

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 686  
3185579

BETWEEN	AMANDA LONG Applicant
AND	DIONYSUS INVESTMENTS LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Applicant in person Grant Humphrey, director, for the Respondent
Investigation Meeting:	On the papers
Submissions received:	30 November and 5 December 2022 from Applicant 2 December and 15 December 2022 from Respondent
Determination:	21 December 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Long was employed by Dionysus Investments Limited (Dionysus), as a Commercial Finance Manager. She was made redundant in April 2022. Ms Long's employment agreement provided for a three month notice period. She was paid for 13 days of her notice period instead.

[2] Ms Long claims for the remainder of her outstanding notice period. She also claims a contribution to her costs in bringing this action, compensation for hurt and humiliation, and penalties against Dionysus for aiding and abetting a breach her individual employment agreement.

[3] Dionysus is represented by its director, Mr Grant Humphrey. He acknowledges that Ms Long was only paid for part of her notice period. He says that this was because Dionysus did not have the money to pay her. While acknowledging and agreeing that there is money owing to Ms Long, he has not put forward any proposal to pay her.

### **The Authority's investigation**

[4] For the Authority's investigation written witness statements and submissions were lodged from Ms Long, and from Mr Humphrey.

[5] 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.

### **The issues**

[6] The issues requiring investigation and determination were:

- (a) Is Ms Long owed part of her notice period, and if so, what is that amount?
- (b) If Ms Long is owed monies, did she suffer hurt and humiliation as a result, that should properly be compensated under s123(1)(c)(i) of the Act?
- (c) Did Dionysus breach a term of Ms Long's employment agreement? If so, should a penalty be awarded against the company, and in what amount?
- (d) Should either party contribute to the costs of representation of the other party?

### **What does the employment agreement say?**

[7] Ms Long has an individual employment agreement dated 1 August 2021.

[8] Ms Long's employment agreement has a notice provision (clause 49), which provides that either party may terminate the agreement "upon three months' written notice". Clause 49 also gives the employer the option to pay salary in lieu of notice for part or all of the notice period.

[9] Ms Long was first told that she might be made redundant, by email dated Monday 4 April 2022, when Dionysus sent her a letter advising of likely redundancies triggered by the sale of the business.

[10] On Sunday 17 April 2022, Ms Long was sent an email, advising that her role had been made redundant. This email had a letter attached which confirmed that Ms Long's employment would end on 30 April. This means that Ms Long only received 13 days notice of redundancy, as opposed to the three months she was entitled to.

[11] Ms Long emailed Mr Humphrey on 17 April, acknowledging that she had received the notice of redundancy, and asking him to confirm she would receive both her contractual notice period, and her contractual redundancy payment.

[12] Mr Humphrey emailed back asking her if she would be "agreeable" to receiving a lesser amount. Ms Long declined and indicated that she wished to receive her contractual entitlements.

[13] Dionysus then paid Ms Long her wages up to 30 April, her annual leave, and her contractual redundancy entitlement. No payment was made for the remainder of her notice period.

[14] There is no dispute between the parties that Ms Long was only paid for 13 days of her three month notice period – Dionysus, through its director Mr Humphrey, accepts this. It also accepts that this amounts to a sum of \$22,000 gross.

[15] Dionysus' position is that when its business was sold, it was not able to pay Ms Long, because it was only able to pay "wages and hol pay", and that Ms Long's notice period was not a "preferred payment". It says that Ms Long is "not entitled to be paid ahead of secured creditors". It says that it will pay her when "all sales of the business were complete".

## **Findings**

[16] I note that despite the language used by Dionysus, in referring to "preferred payments" and "secured creditors", Dionysus is not in liquidation or receivership. When it comes to the payment of wages, Dionysus is, and remains, liable to pay these

when they fall due<sup>1</sup>. Ms Long's notice payment is a wages payment. These wages fall due on the date that Ms Long's employment ended, which was 30 April 2022.

[17] Mr Humphrey also makes reference to Dionysus "waiving" Ms Long's notice period. In the statement of the reply, he says "we forgave the notice period [Ms Long] owed to the company". In his written statement, he says "I waived the notice period that was owed to [Dionysus] to facilitate her moving [to new employment]."

[18] The employment agreement between the parties provided, at clause 49, for termination "by either party upon three months written notice. The employer may at its option pay salary in lieu of notice for all or part of the notice period."

[19] This clause means that, in order to terminate Ms Long's employment, Dionysus must give Ms Long three months notice in writing. Alternatively, Dionysus may pay Ms Long for all or part of this three-month time period.

[20] As Dionysus initiated the ending of Ms Long's employment, it falls to Dionysus to provide the requisite length of notice. It has not done so. The documents provided to the Authority show that Dionysus emailed Ms Long on 17 April 2022, giving notice that her position was redundant, effective 30 April 2022. As will be clear from the dates, this means that Dionysus gave Ms Long 13 days notice of redundancy, instead of the three months it was required to give her.

[21] To "waive" something is to refrain from enforcing a right. In this instance, Ms Long has the contractual right to receive 3 months' notice (and/or payment in lieu as needed). Dionysus cannot waive a right that belongs to Ms Long, so the suggestion that Dionysus has "waived" or forgiven the notice period does not answer Ms Long's claim for payment that remains outstanding to her.

[22] Ms Long has given evidence that she "felt betrayed and angry and was emotionally drained from the roller coaster of events". She points out that her distress continues with the situation remaining unresolved.

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<sup>1</sup> This is set out at section 4 of the Wages Protection Act 1983.

[23] Mr Humphrey says that he does not know how the company and/or its directors have contributed to Ms Long's hurt and humiliation. He says that Ms Long was paid well, and that he has done everything he could under the circumstances.

[24] With respect, Mr Humphrey and Dionysus have not done everything they could, as they have not done the one thing that Dionysus was obligated to do – that is, pay Ms Long her wages when due.

[25] I accept Ms Long's evidence of the hurt that she has suffered. Her comments were reasonable and measured in the circumstances. The non-payment of Ms Long's wages when due is an unjustified disadvantage to her, with obvious adverse impacts. I consider that it would be appropriate to award Ms Long the sum of \$5,000 in recognition of the hurt and humiliation she has experienced.

### **Penalties**

[26] Ms Long has claimed that Dionysus is liable for a penalty for breaching her employment agreement. The breach of her employment agreement is the failure to pay the contractual notice period. Section 134 of the Act provides that a party to an employment agreement who breaches that agreement is liable to a penalty.

[27] Dionysus accepts that the employment agreement requires the payment of a three month notice period, and it accepts that it has not paid Ms Long for the majority of that notice period. In other words, it accepts that it has committed a breach of the employment agreement.

[28] Mr Humphrey stated that Dionysus received advice not to pay Ms Long the remainder of her notice payment. I requested that Mr Humphrey provide copies of this advice to the Authority. Mr Humphrey provided a clip of what appeared to be an email from a senior manager at BDO, although the original document showing letterhead, who it was sent to and the accompanying time and date stamp was absent.

[29] The writer of this document said he had spoken with Ms Long, not with Mr Humphrey. He did not state that he had provided advice to Dionysus not to pay Ms Long her wages or notice period. He said that he "recalled" that he referred Ms Long to Schedule 7 of the Companies Act 1993, which sets out the priority of payments to preferential creditors by a liquidator. He also expressed the view that "payment in lieu of notice is likely unsecured".

[30] I note again that Dionysus is not in liquidation, so Schedule 7 of the Companies Act 1993 does not apply, and Ms Long's notice payment is simply a payment of wages, which must be paid in full when due.

[31] It is also relevant that the only reason Ms Long has had to ask for part of her notice to be paid in lieu is because Dionysus chose to provide her with only 13 days notice of the ending of her employment, and then declined to pay her after this.

[32] Dionysus is therefore liable for a penalty. I must decide what penalty might be appropriate.

[33] The failure is a single one – failure to pay wages in respect of an contractually agreed notice period, which is a breach of Ms Long's employment agreement.

[34] Section 135(2)(b) of the Employment Relations Act provides that Dionysus, as a company, is liable to a penalty of up to \$20,000.

[35] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,<sup>2</sup> *A Labour Inspector v Prabh*<sup>3</sup> and *A Labour Inspector v Daleson Investment*.<sup>4</sup> Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[36] The Court has found a failure to provide minimum standards (which includes the protections of the Wages Protection Act) directly disadvantages employees, and often arise in circumstances *involving a distinct power imbalance*.<sup>5</sup> That would appear the case here.

[37] Essentially penalties are for wanton breaches. This is a failure of an employer's basic obligations, the failure to pay agreed wages on the ending of employment. Ms

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<sup>2</sup> *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

<sup>3</sup> *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

<sup>4</sup> *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

<sup>5</sup> *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

Long has raised her concerns repeatedly, and has been waiting on her money for almost 10 months.

[38] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question<sup>6</sup>, or failed to take reasonable steps to fulfil their legal obligations.<sup>7</sup> Here the evidence leads to a conclusion the failure is deliberate given the attempts by Ms Long to have the situation remedied which have been met with acknowledgement from Dionysus, but which acknowledgement has never progressed into a promise of payment, or payment itself.

[39] With respect to the breach's severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at 80%.<sup>8</sup> This factor suggests a reduction should be applied.

[40] I also must have regard to the statements from Mr Humphrey as Dionysus' director that the company is no longer trading. Mr Humphrey also says that the company has limited funds, but has produced no evidence of this, and says that the company will need to sell assets to meet the debt owed to Ms Long, but provides no detail as to when or how this will occur. Financial matters are relevant to an assessment of penalties, including that the business is no longer trading. This factor also suggests a reduction should be applied.

[41] There is no evidence of similar previous conduct by the respondent and finally I have to cognisance of issue such as consistency and proportionality. Consideration of recent penalties would also suggest the starting point of 80% would lead to an improperly high figure.

[42] Having weighed these factors I conclude the respondent should be required to pay a penalty of \$8,000. The final issue is then to whom the penalty should be paid. Ms Long has, by the inaction of the respondent, been forced to inordinate lengths to get what was rightfully hers. She has lost the use of her money. I also have some concerns that the assurances by Mr Humphrey that Dionysus agrees the money is owing but will

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<sup>6</sup> *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

<sup>7</sup> *El-Agez v Comprede Limited*, TT 4121553, at para 18

<sup>8</sup> See *Preet*, at paragraph [167] which suggests a starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

pay it at some unspecified later date, amounts to a delaying tactic. Ms Long should therefore share in the penalty and I consider half appropriate.

**Orders:**

[43] Dionysus Investments Limited is ordered to pay to Amanda Long, within 28 days of the date of this determination:

- a. The sum of \$22,000 gross being unpaid wages in respect of her contractual notice period; and
- b. The sum of \$5,000 without deduction as compensation for hurt and humiliation.

[44] Dionysus Investments Limited is ordered to pay to the Crown account, within 28 days of the date of this determination:

- a. The sum of \$8,000 without deduction, being the penalty awarded in respect of the breach of statute, half of which will be remitted to Ms Long in accordance with this determination.

**Costs**

[45] Ms Long has claimed for a contribution to her legal costs. The Authority uses a tariff-based system for awarding costs, based on the rate of \$4,500 for the first day of hearing, and \$3,500 for each subsequent day.<sup>9</sup>

[46] Ms Long says that she incurred legal costs, and has provided an invoice in support of her claim. However, she faces a difficulty in that she was self-represented at all times during these proceedings, and in addition, the matter has been heard “on the papers”. Under these circumstances, it is not clear to me that Ms Long is entitled to receive an award in contribution to costs incurred in these proceedings, as it is not clear that Ms Long’s legal costs were, strictly speaking, incurred in relation to these proceedings.

[47] Accordingly, no award of costs is made.

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<sup>9</sup> Please note the Authority’s Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>

Claire English  
Member of the Employment Relations Authority