IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 30
EMPC 175/2016

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	DAVID LUMSDEN Plaintiff
AND	SKYCITY MANAGEMENT LIMITED Defendant

Hearing:	7 and 8 February 2017, and by way of further submissions dated 17 February 2017
Appearances:	D Lumsden, plaintiff in person K Dunn and J Crosbie, counsel for defendant
Judgment:	14 March 2017

JUDGMENT OF JUDGE CHRISTINA INGLIS

---

[1] This is a claim against Skycity Management Limited (Skycity) relating to alleged breaches of a confidential settlement agreement signed by a mediator pursuant to s 149(3) of the Employment Relations Act 2000 (the Act). Mr Lumsden also wishes to pursue a claim of unjustified constructive dismissal and penalties for breach of good faith.

[2] Skycity accepts that the Court has jurisdiction to grant a penalty for an established breach of the settlement agreement. It takes a different view of the claim for unjustified dismissal and for a penalty for breach of good faith under s 4A of the Act. It says that the first is barred by s 149 and the second is also barred by s 149 insofar as it relates to breaches allegedly occurring prior to settlement and, in relation to breaches occurring after that time, it cannot be pursued because Mr Lumsden was no longer an employee at the relevant time.

Background

[3] Mr Lumsden was employed by Skycity on a casual basis on 20 February 2013. From 7 March 2014 he worked at The Grill. The Grill is one of around 20 restaurants and bars operated by Skycity.

[4] In September 2014 Mr Lumsden wrote to Mr Boyd, Employee Relations and Human Resources Business Partner for Hospitality for Skycity. He raised three separate concerns in three separate letters, all dated 28 September 2014. Each of these concerns was investigated by Skycity and the results were advised to Mr Lumsden on 17 October 2014. Mr Lumsden was unhappy with the company's response and suggested that mediation might be useful. Mediation was subsequently arranged for 25 November 2014.

[5] Before mediation took place an incident occurred involving a confrontation between Mr Lumsden and a customer. The customer lodged a complaint with Skycity. Mr Lumsden also raised a formal complaint. He believed that another employee had deliberately prompted the customer to provoke an attack on him, and that an emergency button appeared to have been deactivated immediately prior to the incident. By this stage Mr Lumsden believed that Skycity was intent on securing his departure.

[6] An investigation into the counter-complaints was commenced. On 20 November 2014 Mr Naidu, Employee Relations Consultant, met with Mr Lumsden and advised him that his conduct had been inappropriate and that matters may be progressed on a more formal basis. A letter followed the next day, although Mr Lumsden says he never received it. The letter invited Mr Lumsden to attend a disciplinary meeting to discuss the incident, and advised that the outcome may be dismissal. Skycity scheduled the disciplinary meeting for 27 November 2014, two days after mediation was due to take place.

[7] As planned the parties attended mediation on 25 November 2014. A settlement agreement was signed during the course of it. Mr Lumsden's employment came to an end that day.

[8] The agreement contained the following material clauses:

> **Confidentiality**
>
> 1. These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties.
>
> **No Liability**
>
> 2. That the terms of this settlement & its contents, have been reached on a no admission of liability basis and are in full & final settlement of all and any claims whatsoever that David Lumsden & Sky City Food & Beverage have or may have against the other arising from or related to this employment relationship including the termination thereof.
>
> **Resignation**
>
> 3. David Lumsden resigns from employment and Sky City Food & Beverage accepts David Lumsden's resignation. The parties agree that resignation is effective as of end of business day, today, Tuesday; 25th November; 2014. The recorded reason for the end of the employment relationship by Sky City Food & Beverage, for the purposes of seeking new employment, shall be that of resignation by David Lumsden.
>
> …
>
> **Compensation**
>
> 5. Sky City Food & Beverage shall pay David Lumsden [a compensatory sum under s 123(1)(c)(i)]. This amount will be paid to David Lumsden by way of direct credit within 7 working days of the date of this settlement.
>
> **Non Disparagement**
>
> 6. Sky City Food & Beverage and David Lumsden agree that no disparaging comments will be made by either party about the other party. This includes no disparaging comments to past, existing or prospective staff, prospective employers, internal & external stakeholders or to the general public. For purposes of clarification this includes no disparaging comments on social media sites.
>
> …
>
> **Miscellaneous**
>
> …
>
> 10. David is welcome to apply for any future employment opportunities that may arise at Sky City.

