

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 324
3001375**

BETWEEN

ANGUS McLEAN
Applicant

AND

PRETTY DAMN GOOD FOR
YOU LIMITED
First Respondent

ANGELA MERRIE
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Catherine Goode, Counsel for Applicant
Angela Merrie, Second Respondent, also Representing
the First Respondent

Investigation Meeting: 12 October 2017 at Auckland

Submissions received: 6 & 11 October 2017 from Applicant
16 October 2017 from Second Respondent

Determination: 18 October 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Angus McLean, claims that he was unjustifiably dismissed by reason of redundancy by the Respondent, Pretty Damn Good For You Limited (PDGFY).

[2] Mr McLean also claims that the First Respondent, PDGFY, breached the employment agreement by failing to pay all salary payments due to him and his accrued holiday entitlement.

[3] Mr McLean further claims that the Second Respondent, Ms Angela Merrie, aided and abetted the breach of the employment obligations by PDGFY pursuant to s 134(2) of the Employment Relations Act 2000.

[4] PDGFY denies that Mr McLean was unjustifiably dismissed and claims that the redundancy was genuine.

[5] Ms Merrie denies that she aided and abetted a breach of Mr McLean's employment agreement.

Issues

[6] The issue for determination are whether or not:

- Mr McLean was unjustifiably dismissed by PDGFY by reason of redundancy
- PDGFY breached the employment obligations it owed to Mr McLean
- Ms Merrie instigated, aided or abetted PDGFY to breach the employment obligations it owed to Mr McLean

Background Facts

[7] PDGFY is a company specialising in the development and marketing of recipes and food products. The sole director and manager and major shareholder of PDGFY is Ms Merrie, who initially undertook cookery demonstrations and gave talks but subsequently developed a new concept focussing on online retailing, primarily offering vegan food products.

[8] During February 2016 Mr McLean commenced employment with PDGFY and was appointed as Head Chef with responsibility to develop plant-based recipes. He was provided with an individual employment agreement (the Employment Agreement) which included the following clauses:

3.1 Individual Agreement of Ongoing and Indefinite Duration

... The employment shall commence on 22nd February 2016.

6. Hours of Work

6.1 Full Time Hours with an obligation to perform overtime as necessary with an entitlement to extra pay.

The Employee's normal hours of work shall be 40 hours per week, ...

7. Wages/Salary/ Allowances

7.1 Annual Salary

The Employee's salary shall be \$60,000.00 per annum, which shall be paid weekly...

8. Holidays and Leave Entitlements

8.1

The Employee shall be entitled to paid annual leave on the following basis:

(i) The Employee shall be entitled to four weeks annual leave for each 12 months of service.

(ii) ...

(iii) Annual leave may, with the agreement of the employer, be taken in advance.

(iv) The employee shall, if they so elect, be provided with an opportunity to take at least two weeks of their annual leave entitlement in an uninterrupted break. ...

8.4 Sick Leave as set out in the Holidays Act

The Employee shall, after 6 months employment with the Employer, be entitled to 5 days sick leave for each subsequent 12 month period of service. ...

8.7 Unpaid Leave

Applications for unpaid leave will be given reasonable consideration by the Employer, but shall be granted only at the Employer's sole discretion having regard to the requirements of the employer's business and operations.

12 Restructuring and Redundancy

12.1 Employer to provide information and consider comments in restructuring situations

... The employer will meet with the employee, providing information about the proposed arrangement and an opportunity for the employer to comment on the proposal, consider and respond to their comments.

12.3 Employer to activate redundancy provisions if employee not transferred to the new employer

here the employee either chooses not to transfer to the new employer, or is not offered employment by the new employer, the employer will activate the redundancy provisions of this agreement.

13 Termination of Employment

13.1 General Termination

The employer may terminate this agreement for cause, by providing four weeks' notice in writing to the Employee. Likewise the Employee is required to give four weeks' notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

[9] Mr McLean and Ms Merrie, on behalf of PDGFY, had signed the Employment Agreement on 27 April 2016.

[10] During the period of his employment with PDGFY Mr McLean had taken a significant amount of unpaid leave to cover sickness absence and/or medical appointments. Ms Merrie said she was in full agreement with this, being aware of Mr McLean's medical history at the time of employment and wanting to support him.

[11] On 3 June 2016 Mr McLean had requested a period of unpaid absence in order that he could return to the UK for a family visit, with a commencement date of 2 September 2016.

[12] Ms Merrie advised Mr McLean that he would have an entitlement to some holiday pay entitlement by September, but that if he wanted to take some paid holiday leave over the Christmas period, he should take unpaid leave in September 2016. Mr McLean said he had agreed to this suggestion.

[13] During June 2016 Ms Merrie said she had become aware that funding for PDGFY for which a provisional contract had been drawn up in May 2016 and which she had anticipated being finalised and received within the 2/3 month period following, had been postponed.

[14] She explained that as the funding had been delayed and PDGFY had run out of money, she had transferred some of her personal monies to it, and this was used to pay Mr McLean and the other employees their salary payments in the months prior to September 2016. However during late August 2016 she was unable to sustain the salary payments to Mr Mclean and the other employee.

[15] Just prior to leaving for the UK, but after his tickets had been booked and paid for, Mr McLean said he had been informed by Ms Merrie who had taken him and the other employees at PDGFY for a coffee on or about 31 August 2016 that PDGFY was closing.

[16] Mr McLean said the news had been a surprise to him, he had been unaware that the salary payments he had received over the preceding months had been paid by Ms Merrie personally and understood that all was proceeding as discussed at the commencement of his employment.

[17] Ms Merrie had invited him to raise any queries with her, and he had done so, asking why she had decided to close PDGFY when the product launch was close.

[18] Ms Merrie said that as PDGFY had no funds, she thought it best to complete the process quickly and had offered to assist, and did in fact assist, Mr McLean and the other employee in their subsequent searches for alternative employment.

[19] Mr McLean received a letter from PDGFY dated 1 September 2016, signed by Ms Merrie as: “*Owner and Director*” advising him that his position was redundant. The letter stated:

... As a result of my decision to no longer launch an App and Food Delivery Service as a part of Pretty Damn Good For You the position of Wellbeing and Marketing Assistant is no longer needed. Regrettably this means that your employment will terminate. ...

In accordance with your employment contract, your notice period is 4 weeks. Therefore your employment will end on 29th September 2016.

Due to your employment ending because of redundancy, you will be paid for the 4 days that you would have worked upon your return from your three weeks leave. ...

[20] Mr McLean left for the UK on 2 September 2016. Whilst he was in the UK he was informed by email from Ms Merrie that his one week of paid work upon his return to New Zealand had been cancelled.

[21] Mr McLean received an email from Ms Merrie dated 6 September 2016. In the email Ms Merrie stated that she believed she had been following the correct procedure in paying Mr McLean only 1 week of redundancy notice, but stated: “*However I do really want to help you so I am going to agree to pay you the four weeks redundancy.*”

[22] Ms Merrie reconfirmed this commitment to paying Mr McLean:

- By email dated 18 September 2016: *“I’ve been trying to get extra money so I can pay you both for that week but at the moment its looking like I will be paying it with the redundancy pay in one lump sum. I will keep trying and if I can pay it earlier I absolutely will”*.
- By text message dated 7 November 2016: *“Hi Angus, there is no need to worry. The money will be here next week at the latest and you will get paid.*
- By text message dated 19 November 2016: *“... I was expecting funds this week. Spoke to Switzerland last night and they said they need another couple of days...”*
- By text message dated 28 November 2016: *“... I spoke to them late last week and everything is still on track.”*
- In the Statement in Reply at paragraph 7: *“The most important thing to me is being able to pay my former employees the full amount owing to them. To this end I have been working hard to bring new funding into the company so that I can settle outstanding debts.”*
- *“... between April and August 2016 I chose to use my personal savings to pay my employees wages. What this meant is that at the time of redundancy I was unable to pay out the redundancy package.*

Determination

Was Mr McLean unjustifiably dismissed by PDGFY?

[23] Mr McLean was dismissed from his employment with PDGFY by reason of redundancy. Justification for dismissal is stated in the Act, which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[24] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[25] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that it has complied with the statutory obligations of good faith dealing in s 4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*¹ noted that this compliance with good faith dealing includes consultation *“as the fair and reasonable employer will comply with the law”*²

¹ [2006] ERNZ 825,842

² Ibid at para [40]

[26] The Employment Court further made clear in *Vice-Chancellor of Massey University v Wrigley*³ that consultation is essential to any fair process, stating that:⁴

The purpose of s4(1A)(c)... requires the employer to give the employees an opportunity to comment before a decision is made. The opportunity must be real and not limited by the extent of the information available to the employer.

[27] The evidence of Mr McLean and Ms Merrie supports a finding that PDGFY failed to follow a fair procedure in relation to the termination of Mr McLean's employment.

[28] I acknowledge that PDGFY is a small business without access to a Human Resources department and that it states in s 103A (5) of the Act that:

The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-

(a) Minor; and

(b) Did not result in the employee being treated unfairly.

[29] However in this case the defects in the process were not minor and they resulted in Mr McLean being treated unfairly in that he was deprived of any opportunity to comment on the process prior to a final decision in the matter being taken.

[30] I further note that Ms Merrie sought advice from the Ministry of Business, Innovation and Employment on 5 September 2016 after Mr McLean had raised a query in regards to the redundancy payment. There is no reason why she could not have sought advice from MBIE prior to advising Mr McLean that his employment was being terminated by reason of redundancy and thereafter from following a fair process.

[31] Moreover the Employment Agreement makes reference to the steps to be taken in a restructuring process, namely: *“the employer will meet with the employee, providing information about the proposed arrangement and an opportunity for the employee to comment on the proposal, consider and respond to their comments.”*

[32] I find that PDGFY failed to follow a fair process.

³ [2011] NZEmpC 37

⁴ Ibid at para [55]

[33] I determine that Mr McLean was unjustifiably dismissed by PDGFY.

Did PDGFY breach the employment obligations it owed to Mr McLean?

[34] Upon the termination of his employment on 1 September 2016 Mr McLean had been employed for a period of 6 months. For a significant part of that period PDGFY, in breach of its contractual obligations to him, had not been financially in a position to pay his salary.

[35] Ms Merrie, acting on behalf of PDGFY, did not disclose this to Mr McLean which I find to have been a breach of the good faith duty owed to an employee by an employer.

[36] Upon the termination of his employment, PDGFY did not pay him monies owed to him for the week commencing 29 August, for the week commencing 26 September 2016, or his accrued holiday entitlement.

[37] I determine that PDGFY breached the employment obligations it owed to Mr McLean.

Did Ms Merrie aid and assist PDGFY to breach the employment obligations it owed to Mr McLean?

[38] In accordance with s. 134(2) of the Act:

Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[39] In order to aid and abet a person must know of the agreement and deliberately intend to interfere with it.

[40] As sole Director of PDGFY and a signatory of the Employment Agreement between PDGFY and Mr McLean Ms Merrie was fully aware of the contractual commitments owed towards Mr McLean by PDGFY in the event of redundancy.

[41] Additionally she had been aware that during the period June – August 2016 PDGFY could not afford to meet the contractual obligations regarding payment of Mr McLean's salary, and had actively acted to conceal this situation from him in breach of good faith.

[42] Ms Merrie indicated clearly in subsequent communications that she was aware of the employment obligations owed to Mr McLean in respect of the termination of his employment and that PDGFY was not intending to meet these, stating that she considered it her personal responsibility to pay Mr McLean the entitlements owed by PDGFY.

[43] I determine that Ms Merrie aided and abetted PDGFY to breach the employment obligations it owed to Mr McLean.

Remedies

[44] Mr McLean has been unfairly dismissed and he is entitled to remedies.

[45] Mr McLean provided evidence to the Authority of his efforts to mitigate his loss following the termination of his employment with PDGFY, and he in fact obtained alternative employment on 31 October 2016.

Unpaid wages and holiday pay

[46] I order that PDGFY pay Mr McLean the sum of \$1,154.00 gross in respect of unpaid wages for the period of 1 week from 29 August – 2 September 2016.

[47] Mr McLean claims that he is owed 2 weeks holiday pay. PDGFY does not offer any evidence to the contrary; therefore pursuant to s 83.4 of the Holidays Act 2003 I order that PDGFY pay Mr McLean the sum of \$2,308.00 gross in respect of holiday pay.

[48] Mr McLean obtained alternative employment on 31 October 2016.

[49] I have found that Mr McLean was unjustifiably dismissed and is therefore entitled to lost wages pursuant to s 128(1) of the Act.

[50] I order that PDGFY pay Mr McLean the sum of \$9,232.00 gross (calculated as 8 weeks x \$1154.00 per week 5.09.16 – 28.10.16) pursuant to s 128(2) of the Act.

Interest

[51] Mr McLean has applied for interest on the outstanding wages.

[52] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum⁵.

[53] I consider that it is appropriate that PDGFY is ordered to pay interest on the outstanding sums owed to Mr McLean.

[54] I order that PDGFY pay interest of 5% on the outstanding sums due to Mr McLean from the date of this determination until payment has been made. .

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[55] Mr McLean is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Mr McLean suffered significant hurt and humiliation in addition to financial difficulties which impacted upon him.

[56] I order PDGFY pay Mr McLean the sum of \$7,500.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[57] I have considered the matter of contribution as I am required to do under s124 of the Act. There is no evidence that Mr McLean contributed to the situation which gave rise to the grievances. There is to be no reduction in remedies.

Penalties

[58] Mr McLean is seeking a penalty against Ms Merrie pursuant to s 134(2) of the Act.

[59] The standard of proof in respect of penalties is the civil standard of “on the balance of probabilities”.

[60] Penalties fall to be awarded pursuant to s 134 of the Act which states:

⁵ Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

134 Penalties for Breach of employment agreement

(1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.

(2) Every person who incites, instigated, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[61] The factors to be considered in determining the appropriate penalty under s 133A of the Act have been summarised in the recent Employment Court case of *Lumsden v SkyCity Management Limited*⁶ as including whether the breaches were committed knowingly or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. A history of previous breaches may also be relevant.

[62] As observed Ms Merrie is the sole Director and major shareholder of PDGFY and as such is its guiding mind. It was Ms Merrie who undertook the review of the operational requirements of PDGFY and advised Mr McLean that the termination of his employment on the grounds of redundancy resulted from her decision not to launch an App and Food Delivery Service.

[63] Ms Merrie was aware from June 2016 that the expected funding for PDGFY had not materialised and concealed the precarious financial condition of PDGFY from Mr McLean by transferring funds from her personal account for his salary payments to PDGFY.

[64] This action on Ms Merrie's part had the effect of disguising the true financial situation from Mr McLean, which had he been aware of might have prevented his committing to the purchase of air tickets to the UK, and remaining in New Zealand to look for alternative employment. I find that Ms Merrie aided and abetted PDGFY to breach the Employment Agreement with Mr McLean.

[65] Further I find that in this case, the breaches committed by Ms Merrie were done so knowingly and intentional pursuant to s 133A (c) of the Act.

[66] I order Ms Merrie to pay \$7,000.00 as a penalty, in the circumstances I consider it appropriate that a proportion of the penalties are paid to Mr McLean.

⁶ [2017] NZEmpC 30 at [54]

[67] Ms Merrie is ordered to pay Mr McLean \$5,000.00 of the \$7,000.00 penalty, the remaining \$2,000.00 to be paid to the Crown.

Costs

[68] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[69] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority