

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Suzanne Giddens (Applicant)
AND Lisa Gillian Phelan (Respondent)

AND Andre Kini (Applicant)
AND Lisa Gillian Phelan (Respondent)

REPRESENTATIVES Sue Giddens and Andre Kini In person
Miles Edwards, Counsel for Respondent

MEMBER OF AUTHORITY Leon Robinson

INVESTIGATION MEETING 23 September 2005

SUBMISSIONS RECEIVED 4 & 7 November 2005

DATE OF DETERMINATION 7 December 2005

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

- A** Lisa Gillian Phelan is ordered to pay the sum of \$1,500.00 as a penalty in respect of her inciting, instigating, aiding and abetting Max Magazines Limited's breach of its obligation to pay Suzanne Giddens her annual leave, public holiday, commission and expense entitlements due at the termination of her employment. Of this sum, pursuant to section 136 of the Employment Relations Act 2000, Lisa Gillian Phelan is to pay \$750.00 to Suzanne Giddens and the remaining \$750.00 into the Authority, that sum to be paid by the Authority into the Crown Bank Account.
- B** Lisa Gillian Phelan is ordered to pay the sum of \$1,000.00 as a penalty in respect of her inciting, instigating, aiding and abetting Max Magazines Limited's breach of its obligation to pay Andre Kini his arrears of salary, annual leave, and public holiday pay entitlements at the termination of his employment. Of this sum, pursuant to section 136 of the Employment Relations Act 2000, Lisa Gillian Phelan is to pay \$500.00 to Andre Kini and the remaining \$500.00 into the Authority, that sum to be paid by the Authority into the Crown Bank Account.
- C** The parties are encouraged to resolve costs between them, but failing agreement, Suzanne Giddens and Andre Kini are to lodge and serve a memorandum within 14 days of the date of this Determination making a case for any costs of professional representation. Mr Edwards is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.
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The problem

[1] Ms Suzanne Giddens (“Ms Giddens”) and Mr Andre Kini (“Mr Kini”) seek a penalty against the director of their former employer Max Magazines Limited (“Max”), Ms Lisa Gillian Phelan (“Ms Phelan”).

The facts

[2] Max published three magazines *Style*, *Player* and *The Cut*.

[3] Ms Giddens was employed by Max in its sales team on or about 1 June 2004. The terms of her employment were those set out in an individual employment agreement dated 20 April 2004. Ms Giddens’ duties were later varied so that she worked as the editor of Max’s *Style* publication.

[4] Mr Kini was employed by Max as art director of its *Style* publication and he commenced employment on 28 April 2003. The terms of his last engagement were those set out in an individual employment agreement dated 1 April 2004.

[5] I have not sighted signed employment agreements. The parties do not dispute that the terms of employment were those recorded in the unsigned agreements produced to the Authority. There is no dispute that agreements were signed however they have not been produced. I find the parties were bound by the terms of the said employment agreements.

[6] From 2003, one Mr Carl McIntyre (“Mr McIntyre”) and one Mr Shane Parker (“Mr Parker”) joined Max’s management.

[7] Ms Phelan was Max’s sole director. She took an extended period of leave from December 2004 leaving the management of Max in the hands of Mr McIntyre and Mr Parker.

[8] In mid April 2005, Mr McIntyre advised Ms Phelan that Max was in a serious financial state. Ms Phelan arranged a meeting with a financial adviser whom Ms Phelan and Mr McIntyre met with. The adviser recommended Max sell its three publications to realise funds and pay creditors. Ms Phelan accepted that advice and instructed the adviser to liaise with Messers McIntyre and Parker to effect the sale.

[9] Mr Kini gave notice of his resignation by letter dated 20 April 2005. His employment was to end on 20 June 2005.

[10] Ms Giddens gave notice of her resignation by letter dated 9 May 2005. That letter advised as follows:-

9 May 2005
Dear Carl and Shane

I wish to tender my resignation today, waiving my contract’s two weeks’ notice period and extending it through to the 20th of June 2005 to ensure STYLE’s winter issues goes on-sale, and is appropriately marketed and merchandised.

As per my contract, the 20th of June will be the commission date for this issue, so full payment of commission for STYLE and PLAYER and all outstanding holiday pay and expenses will be due on that date.

