New Zealand Employment Relations Authority Decisions

Gillette v Sunpower Limited (Christchurch) [2017] NZERA 1001; [2017] NZERA Christchurch 1 (4 January 2017)

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Last Updated: 6 March 2017

Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 1
3000036

BETWEEN NATHAN GILLETTE Applicant

A N D SUNPOWER LIMITED Respondent

Member of Authority: David Appleton

Representatives: Jacqueline Stephenson, Counsel for Applicant

Tony Stallard, Counsel for Respondent Investigation Meeting: 13 and 14 December 2016 at Nelson Submissions Received: 21 December 2016 from both parties Date of Determination: 4 January 2017

DETERMINATION OF THE AUTHORITY

A. Mr Gillette was an employee of the respondent between

22 February 2016 to 28 July 2016.

B. Mr Gillette is owed arrears of salary and other payments in accordance with the orders contained in this determination.

C. Mr Gillette was unjustifiably dismissed from his employment.

The respondent is ordered to pay remedies to Mr Gillette in accordance with the orders contained in this determination.

D. A global penalty is imposed upon the respondent for a breach of good faith and for breaching Mr Gillette's employment agreement.

E. Costs are reserved.

Prohibition from publication order

[1] A number of documents were disclosed during the Authority's investigation relating to clients and prospective clients of Sunpower Limited. The identities of these clients and prospective clients are not relevant to the issues to be determined and I therefore prohibit publication of their names, and other information which could lead to their identities becoming known.

Employment relationship problem

[2] Mr Gillette claims arrears of pay in respect of the entire period for which he says he was employed; namely from the alleged commencement of his employment on 22 February

2016 to the date of his alleged dismissal on 28 July 2016. In the alternative, he claims a personal grievance for unjustified disadvantage arising out of the non-payment of salary and wages for the duration of his employment. He also claims he is owed bonus payments for this period. Finally, he also claims that he was unjustifiably dismissed from his employment on 28 July 2016.

[3] The respondent denies that Mr Gillette was an employee at the times claimed, that any wages or moneys are payable, and denies that he was unjustifiably disadvantaged. It asserts that the work Mr Gillette did between February and July 2016 was all done in the capacity of a deemed director and/or shareholder.

[4] Furthermore, the respondent argues that the raising of a personal grievance for unjustified disadvantage is out of time in respect of any issue greater than 90 days prior to the raising of that personal grievance and the respondent does not consent to the matters being raised out of time.

[5] Finally, the respondent denies that Mr Gillette was unjustifiably dismissed. It asserts that the employment relationship was not due to commence until 31 August 2016 and that the applicant abandoned his employment by not reporting to work on that day.

Brief account of events leading to the termination of the relationship

[6] Mr Gillette is a citizen of the United States of America and, prior to arriving in New Zealand, had lived with his wife and three children in Singapore for ten years. The respondent sells and installs solar energy equipment.

[7] Mr Gillette, who was looking to move to New Zealand with his family, responded to an advertisement for a sales position within the respondent company in late 2015. Mr Gillette's evidence is that he had negotiations with the director and main shareholder of the respondent, Patrick Green, in December 2015 and, by 21 December, it had been agreed that Mr Gillette's base salary would be $60,000 per annum, together with commission. Mr Gillette says that he and Mr Green then also agreed that Mr Gillette would become a shareholder of Sunpower Limited and, to that end, a share purchase agreement was negotiated.

[8] Mr Gillette engaged a lawyer in Nelson to advise him on the content of the draft share purchase agreement as well as a draft individual employment agreement that had been provided to him by Mr Green. He also engaged a licensed immigration adviser to assist him obtain a work visa. Sunpower Limited engaged Mr Stallard as its adviser on the shareholder and employment issues, although it seems it had no separate immigration advice.

[9] Mr Green wrote a letter of support to Immigration New Zealand (INZ) arguing that Mr Gillette was the only applicant available who had the required mix of technical sales and senior level sales experience needed by the company, and that no New Zealander was available who fulfilled the needs of the company. He also filled in an "Employer Supplementary Form INZ 1113" which required the employment agreement to be attached, and which made clear that Mr Green was offering employment to Mr Gillette on behalf of the respondent company. Mr Green signed the form on 21 January 2016 declaring, inter alia, that the contents of the form and the information provided were true and correct.

[10] Presumably on the basis of this application and letter of support from Mr Green, Mr Gillette was issued with a work visa by INZ which stated that his start date was

10 February 2016, that it was valid for five years, and that the holder of the visa could only work as a technical sales representative for Sunpower Limited in Nelson.

[11] The employment agreement between Sunpower and Mr Gillette was signed by the parties on 21 January 2016. Whilst the employment agreement does not state when the employment was to start, it does state the following at the First Schedule:

Remuneration

Commencing on 30TH January 2016, the remuneration package will consist of forty (40) hours a week at a salary of $60,000 (SIXTY THOUSAND DOLLARS) a year.

At the end of a 90 (ninety) day trial period a formal review shall be completed between the Employee and Employer.

The Employee will qualify for the On Target Earnings ("OTE") Bonus Scheme outlined below. The OTE scheme provides a chance to earn bonuses based on performance against targets, on a sliding scale.

[12] The majority of the rest of this schedule sets out the details and mechanics of the OTE Bonus Scheme. The employment agreement also contained an entire agreement clause and, separately, a variation clause, which stated as follows:

The parties agree that either party may at any time request a variation to the terms and conditions of employment, however, any variation shall be by mutual agreement only and shall not be binding upon any party unless recorded in writing and signed by both parties.

