

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 162
3001444

BETWEEN DAVID IRWIN
Applicant

A N D AUNZ INVESTMENT GROUP
LIMITED
First Respondent

AND YORK B YU
Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Glenn Finnigan, Counsel for the Applicant
May Moncur, Representative for the Respondents

Investigation Meeting: 26 April 2017

Submissions Received: 3 May 2017 from Applicant
10 May 2017 from Respondent

Date of Determination: 6 June 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Mr David Irwin was constructively dismissed by the first respondent, AUNZ Investment Group Limited (AUNZ). The constructive dismissal was unjustified.**
- B. In order to settle Mr Irwin’s personal grievance claim, AUNZ is to make payment of the following sums to him within 21 days of the date of this determination:**
- (a) \$7,500 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), for humiliation,**

loss of dignity, and injury to feelings in respect of his unjustifiable dismissal;

- (b) Pursuant to s.128(2) of the Act, reimbursement of lost salary in the sum of \$20,425 gross for the three month period from the date of dismissal on 18 November 2016;**
- (c) Reimbursement of the following amounts pursuant to Mr Irwin's employment agreement;**
 - (i) Unpaid salary totalling \$29,888.97 gross (para.70(a) and (d) of this determination);**
 - (ii) Unpaid salary totally \$18,109.59 net (para.70(c) and (e) of this determination);**
 - (iii) Unpaid business expenses totalling \$5,689.38 net(para.70(b) of this determination);**
 - (iv) Unpaid holiday pay for the period of employment totalling \$12,012.00 gross.**
- (d) AUNZ is ordered to pay to the Crown via the Authority a penalty of \$3000 within 21 days of the date of this determination.**

C. Mr Yu aided and abetted AUNZ to breach Mr Irwin's employment agreement. Mr Yu is ordered to pay to the Crown via the Authority a penalty of \$1,000 within 21 days of the date of this determination.

D. Costs are reserved.

Employment relationship problem

Unjustified constructive dismissal claim

[1] Mr David Irwin claims one personal grievance. He claims that he was constructively dismissed by the first respondent, AUNZ Investment Group Limited

(AUNZ) on 19 November 2016. Mr Irwin says he was forced to resign his employment because of the failure by AUNZ to regularly pay him his wages, and its failure to pay him lump sum payments due to him as part of his salary as agreed.

[2] Mr Irwin says his resignation amounted to a constructive dismissal which was unjustified. Mr Irwin seeks compensation for humiliation and loss of dignity he says he suffered and reimbursement of wages lost as a result.

Arrears of wages

[3] Mr Irwin claims he is owed arrears of wages and holiday pay by AUNZ. Mr Irwin seeks orders for payment by AUNZ pursuant to the Wages Protection Act 1983 and the Holidays Act 2003.

[4] As at 18 November 2016, Mr Irwin says AUNZ owed him outstanding salary, entitlements and holiday pay.

Penalties

[5] Mr Irwin seeks penalties against AUNZ pursuant to the Employment Relations Act 2000(the Act) for the alleged breaches of his employment agreement. As against the second respondent, Mr York B Yu, Mr Irwin seeks the imposition of penalties under the Act, for aiding and abetting the alleged breaches of his employment agreement with AUNZ.

AUNZ and Mr Yu's response at the Authority's investigation meeting

[6] AUNZ and Mr Yu deny the claims. Mr Yu says he was shocked by Mr Irwin's resignation and disputes he was forced to resign. AUNZ denies Mr Irwin's resignation amounted to a constructive dismissal.

[7] Mr Yu says the lump sums Mr Irwin is seeking were not part of his annual salary, they were bonuses conditional on good performance by him. AUNZ and Mr Yu claim that Mr Irwin did not perform and so those payments were not due to him.

The Authority's investigation

Personal grievance letter – 23 November 2016

[8] On 23 November 2016, counsel for Mr Irwin sent an email to AUNZ raising a personal grievance that Mr Irwin's resignation amounted to a constructive dismissal which was unjustified. The email claimed that Mr Irwin's resignation was as a result of AUNZ's breaches of its obligations to pay his salary, other remuneration and expenses. Immediate payment of these sums was sought.

