

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 64
5535035

BETWEEN	SIMPRO SOFTWARE NEW ZEALAND LIMITED Applicant
AND	DAVID NUTTALL Respondent

Member of Authority:	Robin Arthur
Representatives:	Maria Green, counsel for the Applicant Respondent in person
Investigation:	On the papers
Determination:	2 March 2015

DETERMINATION OF THE AUTHORITY

- A. David Nuttall must comply immediately with the term of a record of settlement he made with SimPro Software New Zealand Limited (SimPro) that requires him not to make negative or disparaging statements about SimPro and its agents, officers, directors and personnel.**
- B. By no later than 31 March 2015 Mr Nuttall must also pay SimPro the sum of \$1000 as a contribution to its legal costs in applying for the compliance order.**

[1] SimPro Software New Zealand Limited (SimPro) applied for an order requiring David Nuttall to comply with a term in a record of settlement made with him on 29 January 2014 and certified by a mediator under s149 of the Employment Relations Act 2000 (the Act). Mr Nuttall had worked for SimPro during the last quarter of 2013.

[2] SimPro said Mr Nuttall had breached a term requiring him to desist from making or publishing or causing to be published “*any statement which could be construed as being degrading, defamatory, negative or disparaging against*” SimPro and its agents, officers, directors or personnel.

[3] Mr Nuttall had not responded to SimPro’s application within the permitted statutory period but further efforts by the Authority resulted in contact being made with him. He then provided a brief written response and arrangements were made for him and SimPro’s counsel to attend an Authority case management conference by telephone.

[4] During that telephone conference I was able to confirm two essential and uncontested facts that established the grounds necessary for the compliance order sought by SimPro. Firstly, the s149-certified settlement agreement contained the enforceable requirement for Mr Nuttall not to make negative or disparaging comments about SimPro. Secondly, Mr Nuttall has published a comment on a Xero blog site on 4 December 2014 that referred to SimPro as “*a pile of crap*” and “*a waste of space*”. There was no doubt those were negative and disparaging statements.

[5] Following discussion with Mr Nuttall and Ms Green I gained their agreement to two alternative means by which the Authority could resolve the matter without requiring further investigation. Firstly, the parties had an opportunity, on an agreed timetable, to attempt to resolve the matter between themselves on the basis that a consent determination could then be issued by the Authority, with the potential benefit to both parties of preserving the confidentiality of the existence of their earlier record of settlement. Alternatively, if they were not able to resolve the matter within the agreed timeframe, I would then issue a determination granting the compliance order sought by SimPro and awarding it \$1000 in costs. An investigation meeting was not required as the necessary information was undisputed and neither party’s interests were served by incurring the expense of time and money in preparing for or attending an investigation meeting in those circumstances.

[6] The parties have since advised that they had not resolved the matter and I have proceeded to make this determination with the orders made at its head. By operation of s149(3) and s151 of the Act the non-disparagement term agreed between the parties

in their certified settlement agreement was enforceable by way of compliance order under s137 of the Act.

[7] Before making those orders I also took into account further information from Mr Nuttall that he had since arranged for the removal from the Xero blog of the comments he had posted on 4 December 2014 and a request from him that he be permitted to pay the costs order by monthly instalments of \$100.

[8] Although Mr Nuttall had removed his comments on the Xero blog I proceeded to make the compliance order in the event that there were other such postings he was aware of but which had not been brought to SimPro's attention. SimPro's application to the Authority had included allegations that Mr Nuttall was involved in at least two postings of negative comments about SimPro personnel on other blogs but the supporting evidence for those allegations was insufficient to prove the connection without further inquiry.

[9] In his written response to the Authority Mr Nuttall had said he thought SimPro was seeking to silence an ex-employee expressing his opinion. He is correct that the non-disparagement term of the record of settlement has limited – and continues to limit – his freedom of speech but he made that arrangement voluntarily with SimPro and is bound by it. As required under s149 of the Act the mediator had not certified the agreement until after Mr Nuttall had signed a statement that he fully understood the settlement was final, binding and enforceable. As a matter of public interest the Authority must uphold the finality and enforceability of the terms agreed by workers and employers in such agreements once they have the 'stamp' of a mediator's certification.

[10] I have not made an order allowing Mr Nuttall to pay costs to SimPro by monthly instalments. He provided no information establishing the personal financial necessity for such an arrangement. And even if his personal financial circumstances were strained, he would have also needed to establish that he was not able to raise a personal loan (from family, friends or a financial institution) for the relatively small amount of costs awarded. An order for payment by instalments would have, most likely, included a requirement to then also pay interest on the outstanding costs amount until it was paid in full.

[11] Instead the costs award allows a full 28 days before payment is due to SimPro so Mr Nuttall has adequate opportunity to make necessary arrangements.

[12] I note that SimPro could also have sought a penalty under s149(4) of the Act for Mr Nuttall's known breach of the non-disparagement term but did not do so with the overall result being that the cost imposed on Mr Nuttall for that breach has been relatively small.¹

Robin Arthur
Member of the Employment Relations Authority

¹ Penalties awarded by the Authority in 2014 for breach of a settlement agreement ranged from \$500 to \$2000.