IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 452
3107492

	BETWEEN	IAN ROBERTSON Applicant
	AND	STEVRYN HOLDINGS LIMITED First Respondent
	AND	MALCOLM MACDONALD Second Respondent
	AND	DARRYN MACDONALD Third Respondent
Member of Authority:	Helen Doyle	
Representatives:	Amy Kennerley, counsel for the Applicant No appearance for the Respondents	
Investigation Meeting:	8 July 2021 in Christchurch	
Supplementary memorandum lodged by applicant:	4 August 2021	
Date of Determination:	13 October 2021	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ian Robertson commenced working for Stevryn Holdings Limited (Stevryn) from in or about November 2018 as a truck driver.

[2] Prior to working for Stevryn Mr Robertson worked for a company called Baiden's Contracting Limited (BCL) from in or about April 2018 as a truck driver. Darryn MacDonald was a director of BCL. When Mr Robertson worked for BCL he was paid $25 an hour. BCL has been removed from the company register.

[3] Stevryn was incorporated on 31 October 2018 and carries on the business of transport. Mr Robertson said in evidence that BCL sold its assets to Stevryn. Darryn MacDonald was a director of Stevryn for a short period between 31 October and 8 November 2018. Malcolm MacDonald was a director between 1 November 2018 and 1 February 2021. The company register shows that from 1 February 2021 Darryn MacDonald was appointed as sole director.

[4] Mr Robertson was offered employment with Stevryn which he accepted. There was no written employment agreement but Mr Robertson understood that he would continue to be paid the same hourly rate that he had received for work undertaken for BCL of $25.00 per hour. There was some change in the nature of the work undertaken. With BCL Mr Robertson was mostly going into quarries and carting gravel or taking topsoil out of building sites. With Stevryn there was more moving of general freight and containers.

[5] Mr Robertson needed to fill the truck up with fuel to carry out his duties. He recalled he had a fuel card but said that was probably with BCL rather than Stevryn. At a point in time Mr Robertson said the fuel card just stopped working. Mr Robertson decided to pay for the fuel himself and claim reimbursement by production of receipts. He recalled being reimbursed for a short time but he never received the full amount.

[6] Mr Robertson completed his logbooks with the hours that he was undertaking. He stopped being paid on the regular basis that he had been when he worked for BCL.

[7] Mr Robertson was somewhat embarrassed to raise a concern that he was not being paid because of his longstanding friendship with Darryn and Malcolm MacDonald. Not long before Christmas 2018 he raised a concern with Darryn MacDonald that the pay situation was getting serious. Mr Robertson said that he tried to make it look like he had made a mistake in raising the issue and said that he wondered if he had given them the wrong account number. Darryn MacDonald responded that he would ask Katrina who did the bookwork to check but did not come back to Mr Robertson about his pay.

[8] Mr Robertson recalled raising the fact he was not being paid with Darryn MacDonald another four or so times and with Malcolm MacDonald once during the period he continued to work. He was advised that the situation would be fixed but nothing changed. On occasions

he recalled being told that things were getting better and they would be able to pay him. He thought this was around the time they actually did make some payments.

[9] Inland Revenue Department (IRD) statements of earnings provided to the Authority that show gross payments were made on the following dates:

(a) $720 on 31 May 2019;

(b) $1,440 on 30 June 2019;

(c) $1,440 on 31 July 2019; and

(d) $360 on 30 September 2019.

[10] Mr Robertson says that the payments that he received fell well short of the hours he was actually working. With the fuel expenses it was costing him to keep working for SHL.

[11] On 14 February 2020 Mr Robertson got some advice and advised Darryn MacDonald that he could not continue to work anymore and would not come back until he was paid properly. He was then called by Malcolm MacDonald and told he thought Mr Robertson was part of the family. Mr Robertson says that his resignation was in the nature of a constructive dismissal.

[12] Once proceedings were lodged in June 2020 payments were made to Mr Robertson of $9,315 gross. No work had been undertaken by Mr Robertson for Stevryn since February 2020 and the payments were to compensate for work already completed.

[13] Mr Robertson says that he was unjustifiably constructively dismissed and seeks reimbursement of lost wages and compensation.

[14] He seeks payment for 16 statutory holidays that would otherwise have been working days between 21 December 2018 and 30 March 2019 and reimbursement of fuel expenses.

[15] Mr Robertson seeks a penalty be imposed against Stevryn for breaching the employment agreement by failing to pay wages. He seeks penalties against Malcolm and Darryn MacDonald for inciting, instigating, aiding and abetting Stevryn's breach of the employment agreement by assuring they would make the outstanding payments but not in fact doing so.

[16] Holiday pay was not claimed in the original statement of problem however in a supplementary memorandum following the investigation meeting the applicant claims holiday pay. The respondents were advised of this additional claim and given a period of 10 working days to respond. No response has been received at the date of this determination.

[17] A statement in reply was not received from the respondents. The Authority received an email from Darryn MacDonald on 6 July 2020 advising that there had been some discussion about a payment plan with Mr Robertson. There was advice in the email that the business had suffered "dramatically with Covid-19 and the lockdown" and it was unable to make a lump sum payment. There was a suggestion in the email that if agreed Darryn MacDonald would get a loan to pay back the fuel expenses incurred. An amount of $500 per week was offered until the back pay is cleared. There was no evidence of any payment in full for fuel expenses however payments over time were made following the resignation as set out above in the gross amount of $9,315 gross as at the time of the investigation meeting. These payments have been treated as a credit against the unpaid wages.

[18] Mr Robertson wanted to attend mediation but it has not taken place.

[19] Darryn MacDonald attended a case management conference with the Authority on 17 February 2021 with Ms Kennerley and another solicitor from her firm. The matter was set down for an investigation meeting which date was agreed to following discussion. I am satisfied that the respondents were served with copies of the notice of direction that followed the case management conference and the notice of investigation meeting. The Authority delayed the start of the investigation meeting to enable an attendance if there had been unforeseen issues causing delay. The respondents did not attend and no good reason for the failure to do so was advanced. The investigation meeting proceeded in their absence.

The Issues

[20] The Authority needs to resolve the following issues in this matter:

(a) What were the material terms of Mr Robertson's employment with Stevryn?

(b) What are the reasons for Mr Robertson's resignation?

(c) Was the resignation caused by breaches of the employment agreement and, if so, was it reasonably foreseeable that Mr Robertson would not be prepared to continue to work for Stevryn?

(e) If there was a constructive dismissal then was it unjustified?

(f) If there was an unjustified constructive dismissal then what remedies should be awarded.

(f) Is there money owing for unpaid wages and, if so, in what amount?

(g) Is there money owed to Mr Robertson for his purchase of work related fuel?

(h) Is holiday pay and payment for public holidays that would otherwise have been working days owed to Mr Robertson and, if so, in what amount?

(i) Should a penalty be imposed against Stevryn and Malcolm and Darryn MacDonald for breaching the employment agreement and inciting, instigating aiding or abetting the breach?

(j) If penalties are imposed who should they be payable to?

What were the material terms of Mr Robertson's employment with Stevryn?

[21] I conclude that it is more likely than not that a term of Mr Robertson's employment was that he would be paid $25 per hour. Mr Robertson was an experienced driver and the hourly rate was consistent with his hourly rate with BCL. He could reasonably have expected as part of his employment that if he incurred work related expenses such as the purchase of fuel he would on provision of a receipt be reimbursed for those expenses.

The legal approach to a constructive dismissal

[22] In some circumstances a resignation may amount to a dismissal. As was stated in the Court of Appeal Judgment in *Wellington Clerical Union v Greenwich* by Judge Williamson:[1]

[1] *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975

> There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

[23] There were three situations listed by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:[2]

(1) Where the employee is given a choice of resignation or dismissal;

(2) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

(3) Where a breach of duty by the employer leaves a worker to resign.

[24] It was stated by the Court of Appeal that the conduct complained of must amount to a repudiation of the contract rather than just be unreasonable. Conduct can also be a breach of an express or an implied term not to act in a manner calculated to destroy or damage the relationship of trust and confidence between an employer and employee.

[25] Mr Robertson relies on the third situation as described by the Court of Appeal in *Woolworths*.[3]

[26] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW INC* held that the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.[4] In determining that matter, all of the circumstances of the resignation have to be examined, not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found by the employer, was of sufficient seriousness to make resignation reasonably foreseeable.

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[2] *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374
[3] Above n 2.
[4] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

[27] Mr Robertson has the burden of establishing that the resignation was actually a dismissal.

What are the reasons for Mr Robertson's resignation?

