

[3] Henderson Advisory Services, while not conceding the personal grievance claims, readily accepts that wages and other emoluments are due under the applicants' employment agreements. It seeks time to pay and resists the claim in part by purporting to rely on the restraint of trade provisions in the applicants' respective employment agreements. In respect of the last mentioned claim, I made it quite clear at the commencement of the investigation meeting that Henderson Advisory Services could not rely on the restraint of trade provision as the law was clear that such covenants were unenforceable where there had effectively been a repudiation of the employment agreement as in this case where the applicants were simply not paid for the final two months of their employment: *Rock Refrigeration Ltd v. Jones* [1997] 1 All ER p.1 applied.

[4] The applicants were both employed by Henderson Advisory Services as financial planners at Christchurch. Both the applicants emigrated from the United Kingdom and joining Henderson Advisory Services was very much a part of their socialisation into living in this country.

[5] Henderson Advisory Services was established in 2002. Its principal raison d'être was working with migrants from the United Kingdom and returning New Zealanders providing financial services to those returnees. The business recorded losses for the first three and a bit years of trading but was profitable for the two years ending 31 March 2008. The following two years, that is, the two year period 31 March 2010, the business sustained huge losses, in aggregate over \$600,000.

[6] The applicant Mr Baker commenced employment with Henderson Advisory Services on 16 January 2006 and the applicant Ms Robinson commenced with the same employer on 2 February 2009. Both the applicants were not paid for their services from October 2009. Neither of the applicants was paid at all for October and November 2009, Mr Baker was not paid in December 2009 as well and Ms Robinson was unpaid for part of December 2009 and also for part of February 2009 when she commenced her employment.

[7] The short payments affects not just salary but also holiday pay, commission payments, Kiwisaver entitlements and a raft of expenses. Both the applicants took legal advice in December 2009 and each obtained alternative employment in the industry early in 2010.

Issues

[8] The Authority needs to address and dispose of the following questions:

- (a) Are moneys owed to the applicants and, if so, how much;
- (b) Do the applicants have a personal grievance;
- (c) What payments (if any) should be made?

Are the applicants owed wages and other moneys?

[9] It is accepted by Henderson Advisory Services that the applicants are owed unpaid wages, unpaid commission, unpaid expenses, and the cash value of the unpaid Kiwisaver contributions.

[10] It is not necessary for the Authority to traverse this aspect of the claim in any detail because the issue is, in principle, conceded by Henderson Advisory Services; there is some argument around the margin in terms of the actual dollar amounts but the Authority has been able to form a view about what is owed from the very helpful submissions put together by both parties.

[11] There will be orders for Henderson Advisory Services to pay to Mr Baker the following sums:

- (a) Salary: October 2009 (16 September to 15 October) \$4,333.33; November 2009 (16 October to 15 November) \$4,333.33; December 2009 (16 November to 15 December) \$4,333.33.
- (b) Holiday pay: six days \$3,452.34.
- (c) Commission/fees: October 2009 \$6,161.43; November 2009 \$1,798.98; 4 December 2009 \$4,168.83; 15 December 2009 \$1,598.88.
- (d) Commission fees payable to Henderson Advisory Services for business written by Steven Baker: Sovereign Investor Choice clients \$914; Sovereign Risk \$274.
- (e) Kiwisaver: 4% on salary/commission/fees of \$31,368.45 - \$1,305.01.

- (f) Expenses: October 2009 (includes petrol costs on client visit) \$1,002.84; November 2009 \$992.50; December 2009 \$260.49.

The total award to Mr Baker \$34,929.29.

[12] There will be orders for Henderson Advisory Services to pay to Ms Robinson the following sums:

- (a) Salary: February 2009 (one week missed salary) \$1,083.33; October 2009 (16 September to 15 October) \$4,333.33; November 2009 (16 October to 15 November) \$4,333.33; December 2009 (16 November to 15 December) \$1,400.00.

- (b) Holiday pay: 9.5 days \$2,115.70.

- (c) Commission/fees: Aegis Trail commission \$2,148.00; Perpetual Trust Trail commission \$645.40; Life commission \$740.45; HIFX – freight commission \$125.80.

- (d) Kiwisaver: 4% on salary/commission/fees of \$16,924.71 - \$676.99.

- (e) Expenses: February to September 2009 \$698.05; September to December 2009 \$432.95; IFA monthly meetings February to December 2009 \$250.00; mobile phone \$600; mileage \$135; X-Plan meetings \$54.

The total award to Ms Robinson \$19,771.70.

Do the applicants have personal grievances?

[13] The applicants claim to have been constructively dismissed and to have suffered disadvantage as a consequence of unjustified actions of the employer. I am satisfied that each of those claims is amply made out. Dealing with the constructive dismissal allegation first, it seems to me axiomatic that an employer who fails to pay salary and other entitlements to an employee over an extended period of time must be held to have repudiated the employment agreement so as to make the resignations of the applicants entirely foreseeable.

[14] Looking briefly at the elements of this kind of constructive dismissal, the first question to consider is whether the applicants' resignations were caused by a breach of duty on the part of Henderson Advisory Services. I am satisfied the answer to that

question must be in the affirmative; Henderson Advisory Services ceased paying the applicants their wages and other entitlements and persisted in that course over many weeks. The resignations of the applicants were, I am satisfied, entirely caused by the failure of Henderson Advisory Services to pay them moneys to which they were entitled pursuant to their employment agreements.

[15] Next, I think it plain that an employer in the position of Henderson Advisory Services, which ceases to pay employees money to which they are entitled pursuant to contract, has committed a breach of such seriousness as to bring the employment relationship to an end making resignation not just foreseeable but inevitable.

[16] The actions of Henderson Advisory Services in failing to pay the applicants over many weeks is, I am satisfied, not the action of a fair and reasonable employer in terms of the test provided in the law in s.103A of the Employment Relations Act 2000. A fair and reasonable employer would pay its employees. That Henderson Advisory Services did not meet its plainest obligation to the applicants makes it inevitable that the Authority must conclude that the applicants have been constructively dismissed from their employment, that they have a personal grievance of that type as a consequence, and are entitled to remedies.

[17] The applicants also say that they have suffered a disadvantage as a consequence of unjustified actions of Henderson Advisory Services. To some extent, the allegations relied upon under this head are similar in character to the allegations relied upon in respect of the constructive dismissal. In effect, the Statement of Problem identifies two classes of action by Henderson Advisory Services which are said to be unjustified. The first is a failure to pay salary and other financial entitlements and the second is a failure to maintain professional indemnity insurance whereby placing the applicants at risk of claims in the event of a loss being sustained by a client of the applicants and Henderson Advisory Services.

[18] Again, applying s.103A of the Employment Relations Act 2000, there can be little doubt that a good and fair employer would maintain professional indemnity insurance for senior staff in this sort of business and would also pay employees their entitlements pursuant to contract. I am satisfied the applicants also have personal grievances by reason of suffering disadvantages because of unjustified actions of their employer. It is self-evident that an absence of payments pursuant to contract on which the applicants rely for daily living expenses is a disadvantage. While the

failure of Henderson Advisory Services to pay professional indemnity insurance premiums may only be a contingent risk (that is only a risk if a client or former client suffers loss and seeks to make a claim), it is nonetheless a reasonable and genuine concern that the applicants have about the period of their employment.

[19] In relation to the issue of professional indemnity insurance, I note that the applicants' original claim was that they sought payment of the cost of one-off insurance as a consequence of the failure of Henderson Advisory Services to arrange professional indemnity insurance. However, the applicants have been unable to quantify the loss. Notwithstanding that, I am satisfied the loss is real enough and that there is a risk or potential risk; I propose to address that issue by way of compensation in the global sum to be awarded for the personal grievances.

Ought other payments be made?

[20] In the foregoing sections of this determination, I have already dealt with the issues of unpaid wages and other entitlements pursuant to contract and with issues of personal grievance. I have identified that compensation will be ordered. For the sake of completeness, I intend also to award lost wages pursuant to s.128 of the Employment Relations Act 2000 (the Act).

[21] A further matter that requires decision is the question of whether interest ought to apply. I think this is a proper case where interest should be levied on the amounts due and owing pursuant to the employment agreements. Interest will be charged at 4.5% per annum on each and every amount owed by Henderson Advisory Services to the applicants pursuant to their employment agreements, interest to run from the date the relevant payment was due down to the date such payment was actually made.

[22] The next issue for determination is penalties which are claimed by the applicants. In this regard, I have indicated to the parties during the course of the investigation meeting that I was minded to stay the Authority's hand in relation to penalties to give Henderson Advisory Services an opportunity to perform its obligations. In the course of the investigation meeting, Henderson Advisory Services sought time to pay. That request was resisted by the applicants on the basis that it would simply further delay their ability to enforce a judgment against Henderson Advisory Services, assuming payment was not made on schedule.

[23] However, Henderson Advisory Services put into evidence before the Authority a schedule of payments which disclosed that in the month of December 2010 it would have available to pay to the applicants the total amount of \$5,000 and in the succeeding months the total amount of \$10,000, such payments to continue until the debt was repaid.

[24] As I indicated at the investigation meeting, I am prepared to contemplate a payment regime built around this structure, but interest will charge immediately and in the event of default in any promised payment by Henderson Advisory Services, the balance of the total judgment then owing will immediately become due and payable as will additional penalties levied against Henderson Advisory Services and payable to the applicants pursuant to s.136(2) of the Act. I decline to award penalties against Mr Henderson personally.

Determination

[25] Both the applicants gave evidence of their suffering and distress as a consequence of the personal grievances. Their partners gave even more graphic evidence of the effect that the various behaviours of Henderson Advisory Services had on their health and wellbeing. It follows that they are entitled to remedies to address those emotional deficits.

[26] I think the proper course of action is to address a global compensatory payment under s.123(1)(c)(i) of the Employment Relations Act 2000 covering both the constructive dismissal grievance and the unjustified disadvantage grievance for each of the applicants. Lost wages consequent upon the loss of the position are also provided for.

[27] The Act requires me to consider whether anything that the applicants did contributed to either personal grievance. The evidence is plain that the applicants were each of them blameless in the circumstances giving rise to their grievance; as a consequence, there will be no finding of contribution against either applicant.

[28] I direct that Henderson Advisory Services is to pay the applicants the following sums:

- (a) Compensation under s.123(1)(c)(i) to each of the applicants in the sum of \$10,000;

- (b) As to Mr Baker, three months' lost wages and other emoluments in the sum of \$14,000;
- (c) As to Ms Robinson, three months' lost wages in the sum of \$9,000;
- (d) For Mr Baker, payment of salary, holiday pay, commissions and the like unpaid during the employment in the sum of \$34,929.29
- (e) For Ms Robinson, payment of salary, holiday pay, commissions and the like unpaid during the employment in the sum of \$19771.70
- (f) A penalty in the sum of \$5,000 to be paid to Mr Baker;
- (g) A penalty in the sum of \$5,000 to be paid to Ms Robinson;
- (h) As foreshadowed in the last section of this determination, I am prepared to agree to Henderson Advisory Services paying the amounts due and owing to Mr Baker and Ms Robinson over time on the basis that a payment on account of \$2,500 to each of Mr Baker and Ms Robinson is made during December 2010 by direct credit to their respective bank accounts and subsequent payments for each succeeding month of \$5,000 to each of the applicants is made on the footing that if any payment is missed, the total amount of the Authority's determination becomes due and owing together with the penalty sums which, until Henderson Advisory Services defaults in payment, are deferred. In the event that Henderson Advisory Services meets all of its obligations in accordance with this schedule, the penalties levied will be waived.

Costs

[29] Costs are reserved.

James Crichton
Member of the Employment Relations Authority