[13] The Authority also saw a copy of the share purchase agreement between Mr Gillette and Mr Green. In essence, this provided for Mr Gillette to buy 26% of the shareholding for

$52,000, payable in two tranches. The first $32,000 was to be paid on the settlement date in return for 16% of the shares, and a further $20,000 was payable in return for a further 10% of the shares on the sixtieth day after the establishment of a sales department and the hiring of a sales executive to head it.

[14] The share purchase agreement also stipulated that, when the $20,000 tranche was paid, Mr Gillette would be appointed a director of the respondent. It is Mr Gillette's evidence that the sales department was never created and no discussion about it took place. Mr Green's evidence is that Mr Gillette was to become the sales executive once he became a director of the company.

[15] Mr Gillette also had an option to buy a further 23% shareholding for a further

$46,000, which option was to be exercised by him "at any time up to the 89th day after the creation of the dedicated Sales Department and the appointment or engagement of an agreed

upon sales executive to head that department". Mr Green says that the 89th day was intended to tie in with the 90 day trial period in the employment agreement. I will examine this further below.

[16] Mr Gillette arrived in New Zealand on 18 February 2016, turned up for work at the respondent's office on 22 February, and on 24 February paid the full amount of the consideration required to purchase the 49% shareholding. Mr Gillette's case is simple; it is that he was an employee from 22 February 2016 until he was dismissed on 28 July.

[17] Mr Green's case appears to be that Mr Gillette was an employee when he arrived on

22 February, but that when Mr Green learned that Mr Gillette had arrived with his two eldest children but without his wife, they then agreed that Mr Gillette's start date would be deferred until 1 April, so he could settle into the job and life in New Zealand. He says that they regarded this as permissible because of the variation clause in the employment agreement. Mr Gillette denies that such an agreement was ever made.

[18] Mr Green's evidence is that, after this agreement to defer the start date had occurred, he then got a big surprise when Mr Gillette made the payment for the entire 49% shareholding on 24 February, and that event "changed everything". The respondent's case is that, from this point, Mr Gillette had become a deemed director of the respondent, although he was never formally appointed as a registered director with the Companies Office. This is despite Mr Green trying to register him as a director with the Companies Office website he says.

[19] Whilst the respondent accepts that it is possible for an individual to be both an employee and a director and/or shareholder, Mr Green says that, once Mr Gillette became a shareholder and deemed director, all Mr Gillette's activities for the company until the relationship ended on 28 July 2016 were carried on by Mr Gillette in his capacity as a deemed director and/or a shareholder, and not an employee. The basis of this argument is that Mr Green was only taking drawings, and not a salary as an employee as well, and that it would not have been equitable for Mr Gillette to have been both an employee, taking a salary, as well as a shareholder and director taking drawings in addition.

[20] Various steps were taken around this time to integrate Mr Gillette into the respondent's systems, including being given access to the customer relationship management account (CRM account), giving him a company phone and arranging business cards for him

(which bore the title "Director of Sales", a fact much relied upon by Mr Green in arguing that Mr Gillette was a director of the

company). Mr Gillette says he started to do productive work for the respondent on 22 February, and continued to work long hours for the benefit of the company most weeks thereafter. Mr Green disputes this assertion, saying Mr Gillette worked much less than he claimed.

[21] The first payment that Mr Gillette received from the respondent company was on 20

May, when he received $1,500. The respondent refers to this as a director's fee. Mr Gillette says he regarded it as a payment of shareholder's profit from the previous financial year. Neither party attributes it to a salary payment.

[22] On 20 June Mr Green presented Mr Gillette with a document which Mr Gillette said purported to vary his employment agreement to state that he had started on 1 April. Mr Gillette and Mr Green agree that Mr Gillette refused to sign this document. Mr Gillette suggests that he was given this document because, shortly before, he had been asking to be paid his salary under his employment agreement. Mr Gillette and Mr Green agree that they had had an altercation a few days before.

[23] On 21 June Mr Gillette and Mr Green had another falling out (possibly arising out of the refusal to sign the variation document) which resulted in Mr Gillette asking Mr Green if he could work from home and Mr Green deactivating Mr Gillette's access to the CRM system. According to Mr Green, it was only on 22 June that Mr Gillette raised the notion that he was an employee.

[24] The Authority saw a number of email exchanges between Mr Gillette and Mr Green during the period from 21 June to 27 June, in which Mr Green urges Mr Gillette to "present... your view on your present and future employment position with Sunpower". Mr Gillette says he was not sure what proposals Mr Green was expecting, but that Mr Gillette himself wanted to find better ways of working because he had found Mr Green's approach of physically standing over him as he worked to be oppressive.

[25] On Monday 27 June Mr Green sent to Mr Gillette two documents, one purporting to vary the start date of the employment agreement, and the other varying the date of appointment as a director. Mr Gillette replied to Mr Green in the following terms:

Hi Patrick,

Thanks for your understanding, as we settle and adjust to a new home in a

new country. I'm in agreement with both documents and will sign them once

I'm in the office.

[26] The wording of the variation document is material to the issues to be determined and so I replicate it in full below:

To: Nathan Gillette

Date: 27/06/2016

Re: Amending individual employment contract official start date. Dear Nathan,

It is great to have you on board. Your arrival in February was certainly

exciting and Sunpower Solar looked forward to getting you officially started. As with any immigration into another country by a family it takes some time to get settled and adjust to your new surroundings. Sunpower is happy to work with adjusting

your start date to accommodate your transition.

We agree to adjust your official start date for the technical sales position as agreed by both Nathan and Patrick with your official start will being [sic]

31/08/2016. The terms and conditions of the employment contract remain otherwise unchanged.

[27] Mr Green and Mr Gillette signed this document on 28 June. It is Mr Gillette's argument that he signed the agreement under duress because he had not been paid since he started work, apart from the $1,500 he received on 20 May, he had almost no money left to feed his family (his wife and third child had arrived on 25 March), and Mr Green had repeatedly threatened to shut the company down and "report him to immigration". Mr Green says in his brief of evidence that Mr Gillette signed the variation agreement willingly, and that he offered Mr Gillette an employment agreement "in an effort to reach a resolution to the deteriorating relationship between him and Mr Gillette". In his oral evidence, however, Mr Green suggested the variation was to regularise Mr Gillette's immigration status.

[28] A similar agreement delaying Mr Gillette's appointment as a director until 1 August

2016 was also signed by Mr Green and Mr Gillette on 28 June. On the same day, Mr Gillette's access to the CRM system was reactivated.

[29] By 15 July Mr Gillette had still received no payment other than the $1,500 referred to above, and the following week accessed the company accounts using the bookkeeper's PC. He says that, up to that point, he had only ever seen summaries of the accounts which gave

only limited information. Mr Gillette says that he found out from the more detailed accounts that Mr Green had paid himself around $120,000 from January 2016. This was despite the fact, according to Mr Gillette, that Mr Green had been telling him that the company was not making enough money to pay him.

[30] Mr Green says he had only paid himself $96,000 from March 2015 to the present day, and during 2016 he had only paid himself around $30,000, not $120,000. He said he also had significant personal debt because he was a personal guarantor for the company.

[31] According to Mr Gillette, in the afternoon of 18 July, the day Mr Gillette accessed these accounts, Mr Green came to Mr Gillette's home uninvited and told him that, unless he was prepared to sign a personal guarantee, he could not be a director. Mr Gillette refused to do this. During the meeting, says Mr Gillette, he and his wife made it clear that they were in a dire financial situation. He says that, the following day, Mr Green offered to pay Mr Gillette $750 a week, which Mr Gillette says he was in no position to refuse. Mr Green also agreed that Mr Gillette could submit a claim for expenses and Mr Gillette received a payment of $1,204.81 in reimbursement. Mr Gillette says this reimbursement is the only other payment ever received from Sunpower Limited. He never received $750 a week. Mr Green denies that such an agreement to pay Mr Gillette $750 a week was ever reached. He also says that Mr Gillette had told him he had enough savings to support himself and his family for a year.

[32] Mr Gillette says that, on Thursday 28 July, Mr Gillette requested that Mr Green make a payment of the $750 that he had offered to pay. Mr Green refused and Mr Gillette insisted. Mr Gillette says that Mr Green then "launched into an aggressive tirade demanding that I leave the premises, return all things belonging to the Company including keys and repeatedly telling me that I was never welcome on the premises ever again". Mr Gillette regards these words as dismissing him.

[33] Mr Gillette says he sent an email to Mr Green later that day saying that he had returned the items requested, but received

no response.

[34] Mr Green says in his evidence that it was Mr Gillette who was aggressive, which resulted in a "huge argument". Mr Green says that, "reviewing everything that had happened from the 20th of June until right then in my mind, I said that 'that's enough' and 'I'm finished

with this'". He says he was then "unsure of Nathan's intentions either as a Director, or

whether he would start his employment on 31 August."

[35] On 1 August 2016 Mr Gillette wrote to Mr Green expressing concern that he had not received payment of either the salary of $5,000 per month or the bonuses. He took issue with not being approved as a director on 1 August. The letter also raised other concerns about his position as a minority shareholder. However, at no point in the letter does Mr Gillette refer to having been dismissed on 28 July. Mr Gillette's explanation is that he understood that the reference to "personal grievance" in the letter, which he had written with legal advice, was sufficient to refer to his dismissal.

[36] Mr Green replied to Mr Gillette's letter of 1 August saying that he believed there was a need for mediation in order to reach a resolution. Mr Green sent a further email to Mr Gillette on 10 August saying he had not received a response to his last email and saying that it was necessary to schedule a Board meeting and discuss jointly appointing a mediator. Mr Green asked Mr Gillette to suggest a good time "over the next few weeks" to have a meeting.

[37] On 18 August 2016 Mr Green sent a further email to Mr Gillette saying that he had not heard from him since 2 August. In this email Mr Green stated that his start day of his employment agreement had been delayed by mutual agreement until 31 August 2016 and that he expected to see him on that date at 9am. A mediation meeting took place on 23 August.

[38] Finally, Mr Green sent an email to Mr Gillette on 12 September 2016 saying that the start date of 31 August for the technical sales executive role had come and gone, and that he had heard nothing from him since the official start date commenced. Mr Green said that he regarded Mr Gillette as having abandoned his employment agreement.

[39] According to Mr Gillette, these emails were "all for show" and Mr Green had summarily dismissed him on 28 July by stating that he was to return all company possessions and was not to set foot on the premises again. He was left in no doubt that his employment had been terminated he says.

[40] According to Mr Green, Mr Gillette had accepted and behaved in a manner that demonstrated his understanding that he was a director and a shareholder of the company, and not an employee, up until July 2016. He says that, had he been an employee, Mr Green

would have dismissed him within the 90 day trial period as he was not attending work regularly, or carrying out his responsibilities as a technical sales executive.

The issues

[41] The following issues need to be determined by the Authority:

(a) At what date did Mr Gillette become an employee of the respondent, if at all? (b) If he had become an employee prior to 28

July 2016, what contractual terms

had been agreed between the parties with respect to Mr Gillette's

remuneration?

(c) How did the relationship between Mr Gillette and the respondent come to an end?

(d) If Mr Gillette was dismissed as an employee, was that dismissal unjustified?

(e) Did Mr Gillette raise a personal grievance in time with respect to alleged unjustified disadvantage?

(f) If so, did Mr Gillette suffer an unjustified disadvantage in his employment?

At what date did Mr Gillette become an employee of the respondent, if at all?

[42] The starting point for considering this question is s.6 of the Employment Relations

2000 (the Act) which sets out the meaning of employee. The material parts of this section provide as follows:

6. Meaning of employee

(1) In this Act, unless the context otherwise requires, **employee** –

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service;

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority - ...

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.

[43] One of the key planks of the respondent's arguments is that Mr Gillette had never been an employee because he had

been a director and shareholder, and that he carried out the work he did in that capacity. However, there is case law in New Zealand that establishes that an individual can be a director and/or shareholder on the one hand and an employee

employed under a contract for service on the other. I refer to *Smith v Practical Plastics Ltd1.*

The following passages are of particular relevance.

It is common ground that a company director is not, as such, an employee of the company but is an office holder upon appointment. It is clear that a director may however enter into a service contract and thereby become an employee, and that contract may be express or implied.2

The result in any particular case will depend upon its facts and there will always be points of agreement and disagreement between the various authorities. The issue is whether, viewed as a totality, the evidence establishes the existence of a contract of service, whether express or implied, notwithstanding that the contracting party is a director and/or shareholder of the company.3

[44] His Honour Judge Travis then went on to consider what factors persuaded him that

Mr Smith had a contract of service with the defendant company. These factors included:

(a) The company was not a family company. The directors only had a business relationship;

(b) The plaintiff held a minority interest in the company and could not exercise any control over its operations. The degree of control that a company may exercise over an alleged employee is a factor to take into account;

(c) Another factor is whether the person who engaged himself to perform services did so as a person in business on his own account;

1 [1998] 1 ERNZ 323.

2 Ibid., page 340

3 Ibid., page 341

(d) Did the alleged employee provide equipment, hire helpers, undertake financial risk, and/or have responsibility for investment and management in the performance of his tasks?

(e) Was the alleged employee required to sign minutes, approve accounts or pass resolutions?

[45] *Smith* was decided before the Supreme Court pulled all the tests together in deciding, for the purposes of s.6(1)(a) of the Act, whether an alleged employee was employed on a contract of service or a contract for services. The factors identified by the Supreme Court in *Bryson v. Three Foot Six Ltd (No 2)4*, were:

(a) The written and oral terms of the contract which will usually contain indications of the common intention concerning the

state of the relationship;

(b) Any divergence from those terms and conditions in practice;

(c) The way the parties have actually behaved in implementing their contract;

(d) Features of control and integration and whether the contracted person has been effectively working on his or her own account (known respectively as a control, integration and fundamental test).

[46] Whilst *Bryson* was a case about deciding whether Mr Bryson was an employee or independent contractor, the key tests used in that case are all relevant to a greater or lesser degree in deciding whether a director and shareholder was also an employee. I will therefore address the question of Mr Gillette's status by applying the factors referred to in *Smith* and *Bryson.*

The employment agreement

[47] The starting point for considering when Mr Gillette became an employee, if at all, must be the employment agreement signed by both parties on 21 January 2016. This clearly creates a presumption that Mr Gillette was to be employed by the respondent. It does not

state when the employment was to commence. It does state that the remuneration would

4 [2005] NZSC 34

commence from 30 January 2016, although Mr Gillette did not turn up at the office to work until 22 February 2016.

[48] Mr Green says that, on 22 February, there was a mutual agreement that the start date of the employment was deferred until 1 April. This was in line with the variation clause according to Mr Green. However, that variation (denied by Mr Gillette) was never recorded in writing and signed by both parties, as is required by the variation clause. I therefore do not find that that purported oral variation in the start date until 1 April, if it occurred at all, was binding on the parties.

[49] Furthermore, I find it inherently unlikely that Mr Gillette would have agreed to have deferred the start of his employment when he had just recently arrived in New Zealand on a work visa which required him to be employed by the respondent.

[50] Therefore, I find that Mr Gillette became an employee on 22 February 2016, under the terms of the employment agreement, and that the purported oral variation of the start date was not effective.

[51] Mr Green's next argument is that Mr Gillette became a deemed director on

24 February, when he purchased the 49% shareholding. Whether this is correct or not, Mr Green certainly did not appoint him a director as was required under the terms of the shareholders' agreement. Even if Mr Gillette did become a deemed or de facto director upon buying the shares, Mr Green has given no explanation as to what mechanism operated to cause Mr Gillette to cease being an employee once he became a director. The mechanisms that could operate to terminate an employment relationship include the following:

(a) Resignation by the employee; (b) Termination by the employer;

(c) Termination by mutual agreement; (d) Expiry of a fixed term agreement; (e) Abandonment of employment; or

(f) Death of the employee or employer.

[52] None of these events operated to terminate the employment agreement with effect from 24 February. Becoming a shareholder and deemed director is not a recognised mechanism, in the absence of an express agreement, to operate to terminate an employment relationship. The parties could have expressly stipulated in the employment agreement that it ended when Mr Gillette became a 49% shareholder or when he was appointed as a director,

but they did not.5 I also do not accept that there could have been an implied term that such

events would have terminated the employment, as such a term would not have been necessary to give business efficacy to the contract.

[53] On the face of it, therefore, the employment continued under the terms of the employment agreement despite the purchase by Mr Gillette of the shares. However, the employment agreement is not determinative, and I must also look at the wider picture and the reality of the relationship between February and July.

Any divergence from those terms and conditions in practice

[54] Mr Gillette produced a significant number of documents which he says demonstrate that he was carrying out his role as Technical Sales Executive from 22 February 2016. These documents comprise entries from the company's CRM system and emails to and from clients and prospective clients of the company. Mr Green disputes that they show that Mr Gillette was doing any substantial work. However, that is not the point. If Mr Gillette was employed under the terms of an employment agreement, and he did not work in accordance with its terms, it was open to the respondent to discipline Mr Gillette for inadequate performance of his duties. This did not happen, however.

