

NOTE: An order for the payment of a penalty appears at p 6 of this determination

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Oona Busby
AND Talent Base Limited
REPRESENTATIVES Michael Smyth, counsel for Oona Busby
Kate Blackman, counsel for Talent Base Limited
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 7 July 2006
SUBMISSIONS RECEIVED 12 July 2006
DATE OF DETERMINATION 20 July 2006

DETERMINATION OF THE AUTHORITY (No 2)

[1] In a determination dated 2 June 2006 ("the 2 June determination"), made in the absence of Talent Base Limited ("TBL"), I ordered TBL to pay Ms Busby monies by way of unpaid wages and holiday pay, and commissions.¹

[2] Some 10 days later TBL applied to have the investigation reopened. Its sole director and shareholder, Richard Gunton, said he had been out of New Zealand and was not aware Ms Busby's employment relationship problem had even been filed until he cleared the company's post office box on 4 June 2006. He also disputed the amounts awarded in Ms Busby's favour.

[3] Since an application to reopen an investigation requires a consideration, among other things, of overall justice between the parties, and since the original employment relationship problem involved a relatively straightforward assessment of the quantum of any payments owed to Ms Busby, the substantive merits have been addressed in the course of the application to reopen.

Mr Gunton's failure to participate in the original investigation

[4] Mr Gunton left Auckland on or about 28 March 2006. Ms Busby says he told her he would be back in two weeks. About a week after Mr Gunton's departure Ms Busby decided to resign, and was able to contact Mr Gunton by email to advise him of this. The parties maintained email contact into mid-April 2006, discussing arrangements for the termination of Ms Busby's employment and, later, her concern about arrangements for receiving her salary and final pay. These payments were outstanding as at the date her employment ended.

[5] Ms Busby heard nothing more from Mr Gunton from mid-late April. She persisted in attempting to contact him, and told him variously that she would be seeking professional advice about non-payment, and would be putting the matter in the hands of her lawyer. However she did not say anything about taking any formal action to recover the money. She

¹ **Busby v Talent Base Limited** (AA 194/06, 2 June 2006)

says also posted a copy of the notice of investigation meeting to an address in England which she believed to be that of Mr Gunton's parents. Mr Gunton says he did not receive it.

[6] Ms Busby's employment relationship problem was filed in the Authority on 19 May 2006. The Authority sought to serve copies on TBL at an address in St Heliers which is recorded as the company's registered address, and at its business premises (which by then were closed). The registered address was that of a firm of accountants, and they received the employment relationship problem on 22 May 2006. A representative of the firm contacted the Authority to acknowledge receipt, but advised that the firm had no further contact with TBL.

[7] Counsel for Ms Busby contacted the Authority on 24 May to express concerns that Mr Gunton had still not returned to New Zealand and had not replied to Ms Busby's direct approaches, service on TBL's business premises had failed and the company appeared not to be trading. The premises were locked and there was an allegation that rent was not paid.

[8] Accordingly the matter was set down for an investigation meeting on 2 June 2006. Counsel served the notice of meeting on TBL at its registered address on 24 May 2006. He advised the Authority he had been informed the registered address was still correct, but that TBL was no longer a client of the firm's. Telephone contact with Mr Gunton had been attempted without success.

[9] Mr Gunton returned to Auckland on Saturday 27 May 2006, although neither the Authority nor Ms Busby knew this at the time. It was another week before he cleared the company post office box and he demonstrated a very casual attitude to attending to accumulated company business. Nevertheless he instructed his solicitors relatively promptly on becoming aware of Ms Busby's employment relationship problem and its outcome. In support of the application to reopen he:

- (a) denied telling Ms Busby he would be returning in two weeks, saying the return date on his ticket was originally four weeks after his departure although his absence was eventually extended to 7 weeks;
- (b) said TBL had instructed another firm of accountants and that firm should have been recorded as TBL's registered office;
- (c) denied being aware Ms Busby sought to initiate legal action to recover monies owed to her;
- (d) denied receipt of communications from her to that effect; and
- (e) denied any knowledge, prior to 4 June 2006, of the Authority's proceedings.

[10] From this it can be said that, whatever Mr Gunton told Ms Busby about when he might return to New Zealand, the actual date of return was delayed and Ms Busby was not advised of the delay, the reason for it, or when Mr Gunton would return. Moreover Mr Gunton knew Ms Busby wanted her salary and final pay, and that payment was due to her. As time went on he took no steps to arrange for payment or indicate to Ms Busby when and how she might expect to be paid. Finally, he took either no steps or very inadequate steps to ensure he could be contacted after mid-April. While I accept Ms Busby did not tell him she would be filing an employment relationship problem, that does not excuse his inactivity.

[11] Meanwhile, Ms Busby filed her employment relationship problem and the associated documents were duly served on the company at its registered address. It may be that address should have been updated. Mr Gunton says that was the responsibility of his new accountants. However the date on which he said he changed accountants was some three months prior to the date of the last filing in the company's office of the company's annual return. The original accountants are recorded as having filed that return and the registered address was not changed.

[12] This background does not make for a compelling application to reopen an investigation. However, for reasons to which I now turn, it has become apparent that the orders made in the 2 June determination should at least be amended.

The merits of Ms Busby's claims

1. Unpaid wages and holiday pay

[13] TBL accepts Ms Busby is owed unpaid salary and holiday pay, but has quantified it as \$1,870.23 (net). The amount as originally calculated was:

2 weeks + 2 days salary (for 17 – 30 April)	\$1,391.23 (net)
holiday pay @ 6% total gross earnings of \$19,203.21	
	\$1,152.19 (gross)
less PAYE	\$ 234.74
less 3 days taken @ \$146 per day	\$ 438.45
total holiday pay	\$ 479.00 (net)
Total owed	\$1,870.23 (net)

[14] The written employment agreement provided at clause 7.1 that payment was to be made fortnightly on every second Tuesday. According to Ms Busby's schedule of payments received, payment tended to be made on Fridays instead. It is not clear why. Regarding the period prior to the termination of Ms Busby's employment, if I assume payment should have been made on Tuesday 28 March, the next payment should have been made on Tuesday 11 April. Ms Busby was actually paid on Tuesday 18 April – one week late. The next payment of a full fortnight's pay was due on Tuesday 25 April and was not received by the date of termination of employment. Three further working days (or equivalent) remained to the date of termination.

[15] Accordingly, on Ms Busby's salary of \$38,000 per annum, the total gross salary due was $\$1,461.54 + [3 \times \$146.15] = \$1,899.99$ (gross).

[16] Regarding holiday pay, the above calculation contains an error in that the allowance for leave taken should have been deducted from the gross entitlement, not the net entitlement.

[17] Moreover, s 23 of the Holidays Act 2003 refers to payment of 6% of 'total gross earnings'. 'Gross earnings' is defined in s 14 to include productivity or incentive-based payments, including commission. It appears commission payments were not included in the calculation of holiday pay owed to Ms Busby, when they should have been.

[18] Payment of \$1,870.23 (net) has been made. The amount is to be recalculated and payment adjusted as necessary in accordance with the above findings.

2. Unpaid commissions

[19] TBL is a travel industry recruiter and Ms Busby's position was 'talent manager'. It was common ground that some of the placements in March 2006 (on which her original claim for the payment of commission was based) either did not proceed or were the subject of a reduced fee. Ms Busby had said her qualifying billings for March 2006 were \$52,134. By agreement between the parties this was reduced to \$43,344. The relevant order in the 2 June determination must be amended to reflect at least that much.

[20] There is a significant issue between the parties concerning the proper construction of the 'sliding incentive scheme' under which the commission was payable. For convenience, I set the scheme out again:

'7.2 Incentives

The employee shall be entitled to receive incentives in addition to their base salary of \$38,000 per annum on the following basis.

...

[billings]	NZ Dollars	
0	- 12000	0%
12001	- 15000	15%
15001	- 22000	20%
22001	- 28000	25%

The employee's pay shall be paid Monthly and Quarterly into a bank account nominated by the employee. 50% of the incentive shall be paid, on the calendar month following, with 50% being paid as a collective bonus quarterly.'

[21] TBL says there is a cap of \$28,000 on qualifying billings, so that no commission is payable on any billings exceeding \$28,000. Ms Busby says billings in excess of \$28,000 continue to attract commission at 25%.

[22] This means TBL says Ms Busby is owed \$3,349.40 for billings in March 2006. The table of calculations submitted on behalf of Ms Busby incorporates a figure of \$3,836 for commission payable at the rate of 25%, but that figure is the amount calculated on billings in excess of \$28,000 and is the difference between the parties. If commission is payable at 25% for all billings over \$22,000, then \$5,336 is the figure for all commissions calculated at 25% and the total owed for March billings is \$7,185.40.

[23] Obviously the formula in the employment agreement is silent on what, if any, commission is payable on billings in excess of \$28,000.

[24] The parties did, however, discuss Ms Busby's remuneration package before her employment began. They sought to craft a package that would give Ms Busby target earnings of \$80,000 in a year, based on a salary and commission structure. Ms Busby says there was a document, which she cannot now locate, showing details of the proposed sliding incentive scheme and stating that Ms Busby would be entitled to 'superstretch' commission if she achieved billings over \$28,000 per month. She sent an email message dated 18 October 2005 to Mr Gunton, asking for a definition of 'budget' and 'superstretch'. The response read:

"... budget is the agreed minimum we can pretty much guarantee we are going to achieve. Super stretch is 'above' our target and is purely there to enhance the opportunities and incentive rather than hitting our targets and feeling theres little room to 'push the boundaries'."

[25] Ms Busby says the actual rate of commission payable under superstretch (for earnings above \$28,000) was not finalised, but Mr Gunton confirmed in conversation that a superstretch commission would be payable. She did not pursue the matter because she did not believe she would achieve billings at that level. However she says she raised the matter again in March 2006 because it was apparent that she would exceed billings of \$28,000 that month, and says Mr Gunton told her she would receive commission at 25%. Ms Busby felt she had been misled because she expected a higher rate of commission on billings in excess of \$28,000.

[26] Mr Gunton says superstretch was meant as an incentive to hit the top level of commission payable, that is on billings between \$22,000 and \$28,000. He denies presenting any document indicating commission would be payable on billings in excess of \$28,000, or otherwise leading Ms Busby to believe that would be the case. He insists there was a cap of \$28,000 on billings attracting commissions.

[27] Applying the usual approach to interpreting agreements, I might have accepted that the silence in clause 7.2 about commission for billings in excess of \$28,000, coupled with the provision in clause 14.3 that the written agreement comprises the entire agreement, means no commission is payable on billings in excess of \$28,000. However such a construction leads to an absurd result. The commission structure was supposed to provide an incentive to perform. Opportunities were supposed to be enhanced and boundaries were supposed to be pushed. Saying no commission was payable on billings over \$28,000 – or on theoretically superior performance – flies in the face of these objectives. The lack of further commission would be a

disincentive to perform at that level. I do not accept that can have been the parties' intention, and there was no other evidence to suggest that the parties intended to cap commissions.

[28] I therefore conclude that commission payable for March 2006 is \$7,185.40.

[29] Finally, there are some outstanding matters concerning commissions on billings in December 2005 and February 2006. Ms Busby says she was owed \$849.65 and \$677.65 respectively, but was paid \$424.83. TBL says Ms Busby was paid 50% of the \$849.65 she was owed (\$424.87), and is entitled to the rest, but she has received the full \$677.75.

[30] The basis on which TBL says Ms Busby has 'received' \$677.75 is that it acknowledges the amount was owed to her, and the payment was accounted for in a payslip for the pay period ending 24 February 2006. The same payslip shows several overpayments of salary commencing 25 November 2005, in a total of \$769.45. The commission payment was offset against this, leaving a total sum overpaid of \$91.60.

[31] The immediate problem with that action is that it does not comply with the provisions regarding the recovery of overpayments, nor those regarding deductions from wages, in the Wages Protection Act 1983. Nor is it covered by clause 14.5 of the employment agreement, which reads:

"Where requested by the employee the employer shall deduct The employer shall also be entitled to deduct from any salary payment **payable upon termination of employment** any over payment **made to the employee for leave taken in advance.**" (emphasis added)

[32] Having said that, Ms Busby's original calculations acknowledge she was overpaid, and in a sum apparently greater than the sum calculated by TBL. It is far from clear how or why that happened, or whose figure is correct.

[33] I am left on the one hand with a deduction that should not have been made, and on the other an acknowledgement of overpayment. I urge the parties to take a pragmatic approach to resolving that matter, and make no order in respect of it. Leave is reserved to refer it to the Authority if the parties are unable to resolve it.

Application for penalties

[34] Ms Busby's original statement of problem sought a penalty for breach of employment agreement and of the obligation of good faith. In TBL's absence, as well as the apparent inability to contact TBL and uncertainty about whether Mr Gunton would return to New Zealand, counsel withdrew that application at the 2 June investigation meeting.

[35] Since Mr Gunton has returned and sought to reopen the employment relationship problem, counsel also sought to reintroduce the application for a penalty. The original application was made in respect of the company. Because of the reason given for withdrawing it, and the subsequent change in circumstances, I allow the reintroduction of that application. I decline to address an additional application for penalties against Mr Gunton personally.

1. Breach of employment agreement

[36] The breach or breaches in respect of which a penalty was sought were not specified. However I can say Ms Busby's final salary payments were not made in accordance with clause 14 of the employment agreement, and no payment was made in respect of her final salary and holiday pay at all until on or about 19 June 2006. At best, this was some 7 weeks late. I consider Mr Gunton's failure to attend to payment to be a breach by TBL of the employment agreement, and the June payment as an attempt to remedy the breach. I weigh that attempt in favour of TBL.

[37] As for commission payments, Mr Gunton said he wanted to check on qualifying billings by contacting the customers concerned on his return. He could have told Ms Busby that much, but did not. Clause 7.2 of the employment agreement sets out the timing for payments of

commission, and that was not complied with. Mr Gunton's reason for failing to do so is not very compelling.

[38] The timely payment of wages is too important to allow an employer's failure to address the matter to go unpenalised. Mr Gunton was inexcusably lax in that respect. Since I have been asked to order a penalty for breach of employment agreement without further specifics, but am in any event satisfied there has been a breach, I order TBL to pay a penalty of \$2,000. Since Ms Busby's loss is remedied by the order for payment of monies owed plus interest, there is no need to order that the penalty also be paid to her. Payment is to be made to the Authority in accordance with s 136 of the Employment Relations Act 2000.

2. Failure to act in good faith

[39] Section 133 of the Employment Relations Act gives the Authority jurisdiction to deal with actions for the recovery of penalties for breach of any provision in the Act for which a penalty is expressly provided. Section 4A of the Act provides for penalties for deliberate, serious, or sustained breaches of the duty of good faith, and I do not believe Mr Gunton's actions reach that level.

[40] Accordingly I decline to order any further penalty.

Summary of orders

[41] The 2 June 2006 order for payment of salary and holiday pay is amended, with the sum owed to be recalculated in accordance with the findings in this determination. If the recalculated amount exceeds the amount already paid, the balance is to be remitted to Ms Busby.

[42] The 2 June order for payment of commissions is amended, and TBL is ordered to pay to Ms Busby the sums of \$424.87 in respect of billings for December 2005, plus \$7,185.40 in respect of billings for March 2006. That total is \$7,610.27.

[43] The parties are to reconsider their positions on the payment of the February 2006 commission of \$677.75. I make no order in respect of that payment but reserve leave to the parties to apply for an order if necessary.

[44] Interest is to be paid on the unpaid monies, including the amount paid on or about 19 June 2006, at the rate of 7.5% (being today's 90 day bill rate), calculated from the date of termination of Ms Busby's employment to the date of payment.

[45] TBL is to pay a penalty of \$2,000 for breach of the employment agreement.

R A Monaghan
Member of Employment Relations Authority