[28] The evidence supported that Mr Robertson resigned because he was not paid properly over the extended period that he worked for Stevryn. He paid for the fuel for the driving work he undertook and he was not reimbursed for the full amount when he provided the receipts to Darryn MacDonald. It was costing him to work in those circumstances. Mr Robertson advised Darryn MacDonald that he was resigning on 14 February 2020 and he also spoke to Malcolm MacDonald about the reasons for his resignation.

Was the resignation caused by breaches of the employment agreement?

[29] There was a breach of the employment agreement by failing to pay Mr Robertson his wages properly and for much of the period failing to pay at all. Between December 2018 and February 2020 Mr Robertson worked 2654.75 hours for Stevryn at $25 per hour but was only paid $3960 gross. The total number of hours worked in final submissions is lower than those in the statement of problem. I have checked the breakdown of hours and 2654.75 hours is the correct number of hours based on the calculations from the log book for each month. Additionally Mr Robertson was not reimbursed for all work related fuel expenses. He spent $12,419.50 on fuel purchases for his work with Stevryn. He was reimbursed $2,467.46 and is still owed $9,952.04.

Was there a causal connection between the breaches and the resignation?

[30] I accept Mr Robertson resigned from his employment because of the breaches of his employment agreement.

[31] The main issue for the Authority to consider is whether the delay in resigning has any impact.

[32] There was a period between the initial breach and Mr Robertson's resignation of about 14 months. The initial breach occurred in December 2018 and Stevryn continued to breach the employment agreement right through until the date Mr Robertson resigned on 14 February

2020. Mr Robertson raised a concern in December 2018 about not being paid and Darryn MacDonald said he would look into the matter but failed to return to Mr Robertson. After this Mr Robertson carried on working without being paid any wages until 31 May 2019. He received partial payment of wages for the following four months until September 2019. He then carried on working without any payment from September 2019 until his resignation on 14 February 2020. Mr Robertson was only reimbursed a minimal amount for the fuel he had purchased for work related purposes. Mr Robertson raised concerns about payment on about five further occasions after December 2018. Aside from the four months where there was some payment there was no real change in the situation with the breaches over the entire period of employment and at the time of resignation.

[33] The Employment Court decided a claim of constructive dismissal that involved a failure to pay amounts owed to an employee in full in *ANZ Sky Tours Ltd (t/a ANZ Sky Tours) v Wei*.[5] Judge Beck accepted in *ANZ Sky Tours* that the breaches of the employment agreement and failure to pay were "at a very simple level" the primary reason the employee looked for another role but found the employee had "sat on" the breaches for too long before acting. In that case seven months had elapsed between the initial breach and resignation. Judge Beck found that the causal chain was broken because of the choice by the employee not to resign at earlier relevant times and that the resignation was not caused by the breaches because of the time that had elapsed. The claim for constructive dismissal was not successful.

[34] In *NZ Woollen Workers IUW v Distinctive Knitware NZ Limited* the then Chief Judge Goddard stated where there is a breach of a serious nature such as there is in this case the employee has a choice. The employee can carry on working in accordance with the employment agreement and take a case later to claim remedies or the employee can tell the employer they do not want to continue with the employment, resign and seek remedies.[6] Constructive dismissal arises in the latter situation. In the former situation the employee can still bring a number of claims against the employer including but not limited to seeking arrears of wages and penalties. In some employment cases where an employee does not cancel the employment

[5] *ANZ Sky Tours Ltd v Wei* [2021] NZEmpC 76.
[6] *NZ Woollen Workers IUW v Distinctive Knitwear NZ Limited* [1990] 2 NZILR 438.

agreement when there has been a repudiatory breach they have been treated as affirming the employment agreement.

[35] The timeframe within which an employee should make an election when there is a repudiatory breach has been stated by the Employment Court to be, unless there are extenuating circumstances, a short timeframe.[7]

[36] I have considered whether there were extenuating circumstances for Mr Robertson. In *ANZ Sky Tours* it was found that the visa situation of the employee did not amount to an extenuating circumstance based on the facts of that matter. I have weighed the longstanding friendship between Mr Robertson and the second and third respondent. I accept that would support a longer delay between the breach and resignation. I have also weighed the hope Mr Robertson had that he would get paid encouraged by statements to that effect. Even taking those matters into account they do not amount to extenuating circumstances for the entire period of 14 months between the initial breach and the resignation. There was no resignation between the initial breach in December 2018 and May 2019 when the first payment of wages was made. Payment of wages stopped entirely again after September 2019 however a further four months and two weeks elapsed then before resignation.

[37] In conclusion I find that the causal chain between the ongoing breaches and the resignation was broken. That is because of the delay by Mr Robertson in resigning when it was clear that Stevryn at various times could not be relied on to perform the employment agreement consistently or even at all in the future. There are features of affirmation or waiver even though the action of failing to pay wages and reimburse work related expenses would be otherwise actions so serious that a risk or resignation would be foreseeable.

[38] I do not find that the constructive dismissal claim is made out for the reasons set out above.

Reimbursement of unpaid wages

[7] *Fredericks v VIP Frames and Trusses Ltd* [2015] NZEmpC 203.

[39] I accept as set out earlier that Mr Robertson, supported by his log book records, worked a total of 2654.75 hours during his employment for Stevryn. At the hourly rate of $25 per hour he should have received the sum of $66,368.75 gross for that work. IRD records support that he was paid $3960 gross during his employment and after the proceedings were lodged was paid a further $9,315 gross.

[40] As at the date of the investigation meeting Mr Robertson is owed $53,093.75 gross being unpaid wages and he is entitled to an order for payment of that amount.

Public holidays that would otherwise be working days

[41] During the period of Mr Robertson's employment there were 16 statutory days between December 2018 and 14 February 2020 that would otherwise be a working day.

[42] Section 49 of the Holidays Act 2003 provides that the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day.

[43] The hours Mr Robertson worked varied including within the pay period when the public holidays fell. It is difficult in those circumstances to calculate relevant daily pay and it is more appropriate to calculate average daily pay under s 9A of the Holidays Act. Ms Kennerley in seeking payment for public holidays that were otherwise working days averaged out the hours Mr Robertson worked to 8 hours per day at $25 per day to arrive at the amount of $200 for each public holiday. I am not satisfied that is in accordance with the requirements of the Holidays Act 2003.

[44] Ms Kennerley is to calculate average daily pay for the public holidays based on the formula in s 9A(2) of the Holidays Act 2003 and provide those calculations to the Authority within ten working days. If the Authority agrees with the calculation and it will make orders accordingly for payment.

Holiday Pay

[45] When the Authority has confirmed the public holiday calculations then it will add those amounts to the gross wages for the period of employment and calculate holiday pay and make orders for holiday pay owing.

Reimbursement of fuel expenses

[46] Mr Robertson spent his own money on fuel for his work for Stevryn. The total expenditure was $12,419.50. He was only reimbursed $2,467.46 and he is still owed $9,952.04. He is entitled to an order for reimbursement for that amount.

Penalties

[47] Penalties are sought against Stevryn and Malcolm and Darryn MacDonald.

[48] Section 134 of the Employment Relations Act 2000 (the Act) provides liability for penalties for breach of an employment agreement as follows:

> (1) Every party to an employment agreement who breaches that agreement is liable to a penalty under the Act.
>
> (2) Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

Penalty against Stevryn

[49] I conclude that this is an appropriate case for consideration of a penalty. There was a breach by Stevryn of its obligations in the employment agreement it had with Mr Robertson to pay him the agreed wages for work performed and reimburse him for work related expenses.

[50] In determining an appropriate penalty for a breach of an employment agreement the Authority must have regard to all relevant matters including those set out in s 133A of the Act. Section 133A of the Act sets out that relevant matters include the object in s 3 of the Act, the nature and extent of the breach and whether the breach was intentional, inadvertent or negligent. Other relevant matters to consider in that section are the extent of the loss or damage suffered by the person or gains made or losses avoided by the person in breach. The Authority should consider whether the person in breach has taken steps to mitigate the effects of the breach and the circumstances of the breach including the vulnerability of the employee and whether the

person in breach has previously been found by the Authority or the Court to have engaged in any similar conduct.

[51] In addition to the factors in s 133A of the Act the Authority also considers the additional factors in *Labour Inspector v Preet PVT Limited and Warrington Discount Tobacco Limited*.[8]

[52] A failure to pay an employee properly or at all and a failure to reimburse the employee for work related expenses does not advance the object of the Act of good faith. It does not acknowledge and address the inherent inequality of power in employment relationships.

[53] In considering the nature and extent of the breaches there is one breach alleged of the employment agreement in failing to pay Mr Robertson what he was owed for wages and expenses. I accept that it is appropriate to view both those matters as one breach. The maximum penalty for that breach in the case of Stevryn, a company, is $20,000.

[54] I conclude from the evidence that the breach of the employment agreement was intentional. No wages were paid to Mr Robertson for work he performed for Stevryn for 10 months of his employment with inadequate wages paid for another 4 months of employment. Only limited reimbursement was made for work related expenses. There was a failure by Stevryn to take any steps if it was not in a position to pay to make that clear to Mr Robertson at an early stage so that he did not continue to work for its benefit for no or inadequate payment.

[55] This was a very serious breach. The starting point should be 80% of the maximum penalty.

[56] The loss Mr Robertson suffered as a result of the breach was significant. The gains to Stevryn because of its breaches was equally significant. Stevryn benefited from Mr Robertson's work without having to pay him properly and for long periods pay him at all. There was a significant shortfall in reimbursement to Mr Robertson for the fuel he purchased so that he could undertake the work for the company. That was another benefit to Stevryn. Mr Robertson was a vulnerable employee to the extent that he had a longstanding friendship with the current

[8] *Labour Inspector v Preet PWT Limited* [2016] NZEmpC 143.

and previous director of Stevryn and in those circumstances was more likely to believe advice that he would be paid eventually.

[57] Whilst Stevryn did pay some amounts to reduce the wage amounts owed after proceedings were lodged that could not be seen as a significant mitigation in the circumstances. It simply addressed, but only in part, what should have been paid earlier. I make no adjustment in all the circumstances. In so deciding I have compared the situation with that in *A Labour Inspector v Daleson Investment Limited.*[9] Chief Judge Inglis applied a discount of 20 per cent to reflect full payment of lost wages. It was stated that the discount was within the range and broadly consistent but it was indicated it was the "outer limit". Compared with *Daleson* there was no payment in full against a background where there had been no payment for extended periods whilst Mr Robertson was working.

[58] It does appear that there were some financial issues for the company but there was insufficient information to support any significant reduction to a penalty.

[59] There is no evidence to support Stevryn has been found in breach previously by the Authority or Employment Court.

[60] I consider the aggravating factors about the intention, nature of the loss and corresponding benefit to Stevryn and Mr Robertson's vulnerability justify an increase by 10% from the starting point to 90% of the maximum penalty. I then consider it appropriate to make a reduction of 10% for the financial circumstances of Stevryn.

[61] A penalty of 80% of the maximum penalty of $20,000 or $16,000 is proportionate and consistent with other cases given the seriousness of the breach.

Penalties against Malcolm and Darryn MacDonald

[62] Penalties are claimed against Malcolm and Darryn MacDonald on the basis that they incited, instigated, aided and abetted the breaches of Stevryn.

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[9] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [35].

[63] A penalty under s 134(2) of the Act requires that there be an act of incitement, instigation, aiding and abetting a breach of an employment agreement. The Authority needs to be satisfied that Malcolm and Darryn MacDonald had sufficient knowledge of the terms of the employment agreement and that Mr Robertson was not paid or reimbursed for expenses properly.

[64] The evidence supported that Darryn and Malcolm MacDonald both carried out work at Stevryn. Malcolm MacDonald as well as being a director at the time of the employment worked on the trucks doing maintenance. If a truck needed a certificate of fitness or other maintenance then he would do that work. Darryn MacDonald dealt with the general logistics and organising the business. He would normally direct Mr Robertson about the work on any given day that needed to be performed.

[65] I did not hear from Malcolm and Darryn MacDonald but the evidence supported they both had a longstanding friendship with Mr Robertson and knew him well. Additionally Darryn MacDonald had been the director of BCL who had employed Mr Robertson before his employment with Stevryn. Mr Robertson had been paid properly by BCL. Whilst Darryn MacDonald was only a director of Stevryn for a very short period after its incorporation the evidence supported he was involved in the day to day operation of the business and directed Mr Robertson about work to be undertaken. Malcolm MacDonald was the director of Stevryn and involved in the business as well.

[66] I am satisfied both Malcolm and Darryn MacDonald had knowledge of the term of the employment agreement between Stevryn and Mr Robertson to pay $25 per hour for his work. There was knowledge of the hours Mr Robertson worked with his log book entries and that he had not been paid properly or at all from the concerns he raised with Malcolm and Darryn MacDonald about that. It would also have been apparent from the company bank accounts that there was limited or no payment of wages for Mr Robertson and it would have been equally apparent that notwithstanding the absence of payment or payment in full for many months he continued to carry out work. There was knowledge Mr Robertson paid for work related fuel expenses himself because he provided receipts for reimbursement. There would have been no or limited fuel costs for the vehicle he drove apparent from the company bank accounts.

[67] With that knowledge Darryn and Malcolm MacDonald reassured and did not dissuade Mr Robertson from an understanding that he would be paid. He continued to work and incur expenses fuelling the truck. I find a deliberate intention to keep Mr Robertson's employment relationship with Stevryn on foot in the knowledge that Stevryn was in breach of the employment agreement. Malcolm and Darryn MacDonald aided and abetted Stevryn's breach in failing to pay Mr Robertson properly for wages and reimburse work expenses by their words, actions and inaction. This conduct did not promote the obligations of good faith or address the inherent inequality of power that exists in an employment relationship. It is appropriate to consider penalties in the circumstances.

[68] There is one breach alleged for Malcolm MacDonald and one breach alleged for Darryn MacDonald of aiding and abetting the breach by Stevryn of the employment agreement. It is appropriate to treat the failures to pay as one breach. The maximum penalty Malcolm and Darryn MacDonald each face is $10,000.

[69] The breaches were serious and ongoing over the period of 14 months. An appropriate starting point is 80% of the maximum penalty or $8,000 each,

[70] Mr Robertson was in a vulnerable position because he considered Malcolm and Darryn MacDonald to be friends. Even when he resigned Malcolm MacDonald made reference to the friendship.

[71] Darryn MacDonald made some arrangement to make payments after proceedings were lodged. I do weigh that in relation to his penalty but to a moderate degree only.

[72] There was no evidence provided about the financial position of Malcolm and Darryn MacDonald and I make no discount. There was nothing to support that either Malcolm or Darryn MacDonald have engaged previously in similar conduct.

[73] I have weighed all matters including the need to punish and deter and the need for proportionality and consistency. I have also weighed that Malcolm and Darryn MacDonald were party to the breaches rather than the principal. It could not safely be discounted however that they did not also benefit from Mr Robertson's unpaid work and his incurring of expenses to undertaken that work. Malcolm MacDonald was a director at the time and Darryn

MacDonald was involved with the day to day operation of the business. Taking all matters into account I conclude an appropriate penalty is $6,000 for Malcolm MacDonald and $5,000 for Darryn MacDonald.

Payment of penalties

[74] Mr Robertson has asked that the penalties be paid to him under s 136(2) of the Act. I accept an order for reimbursement of unpaid wages and expenses will not fully compensate Mr Robertson. It is appropriate that 75% of the penalties be paid to Mr Robertson and 25% to the Crown.

Section 142Y of the Act

[75] In accordance with Ms Kennerley's request in her memorandum I reserve leave for Mr Robertson to apply under s 142Y of the Act in the event of default by Stevryn in paying the amounts ordered. Issues in the supplementary memorandum as to what orders can be made if leave is granted can be addressed at that stage.

Orders

[76] I order that Stevryn Holdings Limited pay to Ian Robertson within 28 days of the date of this determination:

(a) The sum of $53,093.75 gross being unpaid wages.

(b) The sum of $9,952.04 being reimbursement of work related fuel expenses.

(c) The sum of $12,000 being a penalty.

[77] I order that Stevryn Holdings Limited pay the Crown a penalty within 28 days of the date of this determination in the sum of $4,000.

[78] I order that Malcolm MacDonald pay to Ian Robertson a penalty within 28 days of the date of this determination in the sum of $4,500.

[79] I order that Malcolm MacDonald pay the Crown a penalty within 28 days of the date of this determination in the sum of $1,500.

[80] I order that Darryn MacDonald pay to Ian Robertson a penalty within 28 days of the date of this determination in the sum of $3,750.

[81] I order that Darryn MacDonald pay the Crown a penalty within 28 days of the date of this determination in the sum of $1,250.

Costs

[82] I reserve the issue of costs. Ms Kennerley is to return to the Authority with calculations for public holiday payments and holiday pay owing will then be calculated. It is sensible that costs are determined at the same time as public holiday and holiday pay claims.

Helen Doyle
Member of the Employment Relations Authority