[9] AUNZ and Mr Yu failed to respond.

Statement of problem

[10] A statement of problem was filed in the Authority on 23 December 2016. No statement in reply was filed. An amended statement of problem was subsequently filed by Mr Irwin. No statement in reply was filed.

No engagement by AUNZ and Mr Yu

[11] Neither AUNZ nor Mr Yu filed statements in reply. Neither AUNZ nor Mr Yu participated in the Authority's telephone conference nor did they engage with the Authority.

Witness statements

[12] Mr Irwin filed a witness statement prior to the Authority's investigation meeting and in accordance with an agreed timetable. Mr Yu emailed a letter to the Authority with his version of events shortly before the Authority's Investigation Meeting and not in accordance with the Authority's timetable. The letter failed to address Mr Irwin's claim that he had resigned because of the failures by AUNZ to pay him his salary regularly and its failure to pay the lump sum amounts at the times agreed upon.

[13] As noted in the Authority's oral determination between these parties on 26 April 2017¹, AUNZ and Mr Yu failed to engage in the Authority's process. AUNZ and Mr Yu were granted leave by the Authority to respond to the employment

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relationship problem but the investigation meeting was delayed as a result of their conduct and costs were awarded against them.

[14] At the Authority's investigation meeting, Mr Irwin and Mr Yu both affirmed that their evidence was true and correct.

[15] As allowed under s.174E of the Act, this determination does not set out all of the evidence. Rather, relevant facts and legal issues are set out along with the Authority's conclusions.

The issues

[16] The issues for the Authority to determine are as follows:

- (a) What was the agreement as to remuneration?
- (b) Did Mr Irwin's resignation amount to a constructive dismissal?
- (c) If Mr Irwin was constructively dismissed by AUNZ, was the dismissal unjustified?
- (d) And if so what remedies should be payable to him?
- (e) Is Mr Irwin owed unpaid wages, holiday pay and expenses by AUNZ?
- (f) Has AUNZ acted in a manner which is in breach of Mr Irwin's employment agreement and if so should penalties be awarded?
- (g) Was Mr Yu a person who incited, instigated, aided or abetted any breach of Mr Irwin's employment agreement? If so, is he liable to a penalty pursuant to s.134(2) of the Act?

First issue

What was the agreement as to remuneration?

Relevant facts

[17] Mr Irwin and Mr Yu met in approximately 2006. At that time, Mr Irwin was working as a project manager for the developer of a subdivision in East Tamaki. Mr Yu was the kitchen supplier. They remained acquaintances.

[18] Just prior to Christmas in 2014, Mr Yu contacted Mr Irwin to see if he was interested in doing some work for him. Mr Irwin says he met with Mr Yu at AUNZ's offices in Queen Street, Auckland to discuss the proposed role.

[19] Mr Irwin was told by Mr Yu that he had purchased some land in Warkworth and needed some project management assistance. Mr Yu also told Mr Irwin that it was his intention to acquire some buildings in Auckland and to convert them into apartments or hotel accommodation. Mr Yu told Mr Irwin that there would be further project management work for Mr Irwin.

[20] Mr Irwin and Mr Yu discussed remuneration. Mr Irwin told Mr Yu that his minimum expectation was \$100,000 gross per annum or \$70-\$80 per hour. Mr Yu told Mr Irwin he would consider the level of remuneration and would get back to him in the New Year. Mr Yu invited Mr Irwin to the company's Christmas function at a restaurant below the Sky Tower. At the function, it was agreed between them that Mr Irwin would start work for AUNZ as project manager on 19 January 2015 and that Mr Irwin's remuneration would be finalised at that time.

