

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 109
3024135

BETWEEN THOMAS PATTON GREEN (Known as
PATRICK GREEN)
Applicant

AND BSC SOLAR (NEW ZEALAND)
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Patrick Green, Applicant in person
Geoff Mullen, Advocate for Respondent

Investigation Meeting: 24 July 2018 in Nelson

Determination: 6 August 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A BSC Solar (New Zealand) Limited is ordered to pay to Thomas (Patrick) Green the sum of \$6,666.67 gross being one month's salary in lieu of notice within 28 days from the date of this determination.**
- B BSC Solar (New Zealand) Limited is ordered to pay to Thomas (Patrick) Green penalties in the sum of \$3,500 within 28 days from the date of this determination.**
- C BSC Solar (New Zealand) Limited is ordered to pay to the Authority for payment to the Crown penalties in the sum of \$2000 within 28 days from the date of this determination.**

D BSC Solar (New Zealand) Limited is ordered to pay to Thomas (Patrick) Green the sum of \$71.56 being reimbursement of the filing fee within 28 days from the date of this determination.

Employment relationship problem

[1] Thomas Green known as Patrick Green wants his previous employer BSC Solar (New Zealand) Limited (BSC Solar) to pay him one month's salary in lieu of notice in the sum of \$6,666.67 gross. He says that the liability to pay notice in this sum arises from his employment agreement and further that there was agreement to make that payment to him by 4 January 2018 but BSC Solar failed to do so. He also seeks penalties for late payment of holiday pay¹ and for the breach of his employment agreement. Mr Green would like an order that the whole or part of the penalties are payable to him.

[2] There is a claim for leave to pursue the directors personally for the arrears under s 142Y of the Employment Relations Act 2000 (the Act) if BSC Solar is unable to or does not pay the wages or other money. That may no longer be available to Mr Green because there has been payment of the holiday pay and any default must be due to a breach of employment standards. In any event it is not a matter for consideration at the present time.

[3] BSC Solar is involved in solar technology. It resists the claim for payment of one month's notice to Mr Green.

The Issues

[4] The issues for determination are as follows:

- (a) Whether Mr Green is entitled to payment in lieu of notice?
- (b) If breaches are found then should penalties be awarded for a breach of the employment agreement and/or under s 75 of the Holidays Act 2003; and
- (c) If an order for payment of a penalty is made then should the whole or part of the penalty be payable to Mr Green.

¹ There was a claim for holiday pay and arrears of wages but these were paid following a telephone conference with the Authority and the parties.

Is Mr Green entitled to payment of one month's salary?

[5] BSC Solar operates its business in Perth but has also undertaken work on the Chatham Islands. It decided to set up a company in Nelson purchasing Mr Green's business (SunPower Solar Limited) in June/July 2017. Mr Green was employed by BSC Solar as an Operations Manager from 1 July 2017 and was party to an individual employment agreement dated 15 May 2017. His salary was \$80,000 per annum.

[6] The relationship between Mr Green and BSC Solar is strained. There are some ongoing issues about the purchase of Mr Green's company and disagreement between the parties about many matters. Evidence therefore was confined as much as possible to the issues.

[7] Clause 10.1 of the employment agreement is relevant and provides as follows:

10 TERMINATION OF AGREEMENT FOR SERIOUS MISCONDUCT:

10.1 The Employer shall be entitled, in the event of serious misconduct by the Employee, to terminate the agreement either on one (1) month's notice or at the Employer's discretion without notice with 1 month's salary in lieu payable on the termination notice day.

[8] It was not in dispute that there was a termination for serious misconduct on or about 21 December 2017. I am not required to make any findings about what lead to the termination of employment. Both parties have very different views.

[9] The Authority heard evidence from the Managing Director of BSC Solar, Geoff Mullen. He accepted that an agreement was entered into on or about 21 December 2017 that Mr Green would receive his outstanding wages, holiday pay and payment of one month's notice on 4 January 2018. This was confirmed in correspondence from the lawyers for Mr Green and BSC Solar.

[10] Mr Mullen said that after that agreement was reached the Board of Directors in Australia reconvened and felt that there were grounds not to pay Mr Green. Mr Mullen said some legal advice was obtained.

[11] No specific legal grounds were advanced as a reason for the failure to pay Mr Green notice. If misrepresentation is suggested then I could not be satisfied that BSC Solar was

induced to enter into the employment agreement by any misrepresentation by Mr Green about the notice clause in 10.1.

[12] Although not on all fours with this matter there is a recent judgment from the Employment Court² where unfair bargaining was considered. It was accepted in that case that advice from the employer representative to the employee before the employment agreement was signed was wrong. It was found that the employee was “not lacking intelligence or business nous” and that the interactions between the employee and the representative of the employer were seen to be on a relatively equal footing at the relevant time. The suggestion that the employee was reliant on the employer representative and that undermined his ability to properly consider the draft agreement in that case was considered to be “stretching the reality of the situation.” I find that Mr Mullen is an experienced businessman and he accepted that the company had an opportunity to consider the employment agreement before entering into it on behalf of BSC Solar.

[13] There was a change of heart about making payment to Mr Green following reconsideration by the Board of Directors in Australia. Mr Mullen referred to some of the reasons in his evidence. There was a view that Mr Green had manipulated the situation to gain four weeks’ pay. Further it was considered that Mr Green had written his own employment agreement and that he had advised Mr Mullen clause 10.1 was a standard clause and nothing to worry about. There were ongoing concerns about the purchase of Mr Green’s business and some of his statements and behaviour during employment. There were concerns around ongoing alleged hacking into emails and systems. Mr Green either denied these matters and/or said that he was entitled to behave in the way he did because of his view as to what had been sold to BSC Solar and what he retained control of.

[14] The statement in reply provides amongst other matters; “As previously stated we, as a company accept our responsibility in not doing due diligence with Mr Green we have made a moral choice we would rather accept the consequences in the court in the hope of a fair hearing...”.

[15] There are strong views in this matter and there may be further litigation in a different forum. The role of the Authority however is to resolve employment relationship problems by

² *Kumara Hotel Ltd v Joseph McSherry* [2017] NZEmpC 19 at [27], [28] and [29].

establishing the facts and making a determination according to the substantial merits of the case. Whilst the Authority must act as it thinks fit in equity and good conscience it may not do anything inconsistent with the Act and the relevant employment agreement.³

[16] Clause 10.1 provides BSC Solar shall be entitled in the event of serious misconduct to terminate the employment agreement for serious misconduct either on one month's notice or at BSC Solar's discretion without notice with one month's salary in lieu on the termination notice day. The company was therefore entitled to terminate the employment agreement for serious misconduct but notice was required to be given or paid in lieu. Mr Green's employment agreement was terminated for serious misconduct without notice and he is entitled to one month's salary in lieu payable on the termination day. By agreement the time for payment was extended to 4 January 2018 but no payment was made to Mr Green.

[17] I find that the failure to pay notice in lieu was a breach by BSC Solar of its obligations under clause 10.1 of the employment agreement.

[18] Mr Green is entitled to payment of one month's salary in lieu of notice under clause 10.1 of his employment agreement.

[19] I order BSC Solar (New Zealand) Limited to pay to Thomas (Patrick) Green the sum of \$6,666.67 (gross) within 28 days from the date of this determination.

Penalties

[20] The Authority is asked to consider claims for two penalties.

Penalty for breach of an employment agreement

[21] Section 133 of the Act provides the Authority with jurisdiction for recovery of all penalties under the Act for any breach of an employment agreement or a provision of the Act for which a penalty in the Authority is provided.

[22] In this case a penalty is claimed for a breach of clause 10.1 of the employment agreement – s 134 of the Act. In determining the amount of a penalty the Authority is required under s 133A to have regard to all relevant matters including those referred to in s 133A of the Act.

³ Section 157 of the Employment Relations Act 2000

Penalty for a breach of s 75 of the Holidays Act 2003

[23] Section 75 of the Holidays Act 2003 (HA) provides that an employer who has failed to comply with any provision listed in subsection 75(2) of the HA is liable to a penalty. An employee may bring an action to recover a penalty under s 75 by virtue of s76 HA.

[24] In this case a penalty under the HA is claimed for a breach of the statutory obligation in s 27 of the HA. That is the obligation to pay where an employee's employment has come to an end the annual holiday pay in the pay that relates to the employee's final period of employment.

[25] There is liability for the same amount of penalty under both the Act and the HA of \$20,000.

Four step process

[26] The Employment Court in a judgment called *Borsboom v Preet PVT Ltd*⁴ has provided some guidance by way of a four step process in claims for penalties. This process can incorporate an assessment of the matters under s 133A of the Act and additional matters. Although the breach of the employment agreement is not a breach of employment standards it is nevertheless helpful to use the four step process framework and consider both penalty claims together.

Step One – identify the nature and number of statutory breaches

[27] There are two breaches. One is a breach of the employment agreement under the Act. The other is a failure to pay holiday pay where the employment has come to an end in the pay relating to the employee's final period of employment.

[28] I am satisfied that I should consider the imposition of a penalty for these breaches. Provisionally BSC Solar is liable to maximum penalties of \$40,000 for each breach (2 x \$20,000).

⁴ Borsboom v Preet PVT Ltd [2016] NZEmpC 143

Step Two – assess the severity of the breaches

Breach of the employment agreement and holiday pay breach

Aggravating factors

[29] BSC Solar did not comply with its obligations to pay holiday pay for a period of about three to four months. Although it did not dispute liability to pay holiday pay such payment was delayed. It appeared that such non-payment of holiday pay related to financial issues although that does not reduce the seriousness of the breach. Mr Green did not receive his entitlement at the time it was due. There should be a 40% assessment for that failure which is \$8,000.

[30] The decision not to pay notice was intentional and an aggravating factor. Non-payment continues. There was evidence from Mr Green about the financial impact of failure to pay the money to him and his family who were expecting payment over the Christmas holiday period. Properly Mr Green did not attribute all of his financial difficulties to the breach.

[31] To reflect the aggravating circumstances there should be an assessment of 50% for the breach of the employment agreement which is \$10,000.

Mitigating factors

[32] This is a first such matter for BSC Solar of this nature before the Authority or Court. Mr Green could not be described as a vulnerable employee.

[33] The holiday pay has now been paid in full and correctly.

[34] In terms of the notice payment there was a genuine but misguided view by the company that it was impossible to separate out the concerns about the purchase of the business and other matters from employment obligations. I accept there was real concern for the company about what was happening and what could happen. In all likelihood holding onto the money was about exerting some control in the circumstances. That does not excuse non-payment but in those circumstances obtaining consensus on what should have been a simple decision to pay became problematic. It was not assisted by the fact it was a decision made by the Board of Directors at a distance.

[35] Taking those factors into account I find that the amount for the severity of the breaches should be reduced by 50%.

[36] The total provisional penalty for both breaches is \$9000.

Step 3 – The means to pay

[37] I was provided with limited profit and loss financial information from BSC Solar after the investigation meeting concluded. It was for the period from July 2017 to 31 October 2017 and showed a net loss for the year to date. Mr Mullen said in his evidence that the financial situation was “touch and go” but that the company was continuing to trade its way out. That there were some financial difficulties is also confirmed in some of the other material provided to the Authority.

[38] I accept that BSC Solar is not in a strong financial position. Mr Green did not attempt to argue that it was.

[39] I find a reduction of 30% to the provisional penalty is called for in these circumstances. The provisional amount of penalties is now \$6,300.

Step 4 –Proportionality of outcome

[40] This step involves consideration whether the provisional penalty is proportionate to the seriousness of the breaches and the harm they have caused.

[41] The main harm was that Mr Green was deprived of payment of his holiday pay and payment of one month’s salary in lieu of notice. The accrued holiday pay was the sum of \$2893.53 gross and the one month’s notice \$6,666.67 gross.

[42] A penalty should have a deterrent effect but not be unrealistically high that it may not be paid at all. Penalties reduced to \$5,500 are proportionate to the seriousness of the breaches and harm occasioned.

Should the penalties be paid to Mr Green?

[43] Section 136 (1) of the Act provides that every penalty recovered must be paid into the Authority and not to the applicant and must then be paid by the Authority into a Crown Bank account.

[44] Section 136 (2) provides that the Authority may order that the whole or any part of any penalty recovered must be paid to any person.

[45] Mr Green has been deprived of the use of money and whilst an order has been made for payment of one month's salary and there has been payment of holiday pay that will not completely ameliorate financial issues such as loss of interest, distress over the holiday period without expected funds and the consequence of not being able to pay bills.

[46] I find it fair and just that the sum of \$3500 be paid to Mr Green and the balance of \$2000 be paid to the Crown.

[47] BSC Solar (New Zealand) Limited is ordered to pay to Thomas (Patrick) Green penalties in the sum of \$ 3,500 within 28 days of the date of this determination.

[48] BSC Solar (New Zealand) Limited is ordered to pay to the Authority for payment to the Crown the sum of \$2000 within 28 days from the date of this determination.

Costs

[49] There is no issue of costs. Mr Green was unrepresented and obtained initial legal advice through the Community Law Centre and a solicitor assisted in drafting the statement of problem. He is though entitled to reimbursement of the filing fee of \$71.56.

[50] BSC Solar (New Zealand) Limited is ordered to reimburse Thomas (Patrick) Green for the filing fee in the sum of \$71.56 within 28 days from the date of this determination.

Helen Doyle
Member of the Employment Relations Authority