

was due by him until the date of payment pursuant to clause 11 Schedule 2 of the Employment Relations Act 2000 (the Act).

E. I order Mr Wolmarans to pay Athenry the cost of the \$71.56 filing fee within 21 days of the date of this determination.

F. Costs are reserved.

Employment relationship problem

[1] The applicant, Athenry Electrical Limited (Athenry) seeks recovery of training costs incurred by it in respect of a Diploma in Advanced Automation undertaken by the respondent, Mr Gerhardus Wolmarans while employed by it. Mr Wolmarans denies liability for the training costs.

[2] Athenry is in the business of supplying electrical solutions within the manufacturing, production and energy industries in New Zealand. Products offered by Athenry include general electrical engineering, automation and control systems, fixed wire gas detection systems, machine safety, thermal energy, IQP certification and industrial electronics¹.

[3] Mr David Harris and Mrs Kathryn Harris are directors and shareholders of Athenry.

[4] Mr Wolmarans was employed by Athenry as Electrical and Control System Engineer on 5 December 2006. Mr Wolmarans' employment was initially subject to an individual employment agreement (IEA) dated 28 November 2006. Following a promotion to Manager Electrical Engineering, Mr Wolmarans' employment became subject to an IEA dated 12 July 2008.

[5] Mr Wolmarans was part of the senior management team and was aware that Athenry encouraged its employees to undertake training at its cost.

[6] In early 2011, Mr Wolmarans asked Mr Harris if he could undertake further training to refresh his own qualifications. Mr Harris suggested that Mr Wolmarans research appropriate training. Mr Harris was keen, from a marketing perspective, to be able to offer training that would give Athenry a point of difference in the market and a business advantage.

¹ www.athenryelectrical.co.nz

[7] Mr Wolmarans decided that he wished to undertake a Diploma in Advanced Automation (“Diploma”) which was being offered by the Engineering Institute of Technology. One of the reasons Mr Wolmarans proposed the Diploma was because it consisted of internet based webinar training which he could undertake outside work hours.

[8] In early 2011, Mr Wolmarans put a proposal to Mr Harris that Athenry fund the Diploma at a cost of \$8,144.15. Mr Harris agreed to Mr Wolmarans’ request and recalls telling him that Athenry would be able to market him on the basis he held the Diploma.

[9] In March 2011, Mr Wolmarans commenced study towards the Diploma. Mr Wolmarans says because of his senior management position at Athenry he had a reasonable amount of flexibility and from time to time study was undertaken during work hours.

[10] Athenry made five payments to IDC Technologies in respect of Mr Wolmarans’ study for his Diploma as follows:

- (a) 18 April 2011 : \$1,681.80;
- (b) 15 June 2011 : \$1,630.29;
- (c) 14 September 2011 : \$1,584.34;
- (d) 14 December 2011 : \$1,630.92;
- (e) 7 March 2012 : \$1,616.80.

[11] Mr Wolmarans says that if he had known when he applied to do the training that he may be required to reimburse Athenry for the cost of undertaking the Diploma, he may have made different decisions about the education and training he was to undertake. Mr Wolmarans says the Diploma study that he undertook was largely for the benefit of Athenry and not his benefit.

[12] In early 2012, Mr Wolmarans approached Mr Harris seeking a pay increase. Mr Harris says the request was timely because work had begun on reviewing

Athenry's employment policies and processes. Mr Harris suggested to Mr Wolmarans that they both consider the market rate for the role.

[13] Athenry contracted an organisation called "People Passion" to assist with its research into whether Mr Wolmarans was being remunerated at a market rate for his role. The outcome of this research was that Mr Wolmarans' total package was in fact better than the market rate, but that his efficiency was not as high as it should be.

[14] While undertaking this exercise, People Passion alerted Mr Harris to the high cost associated with Mr Wolmarans' training package. People Passion calculated that Athenry had spent approximately \$12,500 on Mr Wolmarans' training over the previous two to three years. People Passion suggested to Mr and Mrs Harris that Athenry adopt a company-wide training policy to protect it in the event employees resigned before Athenry had received the benefit of its training investment.

[15] Mr and Mrs Harris agreed that this was a sensible proposal and requested People Passion to draft an appropriate policy. Mr Harris says it was important that the policy to be drafted by People Passion capture not only future training but current training being undertaken by employees.

