

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 375
3120674

BETWEEN	KEVIN MCKERROW LIMITED Applicant
AND	DENISE MCDONALD Respondent

Member of Authority:	Marija Urlich
Representatives:	Andrew Schirnack and Rebecca White, counsel for the Applicant Adam Mapu, advocate for the Respondent
Investigation Meeting:	26 January 2023 (by audio visual link)
Submissions and further information received:	3 February and 21 April 2023, from the Applicant 11 April 2023, from the Respondent
Determination:	17 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In an earlier determination the Authority upheld Ms McDonald's personal grievance claim and awarded her remedies.¹ The Authority also found she had breached obligations owed under her employment agreement with Kevin McKerrow Limited (KML).² This determination deals with what damages, if any should be awarded arising from those found breaches.

¹ *Denise McDonald v Kevin McKerrow Ltd* [2022] NZERA 114.

² at [55] – [57].

The Authority's investigation

[2] By consent the investigation of this employment relationship problem was held by audio-visual link. During the investigation meeting the Authority heard evidence from Kevin McKerrow, KML's clinical director and owner, Ian Masson, a chartered accountant and Ms McDonald. The parties have attempted to find a resolution themselves of the issue of damages, including attending mediation.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Discussion

[4] The circumstances of the found breaches are set out in detail in the earlier determination. In summary, the Authority found Ms McDonald breached the terms of her employment agreement by tendering invoices to KML in the name of a company of which she was sole director and shareholder for sums which under the terms of her employment agreement were to be paid as wages and claiming GST input credits for KML on those invoiced sums. As a consequence, KML has made voluntary disclosure to the inland revenue of this situation and taken steps to unwind and rectify the tax implications of the invoices and associated tax credit claim. KML seeks damages orders to compensate it for a range of costs it has incurred in dealing with the consequences of the found breaches. A calculation of interest on any award of damages has not been sought.

[5] The general principles applicable in an assessment of damages are:

- (i) damages are to compensate the injured party for the loss it has sustained;
 - (ii) the injured party is not entitled to a windfall;
 - (iii) the respondent can only be held liable for consequences which can convincingly be said to have been a result of the respondent's conduct;
- and

- (iv) the onus is on the applicant to prove loss, and the extent of loss on the balance of probabilities.³

[6] The objective of any damages award is to put KML, as far as a calculation of money could, in the position it would have been in if Ms McDonald had not committed the found breaches of contractual duties.⁴

[7] Ms McDonald advances a range of submissions in opposition to the orders sought including:

- (i) a claim of special damages requires rigorous proof;
- (ii) KML's delay in taking steps to regularise the taxation matters has unnecessarily inflated the amounts required to be paid to the inland revenue; and
- (iii) the invoices for services provided are unreasonable and there is a question as to whether they have been paid.

[8] Dealing with the last of Ms McDonald's submissions, while I accept the invoices, on their face, do not establish the invoices have been paid, there is evidence before the Authority that these are costs which KML has incurred. I am satisfied the invoiced sums for which KML seeks damages are costs which KML has incurred.

Executive time

[9] KML seeks to recover Dr McKerrow's time in dealing with the issues arising from Ms McDonald's found breaches at \$10,800.⁵ I accept he has spent time dealing with matters arising from Ms McDonald's employment including the found breaches and that this has been a challenging situation to deal with. It is not so clear, however, if KML has suffered a loss overall in relation to Dr McKerrow's billing ability or actual billable hours or if this use of Dr McKerrow's time was reasonable particularly given the resources available to KML such as book-keeping and accountancy services.

[10] For these reasons I decline to make an award for executive time.

³ *Medic Corporation Ltd v Barrett (No2)* [1992] 3 ERNZ 977 at 983-984.

⁴ *Civil Remedies in New Zealand* (2003) Blanchard & Ors 1.3.1 at 9.

⁵ 12 hours @ Dr McKerrow's practice hourly rate + GST.

Accounting fees

[11] KML seeks an award of special damages of \$11,077.50 to recover from Ms McDonald accounting fees incurred for investigating Ms McDonald's breaches of employment obligations and liaising with the inland revenue to rectify KML's tax position. The claim is supported by detailed invoices and Mr Masson's witness statements. Mr Masson is qualified and experienced in the matters which required accounting attention and is familiar with KML's systems. This indicates efficiencies have been gained in these accounting costs. However, I do not know, if the costs incurred, in the broader sense, reflect what might reasonably be charged for such work. Ms McDonald cannot reasonably be expected to meet costs which may have been secured at a lesser rate. An adjustment should be made to reflect that possibility.

[12] Ms McDonald says the steps taken by KML to rectify the consequences of her company invoices to KML were unreasonable and that she would have been able to rectify the situation promptly within her role at KML while her position was extant with little input from the accountant. She estimates 3 ½ hours total time would have been required. This submission begs the question why Ms McDonald did not take those steps herself which is partially answered by the fact she was not directed to do so by KML. However, the Authority has found KML was concerned about and took the matter of the company invoices seriously on discovery and undertook subsequent investigations and engagement of professional services to further those investigations and make the necessary rectification. Ms Masson's evidence as to the reasonableness of the steps taken is accepted. As stated above he is qualified and experienced in these matters.

[13] Time involved in dealing with the issue regarding KML's sister entity cannot be claimed because a breach on that basis was not established.⁶

[14] Ms McDonald is ordered to pay KML \$8,000.00 towards the accounting costs incurred by KML in dealing with taxation matters arising from her found breaches of the employment agreement. The payment is to be made within 21 days of the date of this determination.

⁶ above n1 at [59].

Legal fees

[15] KML seeks an award of special damages to recover legal fees totalling \$2,250 (excluding GST) incurred between 4 February and 7 April 2020. Supporting evidence has been provided including timesheets and a letter from the lawyer involved detailing the work undertaken. The timeframe involves the period KML had started to form concerns about the employment relationship with Ms McDonald beyond the issue of her company invoices, the basis of the found breaches, and which are the focus of this inquiry.

[16] Taking into account the fees incurred are very likely to cover issues beyond the found breaches and the matter of reasonableness of the level of fees incurred, Ms McDonald is ordered to pay KML \$500 towards the legal costs under this head of claim within 21 days of the date of this determination.

Inland revenue liability

[17] KML has paid the inland revenue a total of \$17,645.41 to rectify the tax consequence of Ms McDonald's found breaches. A detailed breakdown of the payments has been provided and includes the shortfall of PAYE and GST and interest and penalties on those amounts.

[18] Ms McDonald accepts liability for \$9,516.87 of this sum and the Authority understands she has paid this amount to KML. Ms McDonald says \$9,516.87 is reasonable because but for KML's delay in rectifying matters with the inland revenue the amount would have been no more than this. Delay causing increased liability to the inland revenue has not been established. Ms McDonald is liable for the total claimed of \$17,645.41, less any portion paid, which she is to pay to KML within 21 days of this determination.

Summary of orders

[19] The Authority orders as follows:

Within 21 days of the date of determination Denise McDonald is ordered to pay Kevin McKerrow Limited the following sums:

- (i) \$8,000 in accounting fees;

- (ii) \$500 towards legal fees; and
- (iii) \$17,645.41 of inland revenue liability less any portion of such paid by Ms McDonald to KML.

Costs

[20] Costs are reserved. Parties are encouraged to resolve any issue of costs between themselves. KML in closing submissions for this matter has proposed that costs should lie where they fall. Given the outcome in this and the earlier determination that may well be a fair outcome.

[21] If parties are unable to resolve costs between them and an Authority determination on costs is needed Ms McDonald may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum KML would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[22] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[23] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁷

Marija Urlich
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.