

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 626
3215259

BETWEEN	ALEXIS LOPEZ Applicant
AND	KARIKI PHARMA LIMITED First Respondent
AND	ALEXANDRA SETON Second Respondent
AND	PAUL SETON Third Respondent
AND	ANDREW STEADSON Fourth Respondent
AND	EAN ALEXANDER Fifth Respondent

Member of Authority:	Claire English
Representatives:	Emma Butcher/ Tanya Preston, counsel for the Applicant Stephen Langton/Rebecca White, counsel for the Respondents
Investigation Meeting:	14 and 15 May 2024 in Tauranga
Submissions received:	25 July and 15 August 2024 from Applicant 8 August 2024 from Respondent
Determination:	17 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Alexis Lopez was employed by the first respondent (KPL) in December 2019 as the Company's Technical Officer (CTO). KPL was a start-up business in the medical cannabis market. Mr Lopez had performed work for KPL in 2019 as an independent contractor while living in Vietnam. KPL wanted to set up a licensed premises in New Zealand, so offered Mr Lopez employment as its CTO, including supporting him and his family to come to New Zealand under the Skilled Migrant visa scheme.

[2] Mr Lopez was successful in obtaining a Skilled Migrant Visa with KPL's support. He and his family moved to New Zealand in December 2019 and commenced employment with KPL. Problems arose with the payment of salary. Mr Lopez was paid late for the months of April, May, and June 2020. He received no payments after this.

[3] Mr Lopez negotiated the issuing of shares to cover his salary payments for August, September, and October 2020 and continued working for KPL.

[4] By December 2021, Mr Lopez was concerned about the continuing non-payment of salary and increased his efforts to negotiate for alternative solutions. KPL put forward solutions including offering two other employment agreements on reduced terms, which were not agreeable to Mr Lopez.

[5] In July 2022, Mr Lopez resigned. He was not paid out his overdue salary, or any holiday pay. He now brings claims for wage arrears, holiday pay owing, Kiwisaver payments owing, claims for penalties for breaches of the Wages Protection Act 1983, the Minimum Wage Act 1983, the Holidays Act 2003, and s 4 of the Employment Relations Act 2000, and claims of unjustified disadvantage and unjustified constructive dismissal by reason of non-payment.

[6] In addition, Mr Lopez brings claims against the second, third, fourth, and fifth respondents, who were all directors of KPL during his employment. He seeks declarations that they are persons involved in a breach of employment standards, penalties against them, and that payment be made by them to the extent that KPL fails to pay any amounts owing.

[7] KPL accepts that monies are owing to Mr Lopez, but does not agree with him as to the amount. It says that Mr Lopez agreed to defer payment of his salary until investor funds were received, but that in the end, investor funding did not arrive.

The Authority's investigation

[8] For the Authority's investigation written witness statements were lodged by Mr Lopez himself, his wife Ms Khanh Ngoc Le, and the Chief Executive Officer (CEO) of KPL, Mr Stephen Wilson.

[9] For the respondents, witness statements were lodged from director Mr John Seton, the board secretary Mr Peter Wood, former director Mr David Seton, the second respondent Ms Alexandra Seton, the third respondent Mr Paul Seton, Mr Paul Seton's partner Ms Phuc Ngo, and the fourth respondent Mr Andrew Steadson. The fifth respondent Mr Ean Alexander did not provide a witness statement.

[10] All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave written submissions.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[12] The issues requiring investigation and determination were:

- (a) Are salary/wage arrears owing to Mr Lopez?
- (b) Are Kiwisaver and holiday pay entitlements owing to Mr Lopez?
- (c) Was Mr Lopez unjustifiably disadvantaged by the non-payment of salary?
- (d) Was Mr Lopez unjustifiably constructively dismissed?
- (e) If KPL's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - Lost salary (subject to evidence of reasonable endeavours to mitigate loss);
 - and
 - Compensation under s123(1)(c)(i) of the Act;

- (f) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Lopez that contributed to the situation giving rise to these grievances?
- (g) Should penalties be awarded against KPL for breaches of statute?
- (h) Are any or all of the second, third, fourth, and fifth respondents parties involved in a breach of employment standards?
- (i) If so, should penalties be awarded against them personally, and should orders be made against them personally to repay any monies ordered to be paid by the company to the extent that KPL does not pay?
- (j) Should either party contribute to the costs of representation of the other party.

Background

[13] KPL was a start-up company formed with the intention of bringing medical cannabis products to market. Mr Lopez had a science and research background, and was hired by Mr David Seton to assist in this process. Mr Lopez was originally hired as an independent contractor, and he and his wife Annie were living in Vietnam at the time. It was desired to base KPL in New Zealand, and after some lengthy discussions throughout 2019, Mr Lopez was offered an employment agreement with KPL, conditional upon him moving to New Zealand and obtaining suitable visas to allow him to work for KPL. KPL hired Ernst Young to assist with the visa process, and in due course, Mr Lopez was granted a skilled migrant visa, which would allow him to live and work in New Zealand, and to bring his wife and infant son with him.

[14] Mr Lopez arrived in New Zealand in early December 2019, and began employment with KPL. All went well, and he was focused on building and developing a suitable premises to be licenced, building industry contacts, manufacturing contacts, research and development initiatives, and consideration of manufacturing operations and product options.

[15] Both Mr Lopez and the directors of KPL told me that this was an exciting time, as they all believed in the business and the potential for bringing a variety of medical cannabis products to market. As the business was at that point in its infancy, it was reliant on investor funding to pay a handful of staff which included Mr Lopez and Mr Wilson the CEO, and to fund the building of the licensed facility and the obtaining of relevant regulatory licences.

[16] Mr Lopez regularly attended board meetings including to report on his work. In March 2020, his monthly salary payment was short by 20%. He was made aware of this and accepted it at the time, as he had faith in the company and was generally aware of its limited cash flow.

[17] Mr Lopez then agreed with KPL to defer payment of his salary for April, May, and June 2020 as well. It was agreed that he would be paid for the three months April to June in the month of July, along with his July salary.

[18] The payslips show that Mr Lopez received a lump sum payment for April, May, and June 2020 on 16 July 2020. There are no payslips after this. Mr Lopez says he never received any salary payments for July 2020. There was a suggestion that there was a payment made on 6 August 2020, however, there was no payslip showing this, nor were bank account or other evidence of payment provided.

[19] Mr Lopez then negotiated with KPL to receive shares in lieu of pay for the months of August, September, and October 2020. In addition, he agreed with his wife that they would invest the lump sum salary payment for the months of April, May and June 2020, being some \$20,000, back into KPL. This was done by the issuing of shares in the company to Ms Khanh Ngoc Le. It is clear that at this point Mr Lopez believed that the company had the ability to succeed, and had trust that his agreements would be met.

[20] Mr Lopez received shares in exchange for three months salary, and this is recorded by way of a board minute dated 1 December 2020 and signed by Mr Lopez and the directors.

[21] He also received a separate allocation of shares at the end of November 2020, pursuant to his employment agreement. Although there was some slight confusion over the two issues of shares at such close dates, I am satisfied that the records show the November 2020 shares was a contractual entitlement, and the 1 December 2020 shares were pursuant to a specific agreement with Mr Lopez in lieu of salary for the months of August, September, and October 2020. They are two different allocations for two different purposes.

[22] Mr Lopez continued to work for KPL through 2021. He was not paid. He says that he kept raising the issue of his payment with the directors generally, including that this was putting pressure on him and his family financially. Mr Lopez' evidence in short was that he liquidated other investments to buy a house to live in in New Zealand so as to reduce the family's outgoings, and then when it became clear that they would need to continue to "eat into" their

savings, bought a rental property so as to achieve some cash flow and made lifestyle economies to make ends meet.

[23] Throughout this time, Mr Lopez continued working and the directors continued looking for third party funding. Although this was described as “challenging”, negotiations were begun with a third party investor, and progress was made on the practical side of the business.

[24] The directors gave evidence that they were aware of the mounting liabilities owed to – among others – Mr Lopez. In about October 2021, a new employment agreement was prepared offering Mr Lopez what was effectively the equivalent of minimum wage. He declined, and no agreement was reached. Later in about December 2021, a second new employment agreement was prepared, offering him 4 hours work per week at the minimum wage rate. He declined this also, given his evidence that he was still working full time in the business, as he wanted – and had every reason to want – to see it succeed.

[25] In February and March 2022, it was becoming clear there were problems, and the expected third party funding had not been realised. Mr Lopez and Mr Wilson incorporated a company and put forward a proposal to KPL to convert their outstanding salary into shares, and with new directors and management. This was not welcomed or accepted, and was described in evidence as a “hostile takeover bid”.

[26] Both sides gave evidence that they were engaged, and had been engaged for some months, in constant back-and-forth negotiations about what to do regarding Mr Lopez’ salary. Mr Steadson, then the Chair of the Board, gave evidence that he believed there was an agreement with Mr Lopez to continuously “defer” payment of his salary until funding of \$2.5 million dollars had been received. He was unable to point to any document recording such an agreement, apart from the Board minutes dated 1 December 2021, which record:

Peter [Wood, Board Secretary] commented that no further liabilities were being incurred other than those where specific arrangements regarding payment had been agreed with the parties concerned.

[27] Mr Lopez rejects the idea that he had agreed to any specific arrangements regarding payment. He says that he had been discussing options, raising concerns, and attempting to negotiate for agreements around payment to him, but nothing was ever actually agreed. He says that what was agreed was the deferred payment for April, May, and June 2020, which was

paid in July; and that he also agreed to receive shares in lieu of payment for August, September, and October 2020, which shares were issued as per the Board Minute of 1 December 2020.

[28] Relations between the parties deteriorated and in July 2022, Mr Lopez resigned. He says that by that time, he had lost faith, trust and respect in KPL and the directors. He also says that he needed to continue earning money to support his family.