[16] The Training and Development Policy (the Policy) was developed in July 2012. The Policy set out its rationale as follows:

Athenry Electrical Limited is committed to training and development of our Employees. We believe that training and development is an investment into our Key Management people and extremely beneficial to the future of our business.

[17] The Policy set out its purpose and the procedures required for the identification of appropriate learning and approval. Relevant for the purposes of this determination is clause 11 which states:

If for any reason the Employee decides to terminate the employment relationship or the decision is made by the Employer to terminate the employment relationship for disciplinary reasons only within a given period of completing a training course, the Employee will be required to reimburse the Company for training costs as set out below:

- a. *Within 12 months full reimbursement of training costs.*
- b. *Within 2 years 60% of training costs.*

[18] The employee declaration states:

I, [Name] understand the above policy in regard to meeting my current and future training needs, I understand the criteria relating to reimbursement of the course/s.

[19] There is then provision for signatures by the employee and Athenry's director.

[20] At about the same time as the Policy was being drafted, Mr Harris developed a new salary package for Mr Wolmarans which was to provide him with a salary increase together with incremental bonus payments. The proposal was that Mr Wolmarans annual salary increase from \$83,500 gross per annum to \$90,000 gross per annum. With the additional components of company vehicle, cell phone, laptop, ipad and training, the value placed on the new package by Athenry was \$135,000 per annum.

[21] In early July 2012, Mr and Mrs Harris met with Mr Wolmarans to discuss the proposed new salary package and the Policy with him. Mr Harris informed Mr Wolmarans, and Mr Wolmarans accepted, that the new salary package was dependent upon him signing the Policy and that the Policy would apply to the training being currently undertaken by him for the Diploma. Mr Wolmarans requested time to consider the salary package and the Policy further and took the relevant documents away with him for consideration.

[22] Approximately a week after this meeting, Mr Harris and Mr Wolmarans spoke again about the Policy. Mr Harris explained to Mr Wolmarans that Athenry was investing heavily in his training and needed to ensure a return on investment and this was why the Policy applied to both current and future training.

[23] Mr Wolmarans told Mr Harris that he disagreed with the policy. Mr Harris explained that reimbursement of the costs for the Diploma would only be sought if he was to leave Athenry.

[24] At a subsequent meeting with Mr and Mrs Harris on 16 July, Mr Wolmarans signed the Policy. When signing the policy Mr Wolmarans told both Mr and Mrs Harris *"it's not really a problem, because if I go anywhere else, then I'll just get the company I go to to pay for it"*.

[25] Mr Wolmarans confirmed during the course of the investigation meeting that when he signed the Policy he considered that if he left Athenry's employment, either his new employer would reimburse him for the cost of the Diploma or the Policy would not be legally enforceable and he would not have to repay it. Mr Wolmarans said that despite signing the Policy he had no intention of reimbursing Athenry if he left its employ. Mr Wolmarans also accepted it was his decision to sign the Policy and obtain the salary increase. Mr Wolmarans was aware he did not need to sign the Policy and in that event would remain on his current salary level and if he left Athenry would not have to reimburse the Diploma costs.

[26] The new salary package and the Policy took effect from 16 July 2012. On 8 October 2012 Mr Wolmarans received a one-off payment of \$2,000 and a \$1,000 increase in his salary as part of the new salary package.

[27] Mr Wolmarans was issued with a certificate of completion in regards to the Diploma on 17 October 2012.

[28] On 22 February 2013 Mr Wolmarans resigned from his employment with Athenry. His final day of work was 28 March 2013. Athenry issued an invoice to Mr Wolmarans for payment of the sum of \$8,144.15 by 20 April 2013. Mr Wolmarans has failed to pay the sum.

[29] Prior to Mr Wolmarans' departure, Mr Harris reminded him that Athenry would require repayment of the costs of his Diploma. Because Mr Wolmarans was setting up his own business, Mr Harris offered him the opportunity to repay the training costs by way of instalment. Mr Wolmarans did not, and has not, paid the Diploma costs to Athenry.

[30] Athenry claims that the cost of the Diploma is payable by Mr Wolmarans pursuant to the Policy. Mr Wolmarans denies payment is owing under the Policy which he says cannot apply retrospectively.

Issues

[31] The following issues are to be determined:

- (a) Is the Policy a binding contract between Athenry and Mr Wolmarans?
- (b) Does the Policy apply to the Diploma and if so is the Policy enforceable?

First Issue

Is the Policy a binding contract between Athenry and Mr Wolmarans?

[32] On 12 July 2008, Mr Wolmarans was provided with a letter offering him the position of Manager Electrical Engineering. Mr Wolmarans signed the letter on 22 July 2008 confirming that he had read the terms of employment including the attached electrical contracting contract. Mr Wolmarans further confirmed that he understood those documents, their implications and accepted the offer of employment.

[33] The attached standard terms of employment for the electrical contracting industry contained a provision that the company *“may vary, cancel or introduce rules, policies and procedures to meet changes in the business but no such change may vary this agreement of employment”*.

[34] Athenry agreed to fund Mr Wolmarans’ Diploma costs in early 2011 and paid such costs in full prior to the introduction of the Policy on 16 July 2012. Mr Wolmarans completed his Diploma and obtained a certificate of completion in October 2012.

[35] The salary increase offered to Mr Wolmarans was conditional on him signing the Policy. Mr Wolmarans signed the Policy after being given a reasonable period of time in which to consider it, make amendments and either sign or not sign it. Mr Wolmarans chose to sign the Policy along with the salary increase. Upon signing the Policy and receiving the salary increase, Mr Wolmarans was paid in accordance with the new salary package. All the requirements of a legally binding contract existed between the parties in my view.

[36] I find that the Policy was binding on Mr Wolmarans.

Second Issue

Does the Policy apply to the Diploma and if so is the Policy enforceable?

[37] Mr Wolmarans says the Policy can not apply retrospectively to the Diploma. Mr Wolmarans says he embarked upon a course of study in early 2011 and the requirement to reimburse Athenry was not introduced until July 2012. Mr Wolmarans says accordingly the Policy is not enforceable in respect of the Diploma.

[38] At the time of signing the Policy in July 2012, Mr Wolmarans was still completing the Diploma. The Diploma was completed in October 2012.

[39] Mr Wolmarans accepted during the course of the investigation meeting, that he knew the Policy applied to the current Diploma he was undertaking. Further, Mr Wolmarans accepted the Policy clearly stated that it applied to both current and future training.

[40] In *Trollope & Colls Ltd v Atomic Power Constructions Ltd*² at page 339, the English High Court observed that there was nothing to prevent a contract from having retrospective effect. At page 341 the Court stated:

I am satisfied from all the circumstances that both parties, in all they did in the course of negotiations, in the defendants' requests or instructions to the plaintiffs to carry out the work as varied, and in the plaintiffs' acceptance of those instructions, were doing so on the understanding and in the anticipation that, if a contract were made, and whenever it was made, that contract would apply to and govern what was meanwhile being done by the parties. I am satisfied that if, on April 11, 1960 (still assuming that a contract was, otherwise, made on that date), the question had been raised, both parties would have said, as a matter of course: "This contract is to be treated as applying, not only to our future relations, but also to what has been done by us in the past since the date of the tender in the anticipation of the making of this contract.

[41] I find that the Policy applied to the current training Mr Wolmarans was undertaking for the Diploma that Mr Wolmarans completed on 17 October 2012. The Policy is enforceable and accordingly, Mr Wolmarans is liable to reimburse Athenry the sum of \$8,144.15.

[42] I order Mr Wolmarans to pay Athenry the sum of \$8,144.15 within 21 days of the date of this determination together with interest at the rate of 5% per annum from 20 April 2013, the date payment was due by him until the date of payment pursuant to clause 11 Schedule 2 of the Employment Relations Act 2000 (the Act).

[43] Mr Wolmarans is to pay Athenry the cost of the \$71.56 filing fee within 21 days of the date of this determination.

² [1963] 1 WLR 333 (QB)

Costs

[44] Costs are reserved. Counsel for Athenry has 14 days from the date of this determination in which to file a memorandum as to costs. Mr Wolmarans has 14 days from receipt of Athenry's memorandum as to costs in which to file a reply.

Anna Fitzgibbon
Member of the Employment Relations Authority