I wish the team every success.

Yours sincerely
Sue Giddens

[11] Ms Phelan was informed by her adviser that he was experiencing difficulties in arranging the sale of the publications. As a result, Ms Phelan returned from overseas on Sunday 5 June 2005 to resume her duties as managing director. Messers McIntyre and Parker ceased to be involved in Max's management.

[12] Ms Phelan advised both Ms Giddens and Mr Kini they were not required to work out their respective notice periods but would instead be on paid leave.

[13] In their respective periods of paid leave, both Ms Giddens and Mr Kini made repeated requests for clarification of their severance pays due on 20 June 2005. Ms Phelan referred matters to the pay clerk Ms Marie Aekins ("Ms Aekins") to resolve. Ms Aekins prepared respective spreadsheet calculations and emailed them to Ms Giddens and Mr Kini.

[14] There then followed an exchange of correspondence which I find related solely to the verification of time in lieu entitlements. Ms Phelan did not respond to Mr Kini.

[15] On 21 June 2005, Ms Giddens wrote to Ms Phelan by email in the following terms:-

Dear Lisa

I have checked my bank balance this morning. My final pay, holiday pay, commission and lieu pay have not been paid in. These payments should have been made yesterday. By my calculations the amount is just short of \$15,000 net.

It is extremely concerning that I have not been paid on time. If you have any explanation I would be pleased to hear it.

In the circumstances, Lisa, I expect this to be sorted out today.

Sue

[16] Ms Phelan responded the same day as follows:-

Sue,

Your fortnightly AP went into your account yesterday as scheduled. I will raise the outstanding issues with the accountant tomorrow.

Lisa

[17] Ms Giddens' salary was credited to her bank account on 22 June 2005.

[18] By letter dated 21 June 2005, Mr Kini's solicitor wrote to Max making demand on Mr Kini's behalf for the following sums:-

Salary/commission/holiday/leave due	
Ordinary pay (salary) (before tax)	\$2,307.69
Annual holiday pay (before tax)	\$4,883.07
Public holidays (lieu days) (before tax)	
6 days	\$1,384.62
Holiday pay not paid for public holidays worked (.5 x	
6 days = 3 days) (before tax)	\$692.31

Agreed time off in lieu not taken - 1 week	<u>\$1,153.85</u>
	<u>\$10,421.53</u>

By letter dated 22 June 2005, Ms Giddens' solicitor wrote to Max making demand on Ms Giddens' behalf for the following sums:-

Salary/commission/holiday/leave due	
Ordinary pay (salary) (before tax)	\$2,307.69
Commission (before tax)	\$12,485.00
Annual holiday pay (before tax)	\$5,772.48
Public holidays (lieu days) (before tax)	\$692.31
Holiday pay not paid for public holidays worked (.5 x 3 days = 1.5 days) (before tax)	\$346.15
Agreed time off in lieu not taken	\$1,153.85
Balance of time off in lieu (spring issue Style)	\$230.77
Expenses	<u>\$508.54</u>
	<u>\$23,496.79</u>

(both hereafter referred to as the "letters of demand").

[19] Ms Phelan relied on Ms Aekin's assessment of Ms Giddens' and Mr Kini's entitlements and matters continued to remain unresolved. Ms Phelan says she did not know how to resolve matters and in the context of her ongoing consultations with lawyers and accountants in relation to sale of the business and liquidity issues, she raised the situation with Max's lawyers for assistance upon her receipt of the letters of demand.

[20] Ms Phelan gives this evidence of advice Max was given:-

40. *Max had been advised by its accountants and solicitors that it was trading while insolvent and that it needed to sell its assets, primarily being the Magazines and their associated intellectual property and place Max into voluntary liquidation. This was to maximise the return to the creditors of Max.*

41. *Max was also advised that it should only make necessary business payments as once Max was placed into liquidation, Max's liquidators would be entitled to void any transactions that had occurred in the six months prior to the date of Max being placed into liquidation. However, this was also to be balanced with the agreements for sale and purchase of the Magazines requiring Max to make certain payments prior to the sale of the Magazines.*

