IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2020] NZERA 56
3068992

	BETWEEN	NATASHA MARSHALL Applicant
	AND	7KIDS LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Gayaal Iddamalgoda, counsel for the applicant Eric Ottow, on behalf of the respondent
Investigation Meeting:	On the papers
Date of Determination:	7 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 29 November 2019[1] 7Kids Limited (7Kids) was found to have breached terms of a Record of Settlement[2] previously agreed with Ms Marshall. 7Kids was ordered to comply with cl. 2 and 3 of the settlement agreement and pay Ms Marshall $3,400, and holiday pay.

[2] The sum of $3,400 comprised 19 separate agreed instalment payments that had not been paid. The amount of holiday pay owed was not quantified in the Record of Settlement, but 7Kids says it is "*just below $500*".

[3] The question as to whether penalties (and costs associated the application) should be imposed was adjourned under s 138(5) of the Employment Relations Act 2000 (the Act).

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1 *Marshall v 7Kids Ltd & Ottow* [2019] NZERA 686
2 Pursuant to s 149 of the Employment Relations Act 2000.

This was to enable 7Kids (and Mr Ottow as a second respondent) to comply with the compliance order. Ms Marshall has now returned for a determination regarding penalties in respect of the established breach.

[4] 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 Act.

Should a penalty be imposed and if so at what amount?

[5] Section 149(4) of the Act provides that person who breaches an agreed term of settlement is liable to a penalty. Amongst other things, the imposition of penalty under the Act is to punish a party who reneges on such settlement agreements.

[6] To the extent I am able to assess 7Kids circumstances where very limited information has been furnished by it,[3] my assessment as to quantum of penalty has been determined after consideration of the factors set out at s 133A of the Act, and guidance from decisions issued by the Employment Court.[4] The following matters are relevant.

The object of the Act

[7] A breach by a party to a settlement agreement undermines public confidence in the problem solving mechanisms the Act seeks to promote. Parties are entitled to expect settlements will be enforced, and that sanctions in the form of a penalties are available when they are not.

The number of breaches

[8] Turning to the number of breaches, it could be said that the failure to make 19 instalment payments, and an agreement to pay outstanding holiday pay, constitutes 20 separate breaches.

[9] On balance I consider the omission to pay any of the monies agreed in the Record of Settlement is best viewed as a single ongoing course of conduct and therefore a single breach.

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3 7Kids was scheduled to furnish information on or by 24 December 2019 in respect of the penalty claim but did not do so.

4 *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12 and *Nicholson v Ford* [2018] NZEmpC 132 at [18]

The maximum penalty for 7Kids' failure to comply with the Record of Settlement is $20,000.[5]

The nature of the breaches, the extent of loss, the degree of culpability, and whether any steps have been made to mitigate the effects of the breach,

[10] While the cause of the breach is said to be (in part) a consequence of a lack of funds - a matter I shall return to – it is clear Mr Ottow views aspects of the settlement agreement as unacceptable, and is a factor that has led to 7Kids' failure to make scheduled payments. Once a party enters into a settlement agreement it is bound to comply. Mr Otto's dissatisfaction with the Record of Settlement appears to be based on what is colloquially referred to a "settlors remorse".

[11] That 7Kids considers the terms (on which it previously agreed to settle the employment relationship problem) as no longer reasonable is not a basis on which it can avoid the Record of Settlement. I note further that 7Kids has not paid any of the agreed payments, even those sums for which it accepts are owed such as wages, and holiday pay.

[12] Ms Marshall is not a vulnerable employee, but it is clear she is disappointed that she has not received the payments she is entitled to receive. I accept she has been deprived of any benefit reasonably expected from entering into terms of settlement with 7Kids. There is also a suggestion in the material furnished by Mr Otto that 7Kids has prioritized other commitments over those it owes to Ms Marshall, and there is no evidence it has attempted to mitigate Ms Marshall's losses.

[13] I must find 7Kids' breach has been blatantly deliberate when not one of the agreed payments has been paid.

[14] The omission by 7Kids to address Ms Marshall's attempts to have it comply with its obligations has compounded its culpability, which detracts from a finding that any penalty should be reduced.

Ability to pay

[15] Mr Ottow provided some financial information regarding 7Kids' financial circumstances albeit this material was incomplete.[6] There is no dispute the company has

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5 Section 135(2)(b) provides that a company in breach is liable for a penalty up to $20,000.

6 *Marshall v 7Kids Ltd & Ottow* [2019] NZERA 686 at [20] and [21]

ceased to trade. This appears to have occurred relatively soon after the settlement agreement was signed. Mr Ottow's use of the company bank account for personal expenses in the months leading up to the closure of the business leads to me conclude some monies may be owed to it by him.[7] On balance however, I find it unlikely 7Kids will be unable to meet a significant penalty where the business no longer generates income. This factor warrants a reduction to the penalty amount.

Conclusion

[16] Having taken into account the above factors; the level of penalties generally imposed where no prior similar conduct is established; as well as the need to deter 7Kids from further breach(es) where instalments are yet to become due for payment under the Record of Settlement, I find a penalty of $1,500 is proportionate to the seriousness of the breach and harm caused by it, and is appropriate to the circumstances of each party. My assessment and order applies only to the breach of the Record of Settlement which occurred prior to 30 November 2019.

[17] Penalties are generally paid to a Crown bank account, although the Authority has discretion to order the whole of part of a penalty to any person.

[18] Ms Marshall should not have been forced to resort to an application for compliance and penalties such as this. I consider it appropriate to order 50% of the penalty ($750) be paid to her.[8]

Costs

[19] Ms Marshall seeks costs of $2,000.

[20] There is evidence of a *calderbank* offer furnished on Ms Marshall's behalf. It is not necessary to detail that document where the offer was above the combined orders of this determination and that dated 29 November 2019, and therefore does not alter my assessment as to costs.

[21] 7Kids Limited is ordered to pay a contribution of $1,000 towards costs associated with the work performed by Ms Marshall's representative to progress her claims.

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7 Above, at [20]

8 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.

Orders

[22] Separate to any prior orders made by the Authority, within 14 days of the date of this determination 7Kids Limited is ordered to pay:

(i) $1,500 as a total penalty sum; $750 of which should be paid to Ms Marshall and $750 to the Crown, via the Authority.

(ii) $1,000 to Ms Marshall for costs.

Michele Ryan
Member of the Employment Relations Authority