

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 204
5440716

BETWEEN

RICHARD NEWALL
Applicant

A N D

FORTE ALPHA
OPERATIONS PTY LTD
First Respondent

FORTE ALPHA PTY
LIMITED
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Helen Wendelborn, Advocate for Applicant
No appearance by Respondents

Investigation Meeting: 13 May 2014 at Auckland

Additional information: 16 and 22 May 2014

Date of Determination: 23 May 2014

DETERMINATION OF THE AUTHORITY

- A. Forte Alpha Operations PTY Ltd (Forte Alpha) employed Mr Richard Newall.**
- B. Forte Alpha breached Mr Newall's employment agreement multiple times by failing to:**
- a. pay his monthly salary when it fell due;**
 - b. pay him his full salary;**
 - c. pay him his salary arrears;**
 - d. pay any KiwiSaver contributions;**
 - e. pay any PAYE to Inland Revenue Department (IRD);**
 - f. pay him his annual holiday pay upon termination.**

- C. Forte Alpha breached s.130(1) of the Employment Relations Act 2000 (the Act) by failing to keep wage and time records for Mr Newall. It also breached s.130(2) of the Act by failing to provide access to or a copy of Mr Newall's wage and time records upon request.**
- D. Forte Alpha engaged in multiple deliberate, serious and sustained breaches of its statutory good faith obligations to Mr Newall in breach of s.4(1)(b) and s.4(1A)(b) of the Act.**
- E. Forte Alpha is ordered to pay a total combined penalty of \$30,000 for its multiple breaches of Mr Newall's employment agreement, its breaches of s.130 of the Act and its multiple breaches of good faith.**
- F. Forte Alpha is ordered to pay the entire \$30,000 penalty directly to Mr Newall.**
- G. Forte Alpha is also ordered to pay Mr Newall:**
- a. \$50,324.29 salary arrears;**
 - b. \$2,119.13 unpaid expenses;**
 - c. \$5,894.77 unpaid holiday pay;**
 - d. \$2,146 unpaid employer KiwiSaver contribution;**
- H. Forte Alpha is ordered to pay Mr Newall interest at the rate of 5% on \$60,484.19 (being the total wage arrears, unpaid expenses, unpaid annual holiday and unpaid employer KiwiSaver contributions as itemised in paragraph G above) it owes him from 01 November 2013 until this amount is paid in full.**
- I. Forte Alpha unjustifiably dismissed Mr Newall. It is ordered to pay him:**
- (a) \$4,615.38 being two weeks' lost remuneration; and**

(b) \$8,000 distress compensation.

J. Forte Alpha is ordered to pay Mr Newall all of the amounts it has been ordered to pay him (including the penalty and interest) within 28 days of the date of this determination.

Employment relationship problem

[1] In April 2013 Mr Steven Prestage, Director of Forte Alpha, offered Mr Newall employment with the Forte Alpha group of companies. Mr Newall accepted that offer and worked as a Client Specialist providing a range of IT support and services to Forte Alpha clients from 07 April until 01 November 2013.

[2] Mr Newall says his monthly salary was never paid on time and when payments were made they were partial payments only that did not clear his salary arrears. Mr Newall says that after emailing Mr Prestage in October that he would be resigning if all arrears were not paid he received no response but was instead locked out of his employer's IT system.

[3] Mr Newall says in addition to not being paid on time or in full his expenses were not fully reimbursed, no PAYE has been remitted to IRD on his behalf, none of the compulsory KiwiSaver contributions have been made to his KiwiSaver account, he was never given a signed copy of his employment agreement and he has not been provided with access to or a copy of his wage and time records. Mr Newall claims he was unjustifiably dismissed as a result of these ongoing and multiple breaches.