Meeting on 19 January 2015 – discussions as to remuneration

[21] Mr Irwin and Mr Yu met at AUNZ's offices in Queen Street on Mr Irwin's first day of work. They discussed Mr Irwin's remuneration. Mr Irwin made a handwritten note of the discussion in his diary. This diary note was provided to the Authority. Although the date on which the note is recorded is 10 January 2015, Mr Irwin explained that he simply wrote the note down on the first page his diary opened at, which was 10 January 2015. Mr Yu's diary note records:

York salary agreement:
\$100,000, weekly payment gross
\$35,000 end of year
\$25,000 gross
\$10,000 cash
This is the minimum payment each year, start 19 Jan 2015.

[22] Mr Yu told Mr Irwin he would give him something in writing recording their agreement, but never did. Mr Irwin was never provided with a written employment agreement by AUNZ.

[23] In the letter from Mr Yu to the Authority shortly before the Authority's investigation meeting, Mr Yu disputes that the \$35,000 payment was part of Mr Irwin's salary. Mr Yu says he agreed to pay Mr Irwin a salary of \$100,000 by

weekly payments. However, Mr Yu says, the amount of \$35,000 was a bonus, conditional on a number of performance objectives by Mr Irwin. Mr Yu says that as Mr Irwin had not met the performance targets, the bonus was not paid. Holiday pay was also not paid because Mr Yu says the parties had not agreed to the calculation of Mr Irwin's annual salary.

[24] If Mr Yu had provided Mr Irwin with a written employment agreement setting out the agreement as to remuneration, as required by s.65 of the Employment Relations Act 2000 (the Act), this type of issue would not have arisen. There was no written employment agreement or bonus scheme in writing.

[25] The Inland Revenue Department records produced for the Authority by Mr Irwin show that for the financial year, 1 April 2015 to 31 March 2016, Mr Irwin was paid \$99,996 by AUNZ. Mr Irwin has produced bank records showing payments to him by AUNZ.

[26] These records reflect the understanding of both parties, that Mr Irwin would receive a gross salary of \$100,000 paid by weekly instalment.

[27] On 27 May 2015, AUNZ paid Mr Irwin the lump sum figure of \$25,000. Mr Irwin has subsequently requested payment of the final part of his salary, being \$10,000. This sum remains unpaid.

[28] It is more likely than not, on the evidence before the Authority, that the parties agreed to an annual salary of \$135,000 paid in the manner recorded by Mr Irwin in his contemporaneous diary note made at the meeting on his first day of work on 19 January 2015.

[29] I conclude the parties agreed that Mr Irwin was to be paid an annual salary of \$135,000 gross. \$100,000 gross per annum was to be paid by AUNZ weekly. At the end of the first year of employment, AUNZ would pay Mr Irwin a lump sum of \$25,000 gross and a cash payment of \$10,000 net.

Second Issue

Did Mr Irwin's resignation amount to a constructive dismissal?

[30] On 19 October 2016, Mr Irwin sent a letter of resignation to Mr Yu. The letter stated:

LETTER OF RESIGNATION

Over the past twelve months AUNZ has failed to pay me over \$25,000 in salary and disbursement refunds which became due and owing. I have repeatedly asked that these payments be brought up to date and have continued to work for AUNZ as you assured me the payments would be addressed. Despite those promises, the salary arrears have not been paid.

I can no longer continue to work for a company which does not properly pay me what is due. I have got to the point where I don't believe AUNZ will sort this out and start paying me on time as is my right. AUNZ's actions have destroyed our employment relationship. Accordingly, by this letter I am resigning my position with AUNZ. Though AUNZ has not provided me with a written employment agreement, setting out a notice period, I am giving one month's notice from the date of this letter, which I think is reasonable notice. However if I am not promptly paid any weekly salary payment during that period, my resignation will take effect from the day of the first missed payment.

I still do require that AUNZ pay me for unpaid salary and expenses and reserve all my legal rights in respect of claiming those amounts and in respect of AUNZ's actions.

[31] Mr Irwin's final day of employment was 18 November 2016.

[32] As at the date of his resignation, Mr Irwin was owed salary, holiday pay and business expenses.

