

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 81
5388378

BETWEEN

NICHOLAS CAIRNS
Applicant

A N D

THE TRUSTY DELIVERY
COMPANY LIMITED
First Respondent

A N D

GRAEME BROWN
Second Respondent

Member of Authority: Helen Doyle

Representatives: Peter Churchman, Counsel for Applicant
No appearance for First Respondent
Second respondent in person

Investigation Meeting: 16 April 2013 at Christchurch

Submissions Received: 16 April 2013 from Applicant
23 April 2013 from Respondent

Date of Determination: 7 May 2013

DETERMINATION OF THE AUTHORITY

- A The Trusty Delivery Company Limited is to pay holiday pay to Nicholas Cairns in the sum of \$5,230.76 gross.**
- B Interest is payable on that amount from 1 March 2012 to the date of payment at 5% per annum.**
- C Graeme Brown is to pay \$3000 by way of a penalty for aiding and abetting the breach by The Trusty Delivery Company Limited in failing to pay holiday pay.**
- D The penalty is to be paid to Nicholas Cairns.**

E I have reserved the issue of costs and have set a timetable.

Employment relationship problem

[1] Nicholas Cairns seeks payment of \$5,230.76 gross for holiday pay and accrued annual leave from The Trusty Delivery Company Limited (Trusty). He also seeks interest on the amount of \$5,230.76 from 22 February 2012. Mr Cairns seeks a penalty of \$10,000 under section 134(2) of the Employment Relations Act 2000 against the second respondent, Graeme Brown for inciting, instigating, aiding or abetting the breach of the employment agreement by Trusty in failing to pay his holiday pay. Mr Cairns asks that the Authority order the penalty be payable to him.

[2] Trusty in its statement in reply says that it has met its contractual obligations to Mr Cairns and does not accept that \$5,230.76 is owing to him by way of holiday pay.

[3] Mr Brown in his statement in reply does not accept that a penalty should be awarded against him. He submits that at all times he acted on behalf of the company and never personally withheld money from Mr Cairns. He says that he was acting in good faith and responding to a request from Mr Cairns to offset his holiday pay to partially settle a debt with Trusty.

[4] There was no appearance on behalf of Trusty at the Authority investigation meeting. Mr Brown attended at the investigation meeting and confirmed that he was not representing Trusty at that meeting.

Issues

[5] It is accepted by the parties that holiday pay has not been paid to Mr Cairns. The gross amount of the holiday pay of \$5,230.76 is not in dispute. The issues for the Authority are as follows:

- (a) Was there a breach of the employment agreement by Trusty in failing to pay Mr Cairns' holiday pay?
- (b) If there was a breach of the employment agreement, then did Mr Brown incite, instigate, aid or abet the breach of the employment agreement?

- (c) If it is found that Mr Brown did, should the Authority award a penalty?

Was there a breach by Trusty in failing to pay Mr Cairns his holiday pay?

[6] In October 2008 Mr Cairns was an employee of Klondyke Fresh Limited (Klondyke) in the role of Sales and Marketing Manager. One of the activities he was involved in as an employee of Klondyke was the establishment of a joint venture company, Trusty. Trusty was a joint venture enterprise between an Australian company, Aussie Farmers Direct Limited and Klondyke. Trusty carried on the business of franchising delivery rounds to vendors who would deliver dairy and other products on behalf of Klondyke to retail customers. Mr Brown, after the formation of Trusty, became a shareholder with Klondyke and then assumed the position of Managing Director of both Klondyke and Trusty. Mr Cairns' position at Klondyke was restructured and he was made redundant. Mr Brown was involved in the restructuring of Mr Cairns' position at Klondyke and then offering to him at that time employment with Trusty which Mr Cairns accepted.

[7] Mr Cairns was party to a fixed term employment agreement with Trusty from 1 November 2010 to 31 October 2011.

[8] His employment agreement provided in clause 6 amongst other matters:

The leave provisions of the Holidays Act 2003 and its subsequent amendments shall apply provided that:

- (a) *The employee shall be entitled to four weeks annual leave per year after 12 months continuous employment.*

[9] During Mr Cairns' employment with Trusty a company, Madicait Limited, of which Mr Cairns and his wife were directors, entered into a franchise agreement on 12 August 2011. An initial payment was made under the franchise agreement of \$35,000 plus GST. Negotiations took place whilst Mr Cairns was still an employee of Trusty as to how the balance of the payments under the franchise agreement were to be made. It is helpful to set out what the initial fees payable by the franchisee were. There was an initial franchise fee of \$75,000 plus GST provided for in the franchise agreement in Schedule 1. The method of payment was set out at clause 14 as \$35,000 plus GST payable on commencement date of the franchise business with \$20,000 plus GST payable on the six month anniversary of the commencement date of the franchise

business, and \$20,000 plus GST payable on the 12 month anniversary of the commencement date of the franchise business.

[10] Mr Cairns ceased to work as an employee for Trusty after 31 October 2011. He did continue working for Trusty but as an independent contractor until the end of February 2012. For current purposes I am not required to resolve any dispute about whether a change from an employee to an independent contractor was for reasons that suited Mr Cairns.

[11] The reason Mr Brown says that holiday pay was not paid to Mr Cairns at the end of his employment on 31 October 2011 is that there was an agreement entered into to offset any net holiday pay against the amount owed for the franchise fee. I was referred to two emails dated 10 November 2011 that Mr Brown says confirmed such an agreement to offset the holiday pay toward the loan. The email sent by Mr Brown to Mr Cairns on 10 November 2011 provided:

Hi Nick

As discussed – please confirm this was the offer.

Background

We sold the round for \$75,000 + GST to Nick/Cindy (the first two rounds were sold for \$70K + GST and incl an income guarantee). This was paid as \$35K paid with a loan for 12 months of \$40k payable \$20K in 6mths and balance 12mths.

To date we have completed the initial round build. We have an obligation to complete the 6 week and 3 month top ups.

Nicks proposal

Nick/Cindy would like to complete the round build themselves.

Therefore they propose

1) Offset his holiday pay of 17 days circa \$4.5k which he is happy to forgo and apply to loan

2) pay \$10K at 6mths and \$10k at 12mths (discount of \$20k)

3) Any further obligation by Trusty to deliver 6 week and 3 month topups to removed

Way forward

I am happy with the above and if you happy to confirm we can document.

Kind regards

[12] Mr Cairns responded on the same date to Mr Brown by email as follows:

Hi Graeme

Yes correct, bar the minor detail that, at point 2 of proposal it's a \$15,500 give or take reduction, as opposed to a discount, if we apply the \$4,500 est. Net holiday pay.

Key detail is its agreed 20k total still to pay in x2 \$10k instalments moving forward, and trusty doesn't have round build completion and top up obligations.

[13] The agreement was never reduced to writing. Clause 33 of the franchise agreement provided that it could only be varied or amended by agreement in writing, signed by duly authorised representatives of the parties. The franchise agreement also included an entire agreement clause that provided the agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understanding between the parties in connection with the subject matter. I accept Mr Brown's view that agreements that do not strictly comply with the requirements of an underpinning contract have, in certain situations, been held to be enforceable.

[14] In this case Mr Cairns says that on 2 February 2012 he was told by Mr Brown that the proposed deal which included the offsetting of his net holiday pay was off the table. Mr Brown did not accept that such a discussion took place although he did recall a discussion with Mr Cairns about the franchise agreement sometime later in February 2012.

[15] I prefer Mr Cairns' evidence that he was told by Mr Brown the deal involving the holiday pay was off in February 2012. I found Mr Cairns' evidence and recollection to be more reliable and consistent with what was agreed or shown by other evidence to have occurred. I have also taken into account in assessing the reliability of the evidence that Mr Brown's evidence was on occasion self serving. For example statements about Mr Cairns' performance having been poor were not supported by documentary evidence that showed Mr Brown had at the material time a very positive view of Mr Cairns as an employee.

[16] Consistent with the proposal involving the offset of holiday pay being at an end Mr Cairns approached the payroll administrator/accountant at Trusty, Brent Wilson and requested his holiday pay be paid. I find the evidence supports that such an approach was made in or about mid to late February 2012. Mr Cairns said that Mr Wilson advised he would have to talk to Mr Brown about the matter and that he

joked to Mr Cairns that there was little chance of it being paid. Mr Brown accepts that he was alerted by Mr Wilson to Mr Cairns' approach about his holiday pay. His evidence is that he told Mr Cairns that payment would not be made and he thought that Mr Cairns had accepted this. Mr Cairns denies a meeting with Mr Brown where there was such a discussion about his holiday pay. I accept that it was Mr Wilson who advised Mr Cairns after his discussion with Mr Brown that the holiday pay would not be paid to him.

[17] The strongest evidence I find that the proposal documented in the 10 November emails was no longer considered to be on foot was Appendix 1 attached to Mr Brown's statement of evidence. This document shows the loan balance under the franchise agreement. It shows that Mr Cairns' net holiday pay has been taken into account. What is clear from the loan balance sheet is that there is no reduction as there was in the email exchange between Mr Brown and Mr Cairns to the amounts owing under the franchise agreement. The full amount under the franchise agreement is expressed in Appendix 1 to be due and owing rather than the approximately \$15,000 reduction to the amount set out in the franchise agreement referred to in the 10 November 2011 emails. Mr Brown accepted that the net holiday pay would have shown as having been applied to the loan balance from March 2012.

[18] Mr Cairns, I accept, approached the accountant again by way of a telephone call on 23 March 2012 for payment of his holiday pay. No payment was forthcoming. Mr Cairns asked for a summary of the annual leave and holiday pay which was due to him. That summary was received some days later and is attached to the statement of problem showing an employee accrued leave report as at 20 March 2012. It shows the total gross annual leave and holiday pay due as \$5,230.76. On 7 June 2012 Mr Churchman wrote to Mr Brown requesting payment of the holiday pay. On 19 June 2012 the representative for Trusty, Mr Robert Thompson wrote to Mr Churchman advising that the parties had agreed to offset the holiday pay and no payment of holiday pay was made.

Conclusion

[19] Under the terms of the employment agreement Trusty agreed to pay annual leave of 4 weeks per year and that it would comply with the provisions of the Holidays Act 2003.

[20] It is accepted that holiday pay has not been made. The defence put forward by Trusty in its written statement in reply is that it was agreed holiday pay was to be offset against a debt owing to Trusty. It is correct that initially there was a proposal to do that and whilst it was on foot Mr Cairns made no request for payment from Trusty. After Mr Cairns approached Trusty for payment in February 2012, when I have found he was advised the deal was off, the continued failure to pay holiday pay was in breach of the employment agreement between Trusty and Mr Cairns. Mr Cairns is owed holiday pay in the sum of \$5,230.76. I find there should be interest payable on that sum. In calculating when that interest should be payable from I find an appropriate date is 1 March 2012.

[21] I order under clause 11(1) of Schedule 2 to the Employment Relations Act 2000 that The Trusty Delivery Company Limited pay to Nicholas Cairns the sum of \$5,230.76 together with interest payable on that sum from 1 March 2012 at the rate of 5% per annum being the rate prescribed under section 87(3) of the Judicature Act 1908 until the date of payment.

If there was a breach then did Mr Brown incite, instigate, aid or abet the breach of the employment agreement?

[22] Section 134 of the Employment Relations Act 2000 provides for penalties for breach of an employment agreement and provides as follows:

- (1) *Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.*
- (2) *Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[23] The maximum penalties that an individual is liable to is prescribed in section 135(2) of the Act as an amount not exceeding \$10,000. I am satisfied that the amended statement of problem seeking the recovery of a penalty against Mr Brown was lodged with the Authority within 12 months after the cause of action first became known to Mr Cairns in December 2012.

[24] For a penalty to be awarded against a secondary party for a breach of an agreement there must be a primary breach of an employment agreement. In this case I

have found that there is such a primary breach by Trusty of the provisions in its employment agreement with Mr Cairns to pay holiday pay.

[25] In the Employment Court judgment in *Strachan v Moodie* [2012] NZEmpC 95 at [150] Chief Judge Colgan stated that *to render someone who is not the employer liable for aiding and abetting an employer's breaches, a high standard of proof is required....*

[26] The proof that is required to a high standard is that Mr Brown must have knowledge of the contract between Trusty and Mr Cairns, or at least the general contractual situation and that he has deliberately intended to interfere with it – *Credit Consultants Debt Services NZ Limited v Wilson* [2007] ERNZ 252.

[27] Mr Brown in his submissions states that there is no evidence that he acted outside of his authority as one of five directors. The evidence supported that there were only ever four directors of Trusty and I have taken the reference to five in the submission as an error.

[28] Mr Brown was the only director undertaking an executive role at Trusty. He was the only director at the material time that Mr Cairns had any contact with in undertaking his role and the only director with whom there was any discussion about off-setting holiday pay against the franchise agreement loan between Madicait Limited and Trusty. Two of the other directors resided in Australia and they only attended at the premises of Trusty on one occasion in early 2011. The other director had no continued managing role after Mr Brown assumed the managing director role in late 2010 and was not present on site.

[29] Mr Brown gave evidence that he referred all matters about the proposal to offset the holiday pay against the loan to the Board made up of all four directors. I find that it was Mr Brown who was the director active in conducting the affairs of the company and in a position to know the obligations of Trusty and to see that it met those obligations. A person who is the *mind* of a company in the relevant sense may be found guilty of aiding and abetting the company in the commission of a breach – *Peacock v NZ Performance and Entertainment Workers Union* [1990] 2 NZILR 257(CA).

[30] Mr Brown submits that the Authority must find that there is a wilful and deliberate breach and that the directors in this case understood that there was an

agreement relating to the off setting of holiday pay. I accept that if there is a genuine dispute about a matter then it is very unlikely that a penalty would be awarded.

[31] Mr Brown who is experienced in business and finance was aware that Mr Cairns was owed holiday pay and discussed with him an initial proposal that that holiday pay be off set against the Madicait Limited loan to Trusty. Part of the proposal included a reduction in the amount to be paid under the franchise agreement. That proposal was never reduced to writing and I have found was no longer on the table from early February 2012.

[32] Mr Cairns' net holiday pay was then I find applied by Trusty to reduce the full amount of the Madicait Limited loan to it. Put simply it was not applied as per the 10 November email. Mr Brown was aware through the payroll administrator/accountant from late February 2012 that Mr Cairns wanted to be paid his holiday pay. He advised the payroll administrator Mr Wilson not to pay the holiday pay to Mr Cairns and that instruction did not change in March 2012. Trusty then received a letter from Mr Churchman in June 2012 seeking payment of holiday pay for Mr Cairns. Still no payment was made.

[33] Mr Brown knew by February 2012 there was no agreement as recorded in the 10 November 2011 emails for the holiday pay to be applied to the Madicait Limited loan. He acted deliberately in instructing Mr Wilson not to pay holiday pay to Mr Cairns in February 2012 or in March 2012. He was in a position at that time as the mind of the company to control Trusty and influence compliance by it with its obligation to pay the holiday pay to Mr Cairns rather than apply it without agreement to the Madicait loan. Mr Brown I find as the mind of Trusty deliberately encouraged and assisted Trusty to breach its employment agreement to pay holiday pay to Mr Cairns.

Conclusion

[34] I find that Mr Brown aided and abetted Trusty in the breach of its employment agreement with Mr Cairns.

Should the Authority award a penalty?

[35] I find that the circumstances are such that there should be imposition of a penalty. In considering the amount of a penalty I need to take into account whether

there is any prospect of Mr Cairns being paid his holiday pay by Trusty. Mr Cairns wishes the Authority to order the full penalty payable to him and if he was also to be paid his holiday pay there would be a measure of double dipping.

[36] I am satisfied that there is little prospect of Mr Cairns being paid his holiday pay by Trusty. The company has ceased to trade and is unlikely to have any assets.

[37] This is a case where the breach for which the penalty is imposed is a serious one. Mr Cairns has not been paid his holiday pay. The payment of holiday pay is an important and fundamental entitlement. I take into account that the amount of the maximum penalty against an individual has increased.

Conclusion

[38] In all the circumstances I order Mr Brown to pay the sum of \$3000. Ordinarily I would have ordered at least part of that sum if not the whole of the sum be payable to the Crown. Mr Cairns however is not likely in this case to receive any payment from Trusty and I order that the full amount of the penalty is to be paid to Mr Cairns.

Costs

[39] I reserve the issue of costs. Mr Churchman has until 22 May 2013 to lodge and serve submissions as to costs and Mr Brown has until 5 June 2013 to lodge and serve submissions in response.

Helen Doyle
Member of the Employment Relations Authority