Full & Final Settlement

11. This is the full and final settlement of all matters between the [sic] David Lumsden and Sky City Food & Beverage arising out of their employment relationship including the termination thereof.

…

[parties' signatures]

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

The settlement is final and binding on and enforceable by us; and

except for enforcement purposes, neither of us may seek to bring these terms before the Authority or Court whether by action, appeal, and application for review, or otherwise; and

the terms of the settlement cannot be cancelled under section 7 of the Contractual Remedies Act 1979; and

that section 149(4) provides that a person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[parties' signatures]

[9] A mediator certified the agreement pursuant to s 149, recording that he had explained to the parties the effect of s 148A and s 149(1) and (3) and that he was satisfied that the parties understood the effect of these sections, and had affirmed their request that he sign the agreed terms of settlement.

Analysis

[10] Section 149(3) restricts a party's ability to revisit a settlement agreement. It provides that:

> Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,-
>
> (a) those terms are final and binding on, and enforceable by, the parties; and
>
> (ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and

(b) except for enforcement purposes, no party may seek to bring these terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[11] The underlying policy intention is plain, namely to facilitate the full and final settlement of employment relationship issues at an early stage via a mediated process. That reflects the broader legislative scheme, which actively encourages parties to resolve such issues between themselves and without the intervention of the Authority and Court.[1]

[12] The avenues for redress post-settlement are not completely cut off, as s 149 itself makes clear. Section 149(4) enables a party to seek the imposition of a penalty in respect of any established breach of a s 149 settlement agreement. Section 149(3) enables a party to enforce the terms of a s 149 settlement agreement. In the present case this is underscored by the agreement itself, which expressly provides that either party may bring the terms of settlement before the Authority or the Court for enforcement purposes. This is precisely what Mr Lumsden seeks to do in respect of his allegations that Skycity damaged his reputation in breach of the non-disparagement provision; took steps to ensure that he would not be re-employed within the company; and failed to treat matters confidentially and as fully and finally settled.

[13] Mr Lumsden's claim of unjustified constructive dismissal is more problematic. That is because the settlement agreement expressly provided (under the self explanatory heading "Full & Final Settlement") for the full and final settlement of all matters between the parties arising out of the employment relationship, including the termination thereof. The position is even more broadly worded under the "No Liability" clause, which purports to narrow the scope of the future liability net by providing that the agreement was entered into on a no liability basis and in "full & final settlement of *all and any claims* whatsoever that David Lumsden & Sky City Food & Beverage have or *may have* against the other arising from or related to this employment relationship *including the termination thereof*."[2]

---

1 See, for example, Employment Relations Act 2000, s 3(a)(v).

2 Emphasis added.

[14] As I observed in my earlier judgment upholding Mr Lumsden's challenge to the Authority's determination dismissing aspects of the statement of problem on the basis that they were frivolous and vexatious:[3]

> While it is true that s 149 restricts a party's ability to revisit a settlement agreement, it may not provide an impermeable barrier. There may be circumstances, which have not been fully explored by the Court, where it is permissible to go behind a settlement agreement. One such example may be in cases of duress. And, as the provision itself makes clear, a party seeking to enforce the terms of an agreement is at liberty to do so.

[15] While Ms Dunn, counsel for Skycity, acknowledged that the Court has previously recognised that there may be some limited circumstances in which a settlement agreement, including one signed off by a mediator, might be able to be revisited, she made the point that there was no evidence to suggest that Mr Lumsden had been forced into signing the agreement or anything of that ilk. Nor did I understand Mr Lumsden to be seeking to pursue an argument at hearing that he had been induced to enter into the agreement on the basis of false assurances given by Skycity. Rather, his argument was firmly based on s 238 of the Act, which he contended enabled him to pursue both a claim of unjustified constructive dismissal and for the imposition of a penalty for breach of the statutory duty of good faith.

[16] Section 238 provides that:

> **No contracting out**
>
> The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

[17] Mr Lumsden says that insofar as the settlement agreement purported to prevent him from pursuing a claim of unjustified dismissal, that was in breach of s 238. He also submitted that to the extent that there is an inconsistency between s 238 and s 149, the former trumps the latter. That, he said, was reflective of the fundamental rights conferred on an employee to pursue a grievance. Such a right should not be read down or constrained by an application of a provision such as s 149.

