IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 463
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	BETWEEN	PATRICK MARTIN and NICOLA JANE MARTIN Applicants
	AND	SOLAR BRIGHT LIMITED (in liquidation) Respondent
	AND BETWEEN	SOLAR BRIGHT LIMITED (in liquidation) Applicant
	AND	PATRICK MARTIN and NICOLA JANE MARTIN Respondents
Member of Authority:	Christine Hickey	
Representatives:	Patrick and Nicola Martin in person Murray Spackman and John Walley for Solar Bright Limited	
Investigation Meeting:	2 and 3 April 2019	
Submissions and further evidence received on:	3 April 2019 from Patrick and Nicola Martin 3, 4, 9 and 18 April 2019 from Solar Bright Limited Consent from the liquidators to continue received 23 May 2019	
Date of Determination:	7 August 2019	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The Martins' claims

[1] Mr Patrick Martin and Mrs Nicola Martin, former employees of Solar Bright Limited (SBL), claim that they are owed unpaid salary arrears, unpaid annual leave entitlements and other money by SBL.

[2] Mr Martin was the founding director of SBL. In 2012 he was appointed the CEO. Mrs Martin was the managing director. Mr and Mrs Martin resigned as employees in early 2018.

[3] Mr and Mrs Martin also claim that they were unjustifiably constructively dismissed by SBL because of its failure to pay them over a long period.

[4] Mr and Mrs Martin claim penalties for breaches of the Holidays Act 2003, in relation to their unpaid leave entitlements.

[5] SBL says that the allegation of constructive dismissal is unsustainable as the applicants were the sole directors of SBL at the time of their alleged dismissal and thus in complete control of SBL. SBL also considers the allegation of constructive dismissal to be frivolous and/or vexatious because the applicants resigned of their own free will for their own reasons.

SBL's counterclaim

[6] SBL acknowledges that it owes the Martins some salary arrears and holiday pay but could not say what that amount is.

[7] These proceedings were initiated by the claims from the Martins against SBL. SBL initially replied that the Martins' statements of problem were not clear and for the most part their claims were denied because the applicants had breached numerous contractual obligations "in such a manner that merit a penalty and other contractual remedies by way of counterclaim".

[8] Mr and Mrs Martin entered into new employment agreements, which they signed in December 2015.[1] They signed the new employment agreements as employer/director on SBL's behalf for one another.

[1] Although page 3 of the agreements has the date 2006 on it, I am satisfied the new agreements were entered into in December 2015.

[9] SBL claims that the Martins caused SBL to instruct a law firm to draft new employment agreements. The new employment agreements altered the original November 2012 employment agreements, specifically by taking out a clause protecting SBL's right to intellectual property developed during the Martins' employment with SBL.

[10] SBL claims that the new employment agreements were wrongly entered into and are illegal contracts, which the Authority should declare to be of no effect. SBL also claims that because the agreements were illegal contracts then the intellectual property wrongly obtained, the DATAeye and the PATeye, by Mr Martin cannot actually be his property, but remains that of SBL.

[11] SBL says that the Martins unlawfully caused SBL to transfer the intellectual property in the PATeye from it to Mr Martin personally. Mr Martin developed the PATeye while working for SBL and therefore the PATeye intellectual property should be that of SBL.

[12] SBL says that the Authority has the jurisdiction under s 161(qa) of the Employment Relations Act 2000 (the Act) to determine disputes about any patent granted, or to be granted for, an invention made by an employee.

[13] SBL claims the maximum penalty against Mr Martin for breach of the 2012 employment agreement. SBL also claims a penalty from Mrs Martin for breach of her employment agreement.

[14] The Martins claims for salary and holiday pay were not disputed, although the amounts were not agreed on. All the other claims and counter-claims are defended.

Participants in the investigation meeting

[15] Mr and Mrs Martin represented themselves. SBL's current directors, Murray Spackman and John Walley, represented SBL.

Liquidation of SBL

[16] At the investigation meeting SBL directors Murray Spackman and John Walley informed the Authority that the Inland Revenue Department was intending to have SBL placed in liquidation on 4 April 2019.

[17] I asked Mr Spackman and Mr Walley to let me know as soon as the company was placed into liquidation. The company was placed in liquidation on 4 April 2019. On 9 April

2019 I wrote to the liquidators seeking permission to continue with the proceedings against the company. On 23 May 2019 the liquidators granted the consent I sought.

The Martins' claims

What salary and benefits are the Martins entitled to?

[18] Despite SBL and its witnesses saying that the second individual employment agreements were not approved by the company, SBL accepts that the other director/s at the time knew of and agreed to the increased salary and benefit packages that were contained in Mr and Mrs Martin's second individual employment agreements.

[19] SBL provided no evidence countering that of Mr and Mrs Martin in relation to the amounts owed. I have no reason to consider the amounts inaccurate. Therefore, I accept that the payroll information to 22 January 2018 that Mr and Mrs Martin have supplied is accurate.

Salary owed to Nicola Martin

[20] SBL owes Mrs Martin the $21,347.52 she has claimed in unpaid salary to 22 January 2018, and $30,086.38 in annual leave holiday pay.

Salary owed to Patrick Martin

[21] The amount of salary claimed by Mr Martin is likewise until 22 January 2018. At the investigation meeting he gave evidence that because SBL had not been paying his salary for quite some time he was compelled to take up some other work as a consultant. However, he says he also continued working at SBL. His evidence is that he worked for SBL from Monday to Thursday from 4:00 p.m. until about 11:00 p.m. in the evening, and on Fridays from 4:00 to either 6:00 or 7:00 p.m. and then all day Saturday and all day Sunday for SBL. At a minimum he worked 40 hours per week for SBL, even after gaining additional employment.

[22] Given that SBL was not paying Mr Martin and had not been for some time, I consider it reasonable that Mr Martin also undertook some other paying work. Therefore, although Mr Spackman asked me to take into account the fact that Mr Martin was working outside of SBL to reduce what SBL owed him by way of salary, I consider that the full salary as claimed is owed.

[23] SBL owes Patrick Martin $39,462.24 in unpaid salary and $43,027.07 holiday pay.

Other amounts claimed

[24] I dismiss the Martins claims for other monetary payments for the following reasons:

- *Garden leave and holiday pay on garden leave* - I dismiss the claim for four weeks' garden leave in lieu of notice as SBL had ceased trading and Mr and Mrs Martin, in their roles as directors, were the ones that came to the decision to cease trading;

- *10% profit* – there was no profit made in the relevant period;

- *Three business trips each* – these trips did not occur, and it is not a tenable claim that Mr and Mrs Martin should somehow be financially paid for business trips that the company could not afford to send them on;

- Mr Martin also claimed that *Koru membership, $3,000 on a petrol card and one car service, or tyres for the car*, should be paid for the period after he finished work. Mrs Martin claimed *Koru membership, and $3,000 on a petrol card* should be paid for the period after she finished work. However, these benefits were actually supplied during the Martins' employment and therefore SBL does not owe the Martins anything for these. Even if it is not correct that all the benefits were supplied during their employment, there is no ongoing employment relationship between the parties and therefore SBL does not 'owe' Mr and Mrs Martin any of these benefits.

Constructive dismissal

[25] Nicola and Patrick Martin became the sole directors of SBL on 28 November 2017, when Mr Spackman resigned as a director. Prior to that Stephen Hampson, the investor director, had resigned as a director on 1 September 2017.

[26] On 20 January 2018 Nicola Martin resigned as an employee from her position of managing director of SBL. On 22 January 2018 she resigned as a director of SBL.

[27] In both written resignations she confirmed that SBL owed her salary arrears and holiday pay.

[28] On 20 December 2017 Patrick Martin resigned as director of SBL. On 22 January 2018 he resigned as CEO of SBL.

[29] In both written resignations he confirmed that SBL owed him salary arrears and holiday pay.

[30] Mr and Mrs Martin's claims are the same, essentially that they were forced to resign as employees because they were not being paid.

[31] SBL denies that it could have constructively dismissed Mr or Mrs Martin, because at the time of their resignations they were the sole directors.

[32] As the above timeline shows when Nicola Martin resigned as an employee she was the sole director. When Patrick Martin resigned as an employee, Nicola Martin was the sole director.

[33] It seems counterintuitive to claim to have been constructively dismissed by way of an ongoing failure of one's employer to pay you when you were effectively the controlling mind/s of the company. Legally speaking, however, a company is a separate entity from its directors and shareholders.

[34] On 11 January 2018, Mr Martin signed a deed of assignment that assigned the ownership of the PATeye intellectual property to Mr Martin personally. The then Operations Manager signed on behalf of SBL.

[35] Mr Martin had already wrongly applied for and retained the intellectual property rights for the DATAeye in his personal name in February 2017.[2]

[36] I find that Mr and Mrs Martin were not constructively dismissed for the following reasons.

[37] As shareholders, investors and directors of SBL they were fully aware all the way through what SBL's financial position was. At the investigation meeting, Mrs Martin gave evidence that they and then director, Steven Wilson, agreed that at that time they would not draw salaries, although they would be paid in full when and if SBL could afford it.

[38] Mr and Mrs Martin's salaries increased significantly throughout their time as employees of SBL. They were paid those increased salaries when SBL could afford it. Over the last few months before Mr and Mrs Martin resigned as directors and as employees, they knew that SBL was in a precarious financial position.[3] They were keenly aware of that situation and had been asking the shareholders/investors to put more money into the

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[2] See paragraphs [44] to [70], below.
[3] *Powerhouse Ventures Limited and Solar Bright Limited v Patrick Martin and Nicola Martin* [2019] NZHC 686, [13].

company. They knew that SBL could not pay them. Nonetheless, they decided to keep working as employees in the full understanding that their employer could not pay them then, or, possibly ever. They acquiesced in their employer's behaviour.

[39] Therefore, the claim of constructive dismissal is dismissed. However, I am not prepared to find that it was a frivolous and vexatious claim, as claimed by SBL, because of Mr and Mrs Martin's lack of legal advice in these proceedings.

Claim for penalties for unpaid holiday pay

[40] Mr and Mrs Martin each claimed a penalty should be imposed on SBL for its failure to pay them their holiday pay entitlements. They did not produce any evidence about this claim or make any submissions on it.

[41] I have considered all the factors governing my discretion on whether to impose a penalty, and, if so, how much. In all the circumstances, including the Martins' sole control over SBL for nearly two months prior to their resignations and SBL's insolvency, I do not consider it is in the interests of justice to impose a penalty. Imposing further costs on SBL at this stage would be a factor counting against the liquidators' ability to pay the Martins their salary and holiday pay ordered in this determination.

Claims the Authority's cannot hear

[42] In documents supplied for the investigation meeting Mr and Mrs Martin provided some further financial information on items that they headed "additions and deductions to the salaries" for my consideration. They pointed out that they were currently personally responsible for debt incurred by SBL during its trading because they are personal guarantors for two overdrafts and SBL's credit card debt. They also pointed out that they made loans to SBL as employees and one loan under the shareholding agreement. In addition, they claim that they had had expenses of $59,284 in relation to the DATAeye and personally paid rent and employee salary during the time the company was trading while they were the sole directors.

[43] I told the Martins on the first day of the investigation meeting that these are not matters that relate to my jurisdiction which is simply in relation to them as employees of SBL. I have no jurisdiction over issues that affected them as either directors or shareholders of SBL or over any personal lending to SBL or to other SBL employees.

SBL's claims

Mr Martin wrongly registered the DATAeye patent personally and for his own benefit

[44] SBL was formed initially to further develop and bring to market Mr Martin's invention, the DATAeye, which had considerable promise for use in New Zealand and in several overseas countries. However, SBL needed to attract capital investment.

[45] In 2016, having gained a grant and further investment, Mr Martin had developed prototypes for the DATAeye to be provisionally patented.

[46] SBL's evidence is that the value of the company was effectively only what the DATAeye and the PATeye could be worth by way of sales. SBL says the only thing of value was the intellectual property of those two inventions.

[47] The Martins' original November 2012 employment agreements included the following obligations in relation to intellectual property:

> 15. **Intellectual Property**
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> 1. Any trademark, goodwill, patent, design or copyright work, procedure, process, formula, method of production, invention or other discovery created by you during your employment relating to the business of Solar Bright Ltd or capable of being used or adapted for use by Solar Bright Ltd, must immediately be disclosed to Solar Bright Ltd and shall be the absolute property of Solar Bright Ltd ("the Intellectual Property").
>
> 2. You will:
>   a. Automatically transfer all of your rights in the Intellectual Property on creation to Solar Bright Ltd without the need for any further documentation; and
>
>   b. Irrevocably waive all your moral rights in the Intellectual Property.

[48] The second employment agreements entered into in 2015 do not contain any clause protecting SBL's intellectual property.

[49] SBL says that there were other directors of the company during 2015 that were not informed of the new agreements and did not give their consent to them. SBL contends that the new employment agreements were prepared in secret by Mr and Mrs Martin's use of SBL's lawyers with a fraudulent intention to deprive SBL of its legal rights to all intellectual property created by Patrick Martin while he was employed by SBL.

[50] The Martins deny that the agreements were drafted and signed with the intention of defrauding SBL of the intellectual property in the DATAeye, and later the PATeye.[4] They say they simply wanted all SBL employees to have the same standard SBL employment agreements.

[51] However, it does not explain why instead of taking the intellectual property protection clause out of their agreements they did not, instead, ensure the other employees' agreements were the same as their 2012 agreements by including such a protection, rather than taking it out of their own.

[52] SBL says that the new employment agreements breach a shareholder agreement to which the Martins were party. However, any SBL claims against the Martins' in relation to their duties as shareholders or directors are not within the Authority's jurisdiction.

[53] In approximately February 2017 Mr Martin took part in a meeting with Stephen Hampson, who was the investor director of SBL. Mr Martin told Mr Hampson that within a fortnight he, with the assistance of the patent attorney who was also at the meeting, was going to apply for a provisional patent on the DATAeye. SBL already had a patent on the PATeye.

[54] Mr Martin led Mr Hampson to believe that the DATAeye patent would be achieved for the benefit of SBL. Mr Hampson then conveyed his belief that SBL would soon acquire the patent on the DATAeye to Powerhouse Ventures Limited (PVL)[5], the investor that had appointed him as a director. However, instead Mr Martin applied for and was granted the patent in his own name, making no arrangement to assign the patent to SBL.

[55] Mr and Mrs Martin say that the reasons Mr Martin applied for the provisional patent in his own name were:

(a) a provisional patent must be granted in the name of the inventor; and

(b) SBL could not afford the cost of the fees to apply for the provisional patent at the time and so because he paid the fees personally, he also caused the bills to be rendered in his name; and

(c) the provisional patent was always intended to be for the benefit of SBL; but

[4] Protection and possession of the intellectual property of the PATeye is the subject of High Court proceedings. The Martins have indicated that they will appeal the High Court judgment [2019] NZHC 447, 15 March 2019.
[5] PVL is also a shareholder in SBL.

(d) because SBL has not paid the Martins for those bills or for tooling undertaken to advance the DATAeye's development in May 2017 he says that he will not assign what is in his view "nothing now" in relation to the intellectual property of the DATAeye to SBL.

[56] There have been proceedings in the High Court brought by PVL and SBL against the Martins. The first relevant outcome of the High Court proceedings was the issuing of an interim injunction against the Martins on 15 February 2018 in relation to the DATAeye and the PATeye. The effect of that was to protect SBL's rights in relation to the inventions.

[57] The Liquidators' First Report[6] reports that the injunction was later discharged under s 141 of the Companies Act 1993. However, the Court has also made an order voiding the assignment of SBL's intellectual property to Mr Martin.[7]

[58] Mr and Mrs Martin were both well aware that the investors that SBL had already attracted and was hoping to attract via PVL were very interested in the PATeye and DATAeye inventions. They were well aware of the intellectual property protection clauses in their original employment agreements.

[59] Mr Martin knowingly, and with Mrs Martin's knowledge and agreement, personally applied for and paid for the registration of the provisional patent. Mr Martin made no attempt to assign the DATAeye patent to SBL once it was registered in his name as the inventor.

[60] Mr and Mrs Martin say that there was never any intention for them to profit personally from the intellectual property in the DATAeye and that it was always intended to be for the benefit of SBL. However, I do not accept that the fact that a provisional patent has to be put in the inventor's name prevented the property in the patent being for the benefit of SBL.

[61] I do not accept Mr Martin's reasoning when he says he had to pay for the application for the patent personally because the company had no money and the new investors were only drip-feeding money into the company that was being eaten up by debt, salaries and rent. Mr Hampson and Mr Wilson gave evidence that the other directors and shareholders were never asked for money to apply for the provisional patent. They say that if they had been,

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[6] 14 May 2019.
[7] Mr Spackman and Mr Walley made me aware that the injunction had been lifted.

money would have been put into the company for that specific purpose because the true value of SBL lay in its intellectual property.

[62] Mr and Mrs Martin insist that they would have handed over the intellectual property to SBL. However, first, they wanted to be paid for the costs of the provisional patent registration and the tooling costs, totalling around $56,000.

[63] I asked Mr Martin what other reason there was for him to apply for the patent personally. In reply, he gave what I consider to have been the real reason. He said he had to protect himself and Mrs Martin. He said that even if he and Mrs Martin had remained bound by the first employment agreements, with their IP protection for SBL, he would still have applied for the provisional patent personally.

[64] I do not find that the second employment agreement is an illegal contract. It simply does not meet the legal requirements of an illegal contract.

[65] I am also unable to make a finding that the Martins entered into those 2015 agreements intending to fraudulently obtain the intellectual property from Mr Martin's inventions for their own purposes. I am unable to pin that intention to the date of the second employment agreements.

[66] However, I do not have to make a finding that the Martins fraudulently entered into the second employment agreement to find that Mr Martin egregiously breached his duty of fidelity to his employer by applying for the provisional patent personally and retaining it instead of assigning it directly to SBL.

[67] It is immaterial that the second employment agreement did not contain an equivalent clause to clause 15 of the 2012 agreement. Mr Martin knew that the reason that investors had put money into SBL was the potential value to the company of sales of the DATAeye (and the PATeye). He knew then and knows now that the intellectual property belonged to SBL and not him personally.

[68] In addition, Mr Martin breached his duty of fidelity to SBL when he allowed SBL's intellectual property in the PATeye to be assigned to him. In the dying throes of SBL's

useful ‘life’ Mr and Mrs Martin wrongly acted together to assign the intellectual property in the PATeye from SBL to Mr Martin personally.[8]

[69] I understand that the provisional patent for the DATAeye has lapsed. It may be that there is no prospect of a patent being granted again in relation to the DATAeye. However, I make the following order in case there remains some value for SBL in the DATAeye and the PATeye.

[70] Under s 161(qa) of the Act, I find that the two inventions made by Mr Martin, either alone or jointly with other people, as an employee of SBL – the DATAeye and the PATeye - and any patent granted or to be granted in respect of those inventions belongs to SBL alone and not Mr Martin.

Penalty for breach of Mr Martin’s employment agreement

[71] SBL claims that the Authority should impose on Mr Martin the maximum penalty of $10,000 for breaching his employment agreement.

[72] The Martins deny that there was any breach of the 2012 employment agreement, because they say it was legally superseded by the 2015 agreement.

[73] However, Mr Martin has breached the implied duty of fidelity that became binding on him once he was first employed by SBL. He did so in applying for the grant of the patent of the DATAeye and not immediately thereafter assigning the patent to SBL.

[74] I am satisfied that the claim for the penalty was made within 12 months of when the cause of action in relation to the DATAeye first became known to SBL.

[75] The Authority’s power to order a penalty is discretionary and it does not automatically follow that a where there has been a breach of an employment agreement, a penalty must be awarded.

[76] The primary purpose of a penalty is to punish wrongdoing.[9] A further purpose of a penalty is to deter future breaches by the penalised party and by others in a position like Mr Martin.

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[8] Please see [88] below for a consideration on whether Mrs Martin’s actions in relation to the PATeye were that of her as an employee or as a director of SBL.
[9] *Xu v McIntosh* [2004] 2 ERNZ 448

[77] I consider Mr Martin should pay a penalty for his failure to comply with his obligations as an employee and to send a message of deterrence to any employees who might consider wrongly obtaining and retaining their employer's intellectual property.

Nature and number of statutory breaches

[78] In this case there is only one breach for which the maximum penalty is $10,000.

Severity of the breach – taking into account aggravating and mitigating factors

[79] Mr Martin knowingly and deliberately retained the DATAeye patent personally to protect his and Mrs Martin's position. He deliberately refused in an ongoing way to turn it over to SBL knowing that in doing so he was disadvantaging SBL.

[80] The breach was intentional and Mr Martin has not acted in any way to put it right. He has not taken any steps to mitigate the ongoing adverse effects of the breach.

[81] SBL was not a particularly vulnerable entity. At the relevant time it had an experienced investor director in place alongside Mr and Mrs Martin.

[82] There are few cases of breaches of implied terms by an employee leading to a penalty. There are no instances of Mr Martin having been brought before the Authority or the Court previously for such a breach.

[83] Standing back and considering all relevant matters, I assess an appropriate penalty would be $4,000.

Means of the respondent to pay the penalty

[84] The last aspect of the exercise of my discretion is to consider the means of Mr Martin to pay a penalty. I accept the Martins oral evidence given at the investigation meeting that their lengthy involvement with SBL means they are significantly in debt. They are personal guarantors for SBL's loans and were behind on mortgage payments on their home. They have not been paid wages and have not been paid holiday pay by SBL.

[85] Because of Mr Martin's difficult financial circumstances, I reduce the penalty payable to $2,000.00.

Who should receive the penalty?

[86] Section 136 of the Act requires the Authority to order every penalty not be paid to the plaintiff but to the Authority, to be paid into a Crown Bank Account. I have not had any request for the penalty to be paid to SBL.

[87] Therefore, I order Patrick Martin to pay the penalty of $2,000 to the Authority for payment into a Crown Bank Account.

Penalty for breach of Mrs Martin's employment agreement

[88] SBL claims that the Authority should impose on Mrs Martin the maximum penalty of $10,000 for breaching her employment agreement. It was unclear which breach was claimed. If it was the breach I have already penalised Mr Martin for, I do not intend to impose another penalty for the same breach since Mr and Mrs Martin's finances are intertwined.

[89] If Mrs Martin's breach was causing SBL to assign the intellectual property in PATeye to Mr Martin towards the end of her employment with SBL, I do not have enough evidence that Mrs Martin did so in her capacity as an employee rather than as a director. In addition, another SBL employee, the Operations Manager, actually signed the deed assigning the intellectual property. I dismiss this claim.

Costs

[90] Both parties have had some success and lack of success. Neither party was legally represented at the investigation meeting. I acknowledge that both parties may have had legal representation at an earlier stage in the proceedings; certainly SBL was initially represented by counsel.

[91] Knowing what I know about both parties' financial positions[10] and the costs of other litigation in the High Court, it is highly unlikely that either party will have the capacity to pay the other's costs of these proceedings.

[92] Using the discretion granted to me by clause 15 of Schedule 2 of the Act, I order that the parties should be responsible for their own costs.

Orders

1. **Solar Bright Limited (in liquidation) must pay:**

[10] Informed by the Liquidators' First Report and evidence from Mr and Mrs Martin during the investigation process.

(a) Nicola Martin $21,347.52 in unpaid salary and $30,086.38 in holiday pay; and

(b) Patrick Martin $39,462.24 in unpaid salary and $43,027.07 in holiday pay.

2. **Solar Bright Limited (in liquidation) did not constructively dismiss Patrick Martin or Nicola Martin.**

3. **Under s 161(qa) of the Employment Relations Act 2000 the Authority declares the DATAeye and the PATeye to be inventions made by Mr Martin, either alone or jointly with other people, during his employment by Solar Bright Limited (in liquidation). Any and all patents for those two inventions belong to Solar Bright Limited (in liquidation) and not to Patrick Martin.**

4. **Within 28 days of today's date Patrick Martin must pay a penalty of $2,000 to the Authority for payment into a Crown Bank Account.**

5. **Costs are to lie where they fall.**

Christine Hickey
Member of the Employment Relations Authority