42. *When I initially raised the situation regarding Mr Giddens and Mr Kini, Max was advised that provided Ms Giddens' and Mr Kini's entitlements could be satisfactorily quantified and verified, I was advised that there was no issue with making payment of the same.*

[21] Ms Phelan then says she "determined" Ms Giddens was not entitled to commissions for the June issue of *Style* until August 2005. She says she discovered Ms Giddens and Mr Kini had worked on establishing their own magazine while employed by Max and had solicited a former Max employee to work on that new publication. She says too that she discovered Ms Giddens had entered into unauthorised contra agreements with Max's clients to provide free advertising in *Style* in exchange for free botox treatments as well as misusing confidential information.

[22] She says these matters left her unsure of Ms Giddens' and Mr Kini's entitlements. She then sought advice from her advisers. She accepted that advice and acted on it. I shall refer to that advice later.

[23] Max's shareholders passed a special resolution placing it into voluntary liquidation on 9 August 2005.

[24] Ms Giddens and Mr Kini were statutorily barred from proceeding against Max for their entitlements consequent upon Max's voluntary liquidation. Ms Giddens and Mr Kini both understand this application is not concerned with recovering those entitlements. They proceed now seeking a penalty against Ms Phelan personally in respect of breaches by Max of their employment agreements with it.

The legal principles

[25] The *Employment Relations Act 2000* ("the Act") provides for penalties as follows:-

134. *Penalties for breach of employment agreement*

(1) *Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.*

(2) *Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[26] As the learned authors of *Brookers Employment Law* note, the words of the section will embrace any person who encourages, or in any way assists, any person in the breach of an employment agreement, no matter how slight the degree of participation may have been.

[27] Penalties are penal sanctions for breaches of an agreement. The respondent's means or ability to pay is relevant. The Act prescribes maximum penalties and presumes that the penalty will, unless the Authority orders otherwise, be paid to the Crown in the same manner as a fine is. The Authority may order that the whole or any part of a penalty be paid to any person.

[28] In *PPP Industries Ltd -v- Doggett*¹ the Employment Tribunal held that where there was a breach of contract, it was not obliged to impose a penalty, but it would normally do so where the breach is clear. In that particular case, the breach was clear. The employee's failure to give notice was deliberate and wilful.

[29] Penalties being punitive in nature, they are directed at proscribing certain undesirable behaviours or conduct. It is logical then that such behaviours be deliberate or wilful. In *Ruapehu District Council -v- Northern Local Government Officers Union*² the Court stated:-

generally speaking, a penalty is appropriate only where there has been a wilful breach or default.

[30] While the requisite standard of proof was previously generally held to be beyond reasonable doubt, it has recently been made plain that the standard to be applied is the ordinary civil standard on the balance of probabilities. The Court has stated:-

In all instances, that is to say in both the personal grievance and the penalty action, the standard of proof required to be attained to discharge the relevant burden of proof is the standard applying in all civil cases: proof on a balance of probabilities. In criminal cases, the higher standard of proof beyond reasonable doubt is required but that has no application in this Court except when it is exercising criminal jurisdiction or is contemplating imprisonment for disobedience to an injunction or a compliance order. I am aware of judicial expressions to the contrary but I have several times reserved my position on the subject and believe it is time for this Court to make the position plain, even if in practice it may make little difference.³

¹ [1996] 2 ERNZ 234, and see also *Wellington Shop etc IUW v Paul Pretty Removals Ltd* [1988] NZILR 312

² unreported, WEC54/92, 16 November 1992, Castle J

³ *Xu -v- McIntosh* [2004] 2 ERNZ 448, Goddard CJ para 29

[31] These are the legal principles the Authority applies in resolving the present employment relationship problem.

Determination

[32] It is necessary first to establish breaches of the respective employment agreements. Those breaches must be clear.

Annual leave payments

[33] Both employment agreements contained the express term that:-

7.1 At the end of each 12 months of employment the employee is entitled to (sic) paid annual leave of three weeks calculated in accordance with the provisions of the Holidays Act 2003.

[34] It is admitted in the statement in reply that both Ms Giddens and Mr Kini are owed annual leave entitlements. I am satisfied that Max acted in breach of the employment agreements in failing to pay Ms Giddens and Mr Kini what was due to them for annual leave in their final pay.

Public holidays

[35] Both employment agreements contained the express term that:-

8.1 The employee is entitled in each year of his/her employment to the eleven public holidays provided for in the Holidays Act 2003.

[36] Max by its statement in reply admits it owes Ms Giddens and Mr Kini payment for public holidays they worked. I am satisfied that Max acted in breach of the employment agreements in failing to pay Ms Giddens and Mr Kini what was due to them for public holidays in their final pay.

Lieu days

[37] As for the allegations relating to non-payment for lieu days, I find on the evidence those entitlements to be in dispute. I accept that the pay clerk had raised issues surrounding the payments sought. I give Max the benefit of the doubt in relation to this claim. However, Max ought to have resolved the matter before Ms Giddens and Mr Kini left the employment.

[38] I am not persuaded that I should find a clear breach in this respect sufficient to raise a case for penalty.

Commissions

[39] The employment agreement at schedule one provides:-

Commission paid 20th following invoicing to the client

And at clause 6.8

Commissions will be paid 20th of month following invoicing to the client.

[40] The statement in reply admits commissions are owed to Ms Giddens in the sum of \$12,485.00. It has not paid those commissions. I am satisfied that Max acted in breach of the employment agreement in failing to pay Ms Giddens what was due to her for commission in her final pay.

Expenses

[41] The employment agreement at clause 6.2 provides:-

6.2 *All work related expenses can be claimed - only if approved prior by directors*

[42] The statement in reply admits expenses are owed to Ms Giddens in the sum of \$508.54. It has not paid those expenses. I am satisfied that Max acted in breach of the employment agreement in failing to pay Ms Giddens what was due to her for expenses in her final pay.

Arrears of wages

[43] Clause 6.7 of the employment agreement provides as follows:-

6.7 *Salary shall be paid fortnightly by direct credit to the employee's nominated bank account.*

[44] Mr Kini was not paid his final salary due to him upon termination. That is admitted in the statement in reply. I am satisfied that Max acted in breach of the employment agreement in failing to pay Mr Kini his outstanding salary in his final pay.

Determination

[45] I note that there is no evidence that Max raised a dispute in relation to lieu days as a reason for its failure to pay Ms Giddens and Mr Kini their final pays. That was not the reason why Ms Giddens and Mr Kini were not paid what they were owed when their employments ended. I have reached a conclusion as to the particular reason why they were not paid.

[46] Parliament has expressly provided that penalties for breaches by an employer of the provisions of the Holidays Act 2003 shall be recoverable only by a labour inspector⁴. I do not regard that section as precluding the present action by the applicants and on the contrary, regard it as the appropriate remedy available to them for the wrong that they allege. I note that there is no legislative provision relating to penalties for inciting, instigating, aiding or abetting breaches of the Employment Relations Act 2000 or other Acts. However, all the breaches I have discussed above are breaches of the terms of the employment agreements.

[47] I have been invited to consider bank statements detailing Max's business transactions. The applicants argue these statements evidence various payments being made by Max in priority over their severance entitlements. That information has proved controversial in this investigation. Max's representative has been vehement in its opposition to the Authority receiving that information. I had reserved my position on the significance of this information and resolved it prudent not to consider it until after my investigation meeting in the event that I regarded it was relevant. I now confirm my preliminary view here. I have resolved I do not consider it relevant for present purposes principally because of evidence I heard from Ms Phelan at investigation meeting. I confirm too, I have not looked at those documents. I expect that declaration to deal decisively with Max's opposition.

⁴ Section 76 *Holidays Act 2003*

[48] It is plain from the evidence that at the material time, Max was in a serious difficult financial position. So much so, its advisers recommended its liquidation. That situation is not disputed and is proved independently of the contentious bank statements. But I have not apprehended Max or Ms Phelan to plead that the obligations owed to Ms Giddens and Mr Kini could not be honoured because of liquidity issues. Rather, I have apprehended from Ms Phelan's evidence that those obligations were not a priority to Max. That is what I now find.

[49] I am satisfied that Max's failure to pay Ms Giddens and Mr Kini their entitlements due at termination was not unintentional or inadvertent. I find it was deliberate and intentional. I have reached that conclusion because of this candid evidence given by Ms Phelan as follows:-

50. Accordingly, Max sought further professional advice and was advised that as Max was to be placed into voluntary liquidation, resolution of the issue of Mr (sic) Giddens and Mr Kini's entitlements in all the circumstances should be left to the Liquidators, who would take steps to verify and quantify the sums owing to them and then make payment of the same. I felt comfortable with this course of action because Max was advised that if the sale of the Magazines went through there would be more than likely to be sufficient funds available to make payment of creditors such as Max's former employees. Accordingly, while I accepted there would be a delay in making the finalisation of Ms Giddens' and Mr Kini's entitlements, I believed that they would be paid exactly what they were entitled to.

[50] It was apparently the case that Max was advised that as voluntary liquidation was imminent together with the proceeds of the sale of its Magazines, there would be sufficient funds in the liquidation estate to pay the Applicants as preferential creditors, and therefore the resolution of the dispute should be left to the liquidators.

[51] Ms Phelan told me Ms Giddens and Mr Kini "*weren't going to be paid because they would be paid by the liquidator*". She said she sought an assurance from her adviser that Ms Giddens and Mr Kini would be paid out of the liquidation estate and that she accepted that assurance. I have concluded Ms Phelan turned her mind to the question, took advice over the situation and followed that advice not to pay Ms Giddens and Mr Kini.

[52] Unfortunately for Ms Phelan there are consequences for her election to act on the advice she received. I find her now liable to a penalty for personally "*inciting, instigating, aiding and abetting*" Max's breaches. She as the company's sole director, was the controlling mind and "brains" of the company. She was the person in a position to influence compliance by Max of its contractual obligations. On the contrary, she influenced it to act in breach of its duty. Liability on this basis has been imposed previously⁵. I have no difficulty in concluding Ms Phelan's involvement and responsibility as such.

[53] I find that Ms Phelan acted knowingly aiding and abetting Max in its breach. She did so acting on advice. Liability in that regard too has also been previously imposed⁶.

[54] I am satisfied that on the balance of probabilities, this is a deserving case for a penalty and such a penalty is necessary to maintain adherence to the objects and intents of the Employment Relations Act 2000. It is appropriate to denounce Ms Phelan's behaviour by way of penalty.

[55] I accept that the consequences of the breaches for Ms Giddens and Mr Kini caused them much inconvenience and stress. The work/wage bargain is basic and fundamental to the employment relationship. I adopt the totality principle and assess the seriousness of the breaches

⁵ *Peacock -v- NZ Performance etc Union* [1990] 2 NZILR 257, *United Food Workers -v- Talley* [1992] 3 ERNZ 423

⁶ *Service Workers Union of Aotearoa Inc -v- Southern Pacific Hotel Corp (NZ) Limited* [1993] 2 ERNZ 513

viewed collectively and take account of the overall picture in deciding the appropriate level of penalty to impose.

[56] Lisa Gillian Phelan is ordered to pay the sum of \$1,500.00 as a penalty in respect of her inciting, instigating, aiding and abetting Max Magazines Limited's breach of its obligation to pay Suzanne Giddens her annual leave, public holiday, commission and expense entitlements due at the termination of her employment. Of this sum, pursuant to section 136 of the Employment Relations Act 2000, Lisa Gillian Phelan is to pay \$750.00 to Suzanne Giddens and the remaining \$750.00 into the Authority, that sum to be paid by the Authority into the Crown Bank Account.

[57] Lisa Gillian Phelan is ordered to pay the sum of \$1,000.00 as a penalty in respect of her inciting, instigating, aiding and abetting Max Magazines Limited's breach of its obligation to pay Andre Kini his arrears of salary, annual leave, and public holiday pay entitlements at the termination of his employment. Of this sum, pursuant to section 136 of the Employment Relations Act 2000, Lisa Gillian Phelan is to pay \$500.00 to Andre Kini and the remaining \$500.00 into the Authority, that sum to be paid by the Authority into the Crown Bank Account.

Costs

[58] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Giddens and Mr Kini are to lodge and serve a memorandum making a case for any costs of professional representation within 14 days of the date of this Determination. Mr Edwards is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority