

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 285
3152644

BETWEEN KEVIN BREEN
Applicant

AND PRIME RESOURCES
COMPANY LIMITED
First Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
Andrew Schirnack and Sarah Lim, counsel for the
Respondent

Investigation Meeting: 15 June 2022

Submissions and/or further evidence: 2022 from the Applicant
from the Respondent

Determination: 30 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Kevin Breen, claims that he was disadvantaged by the late payment of his salary in August and September 2021 by the Respondent, Prime Resources Company Limited (PRCL).

[2] PRCL confirms that it made a late payment of salary in August and September 2021 to Mr Breen based upon a genuine understanding that it was entitled to withhold payment.

[3] PRCL denies that Mr Breen was unjustifiably disadvantaged by the late payment.

The Authority's investigation

[4] During the Investigation Meeting I received evidence and submissions from Mr Breen, and from Mr John Chung for the Respondent. I also received oral submissions from Mr Breen, and from Mr Schirnack on behalf of the Respondent.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issue

[6] The issue requiring investigation is whether or not Mr Breen was unjustifiably disadvantaged by the late payment of his salary by PRCL in August and September 2021.

Background

[7] PRCL is a property development company with a focus on high density housing and residential properties in city fringe Auckland. It is owned and operated by Mr John Chung, sole director and shareholder.

[8] In October 2020 PRCL obtained building consent from Auckland Council to build apartments consisting of 92 units. In order to achieve the level of funding required at least 50 – 60 percent of the units needed to be presold.

[9] In March 2021 PRCL advertised for a marketing and sales manager. Mr Breen successfully applied and was appointed to the position. Mr Breen negotiated a position title change and commenced employment on 6 April 2021. He was provided with an individual employment agreement on 13 April 2021 which designated his title as general manager and head of sales and marketing (the Employment Agreement).

[10] Relevant clauses of the Employment Agreement were:

1. Position, Description and Supervision

You are appointed to the role of general manager and head of sale and marketing in order to sell 92 apartments including its accessory units (called the apartments) and any relevant management for marketing and sale of the apartment efficiently

2.1 ...

2.2 ...

2.3 The Employee is bound to be solely committed to working for Prime Resources Co. Ltd and therefore is prohibited from being engaged in another job or working for other works during the duration, even during the weekend and holiday period granted.

3. Hours of work and report

3.1 You are engaged in the position on the basis of your role and working hour remuneration in accordance with this agreement. It is expected that you will be

working for around 50 hours per week but your working hours may be flexible depending on the requirement and situation of the Company. Your daily working hours will normally be between 8:30 am to 5:30 pm (or 6:00pm) including your lunch and breaks for 40 minutes in total per day from Monday to Sunday in order to perform the function and duties of your role in a timely manner and managing the open home in the sale office.

3.2 You may require reporting your work and performance of your work done daily or weekly, and your report requires including your achievement and work plan for the following week.

4. Remuneration (Salary)

4.1 Your salary is \$150,000 (gross) per annum based on your role and the working hours as per clause 3.1 above. Your remuneration in this agreement is in full consideration of all the requirements of the position, responsibilities, qualifications, experience and hours worked, etc. as set out in this agreement.

4.2 You will not be paid for the hour you are not working because of your personal matter or ACC etc. Your holiday and sick leave shall not be applied to this clause.

4.3 Prime Resources shall be entitled to make a rateable deduction from your remuneration for the hours you have not worked as specified in clauses 4.2 set out above, which will be reflected with your wage calculation each month.

4.4 ...

4.5 ...

4.6 The payday is 1st of the following month of the pay period. The company will direct credit to your bank account on the payday after deduction of PAYE and others (if any).

5. Bonus based on the target set out below;

5.1. The Employer offers to pay a bonus provided that if you have achieved your sales target as per your commitment during the interview meetings, as below.

5.2. You committed that you will be able to sell 2 apartments per week so, the company relies on your commitment that you would be able to achieve sales of the 50% apartments by the end of November 2021 and all the rest of the 92 apartments would be sold out by the end of May 2022.

[11] At the start of his employment Mr Breen said the PRCL sales office had not been built and seeing this as important to the sales effort, he became involved initially with establishing a sales office. Although Mr Chung had started the project, he had involved a contractor known to Mr Breen's wife, resulting in the project being completed more speedily. Mr Breen said he had been actively involved in the sales office project management in his capacity as general manager.

[12] As set out in the Employment Agreement, Mr Breen had committed to being able to sell two apartments a week. During the first months of employment Mr Breen said he made 75 percent of his target unit sales, being 8 out of a potential 12 units. Mr Breen explained that the reason for not making 100 per cent of his target was due to the late completion of the showroom.

[13] Mr Chung said that out of the 8 units sold by Mr Breen, only 6 were sold unconditionally, and the PRCL funding was based on unconditional sales. By the end of August 2021, he said Mr Breen had been expected to sell 18 – 20 units and he was disappointed in his performance.

[14] On Tuesday 17 August 2021 New Zealand entered a lockdown situation as a result of Covid-19. That evening Mr Breen sent a text message to Mr Chung advising that he had access to his files from home and would continue to contact customers and deal with incoming emails and texts. He said he received no response from Mr Chung to this text message.

[15] Mr Chung said he tried not to access to business messages in the evenings, therefore he did not open the message from Mr Breen until the following morning. However, since Mr Breen had explained his situation in the text message but asked no questions, he had not responded to it.

[16] During the remainder of August 2021 Mr Breen said he worked his contractual 50 hours a week. Although leads and enquiries diminished dramatically and customers were not able to come into the showroom, he had worked on inbound enquiries from potential customers, completed spreadsheets and answered questions on prices. He had completed templates setting out the customer information provided to him. In addition, he had carried out some general manager responsibilities and completed work plans.

Emails 1 September 2021

[17] On 1 September 2021 Mr Breen said he had expected to receive his full monthly salary payment for August and was concerned to receive an email from Mr Chung dated that same day which advised that he (Mr Chung) had made a 'guestimate' calculation and would be deducting monies from Mr Breen's salary payment. The email sent at 12.56 stated:

Hi Kevin, I hope you are well.

I am now calculating your wage for August.

As per clauses 4.2 and 4.3 of our employment agreement, I need to deduct your absence hours of work.

My estimated calculation is in good faith is below, which I have considered you did some work in your home.

- Your absence hours of work is 75 hours in August (I prepared a type of calculation sheet)
- Your annual wage is \$150,000 divided by 52 weeks then it came out to \$2,884.62 per week wage.- Your week's wage is \$2,884.62 divided by 50 hours (your working hours per week) then it came out to \$57.69 (per hour of your wage).
- 57.69 x 75 hours then it comes out to \$4,326.75 (this sum is required to deduct as per clauses 4.2 and 4.3 of our agreement)
- Your gross monthly wage is \$12,500 - \$4,326.75 then it comes out to \$8,173.25 (this is your gross wage for August after the deduction)

Unfortunately, we are unable to get wage subsidies from the government at the moment as per the assessment of our accounting consultant BDO, but we may try next time.

Please let me know are you happy with the calculation indicated above? once I receive your confirmation, I will transfer your wage for August ASAP. I look forward to hearing from you ASAP.

[18] Mr Chung said he based his calculation of the hours worked by Mr Breen on his own email access from which he could see that Mr Breen was dealing with one to three emails a day. On that basis he assumed Mr Breen had only worked for only two to three hours a day, and not working for a total of 75 hours over August.

[19] Mr Breen said he was shocked and responded to Mr Chung by email at 13.38. He stated that he expected to be paid his full salary for August and for any additional time worked during the lockdown period. He also advised that it had not been his decision to remain home : "I have been forced to stay at my home therefore should be paid in full".

[20] Mr Chung responded at 14.25:

Hi Kevin,

The government has forced you to stay home, not me or the company, so the government is responsible for your wage payment while you were staying at home. The specific condition of your remuneration (wage) payment is very clear in the employment agreement, please see below;

"4.2 You will not be paid for the hour you are not working because of your personal matter or ACC etc. Your holiday and sick leave shall not be applied to this clause.

4.3 Prime Resources shall be entitled to make a rateable deduction from your remuneration for the hours you have not worked as specified in clauses 4.2 set out above, which will be reflected with your wage calculation each month.

4.4 Your remuneration will be paid as per the remuneration conditions set out in this agreement, these being full compensation for all conditions of your works and other factors surrounding your job."

We must comply with the term and conditions of our agreement.

I do not agree with your comments in your email. If we get a subsidy from the government then we can transfer that to you.

[21] Mr Breen replied at 14.33 stating that it was illegal not to pay his full wages and stating that he had not taken any time off for a personal matter or ACC. He also stated that he would consult with his lawyer if not paid his wages in full.

[22] Mr Chung responded at 14.54:

Hi Kevin, I am doing this based on the employment agreement, which we have agreed and is legally based on.

"4.2 You will not be paid for the hour you are not working because of your personal matter or ACC etc."

"... personal matter or ACC etc." This "etc" means is not only a personal matter or ACC but also other matters such as this case.

[23] Mr Breen stated in an email at 14.58 he disagreed that the use of 'etc' gave Mr Chung the right to not pay his wages in full.

[24] Mr Chung responded at 15.10 stating: "'etc' is quite common use in the agreement when it is difficult to specify everything in any sentence in the agreement ...". He also stated that PRCL was also a victim of the Covid-19 situation.

[25] Mr Breen responded at 15.22 that he appreciated that the Covid-19 situation had also impacted PRCL but stated that:

... as a fair and reasonable employer it is a requirement to pay my salary in full as I have not taken any leave from work and will not be taking leave during this lockdown period and therefore should be paid in full. Just because i cannot be present in the office does not mean that I have not been working or taken any leave of any kind.

[26] Following a couple of email exchanges, Mr Breen concluded in an email sent at 16.33 that his legal representative would proceed with the matter.

[27] The next day, 2 September 2021, Mr Breen emailed Mr Chung stating that if PRCL paid him in full, he would not pursue the matter further.

[28] Mr Chung said he had replied to Mr Breen with a proposal which was that, despite his view that his calculation regarding the payment due to Mr Breen had been compliant with the law and the Employment Agreement, PRCL would pay 50% of Mr Breen's full remuneration sum during the lockdown period in order to resolve the dispute.

[29] Mr Chung said his decision to pay Mr Breen 50 percent of his full remuneration was a reluctant decision because Mr Breen's achievement of the presale of apartments was less than one third of his committed number at the interview. As a consequence he had concern about Mr Breen's performance, in addition to PRCL's financial difficulties at that time.

[30] Mr Chung said that he understood that working from home during the lockdown was not practicable, however Mr Breen had full access to the PRCL email address which was integrated into the website which advertised for sale of the apartments through TradeMe, One-roof and other platforms.

[31] He said this meant that Mr Breen was receiving new enquiries from potential purchasers regarding the presale every day during the lockdown.

[32] Mr Chung said he had also been able to access all the information of more than 340 enquiries received from potential buyers which had been archived in the PRCL inbox. He said

Mr Breen would have been able to contact these potential buyers from his home for marketing/promoting and selling the apartment units. However, Mr Breen had sent no more than one and three emails a day to potential buyers.

[33] Mr Breen said that he had completed work during the lockdown period. He was present and available to work throughout the full 50 hours and had completed work plans as required.

Mediation September 2021

[34] The parties attended mediation during September 2021 and following it, PRCL confirmed in an email dated 30 September 2021 that it would pay Mr Breen the outstanding payment for August, and his full pay for September 2021.

[35] On 1 October 2021 Mr Breen emailed PRCL stating:

Thank you for attending mediation Also, thank you for making a payment yesterday to get my remuneration paid up to date.

As you have made a gesture of goodwill, I will do the same. I will start responding to client's vis the info inbox if you can reply to me with that as an approval to do so.

[36] Mr Breen was also paid his full salary for October 2021 even though he took 9 days of sick leave during the month which would otherwise have been unpaid.

[37] Mr Breen also suggested in the email dated 1 October 2021 that PRCL make another offer in respect of his disadvantage claim.

[38] Mr Chung said he did not understand that suggestion on the basis that Mr Breen had said he would not pursue the claim any further if his salary was paid in full, which it had been.

[39] Mr Chung responded to Mr Breen on 3 October 2021 stating that he did not want to continue the dispute with Mr Breen, which was why he had paid the full salary despite his reservations about the working hours of Mr Breen during the period. He stated that he did not understand what was meant by 'making another offer'.

[40] On 1 November 2021 Mr Breen filled a statement of problem in the Authority claiming he had been unjustifiable disadvantaged by PRCL failing to pay in full on the due date during the lockdown period.

Was Mr Breen unjustifiably disadvantaged by the late payment of his salary in August and September 2021?

[41] Mr Breen has been paid his salary entitlements for August and September in full, but claims that he has been unjustifiably disadvantaged by the late payment of his salary in August and September 2021.

[42] Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[43] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[44] Mr Breen's salary was not paid in full during August 2021. It was a term and condition of his employment at clause 4.1 of the Employment Agreement that he would receive his salary payment provided he worked the hours set out in clause 3.1 of the Employment Agreement.

[45] Mr Chung understood that Mr Breen had not been working the full 50 hours because he had made an estimate of the hours worked by Mr Breen from the number of emails he had been answering each day.

[46] There is no evidence that establishes that Mr Breen was not working the full complement of hours during August 2021. While the number of emails to which he was responding may have been lower than expected, Mr Breen's evidence was that he had been working properly carrying out tasks on other aspects of his role as General Manager. There was no definite evidence that he was not doing so.

[47] There is also no evidence that Mr Breen had taken ACC or any personal time. On the contrary he stated in the email sent at 15.22 on 1 September 2021 that he had not done so, and would not be taking annual leave.

[48] Whilst PRCL may have considered initially that the reference to 'etc' covered the Covid lockdown situation I observe that differed from personal matters and ACC, because that

was outside of Mr Breen's control. Moreover full payment of Mr Breen's salary was subsequently made by PRCL so that is not an issue before the Authority.

[49] Mr Chung's evidence was that he was dissatisfied by Mr Breen's performance which may have affected his approach to the situation. However, there was no evidence of a performance issue being raised with Mr Breen prior to the lockdown commencing, and no justification for payment being withheld on that basis.

[50] I find that Mr Breen was disadvantaged by the non-payment of his full salary in August 2021.

[51] In September 2021 Mr Breen's written evidence was that he had: "stopped responding to email inquiries unless they were sent directly to me when John notified me he was not going to pay me".

[52] The dispute between the parties about full payment of Mr Breen's salary which had commenced on 1 September 2021 had proceeded to mediation during September. That process was concluded by PRCL agreeing on 30 September 2021 to pay Mr Breen's salary shortfalls for August and September 2021. On 1 October 2021 Mr Breen advised PRCL that he would: "start responding to clients ..." in response to the payment made by PRCL.

[53] The Employment Agreement, set out that PRCL would pay Mr Breen a salary which was based upon Mr Breen working 50 hours a week as set out in clauses 3.1 and 4.1.

[54] An employment relationship is based upon good faith dealing between the parties. While Mr Breen claimed he was ready and available to carry out work, I find that during September 2021 he was not fully available and not therefore acting in good faith.

[55] On the basis of Mr Breen's evidence, he did not work in accordance with the terms and conditions of the Employment Agreement during September 2021 because he stopped responding to email enquiries which were a fundamental means of his achieving sales and his sales targets.

[56] Accordingly I find Mr Breen did not have a unjustifiable disadvantage grievance in respect of September 2021.

[57] Moreover I observe that Mr Breen's salary payment for September 2021 was due to be paid on 1 October 2021 in accordance with clause 4.6 of the Employment Agreement, and payment had in fact been made one day prior to that date. There was consequently no breach of the terms and conditions of employment in respect of payment by PRCL for September.

Remedies

[58] Mr Breen's evidence that the failure to pay his full salary in August 2021 caused him stress and anxiety. He had direct debit payments, mortgage payments and other financial commitments which were scheduled for payment on the second day of each month following his salary payment on the first day of each month. The reduced level of his expected salary payment affected him being able to make these payments.

[59] Mr Breen said as a result of the shortfall in payment he had needed to fill out a hardship application at his bank to try to stop the payments due on 2 September 2021 being made. This had been embarrassing and humiliating for him.

[60] Although Mr Breen's salary shortfall for August 2021 and his full salary payment for September were paid on 30 September 2021, this was following mediation and until payment was made, I find that Mr Breen had no certainty that they would be paid.

[61] Although the period of time was short, I find that Mr Breen suffered hurt and humiliation in respect of the failure to pay his full salary during August 2021.

[62] **PRCL is ordered to pay Mr Breen the sum of \$2,000.00 as compensation pursuant to s 123(1)(c)(i) of the Act.**

Contribution

[63] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[64] I find no contributing conduct by Mr Breen and there will be no reduction in the remedies ordered.

Costs

[65] I consider that costs should lie where they fall in this matter.

[66] However if the parties are minded to apply for costs, I note here that, subject to his submissions, Mr Breen represented himself and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

[67] If the applicant seeks costs, he may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply

memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

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

[69] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹

Eleanor Robinson
Member of the Employment Relations Authority

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].