

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 272
3096312

BETWEEN KATHLEEN CLARKE
Applicant

AND SWEET AS POPCORN
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Aaron Clarke, advocate for Applicant
Arndrea Evans for Respondent

Investigation Meeting: On the papers

Determination: 6 July 2020

DETERMINATION OF THE AUTHORITY

- A. Under s 137 of the Employment Relations Act 2000 Sweet As Popcorn Limited is ordered to comply with its continuing obligations under the Record of Settlement.**
- B. Sweet As Popcorn Limited is ordered to reimburse Ms Clarke the sum of \$71.56 being the filing fee on her application within seven days of the date of this determination.**

Employment relationship problem

[1] Ms Clarke and Sweet As Popcorn Limited (SAP) attended mediation and entered into a record of settlement (settlement agreement) on 12 February 2020. The

record of settlement required a sum of money to be paid by 19 February 2020 and the provision of a written reference with positive responses to any enquiries.

[2] Ms Clarke claims SAP breached the terms of the settlement agreement. She seeks orders from the Authority requiring SAP to fulfil the terms of the settlement agreement and the imposition of a penalty for its breaches.

[3] During a case management call with the parties on 21 May 2020 it was agreed Ms Clarke's application would be dealt with on the papers.

Issues

[4] In order to resolve Ms Clarke's application I must determine whether SAP breached the terms of the settlement agreement and if so, whether the Authority should impose a penalty on SAP.

[5] As permitted by s 174E of the Employment Relations Act 2000 this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence received I have carefully considered everything.

Record of settlement

[6] The parties attended mediation on 12 February 2020 and entered into a settlement agreement resolving Ms Clarke's employment relationship problems. The settlement agreement was duly signed by a mediator employed by the Ministry of Business Innovation and Employment pursuant to s 149 of the Act.

[7] The settlement agreement required SAP to do the following:

- a) Pay Ms Clarke a specified sum under s 123(1)(c)(i) within seven days of the date of the settlement agreement (19 February 2020); and
- b) Provide Ms Clarke with a positive written reference.

Alleged breaches

[8] On 24 March 2020 Ms Clarke emailed the mediator advising him that she had not received the money or reference from SAP and asked about what further steps she needed to take.

[9] The monetary settlement was paid into Ms Clarke's bank account on 26 February 2020 without any further communication from SAP. However, the positive reference remained outstanding.

[10] Ms Clarke lodged her application seeking compliance orders and penalties in the Authority on 18 March 2020. On 24 April 2020 SAP provided her with the positive reference.

[11] In a covering letter SAP apologised for the delay in providing the reference. It explained that the General Manager who approved the settlement agreement resigned suddenly from her employment and had advised the director that the terms of the settlement agreement had been met.

[12] SAP explained the delay in making the payment which it attributed to the General Manager being tardy in handing the paperwork over to the financial officer.

[13] The public interest in having terms of a settlement agreement, made and certified in mediation, honoured by the parties to that settlement agreement favours an order for compliance.

[14] The settlement agreement has now largely been complied with. However, there are aspects of the settlement agreement that have a continuing obligation. In particular, SAP has an obligation to respond to any inquiries concerning Ms Clarke in a positive fashion.

[15] The Act states that settlement agreements certified pursuant to s 149 are final, binding and enforceable. It is appropriate for a compliance order requiring SAP to comply with the remaining provisions of the settlement agreement.

[16] Under s 137 of the Act Sweet As Popcorn Limited is ordered to comply with its continuing obligations under the Record of Settlement dated 12 February 2020.

Penalty

[17] Ms Clarke has asked the Authority to impose a penalty for SAP's failure to meet its obligations under the settlement agreement. The monetary payment was made immediately after its failure to pay was brought to SAP's attention. In contrast to the provision in the settlement agreement specifying the timeframe for payment of the

monetary settlement, the settlement agreement did not specify a timeframe for when the positive written reference was to be provided.

[18] Taking all of the factors into account I have concluded it is not appropriate to impose a penalty on SAP and accordingly Ms Clarke's application is declined.

Costs

[19] Ms Clarke has been successful to the extent that a compliance order has been made against SAP. She has not sought an order for costs in her statement of problem however, it is appropriate that she be reimbursed the filing fee on her application.

[20] Sweet As Popcorn Limited is ordered to reimburse Ms Clarke the sum of \$71.56 being the filing fee on her application within seven days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority