IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 138
5548887

	BETWEEN	CHRIS MOOAR Applicant
	A N D	PENNYLANE RECORDS LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Kevin Murray, Advocate for Applicant David Beck, Counsel for Respondent
Investigation Meeting:	26 May 2016 at Christchurch
Submissions Received:	At the investigation meeting from both parties
Date of Determination:	22 August 2016

DETERMINATION OF THE AUTHORITY

A. **Pennylane Records Limited unjustifiably disadvantaged and unjustifiably dismissed Chris Mooar.**

B. **Pennylane Records Limited must pay Chris Mooar:**

(i) **Two weeks wages gross, plus 8% holiday pay, gross. The parties should agree on this amount. If that is not possible Mr Mooar has leave to request the Authority to set the amount.**

(ii) **$4,000 in compensation under section 123(1)(c)(i) of the Employment Relations Act 2000.**

C. Pennylane Records Limited must pay the Crown $1,000 as a penalty for not providing Chris Mooar with a written employment agreement.

Employment relationship problem

[1] Pennylane Records Limited (Pennylane) employed Chris Mooar as its Riccarton Road store manager from November 2012 until 4 October 2014 when his position was made redundant.

[2] Mr Mooar has made an application for the Authority to determine a personal grievance of unjustified disadvantage, a personal grievance of unjustified dismissal and a breach of good faith.

[3] He also claims the Authority should impose penalties on Pennylane for a breach of good faith and failures to provide time and wages records and a written employment agreement.

[4] Pennylane says the redundancy was for genuine reasons of great financial hardship and it carried out the process fairly and reasonably. It denies having breached its duty of good faith.

[5] It concedes it did not supply Mr Mooar, or any of its other employees, with a written employment agreement.

[6] I have not set out all the evidence given and every submission made by each party.[1]

[7] Mr Mooar, David Howard, Pennylane's sole director, and Garry Knight, Pennylane's Christchurch manager, provided written statements, confirmed their statements under oath or affirmation and were questioned and cross-examined on their evidence.

Events

[8] Mr Mooar and Mr Knight had worked together for more than 20 years in the music retail business when Pennylane employed Mr Mooar to manage its new shop in Riccarton in 2012. Pennylane already had two other retail shops, one in Sydenham and one in Eastgate.

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[1] Section 174E of the Employment Relations Act 2000.

[9] Amongst his other duties, Mr Mooar was responsible for ordering stock for Pennylane. While at work, he also ordered stock for himself because he trades on Trade Me and E-Bay.

[10] Mr Mooar used his own personal credit card to make purchases of stock for Pennylane. He did so because Pennylane had debt with a number of its suppliers and could not buy stock on its own account. As store manager, I am sure that Mr Mooar was aware of Pennylane's difficult financial position from at least June 2014, but likely from earlier. However, I accept that it was Mr Knight not Mr Mooar who managed the overall accounts and paid staff and overheads, such as the store rent.

[11] The retail music business is part of an industry in decline. By June 2014, Mr Howard and Mr Knight decided that the business, with three stores, was failing. They talked about options for making money and saving costs and had a number of informal discussions with staff, including Mr Mooar, about any ideas for saving and/or making money.

[12] However, Mr Howard said that the only ideas that surfaced were ones that they had already tried, or were impractical. At some point, Mr Mooar suggested that Pennylane get rid of a staff member at another store to save money. It is not clear whether that suggestion was before formal consultation about the restructuring began, or as part of that process.

[13] I am satisfied that leading up to and around this time, Mr Knight had meetings with Mr Mooar about the difficult financial position the business was in. I am also satisfied that on a number of occasions Mr Mooar was instructed to stop buying new stock, even on his own credit card, because Pennylane could not afford it. Mr Mooar did not adhere to this instruction and that resulted in a number of discussions and meetings between him and Mr Knight. Pennylane then instructed its other buyers not to buy any stock. In part, that was because some of its suppliers had stopped providing it with stock because of its debt.

[14] Also at this time, Mr Knight had discussions with Mr Mooar about putting a "for lease" sign in the window of the Riccarton store. Pennylane put up the sign and prospective new tenants came through and viewed the store, sometimes while Mr Mooar was at work.

[15] On 9 July 2014, Mr Knight gave Mr Mooar a letter signed by Mr Knight on behalf of Mr Howard:

> Following a review of our operations at the Riccarton outlet we have reluctantly decided to explore restructuring some expenditure areas including staffing, to orientate the firm in a different direction by focusing upon more certain potential revenue streams. We have been discussing the matter with our accountant and have reached the unfortunate conclusion that unless we soon cut overheads then the firm will not continue to sustain its current performance level. A central problem is the turnover in the Riccarton outlet does not justify its retention as we are also facing a likely rent increase and struggling to pay current overheads.
>
> As a result, we are proposing that we approach the landlord with a view to quitting the lease of the Riccarton outlet and finding a sub-tenant in a wholly unrelated business. It is envisaged that this may impact upon your current position. We are however, giving you an opportunity to comment on this proposal and any alternatives you can think of before we finalise our plans.
>
> I would thus like to meet with you on Tuesday July 15 … to discuss your situation and any alternatives you may have to our suggestion of basically closing the Riccarton outlet. Please be aware that you can bring a support person or a representative to our meeting.
>
> Once we have met with you we will then consider your view of the situation and decide on a way forward. We aim to do this in a defined time period to allow you sufficient input and to minimise the impact of any stress upon you.
>
> However, if we proceed with our proposal and cannot agree to alternatives and your position is deemed surplus you will be compensated with two week's pay in lieu of notice. We will also give you a positive reference and recommend you to any future employers. I also signal to be entirely transparent that if we do decide, as is likely, to sub-let and close the Riccarton outlet the timing of the potential ending of your employment will coincide with when we can get a new tenant to take on the lease and we are likely to still trade up until that date unless the financial situation deteriorates further.
>
> We realise this news is very unsettling for you. We will do our best to resolve matters in the most dignified manner possible; we emphasise that this is nothing personal as we have always viewed your contribution to our firm as being positive.

[16] I am satisfied that Mr Knight and Mr Mooar had the meeting foreshadowed in the 9 July 2014 letter. Mr Mooar did not have a support person or a representative with him at that meeting. Mr Mooar says that this was not a formal meeting but Mr Knight disagrees. I am satisfied that it was more likely a formal meeting, but the fact that Mr Knight and Mr Mooar were friends and had worked with each other for a number of years made it feel less formal than the situation would usually dictate.

[17] Pennylane had difficulty finding new tenants for its Riccarton store and on 9 September 2014 it wrote a further letter to Mr Mooar entitled *"Notice of Potential Restructuring"*:

> Following a strategic review of the firm partially prompted by the recent outlet rationalisation, we have reluctantly decided to explore restructuring some expenditure areas including staffing, to orientate the firm in a different direction by focusing upon more certain potential revenue streams. We have been discussing the matter with our accountant and have reached the unfortunate conclusion that unless we soon cut staffing and overheads then the firm will not continue to sustain its current performance level.
>
> As a result, we are proposing that we restructure the firm and potentially reduce staffing levels. It is envisaged that this may impact upon your current position. We are however, giving you an opportunity to comment on this proposal and any alternatives you can think of before we finalise a new structure.
>
> I would thus like to meet with you on Tuesday 16 September to discuss your situation and any alternatives you may have to our suggestion of reducing staffing. Please be aware that you can bring a support person or representative to our meeting.
>
> Once we have met with you we will then consider your view of the situation and decide on a way forward. We aim to do this in a defined period of time to allow you sufficient input and to minimise the impact of any stress upon you. We aim to complete the restructure within two weeks.
> …
>
> If we proceed with our proposal and can not agree to alternatives and your position is deemed surplus you will be compensated by two weeks paid notice and have the option if you wish to have that paid in lieu as recognition of your individual service.
>
> We realise this news is very unsettling for you. We will do our best to resolve matters in the most dignified manner possible; we emphasise that this is nothing personal as we have always viewed your contribution to our firm as being positive.

[18] It is clear this letter was based closely on the previous letter. However, there is no reference in it to potential redundancy being linked to subletting the Riccarton store. However, cuts to staffing as well as overheads were proposed.

[19] I am satisfied that Mr Knight and Mr Mooar had the meeting on 16 September that was foreshadowed in the 9 September letter, to discuss the restructuring. In particular, Mr Knight spoke with Mr Mooar about the possibility of his job being made redundant.

[20] Mr Mooar says that all along, even during and after that meeting, he understood that neither he nor any of the other staff at the Riccarton store would lose their jobs until there was an agreement signed to sublet the premises. Therefore, he was very surprised when on 22 September 2014 he received a text message from Mr Knight on his day off asking if there was any chance that they could catch up with each other that day. Mr Knight offered to come over to his place to save him a trip into the shop. Mr Knight also informed him that the matter was serious.

[21] Mr Mooar went into the shop where Mr Knight gave him a letter, signed by Mr Howard, entitled *"Notice of Disestablishment of Position"*:

> Following our indication of a potential redundancy and our request for your input I regret to advise my decision to disestablish your position for reasons of redundancy. The reasons are entirely unrelated to the quality of your work and involve a consideration of how I can best manage my overheads and expenses.
>
> The notice of termination of your employment is effective from today and your last day will be 4th October 2015. I however do not need you to work during your notice period so I will be paying you two weeks' notice in lieu and any outstanding holiday pay owed.
>
> In addition, I am willing to provide you with a positive written reference should your require it attesting to your reliability and honest approach to your work and your undoubted skills. I also wish to thank you for the loyalty you have shown to the company and work undertaken. I wish you well and hope that you find alternative employment soon.

[22] Mr Mooar says that Mr Knight told him that he was sorry he was losing his job, that the sub-leasing was only a week or so away and that the other two staff would lose their jobs too, and that there would be staff cuts at the Colombo Street store.

[23] Mr Knight denies telling Mr Mooar that the two other staff were also losing their jobs. In fact, potential tenants for the premises, who wished to operate a food business, were unable to obtain the appropriate consents and could not take up the lease. Pennylane remained unable to sublet the shop. After Mr Mooar was made redundant Pennylane kept on one staff member and one student who was a part-time staff member. Some weeks later, when the full-time staff member left he was not replaced.

[24] Mr Knight and Mr Howard attempted to keep the shop running between them. However, until mid-2015 the shop continued to lose money every month even without

staff wages to pay. Pennylane decided to sell as much stock as possible on sale, and, in June 2015, shut the shop. It did so despite being liable to keep paying rent until the end of the lease in September 2015.

[25] Pennylane says it saw subletting the premises as the first and best solution. However, the impetus for making that decision was the serious need to save money. Mr Howard says he had difficulty subletting the premises and came to the reluctant conclusion that Mr Mooar's position, as manager of the shop, was not necessary. Mr Mooar was the highest paid staff member in the store and therefore making the management position redundant was Pennylane's best solution.

[26] Mr Howard says that it was always the plan to close down the Riccarton store. That was at least in part because the Riccarton shop's rent was more than the rent of the other two shops combined.

[27] Mr Howard conceded that after making Mr Mooar redundant as of 4 October 2014 Pennylane did not expect to be still trading in Riccarton past November 2014.

Issues

[28] I need to ask the following questions:

(a) Was the need to reorganise the business, resulting in the Riccarton store manager's position being made redundant, genuine?

(b) Was the process used one a fair and reasonable employer could have used?

(c) Did Pennylane honour its good faith obligations to Mr Mooar?

(d) If not, should I impose a penalty for such a breach?

(e) Was Mr Mooar unjustifiably disadvantaged by not being able to work out his two-week notice period?

(f) Should Mr Mooar receive any remedies?

(g) Should I impose a penalty on Pennylane for its failure to provide a written employment agreement?

(h) Should I impose a penalty on Pennylane for its failure to provide time and wages records?

Was the redundancy genuine?

[29] In the Court of Appeal decision *Grace Team Accounting Ltd v. Brake*[2], the Court said that if an employer can show that a redundancy is genuine and that the notice and consultation requirements of s 4 of the Employment Relations Act 2000 (the Act) have been met, then the test of showing that the dismissal was justified is likely to be met.

[30] In *Scarborough v Micron Securities Products Ltd* [3], the Employment Court said:

> The Court of Appeal has … confirmed the Court was entitled to inquire into the merits of the redundancy business decision. The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.

[31] My first consideration must be whether the redundancy was genuine. It is not my role to substitute my business judgment for that of Pennylane. However, I do need to look at the analysis done by Pennylane to determine if the store manager's redundancy was a reasonable conclusion.

[32] Mr Mooar does not dispute that the Pennylane business was in financial trouble. However, he says that he was led to believe his manager's position only became redundant because the Riccarton store was going to close as soon as the premises were sublet. When the Riccarton store continued to operate into the New Year he felt very upset and misled.

[33] I am satisfied that the conclusion that Pennylane needed to rationalise its business and reduce expenditure was genuine. I am satisfied that its analysis that the Riccarton store needed to be the main focus of that rationalisation was sound. That was a decision a fair and reasonable employer could have made in those circumstances.

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2 [2014] ERNZ 129

3 [2015] NZEmpC 39

[34] Pennylane's preferred option, to sublet the store as soon as possible, was unable to be achieved. Therefore, was the decision to make Mr Mooar redundant as a result of restructuring the Riccarton business' staffing fair and reasonable, in all the circumstances?

[35] Pennylane continued to try and sublet the Riccarton store. I accept its inability to do so quickly meant it needed to consider reducing its staffing levels even without closing the store. A fair and reasonable employer could have reached the conclusion that between Mr Knight and Mr Howard it would be possible to manage the Riccarton store without the need for a separate store manager's position. Although Mr Mooar was only paid $17 per hour, he was the highest paid staff member at that store and he was a full-time employee.

[36] The letter dated 9 September 2014 made it clear that Pennylane had reached the "unfortunate conclusion that unless we soon cut staffing and overheads", there would be negative consequences for Pennylane.

[37] When Pennylane made Mr Mooar's position redundant it still hoped to sublet the premises as soon as possible. However, making the store manager's role redundant was not in reliance on imminent subletting, which would lead to the store's imminent closure. Subletting was, and remained, Mr Howard's and Mr Knight's hope.

[38] Mr Mooar believed that the other two staff would be made redundant at the same time as him. However, the failure of the potential sub-tenants to gain resource consent scuttled Pennylane's hope. Those circumstances were outside of Pennylane's control. Pennylane may have been mistaken that subletting the store was imminent, but it was not mistaken that it was in a difficult financial situation and it had to save costs, especially in relation to the Riccarton store. That makes this case distinguishable from the Court of Appeal case of *Grace Team Accounting v Brake*[4].

[39] I consider that the decision to make the Riccarton store manager's role redundant was a genuine decision a fair and reasonable employer could have made in all the circumstances at the time.

[4] Ibid.

Was the process a fair one?

[40] The second part of my inquiry into whether the redundancy was justifiable is to consider whether the process of consultation and implementation was fair.

[41] The duty of good faith, as expressed under s 4 of the Act, is the starting point and, as far as relevant, I must also consider:

(a) Was sufficient information disclosed to Mr Mooar to enable him to make informed comments on the proposed restructuring?

(b) Did Pennylane make a genuine attempt to consult with Mr Mooar once he had that information? Did he have a reasonable opportunity to respond?

(c) Did Pennylane then consider his responses before making its decision to make the Riccarton manager's role redundant?

[42] The process leading to Mr Mooar's redundancy started in an unofficial way and was followed by two letters in which Mr Mooar's input was sought to the first proposal of closing the Riccarton store and the second proposal of reducing staff.

[43] Because Pennylane was proposing to make a decision that was likely to have an adverse effect on the continuation of Mr Mooar's employment it was required to provide him with access to information relevant to the continuation of his employment, and give him an opportunity to comment on it.[5] The only exception to that duty was if the information was confidential and there was good reason to maintain the confidentiality of that information.

[44] Pennylane made a genuine attempt to consult with Mr Mooar. However, apart from general statements in the two letters, and any verbal comments Mr Knight or Mr Howard may have made during the preceding months, the company provided no financial information to Mr Mooar.

[45] The first letter clearly stated that the turnover in the Riccarton store did not justify its retention because Pennylane was struggling to pay its current overheads and was facing a likely rent increase. The problem was expressed as one of Pennylane "struggling to sustain its current performance level." In fact, the situation was bleaker than that, as the evidence at the investigation meeting established.

[5] Section 4 of the Employment Relations Act 2000.

[46] The second letter said that unless Pennylane "soon cut staffing and overheads … the firm will not continue to sustain its current performance." However, the reality was that the current level of business financial performance needed to be reversed, not sustained.

[47] Although Mr Mooar knew things were not going well and it was clearly proposed that the Riccarton store would close the first letter said that it was likely it would trade up until the premises were sublet "unless the financial situation deteriorates further".

[48] The proposal in the second letter required Pennylane to demonstrate to Mr Mooar that the financial situation had deteriorated further and that is why the proposal had changed to make the manager's role redundant even before the premises could be sublet. That letter did not clearly spell that out and Pennylane did not provide any financial information to back up its new proposal.

[49] It would have been a simple matter to provide information on Pennylane's straitened financial situation and, in particular, why the Riccarton store was the greatest problem without having to give Mr Mooar access to any confidential information.

[50] The second letter did not clearly spell out that the only position considered for redundancy at that point was the store manager's role. Therefore, although Mr Mooar clearly understood after receiving the second letter that his role may be made redundant it is not clear that he understood the proposal was to make *only* his role redundant within two weeks.

[51] There is no evidence to show Pennylane told Mr Mooar that his position was targeted because he was the highest paid employee in the store and Pennylane envisaged Mr Knight managing the store, for the short period they assumed it would be open. Lack of details made it impossible for Mr Mooar to give useful and specific feedback, rendering the consultation process ineffective.

[52] Pennylane breached its duty of good faith to provide relevant information to Mr Mooar. Therefore, the process was not one a fair and reasonable employer could have used. Therefore, Mr Mooar was unjustifiably dismissed.

[53] It is possible to argue that the process defects were unjustified actions leading to disadvantage to Mr Mooar. However, that does not give rise to a second personal grievance, as I have dealt with it in my finding that the dismissal was procedurally unjustified.

Was Mr Mooar unjustifiably disadvantaged by not being able to work out his two-week notice period?

[54] The first consultation letter stated that if Mr Mooar was "deemed surplus" he would "be compensated with two week's pay in lieu of notice". The second consultation letter said he would be given "the option if you wish to have [the two weeks paid notice] paid in lieu".

[55] The letter of 14 September suggested that the choice would be Mr Mooar's as to whether he worked his notice period. This choice was taken away from him on 22 September 2014. Mr Mooar was dismissed immediately and paid two weeks' pay in lieu of a notice period. He says he was instructed to remove all his possessions and leave. Mr Mooar claims that this disadvantaged him.

[56] Below, I deal with whether the absence of a written individual employment agreement (IEA) means a penalty should be imposed. The absence of a written IEA means there was not a contractually agreed process for notice in the event of redundancy. Pennylane's offer that Mr Mooar could have the option of working out the two-week period was not honoured.

[57] Mr Howard explained that he decided not to require Mr Mooar to work the notice period because that gave him an earlier opportunity to look for other work. It is clear that Mr Howard intended that to benefit Mr Mooar. If, as Mr Mooar had been led to expect, he had the chance to decide which option he wanted he may have decided not to work out his notice period. However, being offered an option and then having that unilaterally taken away from him was an unjustified action, which caused Mr Mooar disadvantage.

[58] Mr Mooar seeks to be compensated for this.

Remedies

[59] Section 128 of the Act provides that when the Authority finds an employee has a personal grievance, and he has lost money as a result of that grievance, the Authority must order the employer to pay the employee lost wages.

[60] Mr Mooar claims lost wages of more than $6,000 and holiday pay for the period after the paid notice period until he gained new employment, and for a shortfall in wages for an eight-week period after that.

[61] He also claims $15,000 in compensation for humiliation, loss of dignity and injury to his feelings. Mr Mooar says he believed that Pennylane's motives were genuine until he found out that the other two employees had kept their jobs and when the store was still operating in early 2015.

[62] Pennylane submits that the redundancy was genuine and therefore no remedies should flow to Mr Mooar. It also submits that there is scant evidence of Mr Mooar mitigating his loss by actively seeking alternative work.

[63] Pennylane says that even if the redundancy proposal had not proceeded Mr Mooar would have been justifiably dismissed for what he had posted on Facebook, which Mr Howard took as a threat to punch him in the face.

[64] On 10 September 2014, the day after he received the letter, Mr Mooar posted on his Facebook page that "dave howard" had written:

> "Following a strategic review of the firm partially prompted by the recent outlet rationalization, we have reluctantly decided to explore restructuring some expenditure areas including staffing"
>
> I would like to meet the fuckwit who originally wrote that, and punch them in the teeth.

[65] Mr Mooar also wrote:

> I like this bit too: "Once we have met with you we will consider your view of the situation and decide on a way forward. We aim to do this in a defined time period to allow you sufficient input and to minimise the impact of any stress upon you." I like that they know my stress levels and obviously reckon i can get that tidied up in about 2 weeks. Dicks.

[66] Mr Howard's evidence was that a number of staff at Pennylane were Facebook friends with Mr Mooar and the posts were drawn to his attention. He did not know what Mr Mooar was likely to do but he was upset and worried by the posts. He took them as a personal threat.

[67] Mr Mooar's evidence is that he was "absolutely gutted" to lose his job. He says when he posted on Facebook he did not believe Mr Howard had written the letter

and he had no intention of carrying out his expressed desire to punch whoever wrote the letter in the teeth.

[68] There was no likelihood of Pennylane proceeding to discipline Mr Mooar for his Facebook posts. Mr Howard's evidence was that the Facebook posts meant that he chose not to interact with Mr Mooar during the consultation period. He also said that, if anything, he would have been less inclined to make Mr Mooar redundant if that could have been avoided as he did not wish to be subjected to violence. Mr Howard said his usual reaction to confrontation was to avoid it.

[69] Mr Mooar's role as store manager was made redundant. It would have been made redundant even if Mr Mooar had not made the Facebook posts.

[70] Although Mr Mooar has a personal grievance of unjustified dismissal, I do not consider that he lost as much remuneration as he claims as a result of that grievance. That is because the redundancy was a genuine one and Mr Mooar is highly likely to have been made redundant even if the process was more fair. Pennylane could have remedied the procedural deficiencies by starting the second consultation process again and providing the information s 4 of the Act required it to provide. This would have taken no more than a further fortnight. I consider Mr Mooar should be paid lost wages for a two-week period, and 8% holiday pay on that amount. I leave it to the parties to agree on this amount. Mr Mooar has leave to return to the Authority to set this amount if the parties cannot agree.

Compensation

[71] Mr Mooar says he was absolutely "absolutely gutted" to be dismissed. However, by definition a justified redundancy is a no-fault dismissal. Both consultation letters and the dismissal letter made it clear that the redundancy was not related to the quality of Mr Mooar's work. He was offered and given a positive reference. Mr Knight and Mr Howard expressed regret to Mr Mooar over the redundancy.

[72] I cannot order Pennylane to compensate Mr Mooar for any hurt he felt about the fact of his redundancy. The fault on Pennylane's part was its failure to provide the necessary clarity and information to Mr Mooar to let him know that even if it could not imminently sublet the store it was in such a poor financial state it had to make the store manager's role redundant to save on those wages.

[73] I accept Mr Mooar's evidence that as time went on and the store was still trading into the New Year he became more upset about his redundancy and began to see it as personal. It clearly was not personal. After Mr Mooar was made redundant Pennylane had no remaining duty of good faith to him to let him know why the store remained trading. However, I consider that his level of hurt stemming from confusion caused during the consultation period is compensable.

[74] Mr Mooar also says that being effectively sent away on the same day he was given notice meant:

> I was absolutely shattered and embarrassed that I was being sent away without any notice or acknowledgement of what I had done for the store over the years.

[75] He says he was not able to say goodbye to one of the staff members who was not working that day.

[76] The appropriate combined level of compensation for the failure to give Mr Mooar the choice whether to work his notice period and for the compensable confusion about why and how his role was chosen for redundancy is $4,000.

Contribution

[77] Section 124 of the Act requires me to reduce remedies for personal grievances if the employee's behaviour contributed to the situation that gave rise to the grievances in any blameworthy way.

[78] Mr Mooar's behaviour did not contribute to Pennylane's bad financial situation that gave rise to the personal grievances and his remedies will not be reduced.

Penalties

[79] A penalty is imposed for the joint purposes of punishment and deterrence[6]. It is not a compensatory payment.

[80] Section 135 of the Act allows the Authority to impose penalties for breaches of the Act. It provides that the maximum penalty for an individual is $10,000 and the maximum penalty for a company or corporation is $20,000.

[6] *Tan v Yang & Zhang* [2014] NZ EmpC 65

[81] The following non-exhaustive list of factors is useful in deciding whether to impose a penalty, and, if one is to be imposed, what amount should be ordered to be paid. I will look at:

- the seriousness of the breach,
- whether the breach is one-off or repeated,
- the impact, if any, on the employees, including considering the vulnerability of the employees,
- the need for deterrence,
- remorse shown by the party in breach,
- and the range of penalties imposed in other comparable cases.[7]

Lack of a written IEA

[82] Mr Mooar seeks a penalty for Pennylane's failure to provide him with a written IEA, in contravention of s 65 of the Act. He also seeks a penalty for Pennylane's failure to provide wages and time records in breach of s 130(2) of the Act, and for Pennylane's breach of good faith.

[83] Pennylane admits that at the time it had not provided any of its employees with IEAs. It says that now it has taken legal advice and all its employees have IEAs.

Seriousness of the breach

[84] The failure to provide a written IEA to Mr Mooar had some impact on what he and Pennylane understood should happen if he was to be made redundant. The lack of an IEA meant that the issue of notice for redundancy and whether he could choose to work that notice was not clear.

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[7] *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32].

[85] Any breach of the requirements of the Act is serious. This breach is serious but not extremely serious.

Was the breach one-off or repeated?

[86] The breach was one-off in that Pennylane failed once to provide an IEA but it affected Mr Mooar for the whole of period of his employment.

The impact on the employee

[87] I have considered the impact on Mr Mooar in relation to the redundancy at paragraph [81] above.

Vulnerability of the employee

[88] Mr Mooar was not a young and naïve employee but the lack of the necessary legal formality in his employment arrangements meant he relied more than he may have if he had had an IEA on his friendship with Mr Knight to define his employment relationship.

The need for deterrence

[89] There may be no need for specific deterrence of Pennylane now that its practice is compliant. More generally, deterrence is necessary for all employers who need to take their obligation to provide written employment agreements seriously.

Remorse for the breach

[90] I accept that by its more recent compliance Pennylane has demonstrated remorse for its breach.

Conclusion

[91] The penalties for this kind of breach vary greatly. In this case, although I consider the breach requires a penalty I have taken into account the fact that all employees now have IEAs and Pennylane's difficult financial situation. I impose a penalty of $1,000 to be paid to the Crown via the Authority.

Failure to provide wages and time records

[92] These records were requested by Shayne Boyce, who works with Mr Murray, in a letter dated 23 February 2015. They were not provided.

[93] Mr Beck submits that their request was overlooked and that the records do exist. He expressed Pennylane's remorse at the non-provision. He submits that there was no disadvantage to Mr Mooar in their non-provision and that Pennylane was not reminded of the request. He says the breach was inadvertent.

[94] I have taken into consideration the factors set out above at paragraph [81].

[95] I am satisfied wages and time records were kept. I do not consider a penalty is warranted in this case.

Breach of good faith

[96] Section 4A of the Act sets out the circumstances in which a person who breaches their duty of good faith is liable to a penalty. Situations in which a breach is "deliberate, serious or sustained" or intended to undermine bargaining for an employment agreement or to undermine an existing employment agreement or relationship attract a penalty.

[97] The breach of good faith, by failing to provide relevant financial information, was not intended to undermine bargaining or to undermine an existing employment agreement or the employment relationship. Pennylane's failure to meet its duty of good faith to Mr Mooar was not deliberate. Therefore, Pennylane's failure to meet its duty of good faith does not meet the criteria for a penalty to be imposed.

Costs

[98] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[99] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is $3,500.

[100] If the parties cannot reach an agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The

other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority