

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2021] NZERA 400
3044271

BETWEEN TYRONE MALAESAILI
LAURENSEN
Applicant

AND HIGH TECH YOUTH
NETWORK
Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person
Sheryl Connell, counsel for the respondent

Investigation Meeting: 14 October 2019

Submissions and further information received: 26 August 2020 from the applicant
26 August 2020 from the respondent

Date of Determination: 13 September 2021

DETERMINATION OF THE AUTHORITY

- A. Tyrone Laurenson was disadvantaged by unjustified action of High Tech Youth Network (HTYN) in failing to pay his salary. HTYN is to pay Mr Laurenson within 28 days of the date of this determination \$15,000 as compensation for non-economic loss for his grievance.**
- B. HTYN is to pay Mr Laurenson the following sums within 28 days of the date of this determination:**
- (a) \$388.69 net and \$54,000 gross in wage arrears;**
 - (b) \$5,538.46 gross as holiday pay;**
 - (c) \$3,600 for KiwiSaver contributions; and**
 - (d) \$6,020.92 for health insurance.**
- C. Costs are reserved and a timetable set if the matter cannot be resolved by agreement.**

Employment Relationship Problem

[1] Tyrone Malaesaili Laurenson worked for High Tech Youth Network as an In-Country Programme Manager based in Samoa. Mr Laurenson holds the Samoan matai (chieftain) title Moananu.

[2] High Tech Youth Network (HTYN, the board or trust) is a charitable trust board. It aims to increase underserved communities' digital knowledge. It established and operated a learning network in New Zealand and the Pacific. There is also a company High Tech Youth Network Limited, which is connected with the trust. Mr Laurenson confirms that his claim is against the trust.

[3] Mr Laurenson brings claims relating to finishing of his employment. HTYN did not initially lodge a statement in reply. However, it eventually became evident that its position is that Mr Laurenson left his employment, later undertook some tasks on a voluntary basis and is not owed any money.

The Authority's investigation

[4] This matter has a lengthy history. Mr Laurenson lodged an extensive claim in the Authority in late 2018. Frank Po Ching made contact with the Authority. He was HTYN's acting chief executive in a voluntary capacity.

[5] Attempts to ensure that mediation was attended were unsuccessful for a period. Mr Po Ching, as well as the chair of the board Haami Sam Chapman, no longer live in Auckland. Another Authority Member was dealing with the matter at this stage.

[6] It became apparent that the board was barely operational. The Authority set about arranging an investigation meeting. Witness statements were directed to be filed. Mr Laurenson lodged a statement for himself and for a co-worker based at the HTYN Samoan studio (the producer).

[7] An investigation meeting was held on 14 October 2019. Mr Laurenson gave evidence in person and also arranged for the producer to give evidence remotely from Samoa. Mr Po Ching and Mr Chapman participated voluntarily.

[8] I summonsed the following people formerly involved with HTYN: Michael (Mike) Usmar (CEO), John Corey (board member), the chief operating officer and a multimedia specialist (the specialist). They gave evidence in person.

[9] HTYN had not provided documents nor witness statements. A number of witnesses struggled to answer questions fully. Mr Po Ching sought the opportunity after the investigation meeting to seek out further information when he was in Samoa on other matters. This was granted. Mr Usmar and Mr Po Ching both indicated that they would access their emails looking for further material. Mr Usmar provided some documents and further comments. Mr Laurenson was also given the opportunity to seek receipts relating to one of his claims.

[10] In early 2020 Mr Chapman advised the Authority that he had instructed a lawyer. The Authority provided her with the witness statements and documents. The lawyer then sought a meeting of all parties, describing difficulties in communicating with those involved with HTYN and obtaining documents. As HTYN had had an extensive opportunity to gain representation earlier and to seek out and provide further documentation after the investigation meeting, I decided that allowing the parties a final opportunity to provide submissions ensured that HTYN had ample opportunity to respond to the claims. Both parties filed detailed submissions. Mr Laurenson also responded to the additional evidence provided by Mr Usmar. Mr Chapman and Mr Po Ching provided signed statements.

[11] Ultimately HTYN provided some relevant documents but the matter has still been concluded without some important documents such as time and wage as well as holiday and leave records.

[12] This determination has been issued more than three months after the day on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act 2000 (the Act) was applicable.

[13] All the material provided has been carefully considered. As permitted by s 174E of the Act this determination does not record everything received from the parties but states findings of fact and law, expresses conclusions and specifies resulting orders.

The issues

[14] The issues for investigation and determination are:

- (a) Did HTYN dismiss Mr Laurenson prior to the expiry of his fixed term employment agreement on 31 March 2019 and if so, was the dismissal justifiable?
- (b) Did HTYN breach Mr Laurenson's employment agreement and/or disadvantage him unjustifiably as regards any failure to:
 - (i) pay salary and other benefits; and
 - (ii) comply with the agreement's redundancy provision?
- (c) If a grievance is established, what remedies (if any) should Mr Laurenson receive?
- (d) Should a penalty be awarded for any breach of the employment agreement?
- (e) Did HTYN breach its good faith obligations under s 4 of the Act and if so, should a penalty be ordered against it?
- (f) Did HTYN breach s 9 of the Fair Trading Act 1986 and if so, what remedy should be awarded, if any?
- (g) Did HTYN breach the Wages Protection Act 1983 by failing to pay Mr Laurenson and if so, should a penalty be ordered?
- (h) Does HTYN owe Mr Laurenson wages and other benefits or entitlements, including KiwiSaver, health insurance and relocation costs?
- (i) Does HTYN owe Mr Laurenson for his payment of Samoan operational expenses, including the producer's wages?

[15] Mr Laurenson initially sought reinstatement but informed the Authority in mid-2019 that he no longer wanted to be reinstated.

The Samoan project

[16] In February 2016 a funding arrangement was agreed between the Ministry of Foreign Affairs and Trade (MFAT) and HTYN. This included the establishment and operation of a facility for the use of the youth of Samoa. The Samoan facility included a film and music studio, a 3D printer and computers. It became known as Te Tuiga.

[17] The funding was to be paid in four tranches; including around mid-year 2017 and 2018 for tranches #2 and #3. Mr Laurenson understood that this money was or should have been ring-fenced for Samoa. From Mr Usmar's evidence the money was not intended to be sufficient to fully fund the Samoan project and matched funding was required, including potentially from private donations.

[18] A memorandum of understanding was also agreed between HTYN and the Samoan Ministry of Education, Sport and Culture.

[19] The model used by HTYN in two other Pacific projects was for a local organisation to be partnered with or established to run the operation. That seems not to have been possible or readily achievable in Samoa so the Samoan project was run through the New Zealand trust.

[20] Mr Laurenson's history includes holding responsible positions in New Zealand and Samoa. He had networks and relationships with governmental figures in both countries.

[21] In late March 2016 HTYN made Mr Laurenson an offer of fixed term employment. The agreement was to end on 31 March 2019, based on completion of government funding. Mr Laurenson was to report to Mr Usmar. The agreement was described as being an employment agreement under the Employment Relations Act 2000 and contains references to other New Zealand statutes. There is no dispute that the agreement was governed by New Zealand law.

[22] Mr Laurenson accepted the offer, later relocating to Samoa as he had been living and working in New Zealand.

2017

[23] Tranche #2 of the funding was paid, for operations from 1 September 2017 to 31 August 2018. Tranche #3 was due to be paid on 31 July 2018. Mr Laurenson's work in Samoa continued.

[24] In around 2017 difficulties became apparent with the New Zealand-based HTYN operation. Mr Usmar reports a lengthy discussion process with government and others with the government ultimately withdrawing support for New Zealand activities. The Samoan project was not directly affected. At some point Mr Usmar concluded that the New Zealand operation was not viable.

[25] At the investigation meeting Mr Usmar told the Authority that following the withdrawal of support for the New Zealand operation, he recommended that the trust go into liquidation. He later clarified the timing as being at the October 2017 board

meeting, which Mr Laurensen did not attend. Mr Usmar reports also recommending to the board that redundancies were initiated with staff.

[26] At the investigation meeting Mr Corey and Mr Chapman had some recall of being told by Mr Usmar in late 2017 that if things kept going to way they were, the staff would likely have to be informed and there could or would be redundancies. In his statement filed in 2020 Mr Chapman identified that the trustees “were informed” in October 2017 that redundancies for all staff “would have to be put in place”. The trust meeting minutes were not provided.

[27] Even if there was a board decision to make all redundant, that does not necessarily mean it was implemented. Mr Laurensen denies being told anything about a redundancy in 2017 or 2018. This issue is explored in more detail below.

[28] In late 2017 Mr Laurensen had a medical issue arise for which tests were required in New Zealand. By 2018 Mr Usmar had become became unwell. He acknowledges that at some points he was not prioritising HTYN’s activities.

Mr Laurensen’s return to New Zealand

[29] On 8 February 2018 Mr Usmar emailed Mr Laurensen and the multimedia specialist, copying in Mr Chapman. HTYN’s main push was described as completing the sale of its Auckland building which was to go unconditional on 20 February. The sale price was \$60,000 less commission, although money was not to be paid all at once. A decision had been made to dispose of all Auckland studio assets.

[30] Mr Usmar wrote that he had taken the signed building sales agreement to the bank the day before to negotiate a temporary overdraft so they could get paid. Mr Usmar was in negotiation with the government for emergency funding but it was going slowly. An MFAT meeting was upcoming, including possible discussion on an early draw down of Samoan tranche #3 funding, due mid-2018. Mr Laurensen and the specialist were described as remaining Mr Usmar’s priority right now.

[31] On 12 February 2018 Mr Laurensen emailed Mr Usmar advising he would be leaving Samoa for New Zealand the following day and would need to remain until the test results are known and any health management plan put in place.

[32] Mr Usmar responded that Mr Laurenson was free to use the office, including his desk.

[33] Mr Laurenson anticipated staying in New Zealand about a week. He began working from the Auckland studio and continued to have contact with his direct report in Samoa, the producer.

[34] Mr Usmar and Mr Laurenson met at least once. Mr Usmar said that there would be a minimal amount of money to send to Samoa from the next funding round. Mr Laurenson reports being puzzled, believing the Samoan money was ring-fenced. Mr Usmar asked him and the specialist to sell the Auckland studio equipment in order to pay themselves. Mr Usmar describes this as an informal liquidation.

[35] At the investigation meeting Mr Usmar initially recalled having told Mr Laurenson he needed to return to Samoa, on the basis that Mr Laurenson's presence was necessary to keep the Samoan operation running. However, reflecting further, he said he asked if Mr Laurenson wanted to go back, describing it as an offer.

[36] Mr Usmar reports going into the studio office about once a week for a little longer without seeing Mr Laurenson. After that Mr Usmar was having extensive medical treatment and did not visit the office.

March to July 2018

[37] On 6 March 2018 Mr Usmar texted Mr Laurenson saying given salaries may be delayed this month, did he want to put his return ticket (to Samoa) on HTYN's Air NZ account? At the investigation meeting Mr Usmar referred to the text as offering HTYN airpoints. Mr Laurenson's understanding was that airpoints were not transferrable.

[38] The same day Mr Laurenson emailed Mr Usmar, writing extensively about his financial position and the amounts required to maintain the Samoan operation. He concluded that he did not consider an immediate return to Samoa to be in the interests of his own health and safety:

In all honesty I therefore cannot return to Samoa **with no income whatsoever for the next month** and **as yet no guarantee that there will be any future income from involvement in this project.** ...

Taking into account all the factors outlined above and until this matter is sorted where I have a guaranteed income to be able to work in Samoa I can work from HTYN office at Airport Oaks to maintain contact with our operation in Samoa.

[39] The following week Mr Usmar emailed Mr Laurenson and the multimedia specialist on 13 March. He indicated that he had briefed the board on the seriousness of HTYN's position in not being able to make payroll and pay its taxes. Mr Usmar reported working with MFAT and wider government, including trying to get funds for the Samoan project released early. The recommendation was that he go back to the bank and get a larger overdraft. Mr Usmar was to attempt that.

[40] On 27 March Mr Usmar was in hospital and emailed Mr Laurenson and the multimedia specialist. It appeared that a buyer was confirmed for the Auckland building but on condition of not paying until building consent was received. Mr Usmar had learned that consent had been received and so was pursuing payment of the deposit. Mr Usmar indicated that he had paid the two men, albeit was a little short for Mr Laurenson. Mr Laurenson was to be paid the rest when the deposit came through the real estate agents, expected to be the following week.

[41] Further, Mr Usmar wrote that his discussions with MFAT indicated a substantial sum would be released which would mostly be transferred to Samoa. Three complex reports were required which Mr Usmar indicated was a difficulty for him at present. He asked Mr Laurenson if he could work on them.

[42] Mr Laurenson, and it appears the specialist, had been paid their salary as usual in January and February 2018. The March pay was late with Mr Laurenson receiving a little less than the standard amount.

[43] Mr Usmar's evidence is that it became clear that without the New Zealand side of the operation functioning, it was impossible to get the private donations needed to keep the Samoan project running. There is no indication of this being passed on to Mr Laurenson.

[44] Mr Laurenson maintains that for the first few months after his return to New Zealand he went in to the studio daily, meeting and working with the specialist. The specialist was working on bringing in potential clients for a specific New Zealand based project. He recalls catching up with Mr Laurenson in about March 2018 and then meeting regularly with him at the office.

[45] Mr Laurenson describes his own work as focused on strategising for the on-going viability of HTYN's New Zealand and Pacific operations. He prepared accounts, had meetings and marketed HTYN's activities to a number of potential stakeholder

organisations and individuals. Mr Laurenson would occasionally step in for the specialist at meetings. He continued to have frequent contact with the producer in Samoa.

[46] Nothing was heard about the sale of the building and it continued to be available for use. Mr Laurenson believed the building had been sold with its price to cover for salaries for a while until the more substantial tranche #3 amount was released.

[47] Mr Laurenson did not have a cell phone or a warranted car in New Zealand. He based himself at the studio until about May 2018. After that he could not afford the travel costs from his late mother's home to the studio and so primarily worked from home. Occasionally the specialist would pick him up and drop him off on the former's trips to the office.

[48] Mr Laurenson had occasional contact with MFAT who were seeking to contact Mr Usmar and visit the Samoan studio. By this point the Samoan studio was without power and water. Mr Laurenson sent some money to the producer to help with utilities and the costs of hosting the MFAT visitors. He also began paying from his own savings the producer's salary as there was insufficient money in the HTYN Samoan account.

Lack of contact with Mr Usmar and the board

[49] From April to July 2018 Mr Laurenson had no direct contact with the CEO Mr Usmar. He was aware Mr Usmar was very unwell. The specialist and Mr Laurenson agreed informally that the specialist would be the main conduit back to Mr Usmar to avoid imposing too much on the unwell CEO.

[50] Mr Laurenson describes the specialist as his advocate. I think that is putting it too highly. The specialist had no connection with the Samoan work but had better phone and internet availability. The specialist saw himself as the contact person for communications with Mr Usmar but not as speaking about Mr Laurenson's personal issues.

[51] Mr Usmar describes receiving very little communication from the specialist, although the CEO was largely not checking his emails during this period. Mr Usmar acknowledges that his family were protecting him and would not have told him about every email received. He thought it was strange he had not heard from Mr Laurenson.

Mr Usmar did not respond to requests to meet with the specialist and Mr Laurenson nor to meeting invitations with potential stakeholders.

[52] Mr Usmar would have expected, if he was unavailable, staff to approach the HTYN board chair. Mr Laurenson did not try to make contact with board members despite having their email addresses. He thought he should go through normal channels; the CEO via the specialist. He did not receive any contact in this period from board members.

[53] In terms of the board, for the months prior to August 2018 Mr Corey believes that only he and Mr Chapman were trustees. Mr Corey's memory is of trust board meetings not occurring very frequently in 2018.

August 2018

[54] HTYN had previously anticipated tranche #3 being paid on 31 July 2018. It was not received. This became the trigger for action.

[55] Mr Usmar recalls sending an email to Mr Laurenson, possibly on 1 August 2018 asking him to come for a meeting. No such email was filed.

[56] Mr Laurenson emailed the board and the CEO on 2 August 2018. He described himself as being stranded in New Zealand due to HTYN pay stopping and having no savings. He requested immediate reimbursement of funds owing, including salary, PAYE, Kiwisaver payment, unpaid child support and the Samoan operational costs. The total amount, excluding PAYE and levies, was estimated at over \$30,000. Mr Laurenson also reported on his own position and the Samoan situation.

[57] Later Mr Chapman and Mr Corey both acknowledged Mr Laurenson's communication.

[58] Shortly after sending his report Mr Laurenson and board members were emailed by Mr Usmar indicating that he also had not been paid and was still unwell. He resigned effective immediately. The news from his recent discussion with MFAT was not positive with them seeking further information.

Skype meeting

[59] Mr Laurenson and the specialist sought a meeting with board members. On 9 August 2018 a Skype call was held with Mr Corey. Mr Corey remembers making the call from hospital where his wife was unwell.

[60] Mr Laurenson recalls Mr Corey saying that the board understood Mr Laurenson had been made redundant effective 31 December 2017; the end of the year before. Details were not provided. Mr Corey says he may also have assumed that Mr Laurenson was employed by a Samoan entity, rather than the New Zealand trust.

[61] During the Skype call Mr Corey said that if Mr Laurenson claimed to still be an employee, Mr Corey would need to see his employment agreement. Mr Laurenson describes himself as being taken completely by surprise at the suggestion he was no longer employed.

[62] Mr Corey advised that the board was receiving free advice about the possibilities of liquidation, receivership and administration. On request, Mr Corey gave Mr Laurenson authority to liaise directly with MFAT.

[63] Shortly afterwards Mr Laurenson contacted MFAT, providing information about HTYN's situation and referring to his own difficult financial position having not been paid for months.

Remainder of 2018

[64] On 14 August 2018 Mr Po Ching was appointed by the board as acting CEO. This was a voluntary role which Mr Po Ching agreed to because of his role as a New Zealand/Samoan trade and investment private sector liaison. He saw his task as being to save the Samoan project and strategise to take HTYN forward.

[65] In the email announcing the appointment, Mr Chapman recorded that Mr Po Ching had "full and sole authority" to act on the board's behalf. The board conveyed that with Mr Po Ching at the helm its primary objective was to:

... restore to all HTYN stakeholders, (including and especially staff), confidence in our commitment to their wellbeing, to restore and strengthen relationships and to ensure sustainability of the vision and mission of HTYN.

[66] Mr Po Ching describes HTYN as having no funds, with him having to look at a phenomenal amount of information and spend considerable time talking to MFAT.

[67] Mr Po Ching had limited exchanges with Mr Usmar, who remained unwell. Mr Po Ching was not told much about the situation with Mr Laurenson and did not see it as his role to understand Mr Laurenson's issues. Mr Po Ching did not see himself having authority (to contract with) Mr Laurenson nor the trust having the funding to do so.

[68] For some months Mr Laurenson worked collaboratively with Mr Po Ching, including following the latter's instructions to write and collate reports about HTYN's operational strategies and attend HTYN meetings in Auckland and elsewhere. Mr Laurenson worked at times from the Auckland studio, his house and Mr Po Ching's house.

[69] Mr Laurenson drafted an HTYN report dated 30 August 2018 to MFAT. The introduction is in Mr Po Ching's name and he expressed written appreciation for Mr Laurenson's work. However, by the time of the investigation meeting, both Mr Usmar and Mr Po Ching are of the view that Mr Laurenson's contact with MFAT triggered harm to HTYN. Mr Laurenson does not accept that view. I was unable to establish the correct position but do note that both Mr Usmar and Po Ching commented positively at other points about Mr Laurenson's work performance.

[70] In October 2018 a meeting was held at Mr Chapman's house. During a break, Mr Laurenson had a brief discussion with Mr Chapman about the Skype meeting. Mr Chapman replied that the status quo remains. Mr Laurenson did not know what that meant but did not ask him to explain as there were others around.

[71] On 18 October Mr Po Ching emailed Mr Laurenson and the specialist. This included a statement that the specialist was "knocking off a handful of projects to feed his family ...[b]ut we need more to come through so Moananu can also be paid some wages."

[72] There were further meetings and proposals created. At some point Mr Po Ching raised the possibility of Mr Laurenson returning to Samoa if Mr Po Ching could get some trip funds together. Mr Po Ching thought it was important to the future of the project to have Mr Laurenson back in Samoa. Mr Po Ching's sense was that Mr Laurenson was not interested. There is no indication that any instruction was given that he must return.

[73] In late November 2018 Mr Laurensen emailed Mr Po Ching asking him to assist with the producer's salary if he was able. Mr Laurensen notes that he has been providing the producer's salary himself.

[74] In around November or December the purchaser of the Auckland building pulled out of the transaction. Mr Po Ching passed on to Mr Laurensen and others the word from MFAT that the next tranche was not to be paid and the Samoan project was therefore effectively over, as very late December 2018.

[75] In December 2018 the Samoan studio was taken over by another organisation seemingly at the Samoan government's initiative, concerned that HTYN was seen as not performing as per the memorandum of understanding.

[76] Mr Laurensen had no more involvement after December 2018 as things went silent.

Mr Laurensen's employment status

[77] The question of when Mr Laurensen's employment finished is not straightforward. There is no letter of dismissal nor resignation. Mr Laurensen claims his employment was not terminated by HTYN and continued until his fixed term agreement expired on 31 March 2019. His arrears claims are made on that basis. HTYN's closing submissions claim that Mr Laurensen was not ready, willing or able to work in early 2018 and/or abandoned his employment.

2017

[78] It appears the HTYN board approved a plan to make staff redundant by the end of 2017 although I was unable to confirm this via board minutes.

[79] However, there is minimal evidence of a plan being implemented. No letters starting a redundancy process were sent to Mr Laurensen or seemingly others. Much later Mr Laurensen received some information from the IRD indicating they understood that Mr Laurensen's work finished in late 2017. The reason for that was not specified.

[80] I find that any proposal for redundancy, at least as regards Mr Laurensen, was not implemented. There was no notice of termination, when the agreement requires

notice in writing of a redundancy termination.¹ Mr Laurenson continued to be paid for about five months after the October 2017 board meeting without any reference to a payments being final pay. He worked for some time in Samoa. Mr Usmar agreed to him working in the Auckland studio in February 2018. Other correspondence from the CEO in 2018 supports Mr Laurenson's employment continuing. Mr Usmar accepts that he did not notify Mr Laurenson that he was redundant.

Early 2018

[81] HTYN argues that Mr Laurenson was not ready, willing and able to work from the time that he should have returned to Samoa, at least from his 6 March 2018 email to Mr Usmar indicating he was not intending to immediately return to Samoa. That is argued to amount to him abandoning his employment.

[82] I do not agree. Mr Usmar was aware of Mr Laurenson's need to return to Auckland for medical tests. He agreed to let Mr Laurenson work from the Auckland office albeit not foreseeing that Mr Laurenson would remain as long as he did.

[83] The employment agreement did not require Mr Laurenson to necessarily be in Samoa. It provided for a "flexible location" with Mr Laurenson performing his duties in Samoa "or at any other reasonable location which they may be directed from time to time by the Employer".²

[84] A continued intent to remain in Auckland contrary to instruction to return may potentially have justified HTYN taking disciplinary action. However, Mr Usmar raised a return to Samoa but did not instruct Mr Laurenson to return. Then his 13 and 27 March 2018 emails provide no indication that HTYN considers Mr Laurenson to have breached his agreement or abandoned his employment. No disciplinary steps are taken. After that, as he says, Mr Usmar "parked" the issue of Mr Laurenson's employment as he did with his own employment.

[85] Mr Laurenson did not abandon his employment. He continued to attend the Auckland office at least fairly regularly for a couple of months. For the following two months he largely worked from home with occasional visits to the office.

¹ Employment agreement, cl 12.6.

² Employment agreement, cl 5.1.

[86] HTYN also argues that Mr Laurenson was aware of its financial position. The implication appears to be that he should not or would not have continued to do any HTYN work in those circumstances. Mr Laurenson was aware of difficulties with HTYN's financial position from at least early 2018. However, I do not accept HTYN's argument. Mr Laurenson was influenced by his expectation that the building would be sold, that funding for the Samoan project was ring-fenced and that tranche #3 would be released. I find it credible, especially looking at the CEO's March 2018 emails, that Mr Laurenson had some hope of HTYN's financial position improving.

[87] During this time neither party gave any explicit indication that it was pulling out of the employment arrangement. HTYN did nothing to prevent Mr Laurenson's continued access to the building and its server and email systems.

[88] On the evidence before me I conclude that Mr Laurenson remained an HTYN employee, making himself available to work in the April to July 2018 period and undertaking some work on behalf of the trust.

Later in 2018

[89] Mr Laurenson continued to undertake work for HTYN from August to December 2018, writing reports and attending meetings. He was ready, willing and able during this period to take on work as directed by Mr Po Ching. He had extensive contact with Mr Po Ching as well as some contact with board members.

[90] The specialist considered himself still employed by HTYN after the August 2018 period. He describes himself and Mr Laurenson as both hopeful that the appointment of Mr Po Ching would bring new direction and prospects.

[91] During this period there were indicators of Mr Laurenson's employment continuing in an uninterrupted way. He retained access to the HTYN server, email system and other accounts accessed electronically. He continued to have access to HTYN's office, including being given keys by Mr Po Ching.

[92] Mr Po Ching did not talk to Mr Laurenson about his employment status. Mr Po Ching accepts that Mr Laurenson liaised with him during this period but saw Mr Laurenson as a former employee who was now informally volunteering. This was at least partly based on his understanding that Mr Laurenson was aware of the HTYN's insolvent position.

[93] By contrast at least a couple of pieces of correspondence from Mr Po Ching show him making references which suggest Mr Laurenson may still be an employee. For example, an 11 September 2018 email to MFAT refers to Mr Laurenson as “Samoan Country Manager”. The 18 October 2018 email says more must be done so Mr Laurenson could be paid some wages.

[94] Board members took no action regarding Mr Laurenson’s employment. There appears to have been no investigation as to whether the redundancy plan was implemented nor steps on the basis that it may not have.

Conclusion

[95] During 2018 Mr Laurenson continued to undertake work for HTYN and this was in the capacity as an employee.

[96] HTYN’s non-payment of wages, beginning with the short payment in March and continuing with total non-payment, breached the employment agreement. Mr Laurenson could have cancelled the agreement due to these serious breaches but there is no indication during most of 2018 that he did so, even by conduct.

[97] However, once it became clear that the Samoan project was over, the situation changed. No work was undertaken after that point. I consider that the best analysis of events is that HTYN and Mr Laurenson mutually agreed by action to terminate his employment at end of December 2018. It follows that Mr Laurenson was not dismissed and has not established his unjustified dismissal grievance. There remain his other claims to consider.

Disadvantage claim for non-payment of wages

[98] The employment agreement required wages to be paid monthly.³ HTYN failed in this obligation from April to December 2018. I reject the suggestion in its submissions that its action was justified by a lack of funds. There is limited financial information available. In any event, an employer is not able to escape its obligation to pay wages by saying it cannot afford to do so. HTYN had other options it could have taken, such as initiating a redundancy process, but it failed to do so.

³ Employment agreement, cl 7.1.

[99] The non-payment of wages was very much to Mr Laurenson's disadvantage, as detailed below. I find that Mr Laurenson was disadvantaged by HTYN's unjustified action in failing to pay his wages from April to December 2018.

[100] In terms of the unpaid wages, these are better dealt with as wage arrears rather than as a lost wages grievance remedy.

Compensation

[101] Mr Laurenson claims compensation for the humiliation, loss of dignity and injury to feelings, or non-economic loss, he suffered. Mr Laurenson describes not being paid as a very traumatic experience, including getting behind with child support and a tax repayment commitment with the Inland Revenue Department (IRD). He had to live on a very strict financial regime for an extended period.

[102] A report from Mr Laurenson's doctor describes stress with work related issues and not being paid. The doctor assesses this as having impacted Mr Laurenson's health and resulted in high blood pressure. Mr Laurenson refers to times of not being able to visit his doctor as often as he would have wished, due to his financial situation.

[103] As a matai, parent and grandparent, Mr Laurenson has been embarrassed and humiliated by not being able to provide financial support for those he felt responsible for. This includes contributions towards funerals and faith based commitments. I accept that Mr Laurenson was under considerable financial pressure, including having a sense of responsibility for rates and other commitments on his late mother's houses in Auckland and Samoa.

[104] Some of Mr Laurenson's upset and embarrassment was due to the lack of continuation of HTYN's good work through the Samoan studio and the taking over of the premises by others. However, those are not matters which can be considered as caused by this grievance. I have also disregarded events after Mr Laurenson's employment finished in assessing the appropriate level of compensation for the non-payment grievance.

[105] I have considered whether Mr Laurenson can be said to have contributed to the situation by failing to return to Samoa or failing to communicate with HTYN regarding

his continued work. To warrant a reduction in remedies the contribution must be both blameworthy and causative.⁴

[106] Mr Laurenson was reluctant to return without certainty regarding HTYN's future financial position. At some point the unwillingness could potentially be seen as blameworthy however that would have required some further action by HTYN to move the situation along, which did not occur. It has also not been established that remaining in Auckland caused the non-payment situation.

[107] Mr Laurenson did not directly communicate with his manager, the CEO, for some months. The restriction adopted for communications due to Mr Usmar's illness made some sense but perhaps did not assist in ensuring Mr Laurenson's position was brought into focus. I am not persuaded that it caused the non-payment.

[108] Many would have seen the writing on the wall rather earlier than Mr Laurenson appears to have done. However, I make no reduction for contribution regarding this grievance. HTYN is ordered to pay Mr Laurenson \$15,000 without deduction as compensation for his grievance.

Disadvantage claim regarding redundancy provision

[109] Mr Laurenson claims that HTYN breached the restructuring and redundancy clause of the agreement by not giving him notice of redundancy.⁵ This claim relates to the failure to give proper written notice if Mr Laurenson is found to have been made redundant in late 2017.

[110] I have concluded that although Mr Laurenson's role could have been seen as redundant at some point, HTYN did not act to make him redundant in late 2017 or at any other time.

[111] For the sake of completeness, even if HTYN had given Mr Laurenson notice of redundancy he would not have been entitled to redundancy compensation as the agreement explicitly stated that none was payable.⁶

⁴ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178] and *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 (Full Court) at [175].

⁵ Employment agreement, cl 12.

⁶ Employment agreement, cl 13.

Breach of employment agreement and Wages Protection Act

[112] HTYN did not pay Mr Laurenson his wages. That amounts to a breach of his employment agreement and a breach of HTYN's obligations under s 4 of the Wages Protection Act to pay the entire amount of wages when they become due.

[113] I have considered whether a penalty should be awarded against HTYN. The non-payment continued over a considerable period. However, it is not evident that HTYN had any sources of income with which to make payments. I have found Mr Laurenson to have a grievance based on non-payment and awarded compensation for that. The wages owing are covered by an order below. Imposition of a penalty could be seen as double dipping. In these circumstances I conclude that a penalty should not be imposed.

Good faith

[114] Good faith obligations require the parties to be active and constructive in maintaining a productive employment relationship.⁷ Mr Laurenson argues that HTYN did not act that way towards him. Allegations of misleading and deceptive behaviour are dealt with below under the Fair Trading Act heading.

[115] Clearly there was a lack of communication by HTYN. Mr Usmar candidly acknowledges that he should have told Mr Laurenson he thought Mr Laurenson had abandoned his employment. There was an extended period where there was no contact on behalf of HTYN. HTYN did breach its duty to be open and communicative with Mr Laurenson.

[116] However, Mr Laurenson was also not communicating effectively. He did not respond to all of Mr Usmar's March emails and did not correspond directly at all with Mr Usmar in the April to July 2018 period. There was for example, no indication provided until August 2018 that Mr Laurenson had been contributing to the producer's salary and other expenses. Whilst it was understandable to reduce the number of communications to Mr Usmar during his illness, it was not evident that any messages were passed on about the situations of Mr Laurenson or Samoa. Understandably the specialist did not see himself as advocating for Mr Laurenson's personal issues.

⁷ The Act, s 4(1A)(b).

[117] A penalty may be imposed where there is a deliberate, serious and sustained failure to comply with good faith obligations.⁸ Whilst the lack of contact on behalf of HTYN was most unsatisfactory and elements of that description are satisfied, in the most unusual circumstances of the board seemingly believing staff had been made redundant, the CEO being very unwell and there being no contact from Mr Laurenson, I am not persuaded that the test for the imposition of a penalty is met.

Fair Trading Act

[118] Mr Laurenson claims that HTYN misled and deceived him, breaching s 9 of the Fair Trading Act, by holding out an expectation that any arrears under his contract would be paid and that his employment would remain on-going throughout the full term. HTYN denies any such misleading or deceptive conduct.

[119] Under s 162(b) of the Act the Authority may, in any matter relating to an employment agreement, make any order that the High Court or District Court may make under the Fair Trading Act. Section 9 of that Act is the general provision about misleading and deceptive conduct whereas s 12 specifically concerns misleading or deceptive conduct regarding the availability, nature, terms or conditions or any other matter relating to employment.

[120] Where a promise is made with no intention for fulfilling it that may amount to misleading and deceptive conduct.⁹

[121] I look firstly at any promises that arrears would be paid. In his 13 and 27 March 2018 emails Mr Usmar indicated he was working on getting payments from various sources, including to ensure payment of wages. There was no definite indication of payment in the first email. The second does confirm a building buyer with payment to Mr Laurenson to occur when the deposit came through, which was expected the following week. However, it has not been established that a deposit was actually received so I do not see this as misleading or deceptive conduct. In any event the promise related the shortfall of under \$400 rather than a promise to be able to pay wages on an on-going basis.

⁸ The Act, s 4A(a).

⁹ *Sinclair v Webb & McCormack Limited* (1990) 3 NZELC 97,405 HC.

[122] Mr Laurensen also claims board members and Mr Po Ching held out an expectation that the matter of his pay would be resolved. HTYN's position is that there were expressions of hope that funding could come through rather than promises to pay.

[123] I have been unable to identify any specific verbal or written comments by board members which promised payment. The high point in terms of Mr Po Ching appears to be his email saying "... we need more to come through so Moananu can also be paid some wages." That statement was in the context of projects succeeding. It is not evident that any money came in during the second half of 2018 from projects.

[124] The second aspect of Mr Laurensen's fair trading claim relates to his employment agreement continuing until expiry. The funding agreement with MFAT was for a fixed period and that was reflected in Mr Laurensen's employment agreement. However, the employment agreement also provided for termination during its term, for redundancy and in other circumstances.¹⁰ So the prospect of an early finish was allowed for.

[125] I have been unable to identify any conduct which could be said to be misleading or deceptive in the sense of HTYN making a promise which it did not intend to keep that Mr Laurensen's employment would continue for the full three year term.

[126] No breach of the Fair Trading Act is established.

Arrears claims

[127] Mr Laurensen claims that HTYN owes him several amounts of money. I will deal firstly with wages.

[128] HTYN owes Mr Laurensen the following sums:

- (a) \$388.69 net for pay received 27 March 2018; and
- (b) \$6,000 gross for each of the nine remaining pay periods to December 2018.

[129] Usually awards of wage arrears are made in gross or pre-tax amounts. However, in the absence of time and wage records or a payslip, I have been unable to determine the gross amount unpaid in March 2018. The situation is complicated by various amounts usually deducted from Mr Laurensen's wages at source.

¹⁰ Employment agreement, clauses 12 and 13.

[130] I order HTYN to pay Mr Laurenson the following sums within 28 days of the date of this determination:

- (a) \$388.69 net arrears of wages for March 2018; and
- (b) \$54,000 gross arrears of wages for the remainder of 2018.

[131] Mr Laurenson also claims holiday pay. Mr Laurenson was entitled to four weeks' holiday a year. In the absence of wage and time records or holiday and leave records, I calculate that four weeks' annual holiday for the 2018 period is worth \$5,538.46. I order HTYN to pay Mr Laurenson \$5,538.46 gross for holiday pay within 28 days of the date of this determination.

KiwiSaver

[132] Mr Laurenson seeks to be paid for Kiwisaver employee and employer contributions.

[133] On the basis of a letter from Mr Laurenson's KiwiSaver provider, it appears that neither the employee contributions deducted from Mr Laurenson's wages nor HTYN's contributions were not sent to the IRD for January to March 2018. Three months at the employee rate of \$480 a month totals \$1,440. Three months at the employer rate of \$180 a month is \$540.

[134] Deductions for the employee contribution for April 2018 onwards do not need to be separately ordered. I have awarded Mr Laurenson the gross amount of wages for that period which includes the money which should go to the IRD for Mr Laurenson's KiwiSaver contributions.

[135] Regarding the employer's contribution, the amount owing from April to December 2018 is nine months at \$180 gross per month; \$1,620.

[136] Totalling \$1,440, \$540 and \$1,620, I order HTYN to pay to Mr Laurenson \$3,600 for Kiwisaver contributions, within 28 days of the date of this determination.

Health insurance

[137] Mr Laurenson seeks payment for the cost of health or medical insurance from the time of his appointment onwards. His employment agreement specified that:

The Employer shall provide the Employee, with medical insurance for the term of this agreement as per Clause 3.1, up to a value of NZ \$3,600 per annum.¹¹

[138] That clause envisions the employer providing the insurance at its cost. However, it was not certain that HTYN actually had any insurance covering Mr Laurenson's situation of an extended period away from New Zealand on work. I was informed that it held a travel insurance policy but no policy document was provided.

[139] By 26 October 2017 email to Mr Usmar, Mr Laurenson records that the COO stated during 2016 negotiations that HTYN would pay the premiums on a policy he held with a New Zealand Police fund from his previous work. It was noted that no premiums had been paid by HTYN despite an account being provided.

[140] Mr Usmar's response of 2 November 2017 refers to HTYN already having insurance cover for staff overseas. However, he indicates that HTYN would honour the inclusion in the employment agreement.

[141] The COO says that the Police scheme worked quite well for HTYN as the trust's insurance was somewhat limited. He considered it reasonable for HTYN to pick up some of the cost of Mr Laurenson's insurance. He acknowledges the conversations with Mr Laurenson.

[142] Given the agreement, Mr Laurenson was entitled to be reimbursed up to \$3,600 per year for the amount he spent on health insurance.

[143] A letter from the Police fund confirms premiums paid (by Mr Laurenson) from 2 April 2016 to 25 October 2017 were \$5,180.92. Subsequent payments by him Laurenson are evidenced, amounting to \$840. The total paid was thus \$6,020.92. This is below the annual rate permitted, given the period covered. HTYN is ordered to pay Mr Laurenson within 28 days of the date of this determination \$6,020.92 for reimbursement for his health insurance costs.

[144] A claim is also made for a later period. However, as indicated by Mr Laurenson in his 6 March 2018 email to HTYN, his policy had lapsed, even prior to HTYN's late payment of wages that month. I do not accept that Mr Laurenson is entitled to claim reimbursement for a period when he did not have a policy in place. It is hard to see how

¹¹ Employment agreement, cl 9.4.

a policy could be put in place retrospectively. Had there been invoices which would have been covered by a policy arranged by HTYN or Mr Laurenson's Police policy, I would have considered those but there were not.

Child support and tax

[145] To Mr Laurenson it seems that money from the January to March 2018 wages were not forwarded to the IRD. These include deductions HTYN were making from his wages to go to Mr Laurenson's outstanding GST from a previous period and child support obligations. He also claims for the amounts which should have been deducted had he been paid after that period, on the basis that wage arrears ordered to him would be net.

[146] Mr Usmar says that all tax matters have been sorted by HTYN with the IRD although it is not evident that this necessarily deals with all of Mr Laurenson's concerns. If there are PAYE or deductions (income tax, GST and child support) which have been deducted but not been forwarded to IRD, HTYN is directed to pay those to IRD.

[147] The wage arrears of 2018 are largely been ordered in this determination in gross amounts. If any money which would ordinarily have been forwarded by HTYN to IRD is not, then when any payment is made to Mr Laurenson, he can deal with the IRD regarding his obligations.

[148] Mr Laurenson also seeks that HTYN pays IRD penalties imposed on him as a result of non-payment towards his outstanding GST and child support obligations when HTYN were not paying his wages.

[149] Mr Laurenson had some KiwiSaver savings and national superannuation as well as loans from family. He chose to use his funds to keep the Samoan studio going including paying the producer, instead of keeping up his commitments to the IRD. I make no orders regarding the penalties.

Relocation costs

[150] Mr Laurenson claims \$5,000 for costs for the relocating his household goods to New Zealand.

[151] The basis for this claim is not strong. Mr Laurenson had a family house in Samoa and has lived in that country for some periods of his adult life. It was not

necessarily evident that he would be returning to New Zealand after the HTYN contract finished.

[152] The employment agreement does not provide for relocation costs. Mr Laurenson was given \$5,000 to relocate to Samoa and expected to get the same amount to ship goods back. However, the letter offering the money only refers to assistance with the expenses of the “transition and move to Samoa” with no comment regarding any return costs.¹²

[153] In addition Mr Laurenson cannot claim that he has spent money actually relocating as, at the date of the investigation meeting, Mr Laurenson had not relocated his goods. I make no order for relocation costs.

Reimbursement of Samoan operational expenses

[154] Mr Laurenson claims for costs such as power to keep the Samoan studio going including his contribution to the producer’s wages, along with the associated costs of making money transfers to Samoa.

[155] The employment agreement provides for:

7.2 Reimbursement of expenses

The Employee shall be entitled to reimbursement by the Employer of all expenses reasonably and properly incurred by the Employee in the performance of their duties, provided the Employee produces appropriate receipts to the Employer when requesting reimbursement.

Building costs

[156] Mr Laurenson sent money to Samoa on three occasions for the producer to pay for power for the Samoan studio and some consumables, including for a mid-2018 visit by MFAT representatives to the studio. The amounts claimed appear rounded to the nearest five or ten dollars.

[157] Although likely in the nature of usual expenses, these were not approved in advance by the HTYN CEO or the board. Mr Laurenson did not let them know that he had made these arrangements until after all the payments were made, when he sent in his claim in August 2018.

¹² Letter HTYN to Mr Laurenson, 22 March 2016.

[158] Mr Laurenson explicitly and repeatedly asked the producer in a 3 July 2018 email to obtain and keep receipts for payments for power and consumables at the time of the MFAT visit. No receipts were filed before the investigation meeting. At the meeting the producer indicated he had paid the bills and thought he had scanned invoices or receipts. I directed them to be supplied but the producer indicated that he could not find them. I was given no invoices indicating any amounts owing.

[159] In the absence of appropriate receipts Mr Laurenson has not established his entitlement under the clause.

Wages

[160] When HTYN's Samoan bank account no longer had sufficient money to pay the producer's wages, Mr Laurenson felt he had an obligation to make a contribution to those wages because they were operating in the Samoan context. Both have matai titles, giving them a strong connection. Mr Laurenson was single and whereas the producer had a family and extended obligations.

[161] As with the building costs, Mr Laurenson did not let anyone senior at HTYN know when this wages arrangement began. Mr Laurenson paid around NZ\$500 a fortnight. In his 2 August 2018 report he makes a claim for reimbursement of the producer's wages.

[162] Mr Laurenson submits that HTYN knew or ought reasonably to have known that he was paying most of the producer's salary from his personal funds. I do not accept that was the case until August 2018. On examination of Mr Laurenson's 6 March 2018 email to Mr Usmar he stipulates the funds required to keep the Samoan operation going including the producer's salary and indicates that he does not intend to lose the studio producer. I do not consider the email sufficient to indicate that Mr Laurenson was intending to personally take on paying for Samoan expenses including the producer's salary. There were no other relevant communications to Mr Usmar or the board until August 2018.

[163] Mr Usmar says he understands the kaupapa under which Mr Laurenson felt he had to do this although Mr Chapman and Mr Po Ching do not share the same view. In any event, Mr Usmar does not believe that the board, despite being "culturally authentic", would have approved such an arrangement. It appears the board understood local staff were employed by a local organisation, as occurred elsewhere on Pacific

projects. Alternatively, given the board's understanding that staff were made redundant in late 2017 and what appears to have been the poor state of HTYN's finances, it seems unlikely approval would have been given. HTYN also questions whether the Samoan work was continuing, although the producer says it was.

[164] Once HTYN was aware of Mr Laurenson's actions it provided no approval and did not indicate that it would make any contribution towards his spending in this regard. Mr Laurenson chose to continue the payments in the absence of agreement from the board or the acting CEO.

[165] Albeit well intentioned, I am unable to conclude that Mr Laurenson's contribution in the context of his employment agreement could be seen as an expense reasonably and properly incurred. I make no award.

Interest

[166] Interest is claimed on monetary amounts awarded. Mr Laurenson has been deprived of owed wages and other arrears for a considerable period. Interest is appropriate. I order HTYN to pay interest on the arrears sums from 1 January 2019 to the date of payment.¹³ I make no award for interest on the compensation figure.

Costs

[167] Costs are reserved and the parties invited to resolve the matter.

[168] Mr Laurenson has succeeded in some of his claims and would likely be entitled to a contribution if he has incurred any representation costs. The parties are to discuss possible resolution of costs. If they are unable to agree Mr Laurenson shall have 21 days from the date of this determination to file a memorandum on costs. HTYN shall have a further 14 days in which to file a memorandum in reply. Submissions claiming costs should include a breakdown the costs and be accompanied by supporting evidence.

Nicola Craig
Member of the Employment Relations Authority

¹³ The Act, Schedule 2, cl 11. Interest calculated as per <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.