hand, breaches for non-payment or delayed payment or where by the time the compliance application was determined all money owed had been paid have attracted smaller penalties (notably against companies and not individuals). These range from under \$1,000.00 and up to \$2,000.00 often with part of this being paid to the Crown for deterrence.¹²

[48] If I were to award a penalty in this matter, I would consider the predominant reason to be deterrence to others and considering amounts awarded recently this would not result in a high penalty and with part to be paid to the Crown.

[49] The Authority has recently declined to order a penalty in the situation where an individual did not comply with their agreement to pay the employer's debt under a s149

¹⁰ [2016] NZECt at [61]

¹¹ *The Chief Executive Oranga Tamariki v SLU* [2021] NZERA 194

¹² *AG Technology NZ Holdings Ltd v Wild and Anor* [2021] NZERA 494; *Van Wyk v Ingame Builders Ltd* [2021] NZERA; *Simmons v NZ Future Forest Products Ltd* [2021] NZERA 285; *Paku v Hotel Chathams Ltd* [2021] NZERA 173.

settlement agreement. Given some likelihood of Mr Docherty's personal financial position, and that the compliance order itself carries serious consequences if not itself complied with¹³, I also decline to award a penalty.

Is there to be an order for costs including the filing fee?

[50] I find that Ms Mortimer should have an award for her costs. This is because she has been wholly successful in seeking a compliance order and should not have had to bring this claim. This matter was dealt with in a part morning. I accept Ms Mortimer incurred costs for her representation. I find that an award based on the existing tariff should be made to her. A full first day hearing is \$4,500.00 based on the current tariff. I find \$1,125.00 as a quarter day plus the filing fee of \$71.56 is the appropriate contribution that Mr Docherty is to make towards Ms Mortimer's costs.

Summary of findings and orders

[51] I find that Mathew Kevin Docherty breached clause 5 of the record of settlement dated 19 October 2022 and make the following orders:

- a. Mathew Kevin Docherty is ordered to comply with clause 5 of the settlement agreement by paying Robyn Mortimer \$11,700.00 by no later than 21 days from after the date of this determination.
- b. Mathew Kevin Docherty is ordered to pay Robyn Mortimer \$1,125.00 as a contribution to her costs and \$71.56 for the Authority's filing fee by no later than 21 days from after the date of this determination.
- c. The application for a penalty is dismissed.

Antoinette Baker
Member of the Employment Relations Authority

¹³ As set out at clause [30] of this Determination.