

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 29
5577355

BETWEEN

WAYNE LINTS
Applicant

AND

DIY IMPORTS LIMITED (in
liquidation) formerly trading as
EZY BATHROOMS
Respondent

Member of Authority: Andrew Dallas

Representatives: Applicant in person
Jason Still, Director of the Respondent

Investigation Meeting: 10 December 2015

Determination: 22 January 2016

DETERMINATION OF THE AUTHORITY

- A. DIY Imports Limited (in liquidation) formerly trading as Ezy Bathrooms (Ezy Bathrooms) failed to pay Wayne Lints eight weeks' notice under his employment agreement.**
- B. Ezy Bathrooms failed to pay Mr Lints wages and holiday pay.**
- C. Ezy Bathrooms deducted but failed to remit Mr Lints' KiwiSaver contributions.**
- D. Ezy Bathrooms must pay Mr Lints within 14 days of the date of this determination the following sums:**
 - (i) \$15,051.16 net as notice;**
 - (ii) \$3509.96 net in unpaid wages;**
 - (iii) \$8,258.04 net in unpaid holiday pay; and**
 - (iv) \$1311.69 gross as deducted but not remitted KiwiSaver contributions.**

- E. Ezy Bathrooms must pay Mr Lints within 14 days of the date of this determination \$6000 as a penalty for breaches of his employment agreement.**
- F. There is no order for costs.**

Employment Relationship Problem

[1] Wayne Robert Lints was employed as a General Manager by DIY Imports Limited (in liquidation) formerly trading as Ezy Bathrooms (Ezy Bathrooms). Ezy Bathrooms employed Mr Lints from 29 January until 17 July 2015, when his employment ended by reason of redundancy.

[2] Mr Lints raised a personal grievance through his lawyer, for unjustified dismissal and also a claim for unpaid notice, wages and holiday pay with Ezy Bathrooms director, Jason Still on 3 August 2015. During the Authority's investigation, he also raised a claim for deducted but unremitted KiwiSaver contributions.

[3] His lawyer's request for a speedy resolution to his personal grievance and other claims was met by silence from Ezy Bathrooms. Mr Lints subsequently filed a statement of problem with the Authority in his own right.

[4] The parties were directed to attend mediation on 25 September 2015. Mediation occurred on 3 November 2015 but was unsuccessful.

Liquidation

[5] Prior to issuing my determination, I discovered that Ezy Bathrooms had, by special resolution of its sole director under s 241(2)(a) of the Companies Act 1993, been placed into liquidation.

[6] Under s 248(1)(c) of that Act, a person may not continue legal proceedings against a company in liquidation unless the liquidator consents to such continuation.

[7] On 12 January 2016, I wrote to the liquidator, Ms Peri Finnigan of McDonald Vague Limited seeking her consent to continue the proceedings against Ezy Bathrooms for the purposes of issuing my determination.

[8] On 18 January 2016, Ms Finnigan granted her consent. This determination is issued in accordance with that consent.

Issues

[9] The following are the issues for determination:

- (i) Is Mr Lintz owed wages in lieu of notice by Ezy Bathrooms?;
- (ii) Is Mr Lintz owed wages by Ezy Bathrooms?;
- (iii) Is Mr Lintz owed holiday pay by Ezy Bathrooms?;
- (iv) Has Ezy Bathrooms deducted but failed to remit Mr Lints's employee KiwiSaver contributions?;
- (v) Whether penalties should be imposed on Ezy Bathrooms?
- (vi) What quantum of penalties, if any, should be imposed on Ezy Bathrooms?; and
- (vii) Should the Authority exercise its discretion to award part of the penalty to Mr Lints?

The Authority's Investigation

[10] Ezy Bathrooms did not lodge a statement in reply or participate in the Authority's case management conference convened to arrange the investigation meeting although Mr Still was notified of it and attempts to contact him were made.

[11] During the case management conference, I asked Mr Lints about his personal grievance for unjustified dismissal, which whilst raised with Mr Still, was absent from his statement of problem. Mr Lints told me that he just wanted payment of monies he said were owed to him and penalties imposed on his former employer for breaches of his employment agreement under the Employment Relations Act 2000 (the Act). Consequently, the matter proceeded as an application for recovery of arrears and penalties.

[12] I asked Mr Lint to quantify the amounts of monies he claimed to be owed by DIY Imports. I also asked him to lodge and serve a witness statement. He did this on 4 December 2015.

[13] The matter was set down for an investigation meeting on 10 December 2015. A Minute was issued to the parties together with a Notice of Investigation.

[14] The Minute advised Mr Still that if DIY Imports wished to lodge and serve a statement in reply out of time, leave of the Authority would be necessary to do so. No such leave was sought and none was granted prior to the investigation meeting.

[15] During the investigation meeting, I heard evidence from both Mr Lints and Mr Still. Mr Lints had previously provided the Authority with a number of documents in advance including his agreement, letters from Mr Still summarising Ezy Bathrooms' restructuring proposal (dated 15 July 2015) and dismissing Mr Lints (dated 17 July 2015), a personal grievance letter sent by his lawyer, emails which had passed between himself and Mr Still's executive assistant, Sarith Leang, about outstanding monies and a statement of evidence which included calculations for notice, unpaid wages, holiday pay and outstanding KiwiSaver contributions.

[16] As part of his contributions to the investigation meeting, Mr Still sought, unsuccessfully, to pursue a counterclaim against Mr Lints. I return to this below.

[17] At the close of the investigation meeting, I gave an oral indication of my preliminary findings under s 174B of the Act.

[18] Having regard to s 174E of the Act, this determination does not refer to all the evidence or information received during my investigation of Mr Lints' employment relationship problem.

Claim for unpaid notice

[19] Mr Lints claimed that Ezy Bathrooms failed to pay him notice according to his employment agreement.

[20] Mr Lints' individual employment agreement provided for notice in the following terms:

17 Termination

17.1 This Agreement may be terminated by either party upon the notice set out in the First Schedule being given in writing. Unless by mutual agreement, the notice period shall be no more and no less than specified in the First Schedule. The Employer, at its discretion, may make a payment in lieu of notice and not require the Employee to work out the notice period. Where the required notice is not given by the Employee, a sum equal to the remuneration for that period shall be paid to the Employer.

...

[21] The First Schedule to agreement relevantly provided:

First Schedule

...

10 Notice Period: 8 weeks (during the Trial Period notice is one week)

...

[22] In a letter dated 17 July 2015, Mr Still advised Mr Lints, amongst other things:

In accordance with the terms and conditions of your employment with DIY Imports Limited, this letter serves as 8-weeks notice of termination of your employment. This notice will be paid out in lieu.

[23] Ezy Bathrooms did not pay Mr Lints notice (or other entitlements).

[24] On 30 July 2015, Mr Lints emailed Ms Leang about the outstanding monies owed to him. Ms Leang responded later that day and provided the calculation of those monies as follows:

\$7,525.58	July Salary
\$7,525.58	August Salary

[25] Mr Lints calculated his notice as a gross amount. During the investigation meeting, Mr Still stated that the gross amount payable to Mr Lints were, in fact, higher than those calculated by Mr Lints.

[26] Given the discrepancy, the correct course is to accept the net amount, over which there was no dispute between the parties, provided to Mr Lints by Ms Leang on 30 July 2015.

[27] Ezy Bathrooms must pay Mr Lints \$15,051.16 net as notice under his employment agreement.

Claim for unpaid wages

[28] Mr Lints claimed unpaid wages for a period of nine days.

[29] The email from Ms Leang dated 30 July 2015 stated this amount to be:

\$3509.96 Sep 9 days (notice period w/ending Sep 11, 2015)

[30] As with the calculation of notice, there was dispute between the parties about the net amount owed by Ezy Bathrooms to Mr Lints as unpaid wages.

[31] Ezy Bathrooms must pay Mr Lints \$3509.96 net as unpaid wages.

Claim for unpaid holiday pay

[32] Mr Lints claimed unpaid holiday pay from Ezy Bathrooms.

[33] The provisions relating to annual leave for Mr Lints were contained in clause 11 and Schedule 1 of his employment agreement and also defaulting to the Holidays Act 2003. He was entitled to 5 weeks annual leave a year.

[34] As with the claims of unpaid notice and wages, there was dispute between the parties about the net amount owed by Ezy Bathrooms to Mr Lints as unpaid holiday pay.

[35] The email from Ms Leang dated 30 July 2015 stated this amount to be:

\$8,258.04 Holiday Pay

[36] Ezy Bathrooms must pay Mr Lints \$8,258.04 net as unpaid holiday pay.

Claim for deducted but unremitted KiwiSaver contributions

[37] Mr Lints claimed that Ezy Bathrooms had deducted Kiwisaver contributions from his gross pay but had remitted these to the Inland Revenue Department (IRD).

[38] Mr Lints calculated such deductions as \$1311.69 gross.

[39] Mr Still agreed that the KiwiSaver contribution had been deducted and also conceded that these had not been remitted to IRD.

[40] Mr Still did not dispute the gross amount of unremitted KiwiSaver contributions calculated by Mr Lints.

[41] Ezy Bathrooms must pay Mr Lints \$1311.69 gross as deducted but not remitted KiwiSaver contributions.

Penalties

[42] Mr Lints sought the imposition of penalties against Ezy Bathrooms for breaches of his employment agreement.

[43] Under s 135(2)(b) of the Act, the Authority has jurisdiction to impose a penalty of up to \$20,000 on Ezy Bathrooms for each breach of Mr Lints' employment agreement. Alternatively, it is permissible to impose a single *global* penalty for multiple breaches of Mr Lints' employment agreement.¹ The Authority has discretion to award a penalty, in whole or in part, to any person.² The standard of proof for the imposition of a penalty by the Authority is on the balance of probabilities.³

Principles to be applied

[44] The Court has examined the principles to be applied in imposition of penalties the Act.⁴

¹See, *Xu v McIntosh* [2004] 2 ERNZ 448 at [44] and *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252 at [92].

²Employment Relations Act 2000, s 136(2).

³*Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁴*Xu v McIntosh* [2004] 2 ERNZ 448 at [47]–[48] and *Tan v Yang and Zhang* [2014] NZEmpC 65 at [33].

[45] Applying these principles and having considered relevant recent decisions in this jurisdiction on the imposition of penalties,⁵ I make the following findings.

[46] On the evidence of Mr Still, the actions of Ezy Bathrooms in breaching Mr Lints' employment agreement were deliberate. Such conduct by an employer is of serious concern. Mr Lints has been deprived of a significant amount of money, upon which there is no dispute that it was owed, for a sustained period. He told me that these actions by Ezy Bathrooms had a serious economic and emotional impact on himself and his family. I have no reason to doubt his evidence.

[47] Mr Still showed no remorse. If anything, he stridently defended the position of the non-payment of Mr Lints' entitlements.

[48] Not unsurprisingly then, Mr Still opposed the imposition of penalties. However, he did suggest that if penalties were imposed on Ezy Bathrooms, they should be at the lower end of the scale.

[49] Standing back and reviewing the matter in totality, I conclude that a global penalty of \$6000 for breaches of Mr Lints' employment agreement is appropriate in all the circumstances.

Should Mr Lints receive part or all the penalties?

[50] The Authority has discretion under s 136(2) of the Act to award any penalty, in whole or in part, to any person. Mr Lints asked me to exercise this discretion in his favour. Mr Still opposed this course.

[51] There was no doubt that the actions of Ezy Bathrooms in depriving Mr Lints of his entitlements had a significant economic impact on Mr Lints and, by extension, his family.

[52] I conclude it is appropriate in all the circumstances to require Ezy Bathrooms to pay this penalty to Mr Lints.

⁵For example, *Lagrosa v Maxwell Partnership* [2014] NZERA Christchurch 161 and *Su v IGolf Limited* [2015] NZEmpC 66 at [29].

[53] Ezy Bathrooms must pay Mr Lints a global penalty of \$6000 for breaches of his employment agreement.

Ezy Bathrooms' counterclaim

[54] During the investigation meeting, Mr Still attempted to advance a counterclaim against Mr Lints for "negligence" as General Manager of Ezy Bathrooms. He asserted the claim, expressed as damages, was \$1.2 million.

[55] Whilst counterclaims may be meritorious, it is clear that care must be taken in their assessment.⁶ This is particularly so with claims, which on their face, appear to be litigation tactics deployed for the dominant purpose of dissuading parties from pursuing their primary claims or more generally designed to create a chilling effect on parties expressing and asserting their legal rights.

[56] The counterclaim against Mr Lints was not raised in a statement of reply lodged on behalf of Ezy Bathrooms, either in or out of time. Mr Still appeared to be under the misapprehension that he could in his words just "come along" to the Authority's investigation meeting and pursue the claim against Mr Lints.

[57] I declined to hear Ezy Bathrooms' counterclaim against Mr Lints for the following reasons:

- (i) The counterclaim Mr Still sought to advance was described by him as "negligence", a Tort, which is not in the Authority's jurisdiction;
- (ii) Even if the counterclaim was founded in contract, Ezy Bathrooms had not provided specific details of the breaches of contract and/or duties by Mr Lints during his employment or after, dependent upon the allegations, necessary to properly advance such a claim against him; and
- (iii) Mr Still told me Ezy Bathrooms had deliberately withheld Mr Lints' entitlements as, in effect, partial settlement of the damages claim against him. It had no legal justification to do so and, indeed, breached Mr Lints' employment agreement and the Holidays Act 2003 as a result.

⁶ See, *George v Auckland Council* [2013] ERNZ 675 at [143]–[144].

Costs

[58] As Mr Lints was not represented, there is no order for costs.

A handwritten signature in blue ink, consisting of a vertical line on the left, a horizontal line extending to the right, and a small loop at the end of the horizontal line.

Andrew Dallas
Member of the Employment Relations Authority