[4] Mr Newall claims Forte Alpha and/or Forte Alpha PTY Ltd:

- a. breached his employment agreement multiple times;
- b. breached its statutory duty of good faith multiple times;
- c. breached s.130 of the Act by failing to:
 - i. Keep wage and time records for him;
 - ii. Failed to provide access to or a copy of his wage and time records upon request;

- d. Should have penalties imposed on them for the above breaches and that some or all of the penalties be paid to him instead of the Crown;
- e. Owes him unpaid salary arrears;
- f. Owes him unpaid holiday pay;
- g. Owes him unpaid compulsory KiwiSaver contributions;
- h. Owes him unpaid expenses;
- i. Unjustifiably dismissed him.

[5] Forte Alpha and Forte Alpha Pty Ltd (FAPL) appear to deny Mr Newall's claims. Forte Alpha says it is not liable for any breaches because it has no employees or customers in New Zealand and it did not sign Mr Newall's employment agreement. Forte Alpha and the second respondent Forte Alpha Pty Ltd (FAPL) are incorporated companies in Australia. Mr Prestage is based in Australia.

[6] On 05 April Mr Prestage emailed Mr Newall:

- a. A written employment agreement which names "*Forte Alpha Services Limited*" as the employer with an Australia address;
- b. A Confidentiality Deed naming the second respondent Forte Alpha Pty Ltd as the party Mr Newall was contracting with.

[7] Mr Newall signed and returned both documents to Mr Prestage that same day. Within an hour and a half of that Mr Prestage emails Mr Newall saying:

"Forte Alpha Services Ltd is not currently incorporated in New Zealand under New Zealand law. I ask that you write back to me and confirm this agreement is in full effect, even whilst we are in the process of incorporating the company in New Zealand. We are working on incorporating the company as quickly as possible."

[8] Mr Newall responded by email accepting that the employment agreement he has signed "*is in full effect.*" Mr Prestage responds to that confirmation in an email welcoming Mr Newall "*on board*" and referring to Mr Newall's *colleagues at Forte Alpha*. Arrangements were also made for Mr Newall's integration into the business. This included setting him up with a Forte Alpha email address and advising Mr

Newall that a company laptop had been ordered for him and a company ipad would be provided to him shortly.

[9] Forte Alpha Services Limited has never been incorporated so is not a legal entity. Although clause 1.1.7 of Mr Newall's employment agreement refers to Forte Alpha Services Ltd as a company incorporated in New Zealand that is incorrect because that never occurred. The employer referenced in the employment agreement is therefore a trading name which has no legal status.

[10] On 12 May 2014 Mr Prestage emailed the Authority saying Mr Newall's employment agreement had never been signed on the employer's behalf. Mr Prestage further says Forte Alpha "*is the only company that employs people on behalf of Forte Alpha as a "brand".*"

[11] Mr Prestage also sent an email to the Authority which he claims he sent to Mr Newall on 15 April 2013 which says "*Forte Alpha has decided not to countersign the employment agreement with you. We would prefer to have an ad hoc relationship with you. We will pay you what we can when we can. I hope that you understand our position.*" Mr Newall denies ever seeing or receiving this email and says he would never have agreed to work on that basis.

Issues

[12] The following issues require determination:

- (a) Does the Authority have jurisdiction to investigate Mr Newall's claims?
- (b) If yes, who was Mr Newall's employer?
- (c) Did Mr Newall's employer breach his employment agreement?
- (d) Did Mr Newall's employer breach its statutory duty of good faith?
- (e) Did Mr Newall's employer fail to keep and/or provide access to or a copy of his wage and time records upon request?
- (f) Should penalties be imposed for any breaches that may have occurred?

- (g) If so, should some or all of any penalties imposed be paid to Mr Newall?
- (h) Is Mr Newall owed salary arrears?
- (i) Is Mr Newall owed unpaid employer KiwiSaver contributions?
- (j) Is Mr Newall owed unpaid expenses?
- (k) Is Mr Newall owed unpaid holiday pay?
- (l) If Mr Newall is owed unpaid remuneration should he be awarded interest on any outstanding amounts?
- (m) Was Mr Newall dismissed?
- (n) If so, was his dismissal justified?
- (o) If not, what if any remedies should be awarded?
- (p) What if any costs should be awarded?

Does Authority have jurisdiction to investigate Mr Newall's claims?

[13] With one limited exception¹ the Authority only has jurisdiction to investigate claims involving parties to an employment relationship. That means that the Authority can only investigate Mr Newall's claims if it finds he was an employee in terms of the definition of employee in s.6 of the Act. He bears the onus on the balance of probabilities of establishing that there was an employment relationship.

[14] There is no evidence that Mr Newall was in business on his own account and all the evidence supports him being an employee. The fact that the employer named in the employment agreement Mr Newall signed is not a legal entity and/or the fact that the employment agreement he signed may not have been signed by the employer does not in these circumstances contradict the existence of an employment relationship.

[15] I am satisfied there was a mutual intention between Mr Newall and his employer to create an employment relationship and that the parties acted consistently with that mutual intention throughout Mr Newall's engagement. Mr Newall was given

¹ Section 134(2) of the Act.

an employment agreement which he signed and returned and he was asked to confirm the agreement was in effect pending incorporation of the company named in it as his employer. The email communications I have reviewed also support the existence of an employment relationship.

[16] The employment agreement expressly states that the employment relationship is governed by “*the laws in force in New Zealand. The parties agree to submit to the exclusive jurisdiction of the courts of that country.*” The fact the respondents are Australia based companies does not void the Authority’s exclusive jurisdiction.

Who was Mr Newall’s employer?

[17] The employer named in Mr Newall’s employment agreement is not a legal entity so it cannot have employed him. It is evident that Mr Newall did work for the Forte Alpha group and received partial salary payments from some entity so the issue is who or what legal entity employed him.

[18] I find on the balance of probabilities that Forte Alpha was the legal entity that employed Mr Newall. All of Mr Newall’s communications about employment related matters have been with Mr Prestage who is a director of Forte Alpha. It appears that Forte Alpha paid Mr Newall his part salary payments and that the partial payments that were made were arranged by Mr Prestage.

Did Mr Newall’s employer breach his employment agreement?

Timing of salary payments

[19] Mr Prestage sent an email to the Authority the day before the investigation meeting which he alleges he sent Mr Newall on 15 April 2014 but which Mr Newall denies ever seeing. The email is allegedly from Mr Prestage to Mr Newall and it says:

“Forte Alpha has decided not to countersign the employment agreement with you. We would prefer to have an ad hoc relationship with you. We will pay you what we can when we can. I hope you understand our position.”

[20] I have preferred Mr Newall’s evidence that he never saw this email and would not have agreed to it even if he had. It flies in the face of logic or wisdom that Mr Newall as the sole income earner in his family would continue working full time for

an overseas company which would only pay whatever it elected whenever it decided to.

[21] I reviewed over 165 pages of relevant information and not one document supports the email of 15 April. To the contrary - the documents are all consistent with Mr Newall attempting to be paid in accordance with his employment agreement. Nowhere in the extensive exchange of emails over a seven month period does Mr Prestage ever suggest to Mr Newall that he is not entitled to the salary payments he is seeking to recover. Rather Mr Prestage provides a range of excuses both via email and in telephone conversations with Mr Newall as to why the salary has not been paid and assurances it would be paid immediately.

[22] I find that the remuneration arrangements in Mr Newall's employment agreement applied to his employment. Clause 5.3 of the employment agreement provides for Mr Newall to be paid monthly (four weeks in arrears) on the 30th day or thereabouts of each month.

[23] Mr Newall's first salary payment was due 30 April but he only received part payment of that on 27 April. Forte Alpha did not pay Mr Newall his salary on 30 May or 30 June. He received a partial salary payment of \$2,388.04 on 24 July. Mr Newall's salary on 30 July and August was not paid. He was paid \$9,973.00 on 13 September. His salary payments on 30 September and 30 October were not paid with Mr Newall's employment ending on or around 31 October or 01 November.

[24] I find that Forte Alpha breached Mr Newall's agreement seven times by failing to pay him his salary on or around the 30th of each month he worked.

Amount of salary paid

[25] In the absence of wage and time records in accordance with s.132(2) I accept as proved Mr Newall's claims regarding his salary arrears. I therefore find that he is owed salary arrears of \$50,324.29. Forte Alpha's failure to pay Mr Newall his full contractual salary for the days and hours he worked on seven occasions amounts to seven separate breaches of contract.

KiwiSaver

[26] In accordance with Schedule 1 of his employment agreement Mr Newall's salary was inclusive of his employee KiwiSaver contributions but excluded Forte Alpha's compulsory employer KiwiSaver contributions. Forte Alpha has not made any of the required compulsory KiwiSaver contributions. This involves an additional seven breaches of Mr Newall's employment agreement.

PAYE

[27] Forte Alpha has not remitted by PAYE on Mr Newall's behalf to IRD. This amounts to another seven breaches of his employment agreement.

Holiday pay

[28] Forte Alpha has not paid Mr Newall any annual holiday pay and he has not taken any paid annual holiday whilst employed. Forte Alpha breached Mr Newall's employment agreement because it failed to pay him annual holiday pay when his employment ended.

Summary

[29] Forte Alpha has breached Mr Newall's employment agreement 29 times.

Did Mr Newall's employer breach its statutory duty of good faith?

[30] Mr Newall has produced a full bundle of emails and other documentation including diary notes and notes of telephone discussions in which Mr Newall (with increasing desperation) implored Mr Prestage to pay his salary arrears. It is clear from the information I have seen that Mr Prestage continually lead Mr Newall to believe that his salary would be paid on time and his salary arrears would be paid.

[31] A range of excuses were provided by Mr Prestage for the non-payment of salary. These included but are not limited to payroll system error, bank not processing payments, Mr Newall's bank account number being too long, problems with an external payroll provider, changes in payroll systems, transferring money between offshore banks, problems with overseas money transfers, mail not being delivered, and blaming professionals (such as accountant) for not setting up a New Zealand based payroll system.

[32] The gist of the various excuses was that it was not Alpha Forte's fault payment had not been made, it had taken steps to remedy the situation and payment was imminent.

[33] I find that all of these explanation were likely merely unfounded excuses designed to keep Mr Newall in his employment so Forte Alpha could continue to retain the benefit of his services. The evidence I have seen suggests that none of these excuses were legitimate and that Forte Alpha had not in fact taken appropriate steps to ensure that Mr Newall's salary would be paid in full and on time.

[34] I accept Mr Newall's evidence that Mr Prestage kept assuring him he would be paid, kept apologising for the fact that the payments had not been processed and assuring him that Forte Alpha would set up a New Zealand based company for payroll purposes to ensure the payments problems did not continue. This evidence is supported by relevant documentation about such matters. Nevertheless the problems still continued.

[35] On 04 July Andrew Retting, Finance Director of Forte Alpha emails Mr Newall to say *you have my commitment that there will no further delays [regarding his salary payments] from July onward*. This was another empty promise because there were further delays and the salary arrears were never paid to Mr Newall. It does however support Mr Newall's evidence that he continued working in the expectation that the non-payment was a teething problem that his employer was doing everything it could to resolve.

[36] I find that Mr Prestage and Mr Retting on behalf of Alpha Forte deliberately mislead and deceived Mr Newall regarding the non-payment of his remuneration. He was deliberately misled and deceived over the reasons his salary was not paid on time, the dates on which his salary arrears would be paid and over future salary payments being paid on time.

[37] Forte Alpha has engaged in multiple breaches of s.4(1)(b) of the Act which provides that parties to an employment relationship must not directly or indirectly do anything that misleads or deceives the other or which is likely to mislead or deceive the other.

