

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 705
3062916

BETWEEN ACCESS SOLUTIONS LIMITED
Applicant

AND KHYBA RAPANA
Respondent

Member of Authority: Rachel Larmer

Representatives: Scott Mckenzie, General Manager for the Applicant
Garry Pollak, Counsel for the Respondent

Investigation Meeting: 26 September 2019 at Auckland

Submissions and
Additional Information: 10 December 2019 from Applicant
10 December 2019 from Respondent
11 December 2019 from Applicant
11 December 2019 from Respondent

Date of Determination: 13 December 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Access Solutions' claims

[1] This matter involves claims by Access Solutions Limited (Access Solutions) that Mr Khyba Rapana:

- (a) Breached the notice provisions in his employment agreement; and
- (b) Abandoned his employment.

[2] Access Solutions seeks:

- (a) That a penalty be imposed on Mr Rapana for allegedly resigning without notice; and
- (b) Damages from Mr Rapana for financial losses it claims to have incurred as a result of his alleged abandonment of his employment.

[3] Mr Rapana denies abandoning his employment or breaching his employment agreement.

[4] Mr Rapana says Access Solutions knew he had verbally resigned from his position on 3 May 2019, a month prior to his last day at work.

Mr Rapana's counterclaim

[5] Mr Rapana counterclaimed that Access Solutions breached:

- (i) Its good faith obligations in the Act because it deliberately misled and deceived him about his legal and contractual obligations to it; and
- (ii) The Wages Protection Act 1983 (WPA) by withholding his final pay and making deductions from his wages without consulting him.

[6] Mr Rapana asks that penalties be imposed on Access Solutions for its breaches of:

- (a) Good faith, under s4A of the Act; and
- (b) The WPA, under s13 of the WPA.

[7] Access Solutions denies breaching good faith by misleading or deceiving Mr Rapana.

[8] Access Solutions admits it withheld Mr Rapana's final pay, and did not consult him before making deductions from his wages but says it believed it was entitled to do so.

[9] Access Solutions says that penalties should not be imposed on it for any breaches that have occurred.

Issues

[10] The following issues are to be determined:

- (a) Did Mr Rapana breach the notice requirements in his employment agreement?
- (b) If not, did Mr Rapana abandon his employment?

- (c) If so, what if any penalty should be imposed on him?
- (d) If Mr Rapana breached his employment agreement did that cause Access Solutions to suffer loss?
- (e) If so, what if any damages should Access Solutions be awarded?
- (f) Did Access Solutions breach its duty of good faith by misleading or deceiving Mr Rapana?
- (g) If so, what if any penalty should be imposed on it under s 4A of the Act?
- (h) Should a penalty be imposed on Access Solutions for its admitted breaches of the WPA?
- (i) Should some or all of any penalties that may be imposed on Access Solutions be paid to Mr Rapana instead of the Crown?
- (j) What if any costs should be awarded to the successful party?

Did Mr Rapana breach the notice requirements in his employment agreement?

Notice clause in employment agreement

[11] Clause 16.1.1 of Mr Rapana's employment agreement says "*Four [4] weeks' notice of termination shall be given by either parties*".

[12] Clause 16.1.2 stated "*Where notice is not given the notice period shall be paid in lieu thereof or forfeited*".

Verbal notice

[13] Mr Rapana gave his manager Mr Dilakshan Perisdavarayan (known as Joesph) his (Mr Rapana's) verbal resignation on 3 April 2019.

[14] Mr Rapana told his Line Manager Mr Perisdavarayan that he (Mr Rapana) would be leaving in a month to start work for a new employer. Mr Rapana says that Mr Perisdavarayan told him he had to give written notice and asked him what could be done to make him stay.

[15] Mr Rapana says he had checked his employment agreement before giving notice. He therefore told Mr Perisdavarayan that his employment agreement did not require written notice

and that there was nothing that could be done to make him stay because he had already decided to leave Access Solutions.

[16] Mr Rapana's decision to leave was based on his feelings of being let down by Access Solutions because he believed it had reneged on a promise he had been given when he had started work for it regarding the provision of a work truck to him.

[17] Mr Perisdavarayan admitted that Mr Rapana spoke with him on 3 April 2019 about leaving Access Solutions but says he (Mr Perisdavarayan) saw it as a "*threat*" and/or "*demands*" by Mr Rapana to get better terms of employment, not as a verbal resignation.

[18] The Authority did not find Mr Perisdavaryan's evidence that Mr Rapana had not given him a verbal resignation credible. Mr Perisdavaryan had a strong personal motivation to shift the blame to Mr Rapana because it was his (Mr Perisdavaryan's) fault for not passing notice of Mr Rapana's verbal resignation on to Ms Kumar before 3 May 2019.

[19] Mr Rapana's actions were consistent with a verbal resignation because later that same day he met with his new employer and they agreed that, based on his notice period with Access Solutions, Mr Rapana would start work with the new employer on Monday 6 May 2019.

[20] The Authority accepts Mr Rapana's evidence that Access Solutions knew that he had resigned and his last day of work would be 3 May 2019.

[21] Mr Rapana told his co-workers Jonah Kolo, Nolan Rapana (his uncle and co-worker), Jonah Havea, as well as sales representatives James Spear and David O'Leary that he (Mr Rapana) had resigned so would be leaving on 3 May 2019.

[22] Mr Rapana's Team Leader, Mr John Iwihora, told the Authority that Mr Rapana told him (Mr Iwihora), while Mr Rapana was still employed, that he (Mr Rapana) had verbally resigned. Mr Perisdavarayan also asked Mr Rapana at a social event in front of other employees if Mr Rapana was still leaving, to which Mr Rapana replied he was.

[23] A sales representative also approached Mr Rapana to ask if he was leaving Access Solutions because Mr Perisdavarayan had told him (the sales representative) that Mr Rapana was leaving. Mr Rapana confirmed he had resigned so was leaving on 3 May.

[24] Another employee (David - who was not available to give evidence to the Authority) also approached Mr Rapana to ask if he was leaving because Mr Perisdavarayan had told David that Mr Rapana was leaving Access Solutions. Mr Rapana confirmed he was leaving.

[25] Access Solutions' employees Mr Nolan Rapana, Mr Kolo and Mr O'Leary gave evidence by telephone to the Authority that they knew Mr Rapana had resigned and that 3 May would be his last day working for Access Solutions. This was discussed openly at work and in front of managers.

[26] It is significant that the Authority had to obtain this evidence itself, because Access Solutions failed to provide this evidence, although these witnesses were employed by it.

[27] This evidence by Access Solutions' employees was credible because it was against their self-interest, as it contradicted their employer.

[28] The fact that Mr Rapana had resigned, and that his last day of work would be 3 May, because he had another job was openly discussed among Access Solutions employees in the workplace and at after work functions. Other employees, including managers, knew that Mr Rapana's last day of work was going to be Friday 3 May 2019.

[29] Mr Perisdavarayan approached Mr Rapana on the morning of 3 May 2019 to ask if he was still leaving Access Solutions that day. Mr Rapana confirmed that he was and it was only at that point that Mr Perisdavarayan informed Ms Kumar of that.

[30] Ms Kumar admitted that she had been told on the morning of Friday 3 May 2019 that Mr Rapana's last day at work was that day (the Friday). She therefore knew Mr Rapana would not be at work on Monday 6 May, because he would be starting work with a new employer that day.

[31] Ms Kumar could have discussed any concerns Access Solutions had about Mr Rapana's notice period with him on Friday 3 May 2019, before his employment had ended, but she did not do so.

Written notice not required

[32] Up until the Authority pointed out to the parties that Mr Rapana was not contractually required to give written notice of his resignation, Access Solutions appears to have proceeded on the basis that written notice was a requirement.

[33] Although Access Solutions denied that it had done that, its denial was not credible because it was contradicted by documents created at the material time. *Outcome*

Outcome

[34] Mr Rapana did not breach his employment agreement. He gave Access Solutions one month's verbal notice of his resignation when he was only contractually required to have given it four weeks' notice.

[35] Access Solutions' claim that Mr Rapana breached his employment agreement does not succeed.

Did Mr Rapana abandon his employment?

Abandonment clause in employment agreement

[36] The abandonment clause in Mr Rapana's employment agreement does not have a clause number. That appears to be a drafting error, because all of the other clauses are numbered.

[37] The unnumbered abandonment clause says:

Where without reasonable cause in the opinion of the employer, an employer is absent from work for more than three (3) days without the consent of the employer or without notification to the employer, the employer shall be deemed to have terminated his/her employment without notice.

[38] Access Solutions' claim that Mr Rapana abandoned his employment is a surprising one because it was obvious that none of the core elements of the abandonment clause had been met.

[39] Mr Rapana was not "*absent from work*" - he had resigned. His employment had already ended on 3 May. He had started work for a new employer on 6 May and Access Solutions knew that.

[40] Mr Rapana had not been “*absent from work for more than three (3) days*”. On Mr Rapana’s very first day of work for his new employer (6 May) Access Solutions started pressuring him to return to work for it under the guise that he had abandoned his employment with it (Access Solutions). He had not even been away for a whole day at that point.

[41] That pressure was applied to Mr Rapana as soon as he had started work for his new employer. Access Solutions did not even wait for the contractually required three days before it started threatening Mr Rapana with adverse financial consequences for supposedly “*abandoning*” his employment.

[42] Mr Rapana caved in to Access Solutions’ threats that he return to work for the respondent to avoid the adverse financial consequences he had been threatened with.

[43] Access Solutions knew that Mr Rapana had not reported for work on 6 and 7 May because he had resigned, and had already started work with a new employer. There was no legitimate basis for it to attempt to use the abandonment clause in his employment agreement to force him back to work for it.

[44] It made no sense for Access Solutions to invoke the abandonment clause because if it had applied (and it did not) then it would have simply ended the employment relationship, by operation of contract.

[45] Access Solutions’ claim that Mr Rapana had to return to work for it because he had “*abandoned*” his employment therefore made no sense. If he had abandoned his employment, then there would have been no employment relationship for Mr Rapana to have returned to.

[46] The ‘abandonment’ claim was likely a sham device used to improperly pressure Mr Rapana in doing what Access Solutions wanted him to do, under threat of adverse financial consequences.

Did Access Solutions breach its good faith obligations by misleading and deceiving Mr Rapana?

[47] Section 4 of the Act requires parties in employment relationships to deal with each other in good faith. Section 4(1)(b) expressly states that parties in an employment relationship must

not, directly or indirectly, do anything to mislead or deceive each other or that is likely to do so.

[48] Mr Rapana has established on the balance of probabilities that Access Solutions breached its good faith obligations in s 4(1) of the Act because it misled and deceived him in the following ways:

- (a) It asked him (via Mr Perisdavayan) why he had not reported to work (for Access Solutions) on Monday 6 May when it knew that was his first day of work with his new employer;
- (b) It told him he had forfeited his pay, when it had no right to take his wages off him;
- (c) It told him he had not resigned, when it knew he had;
- (d) It claimed he had “*threatened*” Access Solutions because he had allegedly “*demand*ed” more pay and a vehicle, when he had actually resigned and had told it that nothing would make him stay;
- (e) It told him he had to give a written resignation, when the notice clause in his employment agreement did not require that;
- (f) It told him that it was up to Access Solutions to decide whether or not to accept his resignation, when he was permitted to end his employment by giving four weeks’ notice, whether Access Solutions wanted him to or not;
- (g) It claimed he had breached his employment agreement, when it was obvious that he had not;
- (h) It claimed he had “*walked off the job*” and “*abandoned his employment*” when it was obvious that he had not, because he had given Access Solutions more than 4 weeks’ notice of his resignation;
- (i) It claimed he would have to pay Access Solutions penalties, when there was no legitimate basis for making such a threat;
- (j) It claimed he would face financial damages for not returning to work for it, when it had no legitimate basis for making such a threat;

- (k) It claimed he had to return to work for it, even though it knew he had started a new job elsewhere;
- (l) It told him it was entitled to withhold his final pay if he did not return to work for it (after his employment with it had already ended) in clear breach of the WPA;
- (m) It told him it was entitled to make deductions from his wages, even though it had not consulted with him about that, in breach of the WPA;
- (n) It repeatedly demanded that he return to work after the employment relationship had already ended to “*work out his notice*,” when it knew that he had already done that so the relationship had already ended;
- (o) When, in the face of repeated threats, Mr Rapana returned to work (out of fear) in an attempt to avoid the adverse financial consequences Access Solutions had been threatening him with, Access Solutions held an unannounced meeting with him to discuss his supposed “*abandonment*” of his employment (when it was obvious he had not abandoned his employment) during which it told him that it was going to the Authority anyway (despite him returning to work as it had demanded) because he had breached its trust;
- (p) It tried to force him to sign a form during the meeting on 9 May 2019 acknowledging he owed it money. When Mr Rapana refused to do so, Access Solutions threatened Mr Rapana that it would be much worse for him if he didn’t sign it.

Should a penalty be imposed on Access Solutions for its breaches of good faith?

[49] Section 4A of the Act sets out the elements that must be satisfied before a penalty for a breach of good faith can be imposed on a party that has breached its good faith obligations.

[50] The Authority finds that Access Solutions’ breaches of good faith were deliberate, serious and sustained.¹

¹ Section 4A(a) of the Act.

[51] Access Solutions' own meeting notes record its view that Mr Rapana only returned to work because of the threats it had made against him, in particular that it would be lodging a claim against him with the Authority.

[52] These multiple false, deceptive and deliberately misleading assertions by Access Solutions are egregious breaches of good faith against a young, low paid, employee who did not know what the law was and who did not have easy access to any legal advice regarding his rights at that time.

[53] One of the stated objects of the Act is to promote good faith behaviour. Another is to address the inherent inequality of power in employment relationships. The imposition of a penalty on Access Solutions for its breaches of good faith is therefore consistent with the objects of the Act.

[54] Penalties are also necessary to signal disapproval of Access Solutions' conduct and to punish and deter it from breaching its good faith obligations in future.

Should penalties be imposed on Access Solutions for its breaches of WPA?

[55] Clause 14.2 of the employment agreement stated that Mr Rapana's wages would be paid fortnightly. A payslip would also be provided that recorded the wages, allowances, holiday pay and deductions.

[56] Clause 14.3 dealt with deductions from Mr Rapana's wages. It recorded that amounts required by legislation, such as PAYE and ACC would be deducted by Access Solutions from Mr Rapana's wages.

[57] Clause 14.4 dealt with other deductions. It stated that Access Solutions "*may agree to make any other deductions as may be requested from time to time by the Employee.*"

[58] Mr Rapana did not ask for any deductions to be made from his wages. Nor was he consulted about any deductions from his wages before they were made by Access Solutions.

[59] Section 4 of the WPA requires employers to pay employees their entire wages, without deduction, when they become due. Section 4 therefore prohibits an employer from making unauthorised deductions from an employee's wages and/or from withholding an employee's wages from them.

[60] However s 5 of the WPA allows an employee to authorise an employer to make deductions (for a lawful purpose) from the employee's wages with the written consent of, or at the written request of, the employee. Clause 14.4 of Mr Rapana's employment agreement reflected that. He had also acknowledged that his driver licence fee could be recovered from him if his employment ended.

[61] Section 5(1A) of the WPA prohibits the employer from making deductions from an employee's wages without first consulting the employee about that. Access Solutions breached 5(1A) of the WPA because it did not consult with Mr Rapana before making deductions from his final pay.

[62] Section 5(2) allows an employee to vary or withdraw their consent to the employer making deductions from the employee's wages. Mr Rapana was not given the opportunity to consent, or withdraw consent, to the deductions that Access Solutions made to his final pay because of the failure to consult with him about that.

[63] Section 13 of the WPA provides that penalties may be imposed for breaches of it.

[64] Access Solutions breached the WPA in the following ways:

- (a) It withheld all of Mr Rapana's final pay, in breach of s 4 of the WPA, until 2 August 2019;
- (b) It deducted a driver licence fee from Mr Rapana's final pay without first consulting him about that, in breach of s 5(1A) of the WPA.

[65] The imposition of penalties on Access Solutions is necessary and appropriate to punish it for its breaches, to deter it and others from breaching minimum employment standards.

What penalties should be imposed on Access Solutions?

Law relating to penalties

[66] The decision of the full Employment Court in *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited* set out a four-step process for the Authority to use when it is assessing penalties.²

² [2016] NZEmpC 143 at [151].

[67] Section 133A of the Act sets out the mandatory factors the Authority must consider when assessing penalties.

[68] Based on case law and the requirements imposed by the Act, the following matters are to be considered by the Authority when setting penalties:

- (a) Statutory consideration 1 – The object of the Act
- (b) Statutory consideration 2 – The nature and extent of the breach
 - (i) Identify the nature of the breaches
 - (ii) Identify the number of the breaches
 - (iii) Identify the maximum penalty available in respect of each identified breach
 - (iv) Consider whether global penalties are appropriate
- (c) Statutory consideration 3 – Whether the breach was intentional, inadvertent or negligent
 - (i) Assess the severity of the breach
- (d) Statutory consideration 4 – The nature and extent of any loss or damage
- (e) Statutory consideration 5 – Steps to mitigate effects of the breach
- (f) Statutory consideration 6 – Circumstances of the breach, and any vulnerability
- (g) Statutory consideration 7 - Previous conduct
- (h) Additional consideration 8 – Deterrence
- (i) Additional consideration 9 – Culpability
- (j) Additional consideration 10 – Consistency with other cases
- (k) Additional consideration 11 – Ability of person in breach to pay a penalty
- (l) Additional consideration 12 – Proportionality of outcome in relation to harm caused by the breach.

Authority's assessment of penalties

Statutory consideration 1 – object of the Act

[69] Section 3 of the Act states that the objects of the Act are (among other things) to:

- (a) Promote good faith in all aspects of the employment environment and employment relationship;
- (b) Promote the effective enforcement of employment standards, in particular by Labour Inspectors; and
- (c) Acknowledge and address the inherent inequality of power in employment relationships.

[70] Access Solutions breaches of good faith and the WPA are examples of the inherent power imbalance in employment relationships. Access Solutions' high handed and unlawful actions could have destroyed Mr Rapana's new employment relationship.

[71] Access Solutions used its power improperly to pressure and scare Mr Rapana into bending to its will as a result of the financial threats it made against him.

Statutory consideration 2 – the nature and extent of the breach

Identify the nature of the breaches that occurred

[72] Access Solutions breached the Act and the WPA.

Identify the number of Access Solutions' breaches

[73] Access Solutions engaged in 16 breaches of good faith. Each time it misled and deceived Mr Rapana was a separate instance of it breaching its good faith obligations to him.

[74] Access Solutions engaged in two breaches of the WPA;

- (a) Withholding his final pay until 2 August 2019;
- (b) Failing to consult him before it made deductions from his wages.

Identify the maximum penalty available for the breaches

[75] Section 13 of the WPA provides that penalties for breaches of it are in accordance with the Act.

[76] Section s 135(2)(b) of the Act provides that the maximum potential penalty that can be imposed on a company or corporation, such as Access Solutions is \$20,000 per breach.

Identify the maximum penalties available for each of Access Solutions' breaches

[77] The maximum potential penalty available for Access Solutions' breaches of good faith is \$320,000 (being \$20,000 per breach x 16 breaches).

[78] The maximum total potential penalty that could be imposed on Access Solutions for its breaches of the WPA is \$40,000 (\$20,000 per breach x 2 breaches).

Is globalisation appropriate?

[79] Globalised penalties for the multiple breaches of good faith are appropriate. Globalised breaches of the WPA are also appropriate.

[80] However it is not appropriate to globalise penalties for the Act and WPA, because they involved different types of breaches under different legislation.

Statutory consideration 3 – whether the breach was intentional, inadvertent or negligent

[81] Employers are expected to familiarise themselves, and comply, with their employment related obligations under minimum code legislation. Access Solutions' breaches of the WPA were negligent at best.

[82] Access Solutions' breaches of good faith were more serious because they involved deliberate attempts to force Mr Rapana to do what it wanted him to do, with no regard for the legality of its actions or to the adverse impact its actions could potentially have had on his new employment.

Assessment of the severity of the breaches

[83] Access Solutions breaches scared and pressured Mr Rapana to the extent that he left his new job and returned to work for Access Solutions, to avoid the Authority proceedings and adverse financial consequences it had threatened him with.

[84] Access Solutions also continued its breaches of the WPA despite being put on notice by Mr Rapana's counsel that they were not legally entitled to withhold Mr Rapana's final pay. Mr Rapana was a young low paid employee, so the withholding of his wages was a very serious matter for him.

[85] Mr Rapana did not have access to legal advice at the time Access Solutions' breaches of good faith occurred, so he did not know his legal rights or how to address the breaches of

good faith that had occurred, other than giving in to what Access Solutions had demanded of him.

Statutory consideration 4 – the nature and extent of any loss of damage

[86] Mr Rapana was very intimidated by Access Solutions' conduct towards him.

[87] Mr Rapana gave evidence of the huge amount of worry and stress Access Solutions had caused him. He described having multiple sleepless nights. He felt he was being punished for resigning. He had bills to pay but no wages for work he had done. He had to take time off work from his new employer to supposedly work out another four weeks' notice for Access Solutions, despite having already given it a month's notice.

[88] He has been forced to take legal action to enforce his rights. He has had to incur legal costs to defend the claims against him. He has had to take time of work (thereby losing more wages) to attend mediation and the Authority's investigation meeting.

[89] Access Solutions also attempted to sully Mr Rapana's character and work history in these proceedings by repeatedly making adverse comments about him that had nothing to do with the claims the Authority was investigating.

Statutory consideration 5 – steps to mitigate effects of the breach

[90] Access Solutions did not remedy its breaches of good faith.

[91] Instead it gave evidence that was not credible to the Authority and failed to present evidence from its employees that it knew would support Mr Rapana's version of events.

[92] Access Solutions' attitude towards its breaches of the WPA is also concerning. Its breaches made it very difficult to determine whether Mr Rapana has been paid his full entitlements and what if any deductions have been made and/or reimbursed to him.

[93] Access Solutions has complained about being required to provide clarification of Mr Rapana's pay. However the purpose of minimum code legislation is to make it easy to establish if employee's have been paid their minimum entitlements. It should not have been as challenging as it has been to piece together whether or not Mr Rapana has received all of his wages.

[94] Access Solutions' attitude in connection with these Authority proceedings has been concerning. It has demonstrated a lack of remorse or understanding about how its actions have adversely affected Mr Rapana. It did however pay Mr Rapana the wages it had been withholding from him, after the Authority became involved, so that is a mitigating factor.

[95] The Authority notes that the amount paid by Access Solutions on 2 August also involved a deduction of \$1,385.85 from Mr Rapana's final pay that was made without any prior consultation with him.

Statutory consideration 6 – circumstances of the breach and any vulnerability

[96] Mr Rapana was a vulnerable person in terms of being a young person who was relatively new to the employment market. He was a low paid employee, who did not know his rights, and who did not have ready access to legal advice.

[97] Mr Rapana was heavily reliant on receiving his wages in order to support himself so the threats of withholding his wages, proceedings against him and penalties were frightening to him.

Statutory consideration 7 – previous conduct

[98] Access Solutions has not previously had penalties imposed on it.

Additional consideration 8 - deterrence

[99] Deterrence is a significant factor when imposing penalties for breaches of employment standards.

[100] There is a need to bring home to Access Solutions that its good faith obligations to employees must be taken seriously and that it is required to comply with the WPA. All employers must understand that compliance with minimum code legislation, such as the WPA, is mandatory.

[101] It is wrong for an employer to force an employee to do what that employer wants by withholding an employee's wages to make them comply with the employer's wishes.

[102] There is a need for individual deterrence of Access Solutions as well as more generalised deterrence of other employers who may be tempted to engage in breaches of good

faith and/or employment standards (such as breaching the WPA) either through ignorance of their obligations or in order to obtain a perceived advantage.

Additional consideration 9 – Access Solution’s culpability

[103] Access Solutions’ culpability is high. It has used its superior power against a vulnerable employee. It has adopted an aggressive and adversarial approach to this matter. And has adopted position’s that were unsupported by its own documents and employees.

[104] Mr Rapana’s belief that Access Solutions set out to punish him for resigning had merit based on the evidence the Authority heard.

Additional consideration 10 – consistency with similar cases

[105] Whilst a number of other cases have involved the imposition of penalties on employers for breaches of s 4(1) good faith obligations and breaches of the WPA, none of these cases are substantially similar to this one.

Additional consideration 11 – Access Solutions’ ability to pay penalties

[106] The onus was on Access Solutions to provide evidence of any inability it had to pay penalties. That has not occurred.

[107] In the absence of any financial information, ability to pay penalties is treated as a neutral factor.

Additional consideration 12 – proportionality of outcome

[108] It is important that penalties are not so low as to create perverse incentives for employers, by inadvertently encouraging non-compliance with employment obligations, on the basis that it is more cost effective to face a penalty than to comply.

[109] However there also needs to be some readjustment to the proposed penalties for the breaches that have occurred in this matter, to reflect the proportionality of outcome of the total penalties overall.

Summary of penalties imposed on Access Solutions

[110] The attached Appendix 1 provides an analysis of the penalties that have been imposed on Access Solutions, in terms of summarising the penalties imposed on it in terms of *Preet's* four step penalty assessment process.³

[111] Access Solutions has total penalties of \$8,600 imposed on it, consisting of \$5,600 for its 16 breaches of good faith and \$3,000 for its two breaches of the WPA.

Should some or all of the penalties imposed on Access Solutions be paid to Mr Rapana instead of the Crown?

[112] Access Solutions is ordered to pay part of the total penalties imposed on it to Mr Rapana to reflect the harm he has suffered that he otherwise cannot be compensated for.

[113] In terms of allocating the penalties that have been imposed on Access Solutions, \$2,000 of the total penalties is to be paid to the crown and \$6,600 is to be paid to Mr Rapana.

[114] The penalty breakdown is as follows. Within 28 days of the date of this determination, Access Solutions is ordered to pay:

- (a) \$1,000 of the good faith penalty to the Crown Bank Account
- (b) \$4,600 of the good faith penalty to Mr Rapana;
- (c) \$1,000 of the WPA penalty to the Crown Bank Account;
- (d) \$2,000 of the WPA penalty to Mr Rapana.

What costs should Mr Rapana be awarded?

[115] Mr Rapana as the successful party is entitled to a contribution towards its actual costs.

[116] The Authority has assessed his costs based on its usual notional daily tariff based approach to costs.

[117] This matter involved a one day investigation meeting. The starting notional point for assessing costs is therefore \$4,500. Consideration must then be given to whether or not the notional starting tariff needs to be adjusted to reflect the particular circumstances of this case.

³ Above n1.

[118] There are no factors that would warrant a reduction in the notional starting tariff.

[119] However, it is appropriate to increase the notional starting tariff to reflect that the way in which Access Solutions elected to run its case inappropriately and unnecessarily increased Mr Rapana's legal costs.

[120] Access Solutions ran arguments that were untenable, provided irrelevant information to the Authority, and did not inform the Authority that its employees and sales representatives knew that Mr Rapana had resigned and that his last day of work would be 3 May.

[121] All of these actions by Access Solutions unreasonably increased Mr Rapana's legal costs. It is therefore appropriate for the notional daily tariff to be increased by \$2,500 to reflect that.

[122] Within 28 days of the date of this determination, Access Solutions is therefore ordered to pay Mr Rapana \$7,071.56 consisting of:

- (a) \$7,000 contribution towards his actual legal costs; (being \$4,500 daily tariff and \$2,500 uplift) and
- (b) \$71.56 to reimburse his filing fee.

Summary of orders

[123] Within 28 days of the date of this determination Access Solutions is ordered to pay:

- (a) \$6,600 of the total penalties imposed on it to Mr Rapana;
- (b) \$2,000 of the total penalties imposed on it to the Crown Bank Account; and
- (c) \$7,071.56 to reimburse Mr Rapana for his legal costs and disbursements.

Rachel Larmer
Member of the Employment Relations Authority

APPENDIX ONE - PENALTY ANALYSIS – ACCESS SOLUTIONS LTD

Step 1 – Nature and number of breaches – Potential maximum penalties		
Breaches of good faith – s 4(1) ERA	16 x \$20,000	\$320,000
Breaches of ss4 and 5 of the WPA	2 x \$20,000	\$40,000
Reduced due to globalised breaches of good faith		\$20,000
Reduced due to globalised breaches of WPA		\$20,000
	Subtotal	Initially \$360,000 But after globalisation reduced to \$40,000
Step 2 – Aggravating factors as a proportion of maximum in Step 1		
Breaches of good faith	70%	\$14,000
Breaches of WPA	50%	\$10,000
	Subtotal	\$24,000
Step 2 – Ameliorating factors (reducing aggravating factors)		
Less 20% (\$2,800)	Breaches of good faith	\$11,200
Less 20% (\$2,000)	Breaches of WPA	\$5,000
	Subtotal	\$16,200
Step 3 – Financial circumstances – no reduction		
Step 4 – Proportionality		
Reduce by 50%	Breaches of good faith	\$5,600
Reduce by 60%	Breaches of WPA	\$3,000
Penalties for all breaches	Total	\$8,600