[33] Mr Yu's statement filed in the Authority before the investigation meeting stated that as Mr Irwin has been paid \$25,000 "... my solution is that the \$25,000 that I have paid should be enough to offset his unpaid wages and the expenses he was seeking to reimburse. But I am not happy to pay any other money. If David Irwin still thinks he should be paid other money, we should ask David Irwin to take responsibility of our loss".

[34] The loss Mr Yu was referring to was expanded upon at the investigation meeting. Mr Yu claimed that Mr Irwin's project management skills were poor and

had resulted in a significant loss to AUNZ. Mr Yu says he warned Mr Irwin many times and issued written warnings about his poor performance.

Salary payments

[35] Mr Irwin was paid a regular salary during 2015. However, Mr Irwin did not receive the lump sum payment of \$25,000 gross which was due at the end of his first year of employment until 27 May 2016. The \$10,000 cash payment remains unpaid.

[36] During 2016, salary payments to Mr Irwin became less regular. It was during this time that Mr Irwin began making regular requests for outstanding wages and expenses.

Requests by Mr Irwin for \$35,000 payment

[37] On 4 March 2016, Mr Irwin asked Mr Yu about the \$35,000 lump sum payment which he had expected to be paid to him in December 2015. No payment was made.

[38] Mr Irwin made a further request on 12 May 2016. On 27 May 2016, Mr Irwin says he was finally paid the \$25,000 gross part of the \$35,000 lump sum payment of his salary. This payment was made, he says, only after persistent pressing of Mr Yu for payment and it was only after he was told by Mr Yu that he had to issue AUNZ with a tax invoice for that amount. Accordingly, Mr Irwin said he had no choice but to issue an invoice in the name of his company, Irwin Building and Project Management Limited.

[39] It was only after Mr Irwin had issued the invoice that payment was made. The sum of \$25,000 was paid into Mr Irwin's bank account, the same bank account in to which his salary of \$100,000 had been paid in to by AUNZ during 2015.

[40] The cash payment of \$10,000 was not paid and has never been paid to Mr Irwin.

[41] Mr Irwin says he regularly followed up this payment and expenses owing to him. Mr Yu did not deny this. However, Mr Yu says the \$10,000 was a bonus and as Mr Irwin was not performing in the role and AUNZ had suffered losses, he was not obliged to pay the amount to him.

[42] On 18 August 2016, Mr Irwin says he gave a handwritten note to Mr Yu as follows:

York. Payment that was going to be paid into my account prior to
you going away as promised 9/8/16.
Being \$3,411-76 plus
12/8 1,435-20
19/8 1,435-20
Total: 6,282-16 Due now in full please.
I need money to pay my personal accounts.
David

[43] The \$10,000 was not paid and Mr Irwin continued to request payment for this. Mr Irwin says that he recalls that on 9 September 2016 he again told Mr Yu that the \$10,000 lump sum was outstanding. Mr Yu said he would pay it on the Friday before he was due to fly out to Hong Kong. The payment was never made.

[44] Mr Yu never told Mr Irwin that the payment would not be made. Mr Irwin says that eventually matters got to a point where he could not continue working for AUNZ due to the ongoing broken promises to pay his salary as had been agreed. This led to his resignation on 19 October.

[45] It is clear that Mr Irwin had requested outstanding salary payments to be paid to him on a number of occasions. They were not. Similarly, Mr Irwin had requested payment of the lump sum of \$10,000 on a number of occasions prior to his resignation. This was not paid.

[46] Failure to pay an employee wages and holiday pay is a fundamental breach of his or her employment agreement. Mr Irwin resigned giving one month's notice. However, he made it clear in his resignation that in the event there was a further failure to pay him wages, his dismissal would take effect from the date of the non-payment of wages.

[47] Mr Irwin repeatedly raised the issue of late payment of wages and expenses and the non payment of the lump sum components of his salary with Mr Yu and had tried to resolve the matter. When it became evident to him that the matter was not going to be resolved, he put AUNZ and Mr Yu on notice that any further breaches of his employment agreement would result in his immediate resignation. In those circumstances, it is my view that the resignation did amount to a constructive dismissal.

Third Issue

Was the dismissal unjustified?

[48] Mr Yu says he gave Mr Irwin several warnings about his unsatisfactory performance and his company suffered losses as a result. No written warnings were issued and no records were kept of verbal warnings. Mr Yu was unable to provide any details of the unsatisfactory performance or details of when he gave warnings.

[49] I do not accept warnings were given to Mr Irwin for unsatisfactory performance. This claim was made for the first time by Mr Yu in the written statement received by the Authority a matter of days before the investigation meeting.

[50] The statement accepts AUNZ owes Mr Irwin wages and expenses but says as AUNZ has suffered losses, the \$25,000 paid by it to Mr Irwin should be enough to offset these unpaid wages and expenses. The statement goes on to say if Mr Irwin seeks more money, then AUNZ will hold him responsible for its losses. Mr Irwin is still owed unpaid wages, holiday pay and expenses by AUNZ.

[51] The Authority was not made aware of the reasons for the losses suffered by AUNZ or why Mr Irwin should be held responsible. General statements were made by Mr Yu about Mr Irwin's poor performance but with insufficient information in support.

[52] Mr Yu told the Authority that AUNZ paid Mr Irwin the \$25,000 lump sum because it did not want to lose him. This seems to contradict evidence of Mr Irwin's poor performance.

[53] Failure to pay Mr Irwin salary and expenses in accordance with his employment agreement was a breach by AUNZ of its fundamental obligations to him. Further, if AUNZ was unhappy with Mr Irwin's performance, it had an obligation as a fair and reasonable employer to inform him of any deficiencies and an opportunity to respond. It failed to do so. I find Mr Irwin's constructive dismissal by AUNZ was unjustified.

[54] Mr Irwin has a personal grievance arising out of his unjustified dismissal.

Fourth Issue

What remedies should be payable?

Compensation under s.123 of the Act

[55] Mr Irwin was stressed for a long period of time by the ongoing failure by AUNZ to pay his salary and expenses. This stress became progressively worse during the latter part of 2016. Mr Yu made promises to pay but did not keep his promises. This caused a great deal of emotional and financial stress for Mr Irwin and his family. Mr Irwin could not sleep and became depressed.

[56] I consider an award of \$7,500 compensation for hurt and humiliation under s.123(1)(c)(i) of the Act appropriate in the circumstances.

[57] I order AUNZ to pay Mr Irwin compensation of \$7,500 within 21 days of the date of this determination.

Reimbursement of lost remuneration under s.128 of the Act

[58] Mr Irwin seeks reimbursement of lost remuneration being the difference of income he would have earned at AUNZ and income actually earned for the period he ceased employment, until the date of the investigation meeting. This claim is made under s.128(3) of the Act. The amount sought is \$48,970 gross for that period.

[59] Mr Irwin told the Authority that when he resigned from AUNZ, he did not have another job to go to. Mr Irwin says he attempted to mitigate his losses after his employment ceased in November 2016 by obtaining contract work through his own company, Irwin Building and Project Management Limited. Mr Irwin has recently obtained other employment.

[60] I consider an award of lost remuneration for the 3 month period from the date of dismissal to be appropriate. This amounts to \$33,750 gross less \$13,325 earned during that time.

[61] I order reimbursement of lost remuneration in the sum of \$20,425 gross to be paid by AUNZ to Mr Irwin within 21 days of the date of this determination.

Fifth Issue

Is Mr Irwin owed unpaid wages, holiday pay and expenses by AUNZ?

[62] In both the statement of problem and in the amended statement of problem filed in the Authority, Mr Irwin sought payment by AUNZ of weekly salary payments which it had failed to make during the course of his employment, business-related expenses and holiday pay.

[63] AUNZ and Mr Yu did not file a statement in reply to either the statement of problem or the amended statement of problem and in his statement to the Authority prior to the investigation meeting, he seems to have accepted that unpaid wages and expenses were owing to Mr Irwin but sought to offset those amounts by the sum of \$25,000 which was paid and which Mr Yu claimed was a bonus which implicitly he was not entitled to because he had not performed. As has already been determined, I do not accept that the \$25,000 was a bonus nor do I accept that performance issues were raised with Mr Irwin.

[64] In the amended statement of problem and in his evidence, Mr Irwin stated that he had not been paid weekly payments on five occasions totalling \$9,615 gross. In her submissions, Ms Moncur claims the amount is not payable because there was no calculation provided. Clearly the calculation was provided by Mr Irwin at the investigation meeting and it is also specified in the amended statement of problem.

[65] Mr Irwin was not paid his weekly salary on five occasions during 2016. This amount totals \$9,615 gross.

[66] Mr Irwin provided the Authority with details of business-related expenses which he was not paid. Mr Irwin says the expense forms were given to AUNZ in 2016 but were not paid. Mr Yu did not contradict Mr Irwin. Rather, he sought to dispute the content of the expenses.

[67] I find that Mr Irwin had business-related expenses and he submitted his expense forms to AUNZ in 2016. He was not told by Mr Yu or anybody else at AUNZ that these expenses were not to be reimbursed. The expenses were business-related expenses and copies of GST invoices from Caltex for petrol and telephone receipts were also provided. The total of business-related expenses which were not paid and should have been paid amount to \$5,689.38 net.

[68] Mr Irwin was never paid the \$10,000 cash component of his salary for the year of 2015. Mr Yu says he considered not paying any part of the \$35,000 to Mr Irwin but he did pay the \$25,000 because he did not want to lose him as a project manager. However, he decided towards the end of 2015 and at the beginning of 2016, that he was not going to pay Mr Irwin the \$10,000 lump sum which was to be paid in cash. Mr Yu says this was because AUNZ suffered huge losses which directly related to Mr Irwin's poor performance. AUNZ failed to pay Mr Irwin the \$35,000 component of his salary for the following year also.

[69] Mr Yu repeated his statement that because Mr Irwin had not performed, AUNZ had suffered losses and he had made a decision not to pay him. He did not tell Mr Irwin this. Mr Irwin was entitled to be given the opportunity to address any issues as to his performance, especially if such issues impacted upon his remuneration. He was not given such an opportunity.

Orders in respect of unpaid wages, business expenses and unpaid holiday pay

[70] For the above reasons, I order AUNZ to pay the following unpaid wages, expenses and holiday pay to Mr Irwin within 21 days of the date of this determination:

- (a) Unpaid weekly salary instalments: \$9,615 gross;
- (b) Unpaid business expenses: \$5,689.38 net;
- (c) Unpaid lump sum (in cash) due December 2015/January 2016: \$10,000 net;
- (d) Unpaid lump sum for 2016/17 (pro rata of \$25,000 gross based on 296 days): \$20,273.97 gross;
- (e) Unpaid lump sum for 2016/2017 nett of \$10,000 nett prorata based on 296 days) : \$8,109.59 net;
- (f) Unpaid holiday pay for the period of employment totalling \$12,012.00 gross.

[71] The applicant seeks interest on the above sums. Ms Moncur has suggested that before she was instructed, AUNZ and Mr Yu were poorly advised. I am not prepared in the circumstances of this case to order interest.

Sixth Issue

Has AUNZ acted in a manner which is in breach of Mr Irwin's employment agreement and if so should penalties be awarded?

[72] Section 134 of the Act states:

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.

[73] Under s.135 (2), a company is liable to a penalty not exceeding \$20,000, for breach of an employment agreement.

[74] Under s.75 of the Holidays Act 2003, the failure of an employer company to comply with provisions of the Holidays Act including payment for annual holidays incurs a penalty not exceeding \$20,000.

[75] Mr Irwin says that by failing to pay his agreed remuneration, holiday pay and business expenses, AUNZ breached his employment agreement and the Holidays Act. And by failing to keep and disclose accurate wage and time records, Mr Irwin says AUNZ breached s.130 of the Act.

[76] Mr Irwin seeks penalties of \$10,000 for each of the claimed breaches against AUNZ.

[77] Penalties are designed to punish and deter others from engaging in similar conduct².

[78] The Full Bench of the Employment Court set out a four step process which is to be adopted when a penalty is being assessed by the Authority to ensure that there is a consistent and reasonably predictable result with penalties across the board³. The Court also set out the relevant factors to be considered when imposing a penalty.⁴

[79] These factors have been taken into account by me when assessing penalties in this matter. Below is a brief summary by me of the relevant factors:

- (a) The breaches by AUNZ were deliberate and sustained.

² *Tan v Yang & Zhang* [2014] NZEmpC 65

³ *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143

⁴ *Ibid*, [65]-[68]

- (b) A penalty is needed to act as a deterrent, not only to AUNZ but also to the wider community of employers. It is not appropriate for an employer to deliberately breach fundamental terms of an employment agreement or minimum standards legislation.
- (c) The deliberate nature of the breaches is highly undesirable and the Authority must impose a penalty at a level that signals its disapproval of such conduct and which acts as a deterrent to AUNZ and other employers who may not be minded to abide by their statutory obligations.

[80] AUNZ is liable for penalties totalling \$60,000 for the breaches of the Act and the Holidays Act.

[81] Standing back and assessing the proportionality of the outcome, and the decision in respect of Mr Yu's liability for aiding and/ or abetting the breaches of the employment agreement, I consider a penalty of 5% of the total penalty AUNZ is liable for, to be an appropriate penalty in this case.

[82] Accordingly, AUNZ is ordered to pay a penalty of \$3,000 under s.136 of the Act to the Authority for payment by it to the Crown Bank Account. AUNZ is to pay the penalty to the Authority within 21 days of the date of this determination.

Seventh Issue

Was Mr Yu a person who incited, instigated, aided or abetted any breach of Mr Irwin's employment agreement? If so, is he liable to a penalty pursuant to s.134(2) of the Act?

[83] Mr Irwin seeks a penalty against Mr Yu pursuant to s.134(2) of the Act on the basis that he was a person who incited and instigated, aided or abetted the breaches by AUNZ of his employment agreement.

[84] Mr Yu is the sole director of AUNZ and he was the person who negotiated the terms of Mr Irwin's employment agreement. Mr Yu was the person to whom Mr Irwin regularly went seeking payment of outstanding salary and entitlements. It was Mr Yu who made a decision to delay the \$25,000 gross component of Mr Irwin's salary due in December 2014/January 2015, and it was Mr Yu who made the decision not to pay the \$10,000 cash component of Mr Irwin's salary at all.

[85] Mr Yu was the ‘controlling mind and “brains”’ of AUNZ and the person who “influenced it to act in breach of its duty”⁵ of compliance by AUNZ of its obligations

[86] I am satisfied that the failure by AUNZ to pay Mr Irwin his salary and entitlements was deliberate and that Mr Yu influenced AUNZ to act in breach of its duty to pay Mr Irwin pursuant to the employment agreement it had with him.

[87] The failure to pay Mr Irwin was not an isolated failure, it was persistent and ongoing for a long period of time and resulted in Mr Irwin’s resignation.

[88] Accordingly, I find that Mr Yu did aid and/or abet the breach of Mr Irwin’s employment agreement.

[89] Applying the above principles in respect of penalties, and taking into account the principle of totality, I consider a penalty of \$1,000 against Mr Yu, pursuant to s134(2) of the Act to be appropriate.

[90] Accordingly, Mr Yu is ordered to pay a penalty of \$1,000 under s.136 of the Act to the Authority for payment by it to the Crown Bank Account. Mr Yu is to pay the penalty to the Authority within 21 days of the date of this determination.

Costs

[91] Mr Irwin has 14 days from the date of this determination to file and serve submissions as to costs. AUNZ and Mr Yu have 14 days within which to file its submissions as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁵ *Giddens v Phelan and Kini* AA466/605, para 52