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Balogh v Salt Pods Limited (Wellington) [2018] NZERA 2046; [2018] NZERA Wellington 46 (28 May 2018)

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Balogh v Salt Pods Limited (Wellington) [2018] NZERA 2046 (28 May 2018); [2018] NZERA Wellington 46

Last Updated: 4 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 46
3019672

BETWEEN CHANELLE BALOGH Applicant

AND SALT PODS LIMITED Respondent

Member of Authority: Michele Ryan

Representatives: Bede Laracy for the Applicant

Las Brown on behalf of the Respondent

Investigation Meeting: On the papers

Determination: 28 May 2018

DETERMINATION OF THE AUTHORITY Number 2

Employment relationship problem

[1] This determination decides whether penalties should be ordered for breach of terms contained in a Record of Settlement agreed between the parties pursuant to s

149 of the [Employment Relations Act 2000](#).

Background

[2] On 20 November 2017 the Authority investigated Ms Balogh's application for a compliance order, penalties, and costs. The director of Salt Pods Limited, (SPL) Mr Las Brown, accepted SPL had failed to deposit three instalment payments, totalling \$10,140, to Ms Balogh as agreed in the Record of Settlement.¹ The failure was

attributed to SPL's constrained finances.

[3] During the investigation meeting Mr Brown undertook, on behalf of SPL, to make an immediate partial payment of \$2,200 on the sum owed. He advised SPL was

¹ Between September and November 2017 inclusive

likely to experience increased trading over the summer period, and asked to pay the remainder of the debt by instalments which would allow SPL sufficient opportunity to meet its commitments under the Record of Settlement.

[4] Taking into consideration SPL's undertaking, and having assessed the financial information provided to the Authority at that time, I considered it was appropriate to order compliance by way of instalment payments.

[5] A compliance order pursuant to [s 137\(2\)](#) and [s 138\(4A\)](#) was issued on 20

November 2017.² SPL was ordered to pay the debt by instalment payments concluding in March 2018.³ The question as to whether penalties should be imposed was adjourned under [s 138\(5\)](#). This was to enable the compliance order to be complied with. SPL was cautioned as to possible consequences if it failed to comply with the Authority's orders.⁴

The law regarding penalties

[6] [Section 149\(4\)](#) of the Act provides that person who breaches an agreed term of settlement is liable to a penalty. [Section 135\(2\)\(b\)](#) provides that a company in breach is liable to a penalty up to \$20,000.

[7] [Section 133A](#) sets out a non-exhaustive list of factors the Authority or Court must consider when contemplating penalty orders, as follows:

(a) the object stated in [section 3](#); and

(b) the nature and extent of the breach or involvement in the breach;

and

(c) whether the breach was intentional, inadvertent, or negligent; and

(d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and

(e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or

has taken other steps to avoid or mitigate any actual or potential

adverse effects of the breach; and

(f) the circumstances in which the breach, or involvement with the breach, took place, including the vulnerability of the employee;

and

(g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in

² *Balogh v Salt Pods Limited* [2017] ERA Wellington 116

³ Plus costs and disbursements of \$571.56

⁴ The 20 November 2017 determination set out the Court's powers under the Act.

proceedings under the Act, or any other enactment, to have engaged in similar conduct.

[8] In *Lumsden v Sky City Management Ltd*,⁵ a case which also involved a breach of a settlement agreement, Judge Inglis (as she then) observed that the need for general and particular deterrence, and broad consistency in similar cases, were additional considerations relevant to an assessment for penalties.

[9] I have taken into account both the statutory considerations and the findings in

Lumsden in my assessment of Ms Balogh's application.

Should a penalty be imposed?

[10] The further opportunity given to SPL (in the 20 November 2017 determination) to comply with the Record of Settlement does not preclude my finding that its failure to adhere to the terms of that agreement as agreed by the parties warrants sanction. It continues to remain unclear why SPL voluntarily agreed to make time specific payments (as recorded in the Record of Settlement), if it was unable or unwilling to do so. This pattern of conduct appears to have been subsequently repeated. Despite Mr Brown's assurances that SPL would meet the requirements of the revised instalment plan, it has not. It is difficult not to form a view that SPL, via its director, is quick to make pledges so as to avoid impending sanctions. Having then avoided those consequences, SPL becomes careless with its obligation to honour the commitment made.

[11] I note the sum of \$5,440 under the Record of Settlement remains unpaid. Ms Balogh remains entitled to apply to the Court for the imposition of the more stringent sanctions that are available to the Court to obtain compliance.

[12] It is important that parties to a [s 149](#) settlement agreement have confidence that terms agreed will be complied with. Amongst other things, the imposition of a penalty under [s 149\(4\)](#) is to punish a party who reneges on such agreements. SPL's careless approach to its obligations under the Record of Settlement warrants a penalty sanction.

[13] In assessing the quantum of penalty I have applied the four step process set out in *Borsham v Preet PVT Ltd*.⁶

What is an appropriate quantum?

[14] Turning to the nature and number of breaches, it could be said that the failure to make the three instalment payments under the Record of Settlement constitutes three separate breaches to the Record of Settlement. The maximum sum of penalties that may be imposed is \$60,000 (3 x \$20,000). On balance I consider the omission is better viewed as a single ongoing course of conduct and is therefore a single breach. The maximum penalty is \$20,000.

[15] The nature of the breach is, without doubt, very serious. Ms Balogh compromised her entitlement to have her employment relationship problem determined by the Authority in exchange for an early resolution and modest compensation. SPL's failure to comply with that arrangement has eroded those benefits.

[16] That almost half the sum agreed in the Record of Settlement has now been paid serves to mitigate, at least to some extent, the impact of the breach on Ms Balogh, although I am mindful that those payments appear to have only occurred as a direct consequence of Ms Balogh's applications, through her representative, to have the Authority intervene.

[17] Overall however, I find the effect of the breach, particularly where SPL was granted further time by which to comply with the Record of Settlement but has not, is a critical and compounding factor I must consider in my assessment. SPL's further failure to communicate with Ms Balogh about the issues it says have impeded compliance has not assisted its position. Taking all these matters into account at this

stage of the assessment, the potential penalty award now sits at \$12,000.⁷

[18] There is a suggestion that SPL has encountered fiscal difficulties not anticipated at the time of the investigation meeting in November 2017.⁸ I am unwilling to simply rely on Mr Brown's assertions alone however. Nor has SPL

furnished any financial information on which the Authority could reliably conclude

⁶ [\[2016\] NZEmpC 143](#)

⁷ 60% of a maximum penalty award.

⁸ Email dated 28 April 2018.

that the quantum of a penalty order be reduced on grounds of straitened financial circumstances.

[19] In *Preet* the Court found that the quantum of any penalty imposed should be proportionate to the level to the seriousness of the breach(es) and harm occasioned by them.⁹ I consider a penalty of \$4,000 is within the range of penalties currently imposed by the Authority for a breach of a Record of Settlement, and is proportional to the seriousness of the breach and harm occasioned in this instance.

[20] In the circumstances of this matter I consider it appropriate to order that the entire penalty be paid to Ms Balogh.¹⁰

Costs

[21] Salt Pods Limited is also ordered to pay a contribution of \$250 towards costs associated with the work performed by her representative to progress this portion of Ms Balogh's application.

Orders

[22] Separate to any prior orders made by the Authority, within 21 days of the date of this determination Salt Pods Limited is ordered to pay Ms Balogh:

a. \$4,000 as a penalty sum;

b. \$250 in costs.

Michele Ryan

Member of the Employment Relations Authority

⁹ Ibid at fn.6 at [147]

10. [Section 136\(2\)](#) of the Act enables the Authority to award some or any part of any penalty recovered to be paid to any person.

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