[55] Putting aside the amount of work carried out, Mr Green's evidence is that Mr Gillette was doing work in his role as a shareholder and deemed director. However, it appears to me that he was carrying out these duties (contacting potential clients in order to sell solar energy packages to them; assessing their power needs; attending their premises to assess their properties' suitability; and writing estimates) entirely within the expected scope of a Technical Sales Executive as described in the employment agreement. The fact that Mr Gillette also became involved in assisting in installations does not mean, as argued by

Mr Green, that Mr Gillette was not also working as a sales executive.

5 Although it is debatable whether such a condition would be lawful under s. 66 of the Employment Relations

Act 2000 (the Act).

[56] I do not believe, therefore, that there was any significant divergence from the terms of the employment agreement and the work that Mr Gillette carried out in practice.

The way the parties have actually behaved in implementing their contract

[57] Mr Green and Mr Gillette showed themselves to be very clear in their negotiations prior to the employment agreement

being signed that an employment relationship was necessary. By signing and submitting to INZ the INZ 1113 form, Mr Green shows that he knew that the relationship had to be one of employment. The respondent's statement in reply states that Mr Gillette knew the relationship had to be a salaried employment one, for the purposes of obtaining a visa.

[58] An analysis of the relationship against the three *Bryson* tests referred to above confirms that the relationship was one of employment.

The control test

[59] This test effectively examines the extent to which the activities of Mr Gillette were controlled by the respondent. I am satisfied that Mr Green exercised a high degree of control over Mr Gillette, despite his protestation to the contrary. First of all, Mr Gillette was engaging in a new role, which was of a technical nature, in a country he had never worked in before, and so depended upon Mr Green to get started in the role. In addition, I am satisfied that Mr Gillette's decision making powers were very limited, to the extent that he even had to tell Mr Green on a day to day basis where he was going and what he was doing. Mr Green once turned up at Mr Gillette's home to find out where he was.

[60] Mr Gillette also said that he was only able to buy very small items, such as plugs, without having to get permission from Mr Green. He also had to seek permission to take leave.

[61] Indeed, the fact that Mr Green took away Mr Gillette's access to the CRM system and would not let him see copies of the detailed accounts strongly suggest the true nature of the relationship. In addition, on 22 June, Mr Green told Mr Gillette in an email that Mr Green was taking over "all operational tasks and sales related work". An equal business partner, as Mr Green characterised Mr Gillette, would not expect to have all of his duties unilaterally removed, without notice and good reason.

[62] It is self-evident that Mr Gillette had very little self-determination within the respondent and that he worked closely under the control of Mr Green.

The integration test

[63] This test examines the extent to which Mr Gillette was integrated into the respondent's business. He had to use the company's CRM system; he had to change from a Mac based to a Windows based system at the insistence of Mr Green; he had business cards bearing the name of the respondent company. On the other hand, he used his own vehicle. However, given that there is no argument that Mr Gillette was an independent contractor, this integration test is of little assistance, because one would expect a hands-on shareholder and/or director to be as equally integrated into a workplace as an employee.

The fundamental test

[64] This test, also known as the "economic reality test", examines the extent to which Mr Gillette took on financial risk himself in providing his services. Mr Gillette did buy a significant shareholding in the respondent company. However, this shareholding, and indeed a deemed directorship, if that was what he had, does not preclude him being an employee as well. It appears that Mr Gillette was never required (or allowed) to sign minutes, approve accounts or pass resolutions.

[65] I accept that Mr Gillette was integrated into the respondent in his capacity as a shareholder. However, I do not accept he was not also an employee.

Conclusion

[66] It is my view that the respondent has tried to concoct a post facto defence to Mr Gillette's claim for arrears of wages and unjustified dismissal by running an argument which has to, somehow, resolve the tension between him not being an employee during the very same period when he was in New Zealand, working for the respondent, under the terms of a work visa which required him to be an employee.

[67] Indeed, the defence run by the respondent places it at risk of admitting to potential offences under the Immigration Act 2009, and it was to this end that I warned the parties about their rights under s. 60 of the Evidence Act 2006, guarding against the risk of self- incrimination.

[68] In concluding that Mr Gillette was an employee throughout the period 22 February to

28 July 2016, I shall summarise the difficulties of the respondent's defence, which is simply

untenable.

(a) It is inherently unlikely that Mr Gillette would have voluntarily agreed to defer the start of his employment on his very first day at work when he was in possession of a work visa which required him to be an employee. Mr Gillette had obtained advice on his immigration status, and so is very likely to have been aware of his obligations.

(b) It is also inherently unlikely that Mr Green would have allowed Mr Gillette to have worked in a non-employment capacity, when that would have put the respondent (and possibly Mr Green personally) at risk of being in breach of s.350 of the Immigration Act 2009.

(c) It is naïve and not credible to suggest (as Mr Green did in his oral evidence) that he believed that the variation clause in the employment agreement allowed the parties to amend Mr Gillette's start date in a way that INZ would have found acceptable.6

(d) The oral variation purportedly deferring the start of employment to 1 April had no binding effect in any event, as it was not in writing as was required under the terms of the variation clause in the employment agreement.

(e) Mr Green must have viewed Mr Gillette as having been employed up to 1

April at least (and arguably up to 20 June) as he says that he presented Mr Gillette with a variation document on 20 June which sought to change the start date of employment to 1 April. If Mr Green had genuinely not believed that Mr Gillette had been employed from 22 February, he would have had no need to have asked him to agree that the employment did not start till 1 April.

(f) In his email to Mr Gillette dated 22 June, Mr Green referred to Mr Gillette's

"present and future employment position with Sunpower".

6 Mr Green's argument appears to characterise the employment agreement as a contractual version of Schrödinger's cat (which can be simultaneously both alive and dead) as it suggests that the employment agreement was simultaneously both on foot (for the purposes of Mr Gillette's immigration status) and not on foot (for the purposes of Mr Gillette's employment status).

(g) There is no apparent mechanism by which the termination of Mr Gillette's employment would have been triggered by him purchasing 49% of the shares in the company.

(h) Mr Green did not appoint Mr Gillette a director in any event, as was required

under the terms of the shareholders' agreement.

(i) The purported written variation of the employment agreement signed by the parties, deferring Mr Gillette's start date as an employee to 31 August, cannot be effective in re-characterising the nature of the relationship between the parties that had already occurred. A binding variation may vary the terms of an agreement with respect to future performance of a contract, but not change events that have already occurred. For this reason, I do not need to consider whether Mr Gillette signed the variation document under duress.

(j) In any event, the respondent's asserted reasons for the purported variation (in order to regularise Mr Gillette's immigration status) does not fit with Mr Green's evidence that Mr Gillette's immigration status was secure because of the employment agreement containing the variation clause. It also does not fit in with Mr Green's evidence that he and Mr Gillette were confident that Mr Gillette's residency would be approved by 31 August (which would have dispensed with the need to have a work visa).

(k) Making Mr Gillette an employee from 31 August also does not fit in with Mr Green's evidence that it would have been inequitable for Mr Gillette to earn both a salary as an employee and be in receipt of drawings as a shareholder/director.

[69] In conclusion, I find that the respondent has attempted to obfuscate the true nature of what happened between 22 February and 28 July. However, its evidence simply is not credible, and makes no sense when viewed overall. I believe that Mr Green's original plan was to secure Mr Gillette's investment towards the end of the first 90 days of the employment, by which time, he hoped, Mr Gillette would have obtained his residency, and could then have been dismissed under the 90 day trial period provision. That way, Mr Gillette would not have been drawing both profit and salary. However, when Mr Gillette made his investment much earlier, it created a problem for Mr Green. In the absence of

express provisions in the shareholders' agreement and/or the employment agreement anticipating such an event, Mr Green was faced with an employee whose visa status required him to remain an employee but who then would also be entitled to drawings.

[70] My finding is that the relationship between Mr Gillette and Sunpower Limited bore all the hallmarks of an employment relationship and the start date was never deferred. He was therefore employed by the respondent between 22 February and 28 July inclusively.

What contractual terms were agreed between the parties with respect to Mr Gillette's

remuneration?

[71] Having found that Mr Gillette was employed under the terms of the employment agreement throughout his employment, and that the purported variations did not take effect, I find in turn that Mr Gillette was entitled to be remunerated in accordance with the terms of that employment agreement.

[72] He is therefore entitled to arrears of salary for the period 22 February 2016 to 28 July

2016. This equates to a total of $26,043.96 gross in terms of base salary. Although Mr Gillette also claims $15,000 overtime, I do not accept that he was entitled to receive payment for working over the 40 hours per week required in his contract in the absence of express agreement, which did not occur.

[73] Mr Gillette sought interest on the wage arrears. Clause 11 of schedule 2 of the Act provides as follows:

11 Power to award interest

(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of **interest**, at the rate prescribed under section 87(3) of the Judicature Act

1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in

accordance with the determination of the Authority.

(2) Without limiting the Authority's discretion under subclause (1), in

deciding whether to order the inclusion of **interest**, the Authority must consider whether there has been long-standing and repeated non-compliance

with a demand notice.

(3) Subclause (1) does not authorise the giving of **interest** upon **interest**.

[74] The applicable rate is 5%. I agree that it is appropriate for interest to be payable on the wage arrears of $26,043.96. Interest is to be calculated as accruing on this sum from

28 July 2016, when Mr Gillette's employment came to an end, and will continue on this sum, or any lesser sum if partial payment is made7, until the arrears are paid to Mr Gillette in full.

[75] Mr Gillette is also entitled under the employment agreement to holiday pay in accordance with the Holidays Act 2003. Section 23 of the Holidays Act provides as follows:

23 Calculation of annual holiday pay if employment ends within 12 months

(1) Subsection (2) applies if—

(a) the employment of an employee comes to an end; and

(b) the employee is not entitled to annual holidays because he or she has worked for less than 12 months for the purposes of section 16.

(2) An employer must pay the employee 8% of the employee's gross

earnings since the commencement of employment, less any amount—

(a) paid to the employee for annual holidays taken in advance; or

(b) paid in accordance with section 28.

[76] Calculating 8% of $26,043.96 equates to a gross sum of $2,083.52. According to Mr Gillette's record of hours worked, he had seven days leave (where no hours were recorded). That equates to $1,153.85 gross. Mr Gillette is therefore entitled to holiday pay in the gross sum of $929.67.

[77] Mr Gillette claims he is entitled to two monthly bonus payments of $1,500 each, in respect of sales achieved in February and April 2016. However, I do not accept that he is entitled to receive a bonus for the month of February 2016 as he did not commence work until 22 February. The terms of the bonus state that the bonus applies to the first full calendar month worked.

[78] In April, sales were achieved in the sum of $65,399.15. This is slightly below the monthly target of $66,666.66. However, the bonus scheme contemplates that a bonus can be earned on a sliding scale and that 80% of the bonus will be earned if 95% of the target is achieved. As this was achieved, Mr Gillette is entitled to a bonus in the gross sum of $1,200.

[79] Mr Gillette claims a total of $7,040.06 as reimbursement of expenses incurred by him in the course of his employment. His employment agreement allowed for the reimbursement to him of reasonable employment related expenses. However, $6,300 of this sum relates to payments he made to a finance company which granted him a car loan. His rationale is that

the car was used only for business use, on the instructions of Mr Green.

7 For the avoidance of doubt, this determination does not permit the respondent to make the payment of arrears in instalments or on a partial basis.

[80] However, the car was purchased solely in his name, and was never transferred to the ownership of the company. It appears that Mr Gillette is confused in relation to advice he heard indirectly from Mr Green's accountant about how he could write off the finance payments against the company's tax, if the car was registered in the company's name. I disallow this element of his claim.

[81] I find that Mr Gillette is entitled to reimbursement of the other elements of his claim, comprising petrol, usage (which was partially reimbursed on 19 July), the purchase of business cards, the making of a logo for his shirt and trade show expenses. This amounts to

$740.06.

How did the relationship between Mr Gillette and the respondent come to an end?

[82] I find that, on a balance of probabilities, Mr Gillette's employment did end the way he has stated. Namely, by him being sent away by Mr Green on 28 July 2016. I make this finding partially on the basis of the complete lack of credibility of Mr Green's evidence about when Mr Gillette's employment started. I find that the emails that Mr Green sent to Mr Gillette later, referring to the start date of 31 August, were sent after the event to attempt to cover up what had happened. As Mr Gillette stated, I believe they were sent "for show".

[83] Even if Mr Gillette left the employment himself, it would have been by way of unjustified constructive dismissal, in circumstances where he had asked repeatedly to be paid his salary and been rebuffed repeatedly. There is unlikely to be a clearer example of a repudiation of contract by an employer, and a resultant resignation would be entirely foreseeable. However, I do not believe that Mr Gillette resigned, nor abandoned his employment. I believe he was dismissed summarily.

If Mr Gillette was dismissed as an employee, was that dismissal unjustified?

[84] Section 103A of the Act provides the test of justification, as follows:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a

dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted,

were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to

respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation

(if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the

court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process

followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly

[85] Mr Gillette was not given any opportunity to comment on his dismissal. Whilst Mr Green was clearly angry, and sent Mr Gillette away in anger, he did not attempt to reverse the dismissal. He did not contact Mr Gillette until seven days later, which was to respond to Mr Gillette's letter of 1 August. The response was not in substantive terms, but merely stated that there were several issues in dispute.

[86] The dismissal was plainly unjustified, both procedurally and substantively, as no fair and reasonable employer could have acted in the way that the respondent did in all the circumstances.

Did Mr Gillette raise a personal grievance in time with respect to alleged unjustified disadvantage?

[87] During submissions Ms Stephenson clarified that the unjustified disadvantage claim was a claim in the alternative, should the Authority find that Mr Gillette was not entitled to arrears of pay. As I have found that he is entitled to be awarded arrears of pay, I do not need to consider this claim in the alternative.

Remedies

[88] Sub-section 123(1)(a) to (c) of the Act provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or

more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the

employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the

grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee;

and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[89] Section 128 provides:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the

Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the

lesser of a sum equal to that lost remuneration or to 3 months' ordinary time

remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[90] Mr Gillette claims lost wages for 12 months. He does this on the basis that, by being dismissed, he has lost the opportunity to earn commission in a sales role, and it would take at least 12 months to get up to speed to do so. With respect, I believe that this is speculative and misconceived. The correct approach is for Mr Gillette to have calculated what he would have earned at the respondent, had he not been dismissed. He would also have to show me that he was more likely than not to have remained an employee of the respondent for 12 months.

[91] In my view, Mr Gillette is most unlikely to have remained employed at the respondent for a further 12 months. Whilst the bad blood between Mr Gillette and Mr Green arose partially out of Mr Green unlawfully withholding Mr Gillette's salary, there is ample evidence to show that Mr Gillette also did not like Mr Green's working style. He asked to work from home in mid-June because he did not like Mr Green standing over him. I do not

accept that there is much of a likelihood that Mr Gillette would have remained an employee longer than three months. I therefore limit his remedies for lost wages to three months ordinary time remuneration.

[92] I accept that Mr Gillette did make an effort to find new employment, and indeed he has been precluded from working from 19 October because he is now present in New Zealand on a visitor's visa, under which he cannot legally work. He would not be on a visitor's visa if he had not been dismissed of course.

[93] I award Mr Gillette lost wages in the sum of three months' ordinary time

remuneration. This amounts to a gross payment of $15,000.

[94] Turning to compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to his feelings in respect of the effects of the dismissal, Mr Gillette was somewhat reticent about the effects he suffered. Indeed, there was even a sense of relief for him that his day to day relationship had come to an end. This is perhaps supported by the lack of a direct reference to his dismissal in his letter of 1 August to Mr Green. Ms Teo, Mr Gillette's wife, did give some evidence about the effect on Mr Gillette of being dismissed, and she said that his self confidence suffered.

[95] I believe that an award in the sum of $7,000 is appropriate in the absence of better evidence.

[96] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[97] It is clear that Mr Gillette had a shouting match with Mr Green on more than one occasion, including on the day and at the time when he was dismissed. However, the context is relevant; namely, where Mr Green had caused the respondent to fail repeatedly to pay Mr Gillette his salary payments. Under such circumstances, it is understandable that Mr Gillette would have lost his temper. I do not find that this conduct was blameworthy, and it does not justify the reduction of the remedies awarded to him for his dismissal.

Penalties

[98] Mr Gillette seeks penalties to be imposed upon the respondent for a breach of good faith, a breach of the employment agreement and for failing to provide wages and time records.

[99] The seeking of the imposition of penalties in relation to the breach of good faith and breach of the employment agreement arise out of the same set of facts. That is, the failure to pay salary due under the employment agreement.

[100] Section 134 of the Act provides that every party to an employment agreement who breaches that agreement is liable to a penalty. Section 4 A of the Act provides that a party to an employment relationship who fails to comply with the duty of good faith in s.4(1) is liable to a penalty under this Act if the failure was deliberate, serious, and sustained.

[101] The duty at s.4(1) of the Act provides that the parties to an employment relationship must deal with each other in good faith and, without limiting this duty, must not, whether directly or indirectly, do anything to mislead or deceive each other, or that is likely to mislead or deceive each other.

[102] It is my finding that there was a clear and regular breach of the employment agreement by the respondent by it failing to pay to Mr Gillette the salary payments he was entitled to. That triggers a liability for the imposition of a penalty under s. 134 of the Act.

[103] I also find that Mr Green, on behalf of the respondent, misled and deceived Mr Gillette by telling him that the respondent company could not afford to pay him. Clearly, it could afford to pay Mr Green regular payments. In any event, an employer's perceived impecuniosity does not justify the non-payment of salary and wages due to an employee under an employment agreement when that employee continues to provide his work to the employer.

[104] Furthermore, I find that this failure to comply with the duty of good faith was deliberate, serious, and sustained. It was deliberate, as Mr Green clearly wished to avoid paying Mr Gillette. It was serious because it went to the very heart of the employment agreement and the employment relationship; the right to be paid for one's work. It was

sustained because it went on throughout the course of the employment. I am satisfied that the imposition of a penalty under s. 4(1) of the Act is justified.

[105] In deciding the amount of the penalty, I adopt the four step approach required by the Employment Court case of *Jeanie May Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited8.* First, there were breaches of two separate duties giving rise to a penalty, although there was arguably a breach of the employment agreement every time a payment was not made, which would amount to five breaches in that respect alone. This would attract a maximum penalty against the respondent of $20,000 each, giving a total of $120,000. However, it is appropriate to globalise the five breaches of the employment agreement. I do not consider that it is appropriate to globalise across the two

breaches, as they are separate. That results in a total possible penalty of $40,000.

[106] Next, in assessing the severity of the breaches, I estimate that the breach of the employment agreement was very serious, as it went to the very core of the agreement; the right to receive pay in return for labour. I assess that the breach should attract a percentage of

75%. This results in a penalty at this stage of $15,000. Turning to mitigating factors, I can see no mitigating factors at all. The respondent never paid any salary payments, and purported to put back the commencement date of the employment agreement twice. It continued to deny Mr Gillette was due any payment. I therefore do not reduce the penalty at all at this stage.

[107] In respect of the penalty for breach of good faith, again I regard this as a serious breach. Mr Green on behalf of the respondent continued to mislead Mr Gillette about the ability of the company to pay. Lying to an employee about a significant matter such as this is serious, and I assess that the breach should attract a percentage of 75%. This results in a penalty at this stage of $15,000. Turning to mitigating factors, I again can see no mitigating factors. Mr Green never apologised to Mr Gillette for misleading him, and did not admit he had done so. I again decline to reduce the penalty at all at this stage.

[108] Turning to the next step, I consider the ability of the company to pay a penalty. Mr Green said that the company has debts and owes significant amounts of money. However, little by the way of evidence was put to the Authority by the

respondent to support

this contention. In short, I saw no evidence to justify reducing the penalties under this step.

8 [2016] NZEmpC 143.

[109] The final step involves the proportionality or totality test, in which the Authority must consider whether the provisional penalty reached after the first 3 steps is proportionate to the seriousness of the breaches, and harm occasioned by it/them. This step is to ensure that the imposition of a penalty and the amount of it is just in all the circumstances.

[110] I assess that a combined penalty of $30,000 is too much when I consider the amount owed to Mr Gillette, and the fact that the company is a small one. It is not the intention of the legislation to drive employers to the wall, in order to punish them. I believe that it is appropriate to reduce the combined penalty by two thirds, to $10,000.

[111] Mr Gillette seeks that he be paid the penalty. However, the breaches in question have not obviously resulted in non-compensable loss for Mr Gillette, as he has been separately awarded remedies in this determination which compensate him for the failure to pay him his salary. It is therefore appropriate that the penalty be paid to the Crown in its entirety.

[112] With respect to a penalty for a failure to produce wages and time records, I was given no evidence of any breach of the relevant statutory duty. I therefore decline to impose a penalty in respect of that.

Orders

[113] I order that the respondent make the following payments to Mr Gillette with immediate effect:

(a) Arrears of salary in the gross sum of $26,043.96;

(b) Interest on the sum of $26,043.96 at 5% per annum, such interest to commence from 28 July 2016, and to continue to accrue until payment of the sum in full;

(c) Final holiday pay in the gross sum of $929.67;

(d) Reimbursement of expenses in the sum of $740.06; (e) Lost wages in the gross sum of $15,000;

(f) A bonus payment in the gross sum of $1,200;

(g) Compensation under s.123(1)(c)(i) of the Act in the sum of $7,000.

[114] I also impose a penalty upon the respondent in the sum of $10,000. The respondent is to pay this penalty to the Authority with immediate effect, which will then pay it into an appropriate Crown Bank Account.

Costs

[115] I reserve costs. If Mr Gillette seeks a contribution towards his legal costs he should first seek to agree those costs with the respondent. If the parties are unable to reach agreement within 14 days of the date of this determination, then Ms Stephenson may, within a further 14 days, lodge and serve a memorandum of counsel setting out the contribution towards costs that Mr Gillette seeks. The respondent will then have a further 14 days within which to lodge and serve a memorandum of counsel in reply.

David Appleton

Member of the Employment Relations Authority
