IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 24
3000203

BETWEEN	MORRIS JURY BRENDAN LAUGHTON MELISSA DEN HOLLANDER and EMMET MCATEER Applicants
A N D	EFFICIENT LIGHTING TECHNOLOGY LIMITED First Respondent HAROLD LEAUPEPE Second Respondent

Member of Authority:	T G Tetitaha
Representatives:	B Laracy, Advocate for the Applicants G Denholm, Counsel for the Respondents H Leaupepe in person
Investigation meeting:	2 March 2017 at Wellington
Submissions received:	2 March 2017 from both parties
Date of Determination:	3 April 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The application for unjustified dismissal is dismissed.

B. Harold Leaupepe is not personally liable for the applicants wages.

C. Pursuant to s.131 of the Employment Relations Act 2000 Efficient Lighting Technologies Limited is to pay wages in the form of unpaid salary, holiday pay and expenses to the applicants as follows:

a) Morris Jury : $19,598.38

b) Brendan Laughton : $18,815.07

c) **Melissa Den Holland : $14,535.17**

d) **Emmet McAteer : $20,649.95**

D. **There is an order for interest to be paid at the rate of 5% per annum from 12 September 2016 until the date of payment on the above judgment sums.**

E. **Efficient Lighting Technologies Limited is to pay a penalty of $1,000 each to Morris Jury, Brendan Laughton, Melissa Den Holland and Emmet McAteer pursuant to ss.135 and 136(2) of the Employment Relations Act 2000.**

F. **Costs are reserved.**

Employment relationship problem

[1] The applicants allege they were unjustifiably dismissed and seek recovery of unpaid salary, holiday pay and expenses from both respondents. They also seek a penalty for breaches of s120 of the Employment Relations Act 2000 (the Act) and/or breach of their employment agreements.

Relevant facts

[2] All of the applicants were previous employees of a lighting company, known as Enlightens NZ Limited (ENZ). The company has gone into liquidation. All of the applicants were owed unpaid salary, holiday pay and expenses.

[3] Mr Leaupepe had some involvement with ENZ. He set up the first named respondent company, Efficient Lighting Technologies Limited (ELTL). ELTL was intended to take over ENZ's business. Mr Leaupepe raised $500,000 capital by mortgaging his personal assets.

[4] Mr Leaupepe sought to retain the applicants' services. They were employed by ELTL on individual employment contracts. The agreements' required one month's written notice of termination.

[5] In August 2016 ELTL ran into financial difficulties due to insufficient sales. As a result, ELTL defaulted on payment of wages in July 2016.

[6] Between 9 and 10 August 2016 Mr Leaupepe contacted three of the four applicants. He informed them of the company's financial circumstances and the possibility of redundancy. He did not contact Ms Denhollander. She spoke to Mr Laughton the following day and was given the same information.

[7] All of the applicants were called to a Skype meeting with Mr Leaupepe on 12 August 2016. During the meeting Mr Leaupepe outlined the company's financial circumstances. He informed the applicants there was the possibility they were to be made redundant. He was advised by another accountant and director, Tim Fitzgerald to propose staff continuing to work on a commission only basis. This was rejected by the applicants. Mr Leaupepe then indicated he was to meet with the Bank on 19 August 2016 to secure further financing.

[8] On 19 August 2016 Mr Leaupepe advised he was unable to secure any financing. He orally advised all of the applicants they were to be made redundant effective 12 August 2016. The notice period ended 12 September 2016.

[9] Only one applicant (Emmet McAteer) received notice in writing of the redundancy. The remaining applicants have not received any written notice despite requests this be provided.

[10] At the termination of their employment with ELTL, all of the applicants were owed unpaid salary for the period 25 July to 12 September 2016.

The issues

[11] The issues for hearing were set out in an earlier Minute[1] as follows:

(a) What wages are owed for salary, holiday pay and expenses?

(b) Is the second respondent, Harold Leaupepe, liable to pay the above wages personally? This is arises upon two alleged bases:

- An enforceable guarantee; and
- Promissory estoppel.

---

1 Minute dated 1 February 2017.

(c) Was the process leading to dismissal for redundancy what a fair and reasonable employer could have done in all the circumstances? It is accepted there were genuine reasons for the redundancy.

(d) Should a penalty be awarded for failure to respond to requests for reasons for the applicants' dismissal and/or redundancy pursuant to s.120 of the Employment Relations Act 2000 (the Act) and in breach of their employment agreements?

What wages are owed for salary, holiday pay and expenses?

[12] The respondent concedes it has not paid the applicants' salary for the period 25 July to 12 September 2016. It did not contest the expenses sought to be recovered.

[13] Mr Leaupepe alleged Mr McAteer was not owed leave because of eight weeks paid sick leave at the start of his employment. I do not accept this. Mr Leaupepe agreed he had authorised Mr McAteer to take paid leave. He also agreed neither party discussed Mr McAteer repaying the leave.

[14] No leave records have been filed despite the direction to do so.[2] In the circumstances, I accept the evidence of all the applicants about their wages owed and leave taken. The failure to produce, as directed, a compliant wage and leave record has prevented the applicants from bringing an accurate wages and leave claim. There is little or no evidence contradicting the wages and leave are owed.

Is the second respondent, Harold Leaupepe, liable to pay the above wages arrears personally?

[15] The applicants' point to oral discussions, text messages and emails as the basis for Mr Leaupepe being personally liable to pay their wages. They allege he gave an enforceable guarantee to pay their wage arrears or alternatively is estopped from re-siling from his promise to pay their wage arrears.

Was there an enforceable guarantee?

[16] To be enforceable, a contract of guarantee must be in writing and signed by the guarantor.[3] There is no agreement in writing signed by Mr Leaupepe to meet the

---

[2] Minute dated 1 February 2017 at [8].

[3] Section 27 Property Law Act 2007.

applicants wages. The evidence does not meet the tests required for a contract of guarantee.

Is Mr Leaupepe estopped from denying liability for the wage arrears?

[17] There are four elements required to raise an estoppel[4]:

(a) A belief or expectation must have been created or encouraged through some action, representation or omission to act by the party against whom the estoppel is alleged;

(b) The party relying on the estoppel must establish that the belief or expectation has been reasonably relied on by that party alleging the estoppel;

(c) Detriment will be suffered if the belief or expectation is departed from; and

(d) It is unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.

[18] The burden lies with the applicants to prove the estoppel.

[19] The requirements of estoppel are not met on this evidence. There was no promise by Mr Leaupepe to meet the applicants' wages. Rather the evidence supports a finding that he was selling personal assets that had been mortgaged to raise capital for first respondent. His evidence was that he was seeking to reorganise his personal indebtedness to the first respondent's secured creditors in order to prevent sale of his family home. At best he undertook to the first respondent to meet its debts. There is little or no evidence he made an enforceable promise to the applicants.

[20] It was also unreasonable to rely upon his statements. At best he made promises to the first respondent, not necessarily the applicants. The evidence showed the liquidation of his assets was to meet the secured creditor's claims first and anything left over for the applicants.

---

[4] *Weeraphong Harris v TSNZ Pulp & Paper Maintenance Ltd* [2015] NZEmpC 43; ARC79/12 at [76].

[21] There is little evidence of detriment even if they had relied upon his promise. Most had and were looking elsewhere for jobs. They were required to work out their notice under their employment contracts.

[22] Therefore I find Harold Leaupepe is not personally liable for the applicants' wages.

[23] This is an appropriate case for the imposition of interest. The applicants have lost the benefit of significant sums of money since termination.

[24] Accordingly, the following orders are now made:

(a) Pursuant to s.131 of the Employment Relations Act 2000 Efficient Lighting Technologies Limited is to pay wages in the form of unpaid salary, holiday pay and expenses to the applicants as follows:

- Morris Jury : $19,598.38
- Brendan Laughton : $18,815.07
- Melissa Den Holland : $14,535.17
- Emmet McAteer : $20,649.95

(b) There is an order for interest to be paid at the rate of 5% per annum from 12 September 2016 until the date of payment on the above judgment sums.

Was the process leading to dismissal for redundancy what a fair and reasonable employer could have done in all the circumstances?

[25] The applicants accept there were genuine reasons for redundancy. They allege the process leading to dismissal for redundancy was defective because of lack of consultation.

[26] ELTL conceded it had breached its duties of good faith and did not follow a process of consultation. However it submits that these defects were minor and did not cause unfairness to the applicants given its financial circumstances.

[27] The consultation was limited. There was little forewarning consultation about redundancy was occurring. No information on the actual financial position of the

company was given before dismissal. This was a breach of good faith and a procedural defect. The dismissal can only be justified if this defect was minor and did not cause unfairness to the applicants.

[28] From the evidence consultation would have done little other than to delay the inevitable given the company's dire financial circumstances. There were little or no real alternatives to redundancy. At best it would have delayed termination by a week if consultation had been properly undertaken.

[29] In my view, the procedural defects were therefore minor and did not cause unfairness. The application for unjustified dismissal is dismissed.

Should a penalty be awarded?

[30] The applicants seek penalties for breaches of s.120 of the Act namely failure to provide reasons for the dismissal within 14 days. Although three of the four applicants were not provided with written reasons for the termination their evidence did not clearly identify when the request for reasons was made. My impression of their evidence was that they asked for confirmation of termination in writing only. The applicants were well aware by 12 August 2016 that their employment was being terminated by reason of redundancy.

[31] Even if there had been a breach under s120 of the Act, there is no specific provision in the Act for the award of a penalty. Section 134 allows for penalties for breaches of an employment agreement. There is no specific clause within the applicants' employment agreements requiring written reasons for dismissal.

[32] It is accepted there was a breach of good faith by the failure to consult and a breach of the agreement to provide written notice of termination as required by clause 16.1 for three applicants. The applicants seek penalties for breaches of their employment agreement.

[33] I am required to determine if a penalty should issue and quantum. Section 133A of the Act sets out the matters to be considered. Other matters such as the need for general and particular deterrence and the desirability of broad consistency with other penalties imposed in similar cases are also relevant.[5]

---

[5] *Lumsden v Sky City Management* at [55].

[34] The breach appears technical because the applicants were aware of their possible redundancy. However it is Mr Leaupepe's statements about financing and reassurances of imminent payment that created confusion about termination. It is this that prompts these applicants to request notice in writing. Their requests were ignored. The applicants believed this was to prevent them raising a personal grievance within 90 days. My impression of Mr Leaupepe's evidence was that he was rearranging his assets and finances to secure his family home. This may have placed these applicants in a slightly worse position if those assets had been available to meet the first respondent company's debts. This uncertainty about termination and payment of their wages deprived the employees of money and possibly assets for wages recovery.

[35] This breach was serious, deliberate and sustained across all four applicants. There is a need for particular deterrence of this type of behaviour.

[36] In my view it is appropriate to impose a penalty. The maximum penalty that could be imposed is $20,000 against the first respondent. Similar cases have attracted penalties from $750 to $1,000.[6] A penalty of $1,000 per applicant is appropriate. Given the breach is of a private agreement, it is also appropriate it be paid to the applicants not the Crown.

[37] Efficient Lighting Technologies Limited is to pay a penalty of $1,000 each to Morris Jury, Brendan Laughton, Melissa Den Holland and Emmet McAteer pursuant to ss.135 and 136(2) of the Employment Relations Act 2000.

[38] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

---

6 *Pure New Zealand Foods Ltd v Sharma* [2016] NZERA Wellington 129; *Bhatti v Aotearoa Smart Buy NZ Ltd & Anor* [2016] NZERA Auckland 268; *Domingo v Meng Suon & Ngan Heng t/a Town & Country Foods* [2016] NZERA Auckland 170.