



# Employment Court of New Zealand

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## Martin v Solar Bright Limited (in liquidation) [2021] NZEmpC 207 (26 November 2021)

Last Updated: 2 December 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 207](#)

EMPC 312/2020

IN THE MATTER OF	an application for rehearing
BETWEEN	PATRICK MARTIN Applicant
AND	SOLAR BRIGHT LIMITED (IN LIQUIDATION) Respondent

Hearing: 2 November 2021 (Heard at  
Christchurch)

Appearances: Applicant in person  
No appearance for defendant  
N Taefi, counsel assisting the  
Court

Judgment: 26 November 2021

### JUDGMENT OF JUDGE K G SMITH

[1] In August 2019 the Employment Relations Authority imposed a penalty on Patrick Martin, having concluded that he breached an employment agreement with his former employer, Solar Bright Ltd (in liquidation).<sup>1</sup> The penalty was \$2,000 payable within 28 days.<sup>2</sup>

[2] What prompted the Authority to reach that conclusion was its determination about Mr Martin's handling of the intellectual property in two inventions owned by Solar Bright, called respectively PATeye and DATAeye. While those inventions were owned by Solar Bright they were invented by Mr Martin.

<sup>1</sup> *Martin v Solar Bright Ltd (in liquidation)* [\[2019\] NZERA 463 \(Member Hickey\)](#) at [87].

<sup>2</sup> At order 4.

PATRICK MARTIN v SOLAR BRIGHT LIMITED (IN LIQUIDATION) [\[2021\] NZEmpC 207](#) [26 November 2021]

[3] The Authority investigated a wider dispute than Solar Bright's application for a penalty. It was required to resolve claims by Mr Martin, and Nicola Martin, that they were unjustifiably dismissed by the company and had not been paid a substantial sum owed to them for salary and holiday pay. While finding in favour of Mr and Mrs Martin about their monetary claims, the Authority dismissed their claims that they were unjustifiably dismissed.<sup>3</sup>

[4] The Authority also made an order, under [s 161\(qa\)](#) of the [Employment Relations Act 2000](#) (the Act), declaring that DATAeye and PATeye belonged to Solar Bright.<sup>4</sup>

[5] Solar Bright was in liquidation when the Authority concluded its investigation and issued its determination. The liquidator consented to the Authority continuing the investigation and to Mr Martin's subsequent challenge.

[6] Under [s 179\(1\)](#) of the Act, a party to a matter before the Authority dissatisfied with the outcome may elect to have that matter heard by the Court. Where that election is not about the whole matter before the Authority the challenge must specify the alleged errors of law or fact said to have been made or any question of law or fact to be resolved.<sup>5</sup>

[7] A challenge that does not seek a rehearing of the whole matter is conducted in the same way as an appeal.<sup>6</sup> Mr Martin challenged specific parts of the determination he claimed contained errors of law or fact made by the Authority.

[8] Mr Martin disputed the Authority's findings or conclusions in paragraphs [68], [76], [77], [79] and [80] of the determination and the order that he pay a penalty. Paragraph [68] was a finding by the Authority that he breached his duty of fidelity to Solar Bright in the way he dealt with the intellectual property in PATeye by assigning it from the company to himself.

3 At orders 1(a)–(b) and 2.

4 At order 3.

5 [Employment Relations Act 2000, s 179\(4\)](#); colloquially referred to as a non-de novo hearing.

6 See, for example, *Jerram v Franklin Veterinary Services (1977) Ltd* [\[2001\] NZEmpC 79](#); [\[2001\] ERNZ 157 \(EmpC\)](#);

*Xtreme Dining Ltd, (T/A Think Steel) v Dewar* [\[2016\] NZEmpC 136](#), [\[2016\] ERNZ 628](#).

[9] Paragraph [76] was the Authority's statement of the purpose of a penalty relying on *Xu v McIntosh*.<sup>7</sup> In paragraph [77], the Authority stated that Mr Martin should pay a penalty for his failure to comply with his obligations as a Solar Bright employee and to send a message of deterrence to other employees who might consider wrongly obtaining and retaining their employers intellectual property.

[10] Paragraph [79] was a finding by the Authority that Mr Martin knowingly and deliberately retained the DATAeye patent personally to protect his and Mrs Martin's position. In that paragraph the Authority also held that he deliberately refused, in an ongoing way, to turn over to Solar Bright the intellectual property in DATAeye knowing that in doing so he was disadvantaging the company.

[11] In paragraph [80] the Authority held that the breach attributed to Mr Martin was intentional and he had not acted in any way to put it right. It went on to conclude that he had not taken any steps to mitigate the ongoing adverse effects of the breach.