[29] Mr Lopez gave evidence about the impact this had on him. He was stressed and distressed. In addition to putting his time and deferred salary into KPL, he had also invested some \$140,000 into the company. He had persuaded his family, including his aunt and grandmother, to invest as well. He says he found this not just stressful for the obvious reason that he had lost money and not been able to support his family, but he also found it personally and professionally humiliating to have been put in this position.

[30] The evidence of impact on Mr Lopez was supported by his wife, who also gave evidence that she herself had to seek ongoing support from the mental health unit with depression when Mr Lopez finally resigned. She described how he could not sleep, and how there was no place of respite for Mr Lopez as he was working from home, so he had no place to “get away” from it all.

[31] Mr Lopez had been performing some document review work for a company he had previously been engaged with of approximately 4 hours per week. Approximately 2 months after his resignation, he was able to increase his work for that company, and has continued to work for them.

[32] KPL maintains that Mr Lopez agreed to the “deferment” of his salary. This is said by Mr Steadson to be on the basis that Mr Lopez attended board meetings, and was aware of the statement by Mr Wood on multiple occasions, “that no further liabilities were being incurred other than those where specific arrangements regarding payment had been agreed”. Mr Steadson says Mr Lopez knew that this referred to him and by saying nothing, confirmed his agreement.

[33] In addition, KPL says that by continuing to work without his salary being paid, Mr Lopez effectively agreed to not be paid. Mr Steadson described Mr Lopez as being “inside the tent” and that he was not concerned to be paid salary because he stood to increase his personal wealth if KPL became a successful company, as he had shares in KPL. I note that Mr Steadson

was a vague witness, particularly when it came to details of payments, which he was unable to remember.

[34] This contrasts with the evidence of Mr Wilson, KPL's CEO, who states that there were ongoing conversations about Mr Lopez' salary, but no agreement was ever reached as to how long it might be deferred or on what terms.

[35] The directors of KPL gave evidence. Overall, their evidence was consistent, that they were aware that Mr Lopez was not being paid, and they believed that he had agreed to defer payment of his salary.

[36] Mr David Seton went further, and said that even now, Mr Lopez's salary were not due, because the agreement was that he would not be paid until a certain amount of outside funding was received, that funding had not (and could not) be found, and therefore, no salary were due and maybe never would be.

[37] The evidence of this agreement was said to be in the board minutes, where there was a standing comment to the effect that arrangements were in place with creditors. Mr Lopez never said anything to gainsay this, therefore the directors took the view that this he was indicating to them that he was one of the unnamed creditors who had an arrangement in place with the company. I was told that Mr Lopez' silence in the face of this note in the board minutes amounted to assent to his salary not being paid.

[38] There was also discussion about the impact of the company solvency test. The directors were generally aware that KPL did not have the funds to pay Mr Lopez and that if he were to take the step of calling in the salary owed to him, then the company would effectively become insolvent. At the monthly board meetings, Mr Wood, stated that KPL met the solvency test, and this in conjunction with the note that arrangements had been made with creditors, were what the directors relied upon to say that Mr Lopez had agreed to defer payment.

[39] On 1 April 2022, Mr Wood and Mr Wilson met to discuss the current situation. As a result of this meeting, Mr Wilson then emailed the directors that morning to advise of his meeting with Mr Wood and that he "must warn you that Kariki Pharma is now on the cusp of failing insolvency tests".

[40] Mr Wood emailed the directors, copying Mr Wilson, on 4 April 2022. In that email he stated:

However, incurring new liabilities for Steve and Alexis is not the problem as there is an agreement in place that no further liabilities are incurred for them from 1 October 2021 until new equity of at least \$1 million is received.

[41] The directors all relied on Mr Wood's solvency assurances, and on the board meeting minutes to support their position that Mr Lopez had agreed not to be paid.

[42] All directors and Mr Wood agreed that if Mr Lopez had "called in" his salary, the company would not meet the solvency test, and could not responsibly have continued trading. But it did continue trading, meaning that Mr Lopez must have agreed to defer payment in the way that they describe.

[43] There is an obvious element of circularity to this reasoning.

[44] However, my view is that there is a fundamental problem with KPL's position. It and its directors, are unable to point to any firm agreement between it and Mr Lopez that supports the position that such an agreement had in fact been reached.

[45] KPL and the directors accept that there is nothing in writing, either formally or informally, that expressly sets out such an agreement.

[46] This was explained to me as it being understood by all, including Mr Lopez, that he was included in the standing reference in the board minutes, even though his name was not mentioned, and that by saying nothing, he affirmed this agreement.

[47] Mr Lopez said he did not understand this to be a reference to him. Instead he understood it to be a reference to other creditors, examples of which were utilities, lease costs, and a small amount for specified legal fees.

[48] There is no indication that it was ever explicitly discussed that the reference to creditors with specific arrangements included Mr Lopez and his outstanding salary. The board meetings do not record or suggest this level of specificity. None of the directors told me that they had ever discussed this matter specifically with Mr Lopez. The CEO told me that his view was that this reference excluded Mr Lopez.

[49] In short, there is no evidence that KPL and its directors, entered into an agreement with Mr Lopez that Mr Lopez would defer payment of salary until a certain amount of capital funding was received, and/or that as this amount of capital has not been received, Mr Lopez's wage claims are either forfeit or not due.

[50] It follows from this that Mr Lopez's salary remain outstanding.

Other matters

[51] I will also touch on other matters that were raised on behalf of KPL and its directors. It was emphasized at the investigation meeting that Mr Lopez was wealthy and did not need to receive his agreed salary, and also that he had achieved what he wanted from this arrangement, which was said to be the right to live in New Zealand with his family. Mr David Seton in particular took the view that Mr and Mrs Lopez had wanted to come to live in New Zealand and that Mr Lopez took the job with Kariki Pharma, this was primarily to ensure he and his family could obtain a New Zealand visa. Mr David Seton stated that:

It was never intended for [Mr Lopez] to be an employee of KPL for longer than necessary to get a visa to live and work in New Zealand....Once I knew [Mr Lopez] was granted a visa allowing him to be employed by KPL, I made clear to him that I no longer thought he needed to be on the employment contract.

[52] Mr Lopez does not accept that his employment with KPL was a front to allow him and his family to live in New Zealand. His evidence was that he was from the United States, and his wife was from Vietnam, and the opportunities and amenities available to both of them in those countries were superior to those afforded by Omokoroa in the Bay of Plenty. His evidence was that he at all times believed his employment with KPL was genuine, and that the business opportunities if KPL were to be successful were real, to the extent that he put his personal money into KPL, and convinced family to invest as well, both of which actions he now regrets. In response to statements about his personal finances, his evidence is that he and his wife had to sell their properties in Vietnam to ensure they had a house to live in and some income here in New Zealand during the period of non-payment, and that rather than indicating personal wealth, this was effectively the liquidation of their other assets.

[53] Mr David Seton's subjective view on the importance of a visa to Mr Lopez cannot override the binding legal obligations that KPL entered into by way of the employment agreement between it and Mr Lopez. There was no dispute that Mr Lopez was an employee of KPL. That employment agreement including his wage rates, and the contractual provision of

shares at certain points, had been entered into knowingly and deliberately on KPL's part. Suggesting that Mr Lopez did not really need his salary, or that he should consider living in New Zealand adequate compensation, does not alter the contractual obligations owed by KPL. As such, I take these matters no further.

[54] In addition, it was suggested that Mr Lopez was not working full time for Kariki Pharma. This was said to be on the basis of a "Google for Business" profile, which was not in evidence. Mr Lopez's position is that he performed work for KPL on a full time basis, and no concerns were ever raised with him about his performance, hours, or availability during his employment.

[55] KPL is unable to show that any concerns about Mr Lopez's hours of work were raised with him prior to his termination. In fact, Mr Steadson's evidence on this point was that he "didn't push" Mr Lopez on this issue while he was employed. In addition, I directed KPL provide wage and time records for Mr Lopez. No wage and time records have been provided.

[56] As such, I consider that I may accept Mr Lopez's evidence of his hours worked and salary owing to him, in accordance with section 132 of the Act.

Outstanding Salary

[57] Mr Lopez is owed his outstanding salary. He claims \$220,153.85 gross from 1 July 2020 through to the date of termination of his employment on 14 July 2022, being 24 months and 2 weeks.

[58] The respondents' position is that Mr Lopez was paid salary for the month of July 2020. Mr Lopez's evidence is that he was never paid salary for this month. This was discussed at the investigation meeting, and I invited KPL to provide evidence of the salary payment it said was made for that month following the investigation meeting. No documents have been received.

[59] Instead it is submitted for KPL that Mr Lopez verbally accepted the correctness of an arrears statement created by Mr Wood that excluded the month of July 2020, and also that Mr Lopez must have provided evidence satisfactory to Immigration New Zealand about his salary payments to have been granted a permanent resident visa in August 2020.

[60] I do not accept that Mr Lopez's oral evidence was, properly considered, a concession or agreement that he had received payment for July 2020. His evidence was that he had not.

KPL did not provide any form of documentation that would demonstrate payment for that month had been made. In those circumstances, I am disinclined to make an assumption that payment was made based in turn on assumptions about what Mr Lopez might have represented to a third party (which was not in evidence). Mr Lopez's claim for salary for the month of July 2020 is accepted, in accordance with s 132 of the Act.

[61] KPL also submits that Mr Lopez has received share payments for the months of August, September, and October 2020, and should not receive wage arrears for these months on this basis. Mr Lopez accepts that he did receive an allowance of shares in lieu of salary for those months, but submits that this was because there was no other option available to him, and the benefit of owning those additional shares was speculative and not in the end realised.

[62] Mr Lopez accepts that he agreed with KPL to receive shares in KPL in lieu of salary for those months. I do not agree that he should now be able to claim salary for those months simply because it has now become clear over time that this was a bad bargain. I further note that there were subsequent discussions between Mr Lopez and KPL about further share issues instead of salary, but Mr Lopez did not agree to any further arrangements. All of this suggests that Mr Lopez reached a genuine agreement, recorded in writing, to receive shares in lieu of salary. My view is that it would be inappropriate to award salary for these months.

[63] Accordingly, Mr Lopez will be awarded salary for July 2020, and from November 2020 to July 2022. This amounts to 21 months and 2 weeks. Mr Lopez's annual salary was \$108,000. This amounts to a contractual of \$9,000 gross per month, and it has been submitted for the respondents that the 2-week period should be calculated at the weekly rate of \$2,076.92, which is \$108,000 divided by 52. I do not understand there to be any objection to this on behalf of the applicant, and so I adopt this rate. Accordingly, the period of 21 months and 2 weeks equates to \$193,153.84. Orders are made accordingly.

Holiday Pay

[64] Mr Lopez is also owed his outstanding holiday pay. He claims \$20,976.92. KPL says that the amount is \$13,721.54, which properly accounts for 3.23 weeks of annual leave taken during employment. My view is that Mr Lopez accepted that he had taken two periods of leave, and that the lower sum is a more accurate reflection of the remaining entitlements. Orders are made for the payment of this lower sum accordingly.

KiwiSaver

[65] Mr Lopez also brings a claim for unpaid KiwiSaver entitlements. He claims the 3% employer contributions that KPL should have made, amounting to \$7,233.92 in his calculation.

[66] KPL says that Mr Lopez was not eligible to enrol until his grant of residency in August 2020, however, he was in fact enrolled by KPL on 15 June 2020, which enrolment was confirmed by IRD. KPL says that Mr Lopez should not be entitled to receive KiwiSaver contributions in respect of the period of time when he was not entitled to be enrolled. I agree.

[67] Mr Lopez is however, entitled to KiwiSaver contributions in respect of that salary which I have found were outstanding after August 2020. The relevant salary amount is therefore \$184,153.84 (from 1 November 2020 to 14 July 2022), plus the sum of \$13,721.54 for holiday pay, totalling \$197,875.38. At the rate of 3% for employer contributions, this amounts to \$5,936.26. Orders are made accordingly.

Did non-payment amount to a constructive dismissal and/or an unjustified disadvantage?

[68] Mr Lopez claims that the non-payment of his salary amounts to an unjustified disadvantage, and also that the severity and ongoing nature of this failure amount to a breach of duty by KPL that was sufficiently serious that his resignation was reasonably foreseeable.

[69] It is submitted for him that KPL's actions crossed the line separating inconsiderate conduct causing unhappiness or resentment, and were in fact dismissive or repudiatory conduct sufficient to bring about termination of the employment relationship.

[70] It is accepted that this only became clear after the sudden death of a third party investor, and that up to this point, both sides had genuinely believed that there was a way forward for the company.

[71] I accept that a failure to pay salary, especially a complete failure to pay over some months as occurred here, amounts to a disadvantage in Mr Lopez's employment. Entitlement to be paid is a fundamental term of employment and KPL's actions breached that term. I also consider that in doing so, its actions were unjustified. KPL's defence was that Mr Lopez had agreed to defer payment of his salary indefinitely, which I have found was not the case, and was based on a series of assumptions made by KPL and its directors, rather than any discussion

or consultation with Mr Lopez himself. The facts show that Mr Lopez attempted on numerous occasions to start these discussions, beginning in October and November of 2020, but that no firm agreement was ever reached. This culminated in the directors criticising Mr Lopez for his proposals to change how KPL was owned and managed, by calling one of his proposals a “hostile takeover” without ever coming up with any proposals themselves to either pay him his salary or stop liabilities accruing by ending his employment. On the contrary, they were open that they did not intend to put more of their own money into the business.

[72] The ongoing failure to pay Mr Lopez’s salary amounts to an unjustified disadvantage.

[73] I must also consider whether it was sufficient to amount to constructive dismissal. Not every breach will lead to constructive dismissal. There must be “a breach of a sufficiently serious nature to bring a reasonable employee to the conclusion that the employer does not intend to be bound by the contract and, therefore, cannot be relied upon to perform it fully or consistently in the future.”¹

[74] When Mr Lopez resigned in July 2022, this occurred after the unexpected death of a third party investor and the active rejection of a change proposal he himself had put forward. Mr Lopez’ evidence was that there was some discussion, but “it wasn’t clear, even with a change in direction, how, when or, if I would be paid.”² He says he felt exhausted and gave up hope when he submitted his resignation.

[75] On balance, I consider that Mr Lopez’s evidence was that he was felt he had no choice but to resign when it became clear to him (mainly due to the death of the investor) that there was no pathway to the payment of his salary, and that KPL did not intend to honour the terms of his employment. This amounts to a constructive dismissal. Mr Lopez has personal grievances for unjustified dismissal and unjustified disadvantage, and is entitled to remedies accordingly.

What remedies should be awarded?

[76] It is responsibly accepted on Mr Lopez’s behalf that there is overlap in the unjustified disadvantage and unjustified dismissal claims as both arise from the same facts, namely the non-payment of salary. Nevertheless, it is said that the harm suffered by Mr Lopez has been

¹ *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* (1990) ERNZ Sel Cas 791 (LC) at 803.

² Mr Lopez’s witness statement at paragraph 51.

deep and prolonged, and justifies compensation for hurt, humiliation, and injury to feelings of \$30,000.

[77] I accept the evidence of Mr Lopez as to the mental and physical impacts on him, including his feelings of remorse for encouraging family members to invest in KPL, and his feelings of personal and professional embarrassment and shame. Against this, I must weigh that by any account, Mr Lopez waited an unusually long time (106 weeks in total) without pay before resigning, resulting in his arrears and impacts thereof continuing. Looked at in the round, I consider that compensation of \$20,000 is sufficient to recognise the impact on him. Orders are made accordingly.

[78] I have considered whether any actions by Mr Lopez contributed to the situation that gave rise to his personal grievances, such that those actions would require a reduction in the remedies awarded. For this to be so, Mr Lopez's actions would need to have been causative or blameworthy. I find that this was not the case, and no reductions need be made.

Are the Directors of KPL Persons Involved in a Breach of Employment Standards?

[79] Mr Lopez seeks a declaration that the directors of KPL are persons involved in a breach of employment standards under s 142W of the Act. If I find that the directors of KPL are persons involved in a breach, I must then consider if they may be made liable for the payment of any wages or other money due to Mr Lopez if KPL fails to make payment to him in full in accordance with s. 142Y of the Act.

[80] Section 142W of the Act defines a person involved in a breach. This requires that:

- a. There is a qualifying breach, being a breach of employment standards³;
- b. There is a qualifying person, being an officer of an entity⁴; and
- c. There are qualifying actions by that person, being acts that aided, abetted, counselled, or procured the breach, or being in any way, directly or indirectly, knowingly concerned in, or party to, the breach.⁵

[81] The second, third, fourth, and fifth respondents say they have a defence as set out in s 142ZD(2)(a) of the Act, in that their involvement in the breach concerns was due to reasonable

³ See s. 142W(1).

⁴ See s. 142W(2) and (3).

⁵ See s. 142W(1)(a), (b), and (c).

reliance on information supplied by another person. They say in this case that they relied on the statements of Mr Wood, KPL's accountant, that there was an agreement with Mr Lopez to defer payment of his salary until a certain amount of funding was received.

[82] It is submitted for Mr Lopez that Mr Wood and Mr Wilson's evidence was that Mr Wood was acting on information supplied to him by the board which included the second, third, fourth, and fifth respondents and that it would be absurd for the respondents to be able to claim they could reasonably rely on information supplied to them by Mr Wood, when it was them who had passed this idea on to him in the first place.

[83] The defence in s 142ZD(2)(a) requires the second, third, fourth, and fifth respondents to prove that their involvement in the breach was due to "reasonable reliance on information supplied by another person". Mr Wood was an accountant. He contracted to KPL for his services, and was not intimately involved in the running of the business. As I have noted above, Mr Wood's evidence was that he felt able to assure the directors of the solvency of KPL based on what he understood was Mr Lopez's agreement to defer his salary payments, which information he obtained from Mr Wilson and from the board meetings he attended with the directors.

[84] My view is that Mr Wood in his professional capacity was able to speak to his view on whether KPL met the relevant solvency tests, but he was not in a position to give the directors information about Mr Lopez's agreement with KPL or the directors themselves. It was not reasonable for the directors to rely on Mr Wood's views as to factual matters that were not within his knowledge, and which came in fact from information provided by the directors themselves, rather than being truly information supplied by Mr Wood. I find the defence in s 142ZD(2)(a) is not available to the second, third, fourth, and fifth respondents.

[85] I will now consider if there was a qualifying breach. Here the failure to pay salary to Mr Lopez amounts to a breach of s 4 of the Wages Protection Act 1983, which requires that wages (including salary) be paid in full and on time; and a breach of s 6 of the Minimum Wage Act 1983. The failure to pay Mr Lopez annual holiday pay on the termination of his employment is a breach of s 27 of the Holidays Act 2003, which requires that any annual leave not taken as at the ending of employment must be paid in the pay that relates to the final period of employment. It is not possible to contract out of these statutory minimums, which crystallise on the termination of employment.

[86] Section 5 of the Act defines “employment standards”, and these include the minimum entitlements for payment under the Holidays Act 2003, and the provisions of the Wages Protection Act 1983 and the Minimum Wage Act 1983. Breaches of these three Acts, which have occurred here, are breaches of employment standards. This means there are qualifying breaches.

[87] As the employer is an entity, a person can only be considered a person involved in a breach if they are an officer of the employer. Where the employer is a company, a director of that company is an officer of the company for the purposes of s. 142W. The second, third, fourth, and fifth respondents were all directors of KPL at the relevant time. This means they are qualifying persons.

[88] I must then consider if there are qualifying actions by the directors in respect of the failures to pay salary and holiday pay. All directors were aware that Mr Lopez was an employee of KPL, and that he was owed salary by the company. All directors were aware that he was not being paid his salary.

[89] Leaving aside the defence raised on behalf of KPL and the directors that they believed that there was an agreement with Mr Lopez not to pay his salary until certain amounts of funding were received, this cannot stand in the face of Mr Lopez’s termination. Even if I had been persuaded (which I was not) that Mr Lopez had agreed to defer the payment of his salary to some undefined future point, his salary and holiday pay would still have become due and payable on the ending of his employment. There is certainly no ability to contract out of either the Holidays Act 2003 or the Minimum Wage Act 1983. I received no evidence on behalf of any of the respondents as to how they had intended to meet KPL’s obligations at this junction, apart from the frank admission that by that stage, there was no money to pay Mr Lopez, and the directors had generally decided not to put any of their own money into KPL.

[90] The evidence shows that the directors were knowingly party to the non-payment of monies owing to Mr Lopez during his employment, and were directly or indirectly knowingly concerned in the breaches by way of non-payment of monies owed to him on the termination of his employment. This means there is qualifying conduct, making the second, third, fourth, and fifth directors persons involved in breaches of employment standards.

[91] I must now consider if orders should be made under s. 142Y of the Act allowing Mr Lopez to recover the wages and other money payable to them from the second, third, fourth, and fifth directors, if KPL does not make payment to him in full.

[92] This may occur if there has been a default in the payment of wages or other money payable to the employee; and the default is due to a breach of employment standards; and the person is a person involved in a breach.

[93] All these things apply in the present case: there has been default in salary due to Mr Lopez;⁶; the default is caused by a breach of employment standards namely breach of the Wages Protection Act 1983, Minimum Wages Act 1983, and the Holidays Act 2003; and I have determined that the second, third, fourth, and fifth directors are persons involved in a breach.

[94] As all these tests have been met, money owing to an employee may be recovered from the second, third, fourth, and fifth directors personally, if leave for this to occur has been given by the Authority. Bearing in mind that Mr Lopez have been without salary for a considerable period of time already, I grant such leave as requested. In doing so, I note that money may be recovered from the directors personally only to the extent that KPL is unable to pay the arrears owing, as required by s 142Y(2)(b) of the Act.

Interest

[95] Mr Lopez has sought orders that interest be payable on the monies owing to him in accordance with the Interest on Money Claims Act 2016, from 14 July 2022 being the last day of his employment. The respondents' position is that there was a dispute as to the amount owing to Mr Lopez as they did not accept he was owed salary in the absence of funding.

[96] In these circumstances, my view is that it is fairest to award interest from the date of this determination onwards, and I exercise my discretion to do so. Orders are made accordingly.

Penalties

[97] Mr Lopez also seeks an award of penalties against both KPL and its directors. As against KPL, Mr Lopez seeks penalties for breaches of the terms of his employment agreement,

⁶ For the avoidance of doubt, holiday pay is to be treated as wages for this purpose in accordance with s. 86 of the Holidays Act 2003.

breaches of s 4 of the Act, breaches of the Minimum Wage Act 1983, the Wages Protection Act 1983, and the Holidays Act 2003.

[98] By failing to pay Mr Lopez his contractually agreed salary, either when due or at the latest, at the ending of his employment, KPL has acted in breach of the Minimum Wage Act 1983 and the Wages Protection Act 1983. By failing to pay outstanding holiday pay when due, at the latest at the ending of Mr Lopez's employment, KPL has also breached the Holidays Act 2003.

[99] The respondents all say that properly viewed there was no breach, as they believed Mr Lopez had agreed to defer payment of his salary indefinitely. However, even if I had found this to be the case (which I have not), the parties are not able to contract out of minimum employment standards set out in the statute. My view is that without firm agreement set out in writing, which the facts show did not occur, non-payment of salary also constitutes a breach of Mr Lopez's employment agreement.

[100] My view is that no breach of section 4 of the Act has been made out that is separate from the non-payment of salary. The evidence shows that the parties continued to communicate (albeit being unable to reach agreement) on the issue of Mr Lopez's salary and various alternatives to resolve this. While multiple statutory breaches occurred as a result of the nonpayment of his salary, this was in effect a singular problem, and should properly be dealt with as a single globalised breach.

[101] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,⁷ *A Labour Inspector v Prabh*⁸ and *A Labour Inspector v Daleson Investment*.⁹ The considerations in regard to penalties¹⁰ are as follows:

- a. The object of the Act – the failure to pay salary is a failure to pay minimum entitlements, and Mr Lopez has been denied the benefit of his salary;

⁷ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

⁸ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

⁹ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

¹⁰ *Nicholson v Ford*, [2018] NZEmpC 132.

- b. The nature and extent of the breach – the breach continued for some 106 weeks before the employment ended and remains unremedied;
- c. Whether the breach was intentional, inadvertent, or negligent – it was knowing, and KPL and its directors had no plan in place to resolve matters on the ending of Mr Lopez’ employment;
- d. The nature and extent of any loss or damage – Mr Lopez has lost a considerable sum of money, and has been waiting on his arrears for a considerable period of time;
- e. Compensation or other steps in mitigation – there was no evidence that any steps have been taken to pay the arrears owing by KPL or any of its directors;
- f. The circumstances of the breach, including the applicant’s vulnerability – Mr Lopez was on a resident visa, but it did not require him to work for KPL, he was a senior office-holder at KPL. I consider this factor to be neutral;
- g. Any similar conduct –there is no evidence of this;
- h. Deterrence – there is a need for deterrence on a general and specific basis, given the importance of paying salary when due;
- i. Degree of culpability – payment of salary is a fundament part of the employment relationship;
- j. Consistency – the present case is at the lower end of the range of previous awards;
- k. Ability to pay – I take the view that KPL remains constrained in its ability to pay, as there is no evidence it is trading;
- l. Proportionality – the amounts and duration involved are more than minor.

[102] Taking all the above matters into account, I consider that a penalty against KPL is warranted. The payment of salary or wages, including holiday pay, is a minimum entitlement, and multiple employment standards have been breached. The company is liable for a total

maximum penalty of \$20,000¹¹ in respect of a single globalised breach. The starting point for a failure to pay is 80% of this (\$16,000) and I consider that a discount for lack of ability to pay is warranted, taking the penalty to \$10,000. This is at the lower end of such penalties, as noted. Orders are made accordingly.

[103] Mr Lopez has applied to have any penalty awarded paid to him, on the grounds that it is they who have suffered as a result of the failure to pay. I accept that Mr Lopez has been directly economically affected by the breaches with limited other recourse. Seventy-five percent of the penalty will be paid to him, with the remainder going to the Crown account. Orders are made accordingly.

Penalties against the 2nd, 3rd, 4th, and 5th respondents

[104] In addition, Mr Lopez seeks an award of penalties against the second, third, fourth, and fifth respondents for breaching Mr Lopez's employment agreement pursuant to s 135(1) of the Act¹². Mr Lopez seeks that a penalty of \$10,000 be awarded against each, on the grounds that: their actions are in flagrant and sustained disregard for contractual terms, there is no evidence to suggest that any of the directors could not pay and such an award would be just given KPL's limited ability to pay.

[105] The second, third, fourth, and fifth say that s 135(1) of the Act allows an action for the recovery of penalties to be brought against any party to the employment agreement who is affected by the breach. As they were not party to the employment agreement between KPL and Mr Lopez, this claim must fail.

[106] Reply submissions on behalf of Mr Lopez state that the incorrect section was cited, and reference should have been made to s 134(2) of the Act, which provides that every person who incites, instigates, aids or abets any breach of an employment agreement may be liable to a penalty. The difficulty with this submission is that both the statement of problem and the legal submissions referred breaching the employment agreement rather than inciting, instigating, aiding, or abetting. I take the view that it is not appropriate to allow such a change at this late stage.

¹¹ Section 135(2) of the Act.

¹² Set out in paragraph 3.5 of the statement of problem.

[107] My view is that the liability of the directors does not increase in the way submitted on behalf of Mr Lopez as a result of KPL's likely inability to pay. More fundamentally, none of the directors were party to the employment agreement between Mr Lopez and KPL, therefore my view is that they cannot properly be liable for a penalty for breaching an agreement they were not party to in the first place. No orders are made.

Orders

[108] Alexis Lopez has a personal grievance in that he was unjustifiably disadvantaged and unjustifiably dismissed.

[109] Kariki Pharma Limited is ordered to pay to Alexis Lopez within 28 days of the date of this determination :

- a. The sum of \$193,153.84 gross as unpaid wages;
- b. The sum of \$13,721.54 gross as unpaid holiday pay as at the date of termination of employment;
- c. The sum of \$5,936.26 gross as employer contributions to KiwiSaver.
- d. The sum of \$20,000 without deduction as compensation for hurt and humiliation;
- e. Interest on the total wage arrears outstanding of \$212,811.64 from the date of this determination down to the date of payment, calculated in accordance with the Civil Debt Calculator.

[110] Kariki Pharma Limited is ordered to pay a penalty of \$10,000 within 28 days of the date of this determination, with \$2,500 payable to the Crown account, and \$7,500 payable to Alexis Lopez.

[111] Alexandra Lucie Aimer Seton, Paul Frederick Seton, Andrew Leonard Steadson, and Ean Malcolm Alexander are all persons involved in a breach as defined in s 142W of the Act, and leave is granted for Mr Lopez to recover from them any wages or other money payable to him, to the extent that Kariki Pharma Limited is unable to pay the arrears owing, as set out in s 142Y(2)(b) of the Act.

Costs

[112] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[113] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondents will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[114] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹³

Claire English
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1