---

[3] *Lumsden v Skycity Management Ltd* [2015] NZEmpC 225 at [42].

[18] Section 238 is broadly worded and refers to "the provisions of this Act". Section 149 is, of course, one of the operative provisions of the Act. In this case the agreement incorporates s 149 by reference. It also incorporates s 149 by making provision for mediator certification.

[19] While I agree with Mr Lumsden that the personal grievance provisions in the Act are important, they must be read alongside other relevant provisions. Part 9 (in which the personal grievance provisions sit) sets out a process for dealing with employment relationship issues via a hierarchy of increasingly formal interventions. Mediation remains at the forefront as a preferred dispute resolution mechanism, as is evident from provisions such as s 188(2), which requires the Court to continue to consider referral to mediation throughout the litigation lifecycle. While s 149 sits outside Part 9 it links back to it, making specific provision for parties to enter into full and final settlement agreements of personal grievances (including claims of unjustified dismissal) and providing for the circumstances in which such a settlement may be called into question in a Court.

[20] All of this makes it clear that parties may agree the terms of settlement in resolution of their employment relationship problems and may agree to limit the ability they would otherwise have to pursue a personal grievance. Certain safeguards are put in place, including provision for an approved mediator to explain the impact of a proposed settlement and the restriction it will place on their ability to pursue a claim at a later date.

[21] If Mr Lumsden's argument was correct, an exception would need to be carved out of s 149 which does not emerge from the wording of the provision itself or the statutory scheme, and which would render s 149 virtually devoid of utility. Such a result would be at odds with clear Parliamentary intent. It is plain that Parliament intended to restrict the circumstances in which a party could pursue matters following a settlement signed off by a mediator. This is reinforced by s 149(3)(ab), which states that the terms of settlement may not be cancelled (for misrepresentation or repudiation) under s 7 of the Contractual Remedies Act 1979.

[22] As has previously been identified, there may be room for argument that s 149 does not provide a blanket exception. The statutory exclusion of particular causes of action,[4] but not others, may be taken as an indicator that that is so. However these interesting and unresolved issues do not arise in this case given the basis on which the claim was pursued and the evidence which emerged at hearing.

[23] There is nothing in the agreement which conflicts with s 149. Accordingly there is no conflict between s 238 and s 149 which the Court needs to address. Mr Lumsden's claim for unjustified constructive dismissal is barred by s 149.

Jurisdiction to impose penalty for breach of good faith?

[24] Penalties are sought under s 4A of the Act for alleged breaches by Skycity of the settlement agreement. The Court may only impose a penalty under s 4A for breaches by a party to an employment relationship. By the time the alleged breaches occurred, namely following execution of the settlement agreement and Mr Lumsden's resignation having taken effect, Skycity was no longer his employer and he was no longer its employee. Accordingly there is no ability to impose a penalty.

[25] Any claim for penalties for breach of good faith for events preceding Mr Lumsden's resignation is problematic because of s 149, and for the reasons I have already traversed.

[26] The result is that Mr Lumsden's claim for penalties for breach of good faith is barred.

Breach of settlement agreement?

[27] I am satisfied that Skycity breached the terms of the settlement agreement that it entered into and that a penalty under s 149(4) is appropriate. My reasons follow.

---

[4] Such as under s 7 of the Contractual Remedies Act 1979.

Clause 6 – non-disparagement

[28] Ms Haines was Mr Lumsden's manager at The Grill. She had been present at the time the confrontation between the customer and Mr Lumsden occurred. She had drawn the incident to the attention of human resources and she was aware of the three separate concerns Mr Lumsden had previously raised. Ms Haines attended mediation and she signed the settlement agreement on behalf of Skycity.

[29] The settlement agreement contained provisions relating to the way in which Mr Lumsden's departure was to be recorded for the purposes of seeking new employment (namely as a resignation); a provision acknowledging that Mr Lumsden was "welcome" to apply for future jobs within Skycity; and a provision prohibiting either party from making any disparaging comments about the other, including to existing or prospective staff, prospective employers and internal stakeholders.

[30] Despite agreeing that Mr Lumsden was welcome to apply for future jobs within the company, immediately after the agreement was signed and Mr Lumsden's resignation had taken effect, a note was entered on Skycity's human resources computer system. In the tick-box entitled "Would you re-employ?" Ms Haines inserted "No".

[31] Another important fact emerged during the course of the hearing. Three of the five witnesses for the defendant referred in their evidence in chief to the form on which Ms Haines had noted "no" to rehiring. I directed that a copy of the form be made available to the Court, it not having been included in the bundle of documents for hearing.[5] I made the direction as the form appeared to be relevant to the matters at issue, most particularly as to whether ticking the box "no" to rehire amounted to a breach of the terms of settlement.

[32] As a cursory inspection of the form revealed, in addition to the "no" to rehire notation, the form also included room for the relevant manager to insert comments about the reasons for the employee's "termination". This part of the form had also

---

[5] Refer s 189(2) for the Court's discretion to call for evidence and information.

been filled out. Under the heading "Manager Termination Comments" the following notes appeared:

> Outstanding performance issues, staff and customer complaints. Not a team player, major attitude change, became very difficult to manage as he wouldn't follow management's directions.

[33] The omission of reference to the full version of the form had the regrettable effect of presenting a distorted picture of comments made by Skycity about Mr Lumsden following his departure. The omission also had the effect of minimising the nature and the extent of any potential breach. The explanations offered in evidence in relation to the omission were unpersuasive.

[34] Skycity's primary point was that the words contained within the form (namely "no" to rehire and "Outstanding performance issues, staff and customer complaints. Not a team player, major attitude change, became very difficult to manager as he wouldn't follow managements directions") were not disparaging of Mr Lumsden because they were factual and/or truthful in nature, given they represented Ms Haines' views at the time.

[35] As Mr Lumsden pointed out, if Skycity's interpretation of the disparagement clause in the settlement agreement was correct, he would be entitled to publicly air his personal views (perceived to be true) relating to the company's employment practices.

[36] Ms Dunn drew my attention to the following definition of "disparage" within the Shorter Oxford Dictionary:

(a) bring discredit or reproach upon; dishonour; lower in esteem;

(b) degrade, lower in position or dignity; cast down in spirit; and

(c) speak of or treat slightingly or critically; vilify; undervalue, depreciate.

[37] As these definitions make clear, there is no additional requirement for untruthfulness or fabrication. It is difficult, as Mr Boyd accepted in answer to a question from the Bench, to characterise the "no" to rehire and the management comments as anything other than critical. They were plainly directed at recording Mr Lumsden's perceived deficiencies for future reference by Skycity and to inform recruitment decisions, and I was not drawn to attempts to suggest otherwise.

[38] Even if Skycity's interpretation of the term 'disparage' is correct, and a factual comment cannot amount to a disparaging comment, that would not assist it. That is because, as Ms Dunn accepted, the manager comments in the form were directed at allegations about Mr Lumsden which had not been investigated and which had not been established against him at the time the comments were written.

[39] Ms Cheung, who was a recruitment advisor at Skycity at the relevant time (but who now works elsewhere), gave evidence that all people within Skycity who were responsible for recruitment had access to the form, and that she read any recorded termination comments. She also thought that managers may have access to the form. She referred to such access as a "due diligence" mechanism for processing applications. Ms Cheung acknowledged, when asked, that she was probably aware of the content of the form when dealing with Mr Lumsden's applications for re-employment, although she could not recall whether she had passed the detail on to others.

[40] The comments on the form were plainly disparaging of Mr Lumsden and were made available to prospective internal employers or stakeholders in breach of the settlement agreement.

Breach of clause 10 – "welcome to apply for future employment opportunities"

[41] Ms Dunn submitted that there had been no breach of cl 10 as the clause simply meant what it said, namely that Mr Lumsden was able to *apply* for future positions and had indeed done so. The nub of the submission was that the ability to fill in an application form was the beginning and the end of the parties' respective rights and obligations under cl 10 of the settlement agreement.

[42] The difficulty with such an interpretation is that it is so literal the clause becomes meaningless, particularly for Mr Lumsden. It would follow that he could fill in a form, send it to Skycity and Skycity could immediately consign it to the shredder. Even if Skycity intended a literal interpretation when agreeing to the inclusion of such a clause in the settlement agreement, any such subjective intention is irrelevant to the interpretative exercise.

[43] I do not consider that a reasonable and properly informed third party would consider that the parties intended their words in cl 10 to bear the narrow meaning advanced on behalf of Skycity. That is underscored when the provision is read together with other relevant provisions Skycity voluntarily agreed to, including that the recorded reason for termination was to be resignation and that neither party was to disparage the other, including to prospective employers and staff within the organisation itself.

[44] Mr Lumsden applied for four positions following his resignation. None were successful, although he appears to have attended a relatively informal meeting with the manager of the Sugar Club, Mr Stack. He said that Mr Stack advised him that human resources had "intervened" in the recruitment process. Mr Stack denied this and gave evidence that he had made the decision not to employ Mr Lumsden, although he accepted under cross-examination that he had been advised that Mr Lumsden had been noted as a "no" to rehire. It is notable that a subsequent request by Mr Lumsden of Ms Cheung to explain the reasons why he had been unsuccessful in his application was referred to Mr Boyd, seemingly without reference to Mr Stack, and the reasons which were then given were at odds with Mr Stack's explanation at hearing. The evidence relating to the reasons why the other applications had failed was generally indirect and was relatively sparse.

[45] While I accept Ms Cheung's evidence that there has been at least one occasion on which a particular restaurant manager has recruited an applicant in circumstances where a "no" to rehire has been noted, in this particular case the additional critical comments about Mr Lumsden's performance, attitude and client management were in play.

[46] As I have said, the purpose of the form was to inform recruitment decisions. Mr Boyd conceded as much in cross-examination; and he agreed that the comments would likely have impacted negatively on future employment opportunities. I infer that this is what occurred in respect of Mr Lumsden's applications.

[47] While Mr Lumsden was physically able to fill in and submit an application, more was required of Skycity on receipt of it. Ms Dunn was right in saying that cl 10 did not require Skycity to re-employ Mr Lumsden. Plainly that is so. However, the difficulty for Skycity is that cl 10 must be interpreted in light of other relevant provisions of the agreement, including Skycity's self-restrictive undertakings to record the reason for termination simply as a resignation and not to disparage Mr Lumsden. It follows that the only management comment that ought to have been recorded was 'resignation', and that any subsequent application would have needed to be treated fairly and on its merits. The "no" to rehire and negative manager comments that were made undermined the applications that the parties had agreed Mr Lumsden was entitled to make. While the witnesses for the defendant emphasised that each application fell to be decided by the relevant manager, a reasonable inference can readily be drawn that they were effectively doomed from inception.

[48] All of this serves as a salient reminder that terms of settlement must be carefully considered, but once agreed to are binding and enforceable – however unpalatable. I make the obvious point that if Skycity had not wished to be held to various components of the settlement it should not have agreed to their inclusion in the first place.

[49] Skycity breached cl 10 of the agreement.

Clauses 2 and 11 – failure to treat matters as finally settled

[50] Clause 2 recorded the parties' agreement that the settlement was in full and final settlement of all and any claims either party had or may have against the other in relation to the employment relationship, including its termination. Clause 11 recorded the parties' agreement that the agreement was in full and final settlement of

all matters between the parties arising out of the employment relationship, including its termination.

[51] Ms Dunn submitted that the wording of cls 2 and 11 is clear and means that matters were fully and fairly resolved and could not be reactivated by either party. She said that if Mr Lumsden had been re-employed and the company had then sought to reignite the disciplinary process, such action would be barred by cls 2 and 11. However she said that the provisions do not require Skycity to wipe its institutional memory of all previous dealings with Mr Lumsden, and further submitted that the decision not to appoint Mr Lumsden to the positions he applied for was made for reasons unrelated to the matters arising out of the employment relationship. I have already dealt with this latter submission and rejected it.

[52] The broader wording of cl 11 lends weight to Mr Lumsden's argument that the company failed to treat all matters as settled because of the notations made on the system and the way in which his applications were subsequently dealt with. I consider that the steps Skycity took in relation to Mr Lumsden's applications necessarily meant that it had failed to treat matters as finally settled.

Penalty appropriate for breaches and if so what quantum?

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

[54] Section 133A sets out a number of factors which the Court must have regard to in determining an appropriate penalty. It is a non-exhaustive list and was not in force at the time the breaches in this case occurred. However, as a full Court has recently confirmed,[6] the provision essentially confirms earlier case law and may be applied as a useful guide in the present case. The factors are:

- The object stated in s 3;

---

6 *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [141]-[148].

- the nature and extent of the breach or involvement in the breach;

- whether the breach was intentional, inadvertent, or negligent;

- 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;

- 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;

- the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;

- whether the person in breach, or involved in the breach, has previously been found to have engaged in similar conduct.

[55] As I have said, the above list is not exhaustive. In the present case I consider that two other matters are relevantly considered in terms of assessing the appropriateness of a penalty, and its quantum. The first is the need for general and particular deterrence. The second is the desirability of broad consistency with other penalties imposed in similar cases.

[56] The company breached the agreement as soon as it was signed and immediately after Mr Lumsden's resignation had taken effect. The notations were intended to impact on recruitment decisions and did so.

[57] It cannot be said with certainty that Mr Lumsden would have been successful in any of his applications. Indeed many might think it odd for an ex-employee to immediately apply for work with an organisation which he had just chosen to resign from, particularly in the circumstances of this case. However odd the position might seem, it was a possibility that the parties' agreement plainly accommodated. The end result was that company's breach meant that Mr Lumsden missed out on the

opportunity to have his applications fairly considered on their merits. In this sense it was a lost opportunity.

[58] There is no evidence before the Court that Skycity has previously been penalised for breaching the terms of a settlement agreement. There is, however, a need to send a message to parties to settlement agreements of the need to comply with the terms they have agreed to.

[59] This is not a case involving a poorly resourced employer; and there were a number of aggravating features of the company's conduct which are relevant. It is true that steps were taken to amend the extended comments shortly before trial, when Mr Boyd said he became aware of them. Nevertheless the extended comments had, by that stage, been on the system for quite some time (around two years); the extended comment was replaced with a shortened (but still problematic) comment ("David had some outstanding performance issues on his departure regarding his interaction with a customer"); and the shortened comment and "no" to rehire notation remain on the company's system even though Mr Boyd conceded that, with the benefit of hindsight, he would prefer to see them removed and replaced with "yes" to rehire.

[60] I am satisfied that it is appropriate that a penalty be imposed in relation to the breaches committed by Skycity. Because there is a degree of overlap between each of the breaches, I prefer to deal with them together by way of a global penalty.[7] In doing so I have had regard to the nature and extent of the breaches to ensure overall proportionality.

Quantum

[61] Ms Dunn submitted that there was little guidance in terms of the sort of quantum which might be ordered by way of penalty and filed a helpful memorandum following the hearing setting out a table of penalties imposed for breach of a s 149 settlement agreement, a copy of which is annexed to this judgment.[8]

---

7 *Borsboom*, above n 6.

8 Annexure A.

[62] The following points emerge from the table. Thirty penalties have been imposed in 28 cases. All involved penalties imposed by the Authority. Only one has been subject to challenge in the Court (*P v Q*) and there the Court upheld the Authority's decision imposing a $6,000 penalty for breach of a settlement agreement.

[63] Between 5 March 2014 and 2 February 2017 penalties have ranged from $250 to $10,000. The median is $1,500; the average is $1,835. It appears that lower penalties have tended to be imposed on employers than employees, although the reasons for this are unclear.

[64] Penalties for breach by way of non-payment of a settlement sum feature the most (20/30). Such breaches have given rise to penalties ranging from $500 (which, along with $2,000, is the most common amount awarded) to $3,000. Breach of a confidentiality clause in a settlement agreement follows (7/30), with only one previous case involving breach of a non-disparagement clause (1/30). The non-disparagement case involved an ex-employee breach, sending disparaging text messages to a current employee.[9] That case attracted a penalty of $2,500.

[65] The $10,000 penalty imposed in *Tibbitts v EWP Sales Ltd* is significantly higher than other penalties imposed during the period, and arose in circumstances involving a "flagrant and deliberate breach" of a restraint of trade clause in a settlement agreement.[10] The Authority's determination in that case was subsequently set aside pursuant to s 183(2) of the Act, consequent on a consent judgment of the Court.[11] The next highest award (in *P v Q*) of $6,000 involved a number of breaches, including a video posted on the internet which was found to breach the plaintiff's confidentiality obligations.[12]

[66] While Ms Dunn suggested that a penalty in the region of $1,000 might be appropriate I consider that a significantly higher amount is required to adequately reflect the aggravating aspects of Skycity's breaches in the present case. While the breaches were internal to Skycity and were limited in their exposure (unlike in *ITE v*

---

9 *Jacks Hardware and Timber Ltd t/a Mitre 10 Mega (Mosgiel and Dunedin) v Beentjes* [2015] NZERA Christchurch 29.

10 *Tibbitts v EWP Sales Ltd* [2015] NZERA Auckland 196.

11 *Tibbitts v EWP Sales Ltd* [2015] NZEmpC 141.

12 *P v Q* [2015] NZERA Auckland 181; *ITE v ALA* [2016] NZEmpC 42.

ALA[13]), I have concluded that Skycity cynically agreed to terms it had no intention of keeping. It then breached the agreement, immediately after it had been executed. There is also a broader public interest in deterring parties from reneging on s 149 settlement agreements, and of underscoring the importance of compliance, however inconvenient that might prove to be.

[67] The true extent of the breach in the present case was only revealed at a late stage and after a direction from the Bench that a relevant document be made available to the Court. I can only conclude that the failure to refer to the detail of the form reflected an attempt by Skycity to mask the full extent of its breach. While I would otherwise have imposed a global penalty of $6,000, I consider that an uplift of $1,500 is appropriate to reflect this additional aggravating factor.

[68] It goes without saying that any notations now on the system will need to comply with the terms of settlement to avoid an ongoing breach, and the spectre of further enforcement action.

Conclusion

[69] Skycity is ordered to pay $7,500 by way of penalty for breaches of the settlement agreement. I direct that 75 per cent of that amount is to be paid to Mr Lumsden. I consider that appropriate because the impact of the defendant's established breaches has fallen on him, and he has been obliged to take steps to bring the breaches before the Court. The remaining 25 per cent is to be paid to the Crown. This portion reflects the affront to the public interest in breaching an agreement which has been certified by a mediator under the Act.

[70] The parties are encouraged to settle residual issues relating to costs (to the extent they arise) and disbursements. If that does not prove possible, Mr Lumsden may file and serve any application together with supporting material within 30 days

---

[13] At n 12.

of the date of this judgment with the defendant doing likewise within a further 20 days.

Christina Inglis
Judge

Judgment signed at 3.15 pm on 14 March 2017

Annexure A

TABLE OF PENALTIES FOR BREACH OF SETTLEMENT AGREEMENT PURSUANT TO SECTION 149

Date	Case	Penalty	Comments
5 March 2014	*Davidson v Kelly* [2014] NZERA Auckland 77	$2,000	Breach by employer - non-payment of settlement sum.
25 March 2014	*Momi v Indique NZ Ltd* [2014] NZERA Auckland 108	$500	Breach by employer - non-payment of settlement sum and was considered to be "a deliberate and calculated choice".
12 June 2014	*Higgs v LITC Ltd* [2014] NZERA Wellington 63	$1,000	Breach by employer - non-payment of settlement sum.
17 October 2014	*Wallace v Basketball Otago Inc* [2014] NZERA Christchurch 162	$2,000	Breach by employer. Penalty related to three breaches – failure to pay settlement sum, failure to provide a reference and failure to return a laptop. At paragraph 17 the Authority referred to penalties awarded under s149(4) in the period from 1 July 2012 and noted that penalties of between $2,000 and $5,000 were higher than average over that period.
7 November 2014	*Kea Petroleum Holdings Ltd v McLeod* [2014] NZERA Wellington 113	$2,000	Breach by employee – breach of confidentiality through comments on employer's Facebook page.
13 November 2014	*Sinclair v Datum Connect Ltd* [2014] NZERA Auckland 463	$500	Breach by employer – non-payment of settlement sum (considered to be two breaches).
11 July 2014	*Cumming-Steward v Twenty Five Station Ltd t/a Law Debt Collection* [2014] NZERA Auckland 485	$750	Breach by employee – breach of confidentiality through a discussion with an individual. At paragraph 26 the Authority referred to four previous Authority determinations where employees had breached confidentiality provisions and the penalties awarded ranged between $750 and $1,500.
24 December 2014	*Flint v Network Plumbing Ltd* [2014] NZERA Wellington 139	$1,000	Breach by employer – non-payment of settlement sum.

2 March 2015	*Tylee-Porter v The McLean Institute* [2015] NZERA Christchurch 25	$3,000	Breach by employer – non-payment of settlement sum (considered to be three breaches).
2 March 2015	*Jacks Hardware and Timber Ltd t/a as Mitre 10 Mega (Mosgiel and Dunedin) v Beentjes* [2015] NZERA Christchurch 29	$2,500	Breach by employee – breach of non-disparagement clause through "numerous" text messages to a current employee.
2 March 2015	*Cousens v Hark Entertainment Ltd* [2015] NZERA Auckland 63	$2,000	Breach by employer – non-payment of settlement sum.
20 May 2015	*Pullen v Agrissentials NZ Ltd* [2015] NZERA Auckland 145	$1,500	Breach by employer – breach of confidentiality (on a form seeking an ACC review).
28 May 2015	*Major v Future Print & Design Ltd* [2015] NZERA Auckland 153	$1,500	Breach by employer – non-payment of settlement sum.
22 June 2015	*P v Q* [2015] NZERA Auckland 181; on appeal as *ITE v ALA* [2016] NZEmpC 42	$6,000 (upheld on appeal)	Breach by employee – breach of confidentiality provision through emails and posting a 35 minute video to the internet. The Authority referred to the breaches as deliberate and noted (at paragraph 58) that penalties for breach of the terms of a certified settlement agreement had ranged between $300 and $5,000 in the previous two years. The Court referred to factors relevant to the imposition of a penalty (at paragraph 61) as including deterrence, punishment, consistency with penalties imposed on others in similar circumstances, the nature and extent of the breach, steps to remedy and proportionality.
30 June 2015	*Tibbitts v EWP Sales Ltd* [2015] NZERA Auckland 196	$10,000	Breach by employee – breach of restraint of trade obligation agreed in settlement agreement. Said to be a "flagrant and deliberate breach".
		$250	Breach by employer – non-payment of settlement sum in response to employee breach.

6 July 2015	*McIntyre v TTR Automotive Ltd t/a Pit Stop Nelson* [2015] NZERA Christchurch 93	$1,000	Breach by employee – breach of confidentiality.
		$300	Breach by employer – non-payment of settlement sum in response to employee breach.
24 September 2015	*Chilton v Rutherford Street Kindergarten Inc* [2015] NZERA Christchurch 141	$3,000	Breach by employer –certificate of service provided late and was defective.
20 October 2015	*Bidvest New Zealand Ltd v Vivian* [2015] NZERA Wellington 101	$3,000	Breach by employee – breach of confidentiality through Facebook post.
22 October 2015	*Taylor v First Aid Specialists Ltd* [2015] NZERA Wellington 103	$500	Breach by employer – non-payment of settlement sum.
20 May 2016	*Lavelle v EB Franchise Ltd* [2016] NZERA Auckland 152	$500	Breach by employer – non-payment of settlement sum.
8 June 2016	*Labour Inspector v Bay Enterprises Ltd* [2016] NZERA Auckland 178	$500	Breach by employer – non-payment of settlement sum.
8 June 2016	*Hannington v DMI Homestagers Ltd* [2016] NZERA Auckland 180	$1,000	Breach by employer – non-payment of settlement sum.
25 July 2016	*Vasile v Rollerflex Ltd* [2016] NZERA Auckland 249	$500	Breach by employer – non-payment of settlement sum.
26 July 2016	*Kaur v DRB2 t/a Super Saver Foodmart Ltd* [2016] NZERA Auckland 255	$2,000	Breach by employer – non-payment of settlement sum.
3 August 2016	*Fleming v Magma Rock Ltd* [2016] NZERA Auckland 263	$1,500	Breach by employer – non-payment of settlement sum.
12 August 2016	*Powell v Tricklebank Plumbing 2010 Ltd* [2016] NZERA Wellington 97	$2,500	Breach by employer – non-payment of settlement sum.

5 January 2017	*Wanaka Sun (2003) Ltd v Woodrow* [2017] NZERA Christchurch 3	$250	Breach by employee – breach of confidentiality through comment made to an individual.
2 February 2017	*Oka v Handyman Pro NZ Limited* [2017] NZERA Auckland 28	$2,000	Breach by employer – non-payment of settlement sum.