[38] I also find that Alpha Forte has breached s.4(1A) of the Act multiple times because it was not "*active and constructive in establishing and maintaining a*

productive employment relationship in which the parties are among other things responsive and communicative.”

Did Mr Newall’s employer fail to keep and/or provide access to or a copy of his wage and time records?

[39] Section 130 of the Act requires an employer to keep a wage and time record for every employee who may have access to it or a copy of it upon request. Mr Newall’s requests for a copy of his wage and time record have not been responded to. The Authority’s direction that Mr Newall’s wage and time records be supplied has also not been complied with.

[40] I find Alpha Forte has breached s.130(1) of the Act by failing to keep wage and time records for Mr Newall. It also breached s.132(1) of the Act by failing to provide Mr Newall with access to or a copy of his wage and time records upon request.

Should penalties be imposed on Forte Alpha for its breaches?

Need for penalties

[41] Penalties are required to signal disapproval of Forte Alpha’s conduct, to punish it for its multiple and ongoing breaches of various employment legislation and contractual obligations and to act as a deterrent to others who .

Breach of good faith

[42] The s.4A penalty prerequisites that a breach of good faith be deliberate, serious and sustained are met. The penalty claim was commenced within 12 months of the cause of action becoming known to Mr Newall as required by s. 135(5) of the Act. Forte Alpha is liable to a maximum penalty of \$20,000 for each separate breach of good faith.

Breach of employment agreement

[43] Forte Alpha is liable under s.134(1) of the Act to a maximum penalty of \$20,000 for each individual breach of Mr Newall’s employment agreement.

Breach of s.130 of the Act

[44] Forte Alpha is liable under s.130(4) of the Act to a maximum penalty of \$20,000 for the failure to keep a wage and time record for Mr Newall and under s.130(2) of the Act for a maximum penalty of \$20,000 for failing to provide access to or a copy of his wage and time record upon request.

Outcome

[45] I am guided by the criteria the Employment Court set in *Xu v McIntosh*² when assessing the level of penalties required. I adopt a totality approach to assessing the appropriate penalty by fixing one sum as a penalty to encompass all breaches instead of separately specifying individual penalties for each breach.

[46] I find that Forte Alpha's breaches are deliberate serious and sustained. They were ongoing throughout the duration of the employment relationship and resulted in considerable hardship stress and anxiety to Mr Newall and his family. Forte Alpha was put on notice by Mr Newall of the severe adverse effects its breaches of his employment agreement were having on him yet nothing was done to address his legitimate concerns.

[47] Forte Alpha derived a benefit for itself at Mr Newall's expense by deliberately using him to provide services to its clients (whom it billed for Mr Newall's services) whilst simultaneously not paying Mr Newall his contractual remuneration for the days and hours he worked.

[48] Forte Alpha also deliberately misled and deceived Mr Newall about repaying his salary arrears and about the timeliness of future salary payments in order to convince him to stay working for it. There is a need for the penalties to be fixed at a high enough level to act as a deterrent to other employers who may be tempted to blatantly breach contractual and good faith obligations.

[49] I recognise that Forte Alpha appears as a first offender in this jurisdiction. However weighed against that mitigating factor is the fact that it engaged in multiple and repeated serious breaches over a seven month period.

² [2004] 2 ERNZ 448.

[50] I consider Mr Newall was vulnerable in the sense he was the sole income earner for his family and he relied on his salary to meet his outgoings. He wanted to continue working for Forte Alpha and he believed Mr Prestage's and Mr Rettings' ongoing assurances that the salary arrears issues would be resolved. To say these events have financially embarrassed Mr Newall is to understate the adverse impact on him. The level of penalties must reflect that.

[51] Forte Alpha has also expressed no remorse for its actions.

[52] I consider it important for the Authority to send an unequivocal message that not paying employees for work they have done is wholly unacceptable. Forte Alpha is ordered to pay a total penalty \$30,000 encompassing all of its breaches of Mr Newall's employment agreement, good faith obligations and the wage and time record provisions in the Act.

Should some or all of the penalty be paid to Mr Newall?

[53] It is usual for penalties to be paid to the Crown. However it is appropriate in this case for all of the penalty to be paid directly to Mr Newall. He has personally suffered as a result of these breaches. He will also have to incur the time, cost and stress associated with enforcing basic legal and contractual rights on an entity based outside of New Zealand. He is also likely to face additional delay and cost in actually recovering the money he has been awarded.

[54] Forte Alpha is ordered to pay the full \$30,000 penalty directly to Mr Newall within 28 days of the date of this determination.

Is Mr Newall owed wage arrears?

Salary arrears

[55] In accordance with s.132(2) of the Act I rely on Mr Newall's records of the days and hours he worked and the amount he was paid in the absence of wage and time records being provided by Alpha Forte.

[56] Mr Newall should have been paid \$71,538.50 salary inclusive of employee KiwiSaver contributions but exclusive of employer KiwiSaver contributions. He received \$21,214.21 excluding the employer KiwiSaver contribution so there is a shortfall of \$50,324.29.

[57] Forte Alpha is ordered to pay \$50,324.29 in salary arrears to Mr Newall within 28 days of the date of this determination.

Employer KiwiSaver contribution arrears

[58] Under Mr Newall's employment agreement his employee KiwiSaver contributions were included in his salary but the compulsory employer KiwiSaver contribution was not. I therefore find that Forte Alpha is required to pay Mr Newall 3% of his total gross earnings on top of his salary as the employer's KiwiSaver contribution. No employer KiwiSaver contributions have been made.

[59] Forte Alpha is ordered to pay Mr Newall \$2,146³ unpaid employer KiwiSaver contributions within 28 days of the date of this determination.

Unpaid holiday pay

[60] Mr Newall was not paid an annual holiday pay whilst employed so he is entitled to 8% of his total gross earnings as annual holiday pay upon termination. This is inclusive of the compulsory employer KiwiSaver contribution which should have been paid. No annual holiday pay has been paid.

[61] Mr Newall's total gross earnings were \$73,684.50 (being \$71,538.50 salary inclusive of employee KiwiSaver contributions plus additional employer KiwiSaver contributions of \$2,146). Forte Alpha is ordered to pay Mr Newall \$5,894.76 (being \$73,538.50 x 8%) unpaid holiday pay within 28 days of the date of this determination.

Is Mr Newall owed unpaid expenses?

[62] I am satisfied Forte Alpha has failed to reimburse Mr Newall \$2,119.13 for business expenses. It is ordered to pay him that amount within 28 days of the date of this determination.

Was Mr Newall constructively dismissed?

[63] I am satisfied on the balance of probabilities that Mr Newall's employment ended because he was dismissed.

³ Being 3% of his total gross earnings whilst employed.

[64] Mr Newall advised Forte Alpha of his financial embarrassment as a result of not receiving his full salary on time and he detailed the adverse impact that was having on him, his family and his ability to meet his ongoing financial commitments as they fell due. I am satisfied Mr Newall pro-actively took steps to recover his salary arrears and to engage with Forte Alpha over its failure to pay PAYE and KiwiSaver contributions on his behalf.

[65] No response was received to Mr Newall's last four emails dated 18, 19 and 21 October asking for urgent payment of his salary arrears. He then wrote a letter dated 30 October stating that he required payment of all outstanding salary and expenses, confirmation that tax and KiwiSaver obligations had been paid by Forte Alpha to IRD, a pay slip detailing his income and written confirmation that all salary payments would be received on time in future.

[66] Mr Newall advised Forte Alpha that if he did not receive this confirmation he would have no option to resign on the basis of serious and ongoing breaches of his employment terms and conditions and he referred specifically to clauses 5.1 and 5.3 in Schedule 1 of his employment agreement. He also put Forte Alpha on notice that if he was forced to take this action as a result of its breaches he would be raising a personal grievance for unjustified dismissal and a claim for arrears of wages.

[67] No response was received to that letter. The next day Mr Newall discovered that he had been locked out of his Forte Alpha email and his password unilaterally changed. He therefore emailed Mr Prestage on 01 November stating that he had not had any response to his emails regarding outstanding salary and expenses and that he had been locked out of the email system and his password had been changed without his knowledge so he concluded he had been dismissed but if that was not the case he resigned as a result of the ongoing fundamental breaches of his employment agreement.

[68] I find on the balance of probabilities that Forte Alpha actually dismissed Mr Newall by responding to his final letter about his salary arrears by locking him out of its IT system and by changing his password. That amounts to a dismissal because it is a sending away that occurred at Forte Alpha's initiative.

[69] Even if Forte Alpha did not actually dismiss Mr Newall on 31 October his employment had ended by 01 November as a result of a constructive dismissal. Mr

Newall's resignation was not a free or voluntary resignation., It was an acceptable and reasonably foreseeable response to Forte Alpha's multiple and ongoing breaches of his contractual and statutory rights. Forte Alpha's ongoing failure to pay Mr Newall his salary and salary arrears and its actions in deliberately misleading and deceiving him about such matters amounts to a constructive dismissal. It was reasonably foreseeable that Mr Newall would not continue to work in the face of such fundamental and ongoing breaches.

Was Mr Newall's dismissal justified?

[70] Forte Alpha bears the onus of establishing that Mr Newall's dismissal was justified in accordance with the justification test in s.103A of the Act. I find that it is unable to do so. The way Forte Alpha acted and its actions were not what a fair and reasonable employer could have done in all the circumstances.⁴

[71] I find that Mr Newall's dismissal was unjustified.

What if any remedies should be awarded?

Mitigation

[72] I am satisfied that Mr Newall appropriately mitigated his loss.

Lost remuneration

[73] Mr Newall two weeks' remuneration as a result of his unjustified dismissal so it is appropriate for him to be compensated for that. Within 28 days of the date of this determination Forte Alpha is ordered to pay Mr Newall \$4,615.38 gross under s.128(2) of the Act.

Distress compensation

[74] It is clear that Mr Newall suffered ongoing stress, distress, uncertainty and serious financial embarrassment and pressure as a result of his unjustified dismissal. This was recorded in emails to Mr Prestage in which Mr Newall describes himself as "very embarrassed", "tired", "stressed and very very worried". He refers to the highly embarrassing position of having to explain his money difficulties to family and his bank and of the failure to pay his salary as having a "major impact on his life".

⁴ Section 103A(2) of the Act.

[75] I order Forte Alpha to pay Mr Newall \$8,000 to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

Contribution

[76] Section 124 of the Act requires me to consider whether Mr Newall contributed to the situation that gave rise to his personal grievance and if so to reduce remedies accordingly. I find that he did not so there is to be no reduction made to the remedies he has been awarded.

Orders

[77] Forte Alpha Operations PTY Ltd is ordered within 28 days of this determination to pay Mr Newall:

- a. \$50,324.29 salary arrears
- b. \$5,894.76 annual holiday pay;
- c. \$2,146 employer's KiwiSaver contribution
- d. \$2,119.13 unpaid expenses;
- e. 5% interest on the \$60,484.18 from 01 November 2013 until this amount has been paid in full;
- f. \$30,000 penalty;
- g. \$4,615.38 lost remuneration;
- h. \$8,000 distress compensation.

Costs

[78] Mr Newall as the successful party is entitled to a contribution towards his actual costs. The parties are encouraged to resolve costs by agreement.

[79] If that is not possible then Mr Newall has 14 days within which to file his costs application, Forte Alpha has 14 days within which to respond, with Mr Newall having a further 7 days within which to reply.

[80] This timetable will be strictly enforced and any departure from it requires the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority