IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 342
5372315

	BETWEEN	SIMON MAXWELL EDWARDS Applicant
	A N D	TWO DEGREES MOBILE LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Anthony Drake, counsel for Applicant Penny Swarbrick, counsel for Respondent
Investigation meeting:	23 and 24 April 2012
Submissions Received	9 May, and 10 & 24 July 2012
Date of Determination:	1 October 2012

DETERMINATION OF THE AUTHORITY

The Authority determines:-

A. Mr Simon Edwards has remained since 2007 entitled to be paid salary of $350,000 per annum as a term of his employment with Two Degrees Mobile Ltd.

B. Mr Edwards is entitled to notice of two months if his employment is terminated.

C. Mr Edwards has not been permitted by Two Degrees Mobile Ltd to participate in an employee share option scheme, contrary to an express term of his employment agreement.

D. Leave is reserved to the parties if unable to agree on quantum, for the Authority to determine the amount of Mr Edwards' entitlements to underpaid salary and compensation for denial of entry to a share option scheme.

E. Two Degrees Mobile Ltd is ordered to pay a penalty of $4,000 to the Authority for breach of Mr Edwards' employment agreement.

F. Interest at 5% per annum is payable on the arrears of salary, from the date Mr Edwards commenced his claim.

G. A non-publication order is made by the Authority.

H. Costs are reserved.

Non-publication order

[1] By consent, pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 the following exhibits presented to the Authority by the applicant and respondent parties shall not be published;

a) In the Agreed Bundle of Documents:-

"3" – Trust Deed relating to 2008 Share Plan, and

"14" – Trust Deed establishing 2010 Share Plan.

b) In the Respondent's Documents for Hearing:-

"F" - Disclosure letter dated 22 December 2006, and

"G" – Employees' section 4.4 of 2006 Due Diligence report.

Employment relationship problem

[2] The applicant, Mr Simon (Tex) Edwards, and his employer, the respondent Two Degrees Mobile Ltd, have a disagreement about several of the terms and conditions Mr Edwards has been employed under since about 2001.

[3] Although Mr Edwards was given notice of termination of his employment with effect from 15 July 2012, he remains employed by Two Degrees but has applied to have the Employment Court decide whether his employment can justifiably be terminated on the grounds of redundancy.

[4] The parties do not dispute that at material times Mr Edwards was in an employment relationship and that therefore under the Employment Relations Act the Authority can investigate and determine the problems he has raised.

[5] The particular terms and conditions in dispute are key ones that relate to salary, length of notice of termination and participation in an employee share option scheme or plan.

Salary

[6] The issue with regard to salary is whether Mr Edwards agreed to a reduction in his pay from $350,000 to $200,000 a year, which was implemented by Two Degrees in mid-2008. There is no dispute that until then and from about March 2007, he had been entitled to and did receive the higher salary pursuant to the terms of the parties' employment agreement at that time.

[7] Mr Edwards denies that he in any way agreed to the reduction, while Two Degrees contends that he consented by conduct amounting to acquiescence or affirmation, which is recognised in the law of contract as being able to lead to contractual relations or the formation or variation of particular terms of contract.

Period of notice

[8] Mr Edwards claims that in 2002 under an employment agreement in force at that time, he became entitled to three years' notice (or 36 months' payment in lieu) and that he did not subsequently agree to any reduction of that period.

[9] Two Degrees denies that there was an agreement in existence providing Mr Edwards with that length of notice but argues that even if there had been it was superseded in 2007 under a new employment agreement which expressly replaced all prior employment arrangements he had been a party to. Two Degrees claims that from 2007, under the replacement employment agreement, Mr Edwards became entitled to only two months' notice, although he could not be terminated until mid-2008 after an agreed minimum period of employment of one year had expired.

[10] Two Degrees claims that the two months' notice period was superseded from mid-2008 when Mr Edwards, by his conduct, acquiesced in or affirmed further

changes to his employment agreement including a 43% reduction in salary and a reduction of the notice period to one month.

Participation in share option scheme

[11] With regard to this issue, Mr Edwards claims that under terms of employment which took effect from March 2007, he became expressly entitled to participate in any employee share option scheme which Two Degrees established or operated. The company contends that the employment agreement which came into existence through the conduct of Mr Edwards in mid-2008 did not require the company to let him participate in any share option scheme it provided for other employees.

[12] Two Degrees claims that he was not invited to join a scheme it instituted in 2010 because it was not an appropriate one for Mr Edwards in his particular circumstances, which included an interest he had in shares acquired by KLR Hong Kong Ltd, a holding company or family investment vehicle he was the beneficial owner of. Two Degrees contends that the participation by Mr Edwards in a share scheme was at the discretion of the Board of the company and not a matter of right, and the discretion was exercised against participation because of special circumstances applying to Mr Edwards and his employment relationship, including his anticipated resignation and because of the Two Degrees shareholding he had an interest in.

[13] Mr Edwards has asked the Authority to determine first the liability issues arising from his claims and then by what amount he has been underpaid salary by Two Degrees, and also what period of notice he should be given if the company lawfully terminates his employment. He also seeks an appropriate remedy such as compensation or damages to cover any loss that has arisen through being denied participation in an employee share option scheme, as he claims was his entitlement.

[14] Mr Edwards also claims penalties for breaches of his employment agreement and an award of interest on any arrears of salary found owing to him.

[15] Any question of quantum of remuneration and lost benefits is appropriately to be left for the parties to try and agree upon once the Authority has determined the liability issues.

[16] In summary, if Mr Edwards' claims are upheld entirely, upon being given notice at any time he will either be entitled to remain employed for three years at a salary of $350,000 per annum or to be paid $1,050,000 in lieu of notice (or receive a combination of notice and salary in lieu) and he will be entitled to arrears of salary since mid-2008 to date of about $600,000. Further he will be entitled to compensation in a sum that will depend on what he has lost by not being able to participate in a share option scheme. He will be entitled to any part of a penalty the Authority may award him, and he will be entitled to receive interest on arrears of salary accruing from mid-2008.

Construction principles

[17] The determination of this case has required the Authority to consider several documents having the form and content of employment agreements or having express contractual effect between parties. Only one of them is signed. The various contractual arrangements made with Mr Edwards, or claimed to have been, should as usual be considered against the context in which they came into being. In that regard there is considerable background to this case, but it is not necessary to set out the detail of that as it has been thoroughly disclosed by the evidence of the parties. That background covers the relationships Mr Edwards had with Two Degrees, the work he did and the central and leading part he took in the establishment and development of the Two Degrees Mobile business. The background has helped explain to the Authority some of the more unusual contractual provisions, as the employment relationship had some quite distinct features, reflecting Mr Edwards' different roles as an employee as well as his commercial and investment connections with Two Degrees.

[18] As always the construction of contractual provisions in dispute is an exercise that must be carried out by applying well established principles, in particular those set out in the leading authority on contract interpretation, the decision of the Supreme Court in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] NZSC 5. Although the decision related to the construction of a commercial contract, the principles of interpretation set out in it have equal application to employment agreements, as the Employment Court held in *Silver Fern Farms Ltd v. New Zealand Meatworkers & Related Trades Unions Inc* [2010] NZCA 317. The principles require that disputes as to meaning in employment agreements must be determined objectively and that

awareness of context is a necessary ingredient in ascertaining the meaning of contractual words.

[19] It is enough to say that Mr Edwards' relationship with Two Degrees was not just on the one level of employment but was multi-layered. This feature has been kept in mind by the Authority when examining the contractual documents in dispute in this case.

The 7 July 2002 employment agreement

[20] Mr Edwards claims that this agreement contained the terms and conditions of his employment applying from July 2002 and that some of its provisions remain in force. He seeks a declaration that the termination of employment clause 13.1 in particular requires Two Degrees to give him no less than three years' notice of termination or, at its discretion, pay remuneration of up to 36 months' salary in lieu of notice. Clause 13.1 provides as follows:

> *13.1* ***General Termination***
>
> *The Employer may terminate this agreement for cause, by providing **3 years** notice in writing to the Employee, subject to the condition that employment shall not be terminated within one year of the commencement date unless agreed by the Employee. Likewise the Employee is required to give **3 months** notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period. The Employer shall pay 36 months salary in lieu of notice should the Employer be unsatisfied.*

[21] Two Degrees contends that the 2002 individual employment agreement was drafted as a proposal of employment terms and conditions but one that was never finally accepted by the parties and therefore did not become binding on them. Alternatively, Two Degrees contends that if the document was a contract between the parties it was superseded or replaced in 2007 by the terms of a new contract of employment agreed to in principle in 2006 and which took effect from March 2007.

[22] A copy of the July 2002 agreement signed by Mr Edwards and the employer party (then known as Econet Wireless NZ Ltd) has not been produced in evidence. Two Degrees relies on largely circumstantial evidence that if Mr Edwards had believed he was entitled to three years' notice or payment in lieu, he would have disclosed that substantial liability of his employer when a due diligence exercise was

being carried out several years later in 2006 prior to the transfer of shares from KLR, a company Mr Edwards controlled or was closely connected to.

[23] The due diligence documentation completed by Mr Edwards makes no reference to the 2002 agreement or to the provision requiring him to be given three years' notice as a liability.

[24] I prefer, however, the direct evidence given by Mr Edwards that he did agree to the terms set out in the July 2002 agreement, as it has been corroborated by Mr Craig Fitzgerald in his evidence. In 2002 Mr Fitzgerald oversaw the start up of Two Degrees in New Zealand and was directly involved in negotiating with Mr Edwards the terms of his employment agreement with the company. His evidence is that those terms were reflected in the 7 July 2002 document. He said "I cannot recall whether the agreement was ever signed, but the document …… was prepared by the company and reflects the agreement we had reached with Tex."

[25] Mr Fitzgerald also explained the background to the three year notice period contained in the agreement, which was to reflect the critical importance of Mr Edwards and the work he was doing at the time, to the starting up of Two Degrees. The long period of notice was intended to be an acknowledgment of Mr Edwards' shareholding and investment in the company and was intended to give him a degree of protection moving forward at the same time that new shareholders became involved in the business.

[26] Mr Edwards' evidence is that Mr Fitzgerald had arranged for the agreement to be drawn up and he confirmed to Mr Fitzgerald he was happy with the terms offered, which were agreed to. Mr Edwards recalls signing a copy of the agreement but has been unable to locate it in his personal records.

[27] I find that Mr Edwards became entitled to receive 3 years notice of termination under the 7 July 2002 employment agreement. Whether that notice provision remains in force today as contended by Mr Edwards, depends on the effect of contractual arrangements which came into force by agreement in about March 2007 and also whether subsequently, in about June 2008, a new employment agreement was entered into by the parties. The terms of the March 2007 contract had earlier been documented in a letter written in about September 2006.

The September 2006 letter

[28] The 2006 letter, which Mr Edwards signed, recorded arrangements which he expressly agreed were to come into effect after an acquisition of shares from KLR his holding company. Upon the shares being transferred, a step referred to as *Completion*, the following arrangement was agreed:

> *We confirm that subject to Completion taking place, and KLR Hong Kong Limited ("**KLR**") entering into and performing its obligations under the Agreements:*
>
> *1. We will procure that the Company* [Two Degrees] *will offer you* [Mr Edwards] *a contract of employment to take effect on and from Completion. Such contract (which will supersede and replace all prior employment, consultancy and similar arrangements between yourself, KLR and the Company) will be on terms applying to senior executives of the Company, including as to duties, benefits, restrictive covenants and the like. Your salary will be NZ$350,000 per annum, your position will be COO or other position to be determined by the Board and you will report to the Chief Executive Officer of the Company. Notwithstanding the notice period which might be specified under your contract of employment the Company will employ you for a minimum period of one year following Completion (or make payment in lieu), unless your employment with the Company is terminated earlier by the Company as a result of your misconduct, or you voluntarily resign. Thereafter, you may be terminated by the Company at any time on not less than two months notice expiring on or after such one year period in accordance with the terms of your contract of employment.*

[29] The 2006 letter also recorded a term providing for participation by Mr Edwards in a share option scheme, which was also expressed to come into effect upon Completion of the share transfers, as follows:

> *2. You will be entitled to participate in any employee share option or profit sharing scheme established by the Company after Completion. Your participation will be commensurate with your position in the Company and no less favourable to you than comparable participation by other senior executives in such employee share option or profit sharing scheme, determined by reference to relative positions and responsibilities within the Company. The terms of any such employee share option or profit sharing scheme, and the extent of your entitlement to participate in the same (and the terms thereof), will remain at all times within the ambit of the Board of the Company.*

[30] There is no dispute between Mr Edwards and Two Degrees that the arrangements recorded in the letter of 2006, on which he had written "agreed," came

into effect in 2007 following completion of the share acquisition. In or about March 2007, Two Degrees began paying salary of $350,000 per annum to Mr Edwards, the level stipulated in the 2006 letter.

[31] Mr Edwards contends that when his salary was substantially increased to that level he retained his entitlement to three years' notice provided by the July 2002 agreement. He claims that clause 1 of the 2006 letter is to be read as referring back to and preserving the three year notice provision.

[32] Two Degrees contends that any entitlement to three years' notice Mr Edwards had under the July 2002 agreement was extinguished by the 2006 arrangements, including the provisions of clause 1 reproduced above, which were expressed to "supersede and replace all prior employment arrangements."

[33] In considering the construction to be placed on clause 1 and the 2006 letter generally, the Authority has had regard to the following principles of interpretation referred to, at para. [61], in the *Vector Gas* case:

> *… interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the Courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business commonsense.*

[34] The above was adopted by the Supreme Court from the judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 at 912.

[35] I find that the terms of employment, or what were really proposed future terms of employment, as recorded in the 2006 letter provided for notice of termination to be a period of "not less than two months". The only qualification was that there would be initially a minimum period of employment of one year following Completion; two months' notice could be given to expire on or after that one year period. The prospective terms of employment expressly provided that they were to "supersede and replace" all prior employment arrangements between Mr Edwards and Two Degrees.

Those words are to be given their natural and ordinary meaning, as there is no indication the parties intended otherwise, and nothing appears to have "gone wrong" with the language they used. This is apparent when the provisions are considered within the overall context of a proposal as to future terms of employment.

[36] I do not consider that in clause 1 the phrase "your contract of employment" can be read as referring to the July 2002 contract of employment which had provided for three years' notice. Clause 1 as drafted in the letter of 2006 was not itself a term of employment at that time but was a proposed term of a future employment intended to be offered in consideration of the share acquisition being completed. Clause 1 is a statement of future intention, as the language of it makes clear; "We will procure that the Company will offer you a contract of employment to take effect on and from Completion".

[37] That contract expressly was intended to supersede and replace "all" prior employment arrangements, not just some of those. I find that "your contract of employment" was used with reference to the future contract of employment Mr Edwards was to be offered upon Completion. The reference to "the notice period which may be specified under your contract of employment" must properly be read as a reference to a period of two months. The words make it clear that unless there was misconduct or Mr Edwards resigned, his employment had to run for a minimum period of one year before the two months' notice period could be invoked.

[38] In submissions for Two Degrees counsel Mr Drake referred to the September 2006 letter as a "letter of variation," but that is not an accurate characterisation or description of the document which if anything, expressly, is a "letter of confirmation." The letter confirmed that the signatories would bring it about that at a future date and upon transfer of his or KLR's shareholdings Mr Edwards would be offered a contract of employment containing the terms referred to in the letter. It is a letter recording arrangements between the parties to a share acquisition rather than parties to an employment agreement. The parties who undertook "to procure" Two Degrees to offer Mr Edwards a contract of employment were Beddington Holdings Ltd and GEMS 111 Ltd, who were not themselves Mr Edwards employers and would not seem to have been capable of varying his employment agreement with Two Degrees.

[39] I therefore find that under clause 1 of the proposed terms of employment when they became effective upon Completion in March 2007, Mr Edwards entitlement to

three years' notice was replaced by one of two months. Acceptance by him of a salary increase to $350,000 was part of the consideration for that change.

[40] With regard to clause 2 and the expressed entitlement to participate in any employee share option scheme, he was clearly given that benefit under the employment agreement when it began operating upon Completion. It will be further considered by the Authority below what Two Degrees was required to do in discharging its obligation to allow Mr Edwards "to participate" in a scheme established by the company after Completion.

[41] Two Degrees contends that whatever terms and conditions of employment Mr Edwards had up to about June 2008, after then by his conduct he entered into new terms and conditions under which his salary reduced to $200,000 per annum and his entitlement to notice became one month.

The June 2008 employment agreement

[42] After Mr Edwards had been receiving a salary of $350,000 per annum from March 2007 for the specified minimum period of 12 months, the company decided that the circumstances of his continued employment needed to be reviewed and that new terms and conditions were appropriate. A benchmarking exercise carried out indicated to Two Degrees that a salary of no more than $200,000 per annum was justified for the level of Mr Edwards' current employment. A contract was drafted by the company providing for that salary and also for a notice period of one month, as well as other terms and conditions. This was a standard form of agreement for senior employees of Two Degrees.

[43] The evidence of Mr Sean Dexter, who in 2008 was the Chief Operating Officer of Two Degrees, was that he had handed Mr Edwards the draft contract and "asked him to review the document and then either sign it or respond to me with his comments". Mr Dexter's evidence was:

> *Despite a number of reminders and direct requests for him to sign, Tex never signed the employment agreement, nor did he come back to me with his comments. When pushed he would say that it was with his lawyer. When pushed further he did say that he was not happy about the designation or the reduction in salary. We fixed the designation issue to his satisfaction (so he was called "Strategist"). At no time did he take any steps to address the salary issue. I knew he was not happy but he never actually disagreed or proposed any alternative. We implemented the new rate in June* [2008]*, and he said*

> *nothing to me, or to my knowledge Helen Roach or any other manager, about it. I operated on the basis that we had an agreement.*

[44] I accept Mr Edward's evidence given in cross examination that as well as Mr Dexter making that request, Mr Bill McCabe, Chief Commercial Officer, asked him three times to sign the contract. Mr Edwards said he had indicated that he did not intend to.

[45] Two Degrees attached some importance to having the agreement signed. This can be seen from the evidence of Mr Edwards, which was not disagreed with by Mr Dexter, that in around May 2008 Mr Dexter became impatient during a meeting and said "Tex, sign the fucking agreement," frustrated apparently by Mr Edwards continued refusal to sign the agreement. In June with the draft agreement remaining unsigned, Two Degrees began paying Mr Edwards the salary of $200,000 the agreement provided for.

[46] After about three pay rounds at the substantially reduced rate of salary, Mr Edwards' solicitor, Mr Michael O'Brien, contacted Ms Helen Roach who had responsibility for Two Degrees Human Resources function and, I accept, in about July 2008 advised he had been instructed and that he was in the process of assisting Mr Edwards to review the proposed employment agreement. On 15 August 2008, I also accept, Mr O'Brien rang Ms Roach again and advised that Mr Edwards was not prepared to accept the reduced terms of the draft agreement, specifically the reduced salary.

[47] There was also an earlier email exchange in June 2008 in which Mr Edwards, with reference to "employment details," advised that the contract details he had received in the week before conflicted with other documentation and that he could not accept those details at that stage. He advised that he had passed everything to an adviser to sort out and that the adviser would be in touch with the company. Ms Roach had replied to this on the same day, "okay Tex."

[48] Two Degrees in submissions has relied on the authority of *Brodgen v. Metropolitan Railway Co* (1877) 2 AppCas. In that case from the subsequent conduct of parties it was able to be inferred by the Court that they had mutually approved the terms of a draft agreement, although it had remained unsigned by one party. Performance of the contract by the parties under the terms drafted was held to indicate the commencement of the agreement between them.

[49] The Authority must examine all of the circumstances revealed in evidence to determine, as a matter of fact and degree, whether by his conduct in not raising particular objections to any terms of the contract and by receiving the substantially reduced salary over a number of pay periods, Mr Edwards had assented to the terms of the draft agreement given to him by Mr Dexter around the middle of 2008.

[50] Viewed objectively, I consider there was no assent given by Mr Edwards. It is significant that he would not sign the draft contract despite persistent requests from Mr Dexter and Mr McCabe for him to do so. Written employment agreements are a requirement of law and the Employment Court has recently observed in *Smith v. Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, at para. [101], that parties do not intend that they will each be bound by a draft written agreement unless and until it is executed by the writing of their signatures. The Court said this was so "as with most contracts, and employment contracts or agreements in particular",

[51] The need for commercial certainty and caution to be exercised is likely to have led Two Degrees to regard a signed contract as essential. A reasonable person observing the behaviour of Mr Dexter, Mr McCabe and Mr Edwards would, in my view, consider that by declining to sign the agreement despite persistent requests to do so, Mr Edwards was conveying his disagreement with the draft or some of its provisions. He had also indicated some dissatisfaction with "details" of the draft. Despite that level of resistance Two Degrees simply commenced paying him the lower salary. Relying on Mr Edwards' acceptance of it over a period of time was not sufficient to bring an agreement into existence.

[52] It was also a relatively short period of time before Mr Edwards' solicitor, Mr O'Brien, advised that Mr Edwards had not accepted the agreement and wished to review it. The action of Two Degrees' continuing to pay the lower salary over a period of some 18 months did not create agreement with regard to the draft terms. Mr Edwards could not reasonably be expected to have rejected his pay and sent it all back to Two Degrees as a demonstration of his opposition to the change that had been imposed. Mr Edwards and Two Degrees may be equally guilty of not being responsive and communicative in the situation they faced. Both had good faith obligations in this regard, to be discharged with the objective of maintaining a productive employment relationship by identifying any changes needed to the draft agreement before it was considered acceptable to Mr Edwards and Two Degrees.

[53] I therefore find that Mr Edwards remains entitled to receive a salary of $350,000 per annum, although Two Degrees is entitled to lawfully terminate his employment by notice of two months. Leave is reserved to refer the assessment of the arrears of salary due to Mr Edwards back to the Authority if the parties cannot agree.

Participation in share option scheme

[54] Clause 2 of the 2006 letter, which later became a term of Mr Edwards' employment upon Completion of the share transfer, provided that the extent of Mr Edwards' entitlement to participate in any employee share option scheme established by the company would remain at all times within the ambit of the Board of the company. I do not consider that within its ambit the Board could in effect have vetoed his participation or denied him the express entitlement to participate. It could not have prevented his entry to a scheme by taking into account his personal circumstances including the possibility that he was likely to be leaving the company or taking into account his shareholding through KLR and the considerable value of that. I find that the Board's purported exercise of discretion had the effect of disallowing Mr Edwards to take a part or share in the scheme, contrary to the express term of clause 2.

[55] Under the 2010 Share Plan entry was a matter for approval to be given by the trustee, NZ Communications Ltd, in accordance with the terms and conditions of the Scheme. The Board of Two Degrees was given considerable powers within the Scheme, such as deciding the number of shares an employee would be issued upon entering the Scheme, but entry itself was a matter for the trustee to decide and not Two Degrees.

[56] The ambit of the Board extended to matters such as determining the extent of participation that was commensurate with Mr Edwards' position, and determining that his participation would be not more or less favourable to Mr Edwards than comparable participation by other senior executives in such a share option scheme, as "determined by reference to relative positions and responsibilities within the company". While some of the terms of the scheme were a matter for the exercise of reasonable discretion by the Board, in my view Two Degrees could not determine whether or not Mr Edwards could enter the scheme in the first place.

[57] I therefore find that Mr Edwards has been denied his share option participation entitlement under clause 2 of his employment agreement. That entitlement was an ongoing one and remains so, as there was no subsequent employment agreement entered into which extinguished it.

[58] As with the matters of fixing quantum in relation to arrears of salary due to Mr Edwards, I consider the parties should also try to resolve the question of compensation due to Mr Edwards for being denied his entitlement to participate in a share option scheme. Leave is reserved to refer the fixing of compensation back to the Authority if the parties cannot agree.

Penalty claim

[59] When Two Degrees gave notice of termination to Mr Edwards on 15 May 2012 the period notified was two months, so there was no breach of the employment agreement in that regard.

[60] I find that Two Degrees breached clause 1 of the March 2007 employment agreement (as recorded in the September 2006 letter) each time after mid-2008 it failed to pay Mr Edwards salary at the rate of $350,000 per annum. Under s 135 (5) of the Employment Relations Act a claim for a penalty must be commenced with 12 months after the date when the cause of action first became known to the applicant for the penalty. Mr Edwards said that he found out in the middle of 2008 that his salary was being paid at a reduced rate. He commenced his claim for penalties on 28 February 2012, about 3 years and eight months later.

[61] No penalty therefore can be awarded for any actions or omissions of Two degrees occurring prior to 28 February 2011. The breach with regard to salary reduction is a continuing one which has occurred on each payday. (There has been no breach since 3 September 2012 when the parties became subject to interim orders made by the Employment Court.) The seriousness of the breach must be considered against the circumstances of Mr Edwards' employment. He said he had not taken action over the reduced salary because it was a relatively minor issue and he was "being an entrepreneur" trying to deal with other more major issues and not just those directly arising from his employment relationship.

[62] In the circumstances a penalty will be imposed in respect of a single breach occurring within the 12 month limitation period in March 2011. The maximum was

$10,000 at that time (it doubled from 1 April 2011). I see no basis for awarding any of the penalty to Mr Edwards who is legally able to recover all underpayments of salary and interest on the amount at 5%. Two Degrees is ordered to pay $4,000 to the Authority, pursuant to ss 134 and 135 of the Act.

[63] The penalty claim for breach of s 4(1) of the Act insofar as it relates to the failure to pay salary has been addressed by the penalty of $4,000 awarded for that breach.

[64] With regard to the penalty claim reference is also made in submissions to a letter dated 8 April 2010 from Mr O'Brien to Two Degrees' solicitors at that time, Minter Ellison. Two Degrees was requested to address the reduction in Mr Edwards' salary issue and provide details of any relevant share option scheme that had been offered to senior employees. Reference was made in the letter to Mr Edwards' entitlement to participate in such scheme. An alleged failure to respond to the letter is the basis for a penalty sought presumably for breach by Two Degrees of the good faith obligation to be responsive and communicative. If there was such failure it was complete in 2010 within a reasonable time, being no more than a few months after the letter had been received. Any breach occurring in 2010 was well outside the time limit for claiming a penalty.

[65] I consider it is likely there was a breach of clause 2 of the 2007 employment agreement with regard to Mr Edwards' express entitlement to participate in a share option scheme, but it occurred outside of the statutory 12 month time limit, probably at some time or times during 2007 to 2010. The evidence on which to found a penalty claim as to the exact time and the acts or omissions of Two Degrees that created the breach, is insufficient.

Interest

[66] Interest is to be paid on the arrears of salary from the date Mr Edwards commenced his claim in the Authority, 28 February 2012. The prescribed rate of interest under s 87(3) of the Judicature Act 1908, as referred to by clause 11 of Schedule 2 of the Employment Relations Act, is 5%.

Costs

[67] Costs are reserved. Given that the parties in their positions taken have each prevailed to some extent in this investigation, and given the need for them to try and resolve quantum issues from this determination themselves, and also given the pending Employment Court hearing, no further directions about costs are given at this point but they may be applied for.

A Dumbleton
Member of the Employment Relations Authority