[12] Mr Martin's challenge was dismissed in a judgment of 9 September 2020.<sup>8</sup> The judgment divided his submissions into two parts. The first part was about his contention that the Authority should not have made any decision touching on PATeye because that subject was dealt with by the High Court.<sup>9</sup>

[13] In the judgment I rejected Mr Martin's argument about PATeye. The subject matter of the High Court's judgment was a resolution, by the directors of Solar Bright, avoiding the assignment of PATeye from the company to Mr Martin. The High Court upheld that resolution.<sup>10</sup> I concluded that the High Court's decision was not relevant to the employment relationship problem between Mr Martin and Solar Bright arising from the same transaction.<sup>11</sup> That was because the Authority has exclusive jurisdiction over employment relationship problems so that employment-related issues arising from the assignment were not before the High Court and could not have been resolved by its judgment. It followed that the Authority was entitled to investigate and

<sup>7</sup> *Xu v McIntosh* [\[2004\] NZEmpC 125](#); [\[2004\] 2 ERNZ 448 \(EmpC\)](#).

<sup>8</sup> *Martin v Solar Bright Ltd (in liquidation)* [\[2020\] NZEmpC 144](#).

<sup>9</sup> At [17].

<sup>10</sup> *Solar Bright Ltd v Martin* [\[2019\] NZHC 447](#).

<sup>11</sup> *Martin v Solar Bright Ltd (in liquidation)*, above n 8, at [20].

determine if Mr Martin had breached the employment agreement and, if so, to move on to assess whether a penalty was warranted.

[14] In the second part of the challenge Mr Martin had argued that the Authority made a mistake by describing DATAeye as a patent when it was only the subject of an application for a patent. That apparent mistake flowed into the second claimed error Mr Martin relied on, which was the Authority's failure to recognise that a patent could only be applied for by a person, meaning him and not Solar Bright.

[15] I held that the [Patents Act 2013](#) did not require the application for a patent for DATAeye to be lodged by Mr Martin rather than Solar Bright.<sup>12</sup> The second reason for dismissing that part of the challenge was what Mr Martin did after applying for the patent for DATAeye. I found, as the Authority had done, that he had declined to assign the intellectual

property in the application to Solar Bright for his own advantage.<sup>13</sup> The outcome of Mr Martin's challenge was that the penalty was upheld.

## Application for rehearing

[16] Mr Martin has applied for a rehearing. There are four grounds to his application as follows:

- (a) There had been a miscarriage of judgment in the September 2020 judgment.<sup>14</sup>
- (b) There was a conflict between the September 2020 judgment and the Authority's determination.
- (c) Solar Bright breached the contract of employment and that had not been considered.
- (d) The law relating to patents had been misunderstood by this Court, and by the Authority, in their respective decisions.

12 At [21] and also by reference to reg 50 of [Patents Regulations 2014](#).

13 At [23] and [25].

14 Mr Martin said that this ground could also be read as a miscarriage of justice.

[17] It is appropriate to begin this analysis by describing what is required to obtain a rehearing. Under cl 5 of sch 3 to the Act the Court may grant a rehearing and, if it does, to do so on such terms as are considered reasonable. The Court's discretion must be exercised on a principled basis.

[18] There is a public interest in the finality of litigation.<sup>15</sup> Rehearings are, therefore, usually only granted where the judgment concerned is placed in issue by some special or unusual circumstance. There is no hard or fast rule about what amounts to a special or unusual circumstance. The threshold test is whether the party applying for a rehearing can establish a real or substantial risk of a miscarriage of justice if the judgment is allowed to stand.<sup>16</sup> That must, however, be distinguished from an attempt to mount a de facto appeal. One example justifying a rehearing is the discovery of fresh or new evidence that could not, with reasonable diligence, have been discovered prior to the hearing and which is of such a character as to have had an impact on the original decision.<sup>17</sup> Another example is where some statutory provision or authoritative decision was inadvertently overlooked or misapprehended.<sup>18</sup> Those examples are not exhaustive.

[19] An application for a rehearing cannot be granted where the basis for it is a claim that the judgment contains an error of law. In that situation the appropriate course is to seek leave to appeal.<sup>19</sup>

## Mr Martin's submissions

[20] Mr Martin's application was brief and the four grounds may contain some overlap.

15 Subject, of course, to exercising rights of appeal.

16 *Davis v Commissioner of Police* [2015] NZEmpC 38, [2015] ERNZ 27 at [13].

17 *Davis v Commissioner of Police*, above n 16.

18. *Davis v Commissioner of Police*, above n 16; and see *Ports of Auckland Ltd v New Zealand Waterfront Workers' Union* [1995] NZCA 390; [1995] 2 ERNZ 85 (CA).

19 *Yong, (T/A Young and Co Chartered Accountants) v Chin* [2008] ERNZ 1 (EmpC).

*Miscarriage of judgment/misunderstanding about patents*

[21] It is convenient to deal with these grounds together. Mr Martin maintained that Solar Bright was unable to apply for a patent. The argument was that the [Patents Act](#) requires an application to be made by a person not a company. This interpretation of the [Patents Act](#) permeates all of the grounds of the application.

[22] If Mr Martin is correct, the judgment wrongly concluded the application could have been made by Solar Bright, and has flow-on consequences for the adverse conclusions that were reached.<sup>20</sup>

[23] Mr Martin referred to several sections of the [Patents Act](#) where the word "person" is used. An example is [s 31](#), which provides that any "person" may apply for a patent either alone or jointly with another person. He considered that meant, as the inventor, it was up to him to apply and Solar Bright could not do that.

[24] I do not accept Mr Martin's argument. Ms Taefi, counsel assisting the Court, correctly pointed out that while "person" is not defined in the [Patents Act](#), it is defined in the [Interpretation Act 1999](#). That definition includes a corporation sole, body corporate, and an unincorporated body.<sup>21</sup> That definition includes a company. Nothing in [s 31](#) of the [Patents Act](#) indicates

that the extended definition of “person” does not apply to applications for patents. Mr Martin’s overarching premise, that the law required him to apply because the company could not apply, was misplaced.

[25] Part of Mr Martin’s argument on these grounds was his concern that the Authority wrongly referred to DATAeye as a patent. He submitted that DATAeye was only the subject of an application for a patent and, therefore, had little or no value. The mistake attributed to the Authority was said to call into question the decision to impose a penalty. While not expressed in these terms, it seems he considered the Authority’s error was repeated in the judgment.

20 *Martin v Solar Bright Ltd (in liquidation)*, above n 8, at [21].

21. [Section 29](#). At the time submissions were filed the [Interpretation Act 1999](#) applied but now see the [Legislation Act 2019, s 13](#) which came into force on 28 October 2021 and is to the same effect.

[26] The judgment did not describe DATAeye as a patent and, in any event, its actual status was not material. The point was about why Mr Martin handled Solar Bright’s intellectual property as he did and not the legal status of DATAeye. Additionally, Ms Taefi pointed out that [s 129](#) of the [Patents Act](#) recognises the ability to assign applications. In fact, Mr Martin treated DATAeye as having value because an assignment of it was proposed in negotiations between him and the majority shareholder in Solar Bright.

[27] Mr Martin argued that the Authority’s analysis about how he dealt with DATAeye was misplaced because he did not have to take any steps to assign it to the company. That was because under the terms and conditions of the employment agreement Solar Bright already owned it. This argument missed the point. The company owned the product of his work on DATAeye, but what he did with that invention was inconsistent with Solar Bright’s ownership and the employment agreement. That was the Authority’s conclusion and I agreed with it.

[28] There is nothing new in these grounds which revisited submissions made in the hearing last year. They do not support an application for a rehearing.

#### *Conflict between the judgment and determination*

[29] The next ground Mr Martin relied on was an alleged conflict between the judgment and the Authority’s determination.

[30] The inconsistency was said to lie in the Authority’s finding that Mr Martin refused, in an ongoing way, to turn over to Solar Bright its intellectual property knowing that in doing so he disadvantaged the company.<sup>22</sup> In contrast, in the judgment I held that there were negotiations in which he offered to transfer DATAeye as part of the sale and purchase of shares. As part of those negotiations he eventually offered to transfer it without any conditions attaching to the transaction. I held that before he made the subsequent offer he had declined to transfer DATAeye for some time.<sup>23</sup>

22 *Martin v Solar Bright Ltd (in liquidation)*, above n 1, at [79].

23 *Martin v Solar Bright Ltd (in liquidation)*, above n 8, at [24].

[31] There is no inconsistency. First, the judgment dealt with a challenge to the Authority’s determination and, pursuant to [s 183](#) of the Act, the Court is required to make its own decision on that matter.<sup>24</sup> Second, there is, in reality, little difference between the Authority’s finding and the judgment. The crux of the Authority’s determination was that Mr Martin breached his duty of fidelity to his employer by applying for DATAeye personally and retaining the application in his name instead of promptly assigning it to Solar Bright. I agreed.<sup>25</sup>

[32] There is no basis for a rehearing arising from this ground of Mr Martin’s application.

#### *Solar Bright’s breach of contract*

[33] Mr Martin criticised the Authority for imposing a penalty on him without taking into account what he considered to be a breach of the employment agreement by Solar Bright. He said the company owed him a substantial sum of money to reimburse him for DATAeye’s application costs he incurred personally when the company could not fund them. He had a sense of injustice about being out of pocket and being given little or no credit for meeting this expense which was ultimately for the company’s benefit. He considered Solar Bright escaped criticism for not reimbursing him, in breach of the employment agreement, while his breach was criticised and punished.

[34] The Authority considered how the DATAeye application was funded but did not accept Mr Martin’s reason for saying that he had to pay the application costs personally. In the Authority Mr Martin said he funded it because Solar Bright had no money, the new investors only drip-fed money into the company, and the available funds were used to pay debts, salaries and rent.<sup>26</sup> The Authority preferred the evidence of other directors and shareholders, that they were never asked for money to apply for the provisional patent.<sup>27</sup> That evidence went so far as to say that a request for money

<sup>24</sup> *Slight v Boise New Zealand Ltd* [2005] NZEmpC 20; (2005) 7 NZELC 97,792 (EmpC) at [13]; *Sefo v Sealord Shellfish Ltd* [2007] ERNZ 680

[\(EmpC\)](#) at [16]. And see *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

25 *Martin v Solar Bright Ltd (in liquidation)*, above n 8, at [25].

26 *Martin v Solar Bright Ltd (in liquidation)*, above n 1, at [61].

27 At [61].

to pay the application costs would have been agreed to because the true value of the company lay in its intellectual property.

[35] The Authority concluded the real reason Mr Martin applied for the DATAeye patent personally was to “protect himself and Mrs Martin”.<sup>28</sup> It went on to note Mr Martin as having said that even if he and Mrs Martin had remained bound by their first employment agreements, which contained intellectual property protection for Solar Bright, “he would still have applied for the provisional patent personally”.<sup>29</sup> A reasonable inference from those findings is that the Authority was not persuaded to take into account the payments made by Mr Martin, because he was motivated by self-interest to incur the application costs personally.

[36] I agreed with the Authority’s conclusion that Mr Martin was attempting to use DATAeye in bargaining for a commercial benefit for himself.<sup>30</sup> The judgment referred to one proposal where he offered to assign the DATAeye intellectual property in exchange for an agreement to sell shares he and his wife held in Solar Bright and for payment of the outstanding salary and holiday pay.

[37] When Mr Martin gave evidence at the hearing last year, he acknowledged having attempted to bargain over transferring DATAeye to Solar Bright in exchange for being paid for the costs he had incurred in making the application. He said that he needed to get money from the company and the transaction, in which he offered to return DATAeye in exchange for payment, did not involve any malice on his part. He accepted that he could have issued proceedings to recover what was owed to him but said it was easier to tell the company to pay and he would give it the DATAeye application.

[38] Mr Martin’s application for a rehearing shifted the emphasis of the argument about the company’s indebtedness to him; concentrating on the company’s failure to reimburse him for the DATAeye application costs rather than unpaid wages and holiday pay. It is not clear when he sought reimbursement for those costs. Solar

28 At [63].

29 At [63].

30 *Martin v Solar Bright Ltd (in liquidation)*, above n 8, at [23].

Bright’s liquidation began immediately after the investigation meeting and probably precluded any prospect of payment by the company. In any event this shift does not support a conclusion that a rehearing is appropriate.

[39] The evidence given at last year’s hearing was consistent with what the Authority concluded. That is, Mr Martin was seeking to protect his own interests and doing so in a way inconsistent with the duty of fidelity. It is clear that the Authority considered the expense incurred by him but, because of the circumstances in which it arose, gave it no weight in the decision to impose a penalty.

[40] It was not material whether Solar Bright’s debt was for unpaid wages and holiday pay or the application costs. The fact that Solar Bright became indebted to Mr Martin does not offset or excuse his breach of the duty of fidelity owed to the company. I agreed with the Authority and this change of emphasis does not alter the analysis or conclusions in the judgment.

[41] This subject was raised and dealt with by the Authority and by the Court. This ground of the application does not cross the threshold for a rehearing.

## Conclusion

[42] Mr Martin has not established that there are any grounds to warrant a rehearing of his challenge to the Authority’s determination. His application is dismissed and, for the avoidance of doubt, that means the penalty previously imposed by the Authority is unaltered.

[43] Costs are reserved. If they are sought memorandum may be filed requesting a timetable for an exchange of submissions.

