New Zealand Employment Relations Authority Decisions

Bayliss v Solar Bright Limited (Christchurch) [2017] NZERA 1090; [2017] NZERA Christchurch 90 (8 June 2017)

Last Updated: 24 June 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 90
5633936

BETWEEN JOHN BAYLISS Applicant

A N D SOLAR BRIGHT LIMITED Respondent

AND BETWEEN SOLAR BRIGHT LIMITED Applicant

A N D JOHN BAYLISS Applicant

Member of Authority: Helen Doyle

Representatives: Peter Cahill, Advocate for Applicant

Nicola and Pat Martin, Advocates for Respondent

Investigation Meeting: 28 February 2017 at Christchurch

Submissions Received: 28 February and 28 March 2017, from the Applicant

2 March 2017, further information from the Respondent

21 March 2017, from the Respondent

Date of Determination: 8 June 2017

DETERMINATION OF THE AUTHORITY

A John Bayliss was not constructively or actually unjustifiably dismissed from his employment with Solar Bright. His employment ended for the genuine reason of redundancy following a fair process in accordance with good faith.

B John Bayliss was unjustifiably disadvantaged in his employment with Solar Bright because he was unjustifiably suspended from his employment and lost the benefit of the use of his company car for five weeks.

C Orders have been made that Solar Bright Limited pay John

Bayliss:

(i) The sum of $5000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

(ii) The sum of $1730.76 being compensation for the loss of the benefit of a car under s 123(1)(c)(ii) of the Employment Relations Act 2000.

D There is a dispute about what Mr Bayliss owes Solar Bright Limited and whether he should be reimbursed money deducted from his salary. The Authority suggests that the parties reach some agreement about what is owed by Mr Bayliss to prevent further litigation. The Authority has, on the basis of the evidence heard, provided some guidance to the parties about this. A finding there should be reimbursement of some money by Solar Bright to Mr Bayliss is likely. Resolution may need the assistance of a mediator. Leave is reserved for either party to return to the Authority.

E There is no penalty awarded for a breach of good faith.

F I have found that the restrictive covenants for non-solicitation, if the six month period is modified to commence at the start of formal garden leave on 25 May 2016, are reasonable and enforceable. On that basis I have found there were breaches of the non-solicitation restrictive covenants. No documentation was disclosed about the extent of work accepted or undertaken as a result and I make no findings about that as a result.

G Before the Authority can modify the commencement date of the restrictive covenants so to enforce the covenants it must under s

164 of the Employment Relations Act 2000 direct the parties to attend mediation to resolve the commencement date issue. The parties must attempt in good faith to resolve that issue.

H A penalty is claimed in submissions for breaches of the non- solicitation covenants but such an action has not been commenced in the Authority. I direct the parties to the timeframe for commencing an action for penalties in s 135(5) (a) and (b) of the Act.

I I have reserved the issue of costs until all matters have been finalised.

Prohibition from publication

[1] I prohibit from publication the financial information from Solar Bright

Limited except to the extent that it has been disclosed in this determination.

Section 121 of the Employment Relations Act 2000

[2] I refer both parties to s 121 of the Employment Relations Act 2000 (the Act) because of concerns raised by the applicant about the content of some of the statements of evidence and information provided.

Employment relationship problems

John Bayliss v Solar Bright Limited

[3] John Bayliss was employed by Solar Bright Limited (Solar Bright) from in or about March/April 2014 and was party to two fixed term employment agreements. The first was for a one year period and the second for a three year period commencing on 1 February 2016 and ending on 31 January 2019. Mr Bayliss's job was described in his second fixed term agreement as a Solas Lighting Applications Engineer.

[4] The employment relationship problems were listed without elaboration in Mr Bayliss's statement of problem and the facts that followed were not clearly linked to a particular problem. The Authority held a telephone conference with Mr Cahill and the representatives for Solar Bright, Nicola and Pat Martin, on 5 October 2016. Mr and Mrs Martin are the founders and directors of Solar Bright which was incorporated on 15 December 2006. Mr Martin invented the products Solar Bright sells and Mrs Martin undertakes administration, sales and marketing.

[5] The Authority was able to clarify the employment problems during the telephone conference that Mr Bayliss wanted resolved. Mr Cahill subsequently provided a memorandum on 20 January 2017 setting out the remedies claimed and it was responded to by Mr and Mrs Martin.

[6] Mr Bayliss's employment relationship problems are:

Unjustified dismissal

[7] Mr Bayliss says that he was unjustifiably dismissed, either constructively on

20 April 2016 or actually following a restructuring process. By letter dated 25 May

2016, Mr Bayliss was advised that a decision had been made to disestablish his role with four weeks' notice with his last day being 22 June 2016. Mr Bayliss was advised he was to remain on garden leave during that time and would not be required to perform any duties.

Unjustified disadvantage

[8] Mr Cahill stated that the unjustified actions that caused disadvantage were the withdrawal of benefits being a car, laptop and a phone from 20 April 2016.

Breach of contract

[9] This was described in the statement of problem as a repudiation of the three year fixed term agreement although was

later stated in the memorandum to overlap with the loss of benefits.

Wages Protection Act

[10] An additional claim not altogether clear from the statement of problem was that there had been a breach of the Wages Protection Act 1983 with respect to deduction of money from Mr Bayliss' salary and a reimbursement was sought of sums deducted as a result.

Breach of good faith

[11] It was alleged there were breaches of good faith when Solar Bright failed to be communicative and responsive and entered into a course of action to mislead and deceive and corresponded with Mr Bayliss' new employer about an alleged breach of his non-solicitation covenants.

Remedies

[12] In his memorandum lodged with the Authority on 2 January 2017, Mr Cahill set out the remedies Mr Bayliss sought:

(a) Compensation of $60,000 for humiliation, loss of dignity and injury to feelings;

(b) Payment of a sum equivalent to 17 weeks of lost wages in the sum of

$28,333;

(c) Compensation for the loss of the benefit of the motor vehicle and cellphone for the 17 weeks in the sum of $15,000;

(d) Payment of the sum of $4,180 being the amount alleged to have been unlawfully deducted in breach of the Wages Protection Act;

(e) A penalty of $20,000 for a breach of good faith provisions where the respondent failed to be communicative and responsive and entered into a course of action which was likely to mislead and deceive including with Mr Bayliss' new employer;

(f) Costs.

[13] Solar Bright is a company involved in the business of creating, designing and manufacturing lighting solutions for its customers. It does not accept the claims made by Mr Bayliss and says that he was not unjustifiably dismissed or disadvantaged and that it acted in good faith. It says it had authorisation from Mr Bayliss to deduct money because it had made payments to him in the nature of a loan and that he authorised the deduction under his employment agreement which also provided that he was to repay to the employer any sums owing on termination. It says that Mr Bayliss was made redundant and that the process it followed was fair and the redundancy was for genuine reasons.

Solar Bright Limited v John Bayliss

[14] Solar Bright says that after Mr Bayliss' position was declared redundant he left the organisation and went to work for a direct competitor who I shall call Bright Light. Solar Bright is prepared to consent to a breach of clause 17.1.2 of the

employment agreement to enable Mr Bayliss to continue working in circumstances where he has been made redundant. The concern as expressed in its statement of problem is that Mr Bayliss has contacted a number of Solar Bright clients and customers in breach of his non-solicitation obligations in his employment agreement.

[15] The way in which the problem was expressed to be resolved was that Mr Bayliss cease contacting Solar Bright customers and return all pricing and sales literature, a list of customers contacted since the start of his employment with Bright Light and details of work undertaken by him and others at Bright Light for customers of Solar Bright.

[16] In his statement in reply, Mr Bayliss did not accept the allegations that he had breached his obligations in the employment agreement. He did not accept that he held any information and stated that his present employment related to the wholesale market of lighting products that Solar Bright is not involved in.

[17] Following a further telephone conference with the Authority, it was agreed that this problem would be dealt with at the same time as Mr Bayliss's claim and evidence about client contact was provided for the first time by Mr Bayliss for the investigation meeting. He provided no evidence about work undertaken.

The issues

[18] This determination needs to address and resolve the following issues: (a) The effect of 20 April 2016 and being sent home;

(b) Was Mr Bayliss constructively dismissed from his employment on or from that date;

(c) If Mr Bayliss was constructively dismissed, then was his dismissal unjustified;

(d) If Mr Bayliss was not unjustifiably constructively dismissed on

20 April 2016, then was he dismissed following a restructuring process that concluded on 25 May 2016 with a decision to disestablish his position on 22 June 2016;

(e) Was there a genuine reason for the redundancy and was the process procedurally fair;

(f) If Mr Bayliss was actually dismissed, then was the dismissal justified;

(g) Were there unjustified actions and corresponding disadvantage as a result;

(h) If some or all of these matters are answered in favour of Mr Bayliss, then what remedies is he entitled to and is there an issue of contribution and mitigation;

(i) Was money deducted from Mr Bayliss' salary in contravention of the

Wages Protection Act 1983 and should there be reimbursement;

(j) Were there breaches of good faith and should a penalty be awarded;

(k) Did Mr Bayliss in terms of the counterclaim breach his obligations under his employment agreement with Solar Bright Limited?

[19] The Authority received about 55 pages of closely typed evidence from Mr Bayliss and there was a large folder of documents containing documents from both parties.

[20] I have given all material provided careful consideration even if I have concluded it is not necessary for me to refer to it in this determination. In accordance with s 174E(b) of the Employment Relations Act 2000 (the Act) this determination sets out the relevant findings of fact, findings on relevant issues of law and conclusions on the matter or issues that dispose of this matter together with any order the Authority may make. It is not a requirement that a determination set out a record of all of the evidence heard or received.

Background against which the grievance claims should be considered

20 April 2016

[21] On 20 April 2016 Mr Martin was in China. He had been overseas for a period of 7 weeks and was due back in Christchurch that day at about 4pm. An issue arose about a banking transaction and changes to bank accounts although I do not need to set out the exact details. Mr Bayliss was not involved with the transaction.

[22] Mr Bayliss's evidence as supported by office manager Dale Leonard was that the atmosphere that day in the office was tense. Mrs Martin discussed the matter about the banking transactions with Mr Martin by telephone after he landed at Christchurch airport and she was advised to send Ms Leonard and Mr Bayliss home so it could be investigated. It was likely that it was after 4pm. There was a dispute as to exactly what was said and how it was said. I am satisfied, that in accordance with Mr Martin's instruction, Mrs Martin told Mr Bayliss and Ms Leonard to go home and Mr Bayliss was asked to leave his cell phone, laptop, keys and the company car he used after he had removed any personal items from the car. Mr Bayliss was advised of an intention to contact him on 26 April being the day after Anzac Day.

[23] Mr Bayliss was taken home by Ms Leonard as he was without a car. Mr Bayliss and Ms Leonard contacted the chief executive officer of Solar Bright, Ross Sinclair, to discuss the situation. Mr Sinclair advised that Solar Bright was in some difficulty amidst concerns from its majority shareholder Powerhouse Venture Limited (Powerhouse). On Anzac day Ms Leonard said that Mr Sinclair had advised her that Powerhouse are looking to negotiate with Mr and Mrs Martin and start a new business but there would be no future for her and Mr Bayliss. I am satisfied that Ms Leonard talked to Mr Bayliss along those lines.

What happened then?

[24] Mr Bayliss did not return to work but remained on full pay until 22 June 2016. Mr Cahill submits that Mr Bayliss was unjustifiably constructively dismissed from the time he was asked to leave on 20 April 2016 and that the subsequent restructuring process was simply an attempt to justify the earlier dismissal. There is a claim that there was a lack of good faith because of the inadequacy of the attempts to contact Mr Bayliss to keep him informed as to what was happening after 20 April 2016. Some focus is therefore required on the events that followed 20 April 2016.

Communication between 26 April and 4 May 2016

[25] Mr Bayliss, as requested on 20 April 2016, returned his work cell phone. Unfortunately his wife's cell phone number which he had provided as an emergency number on a list held at Solar Bright was no longer the correct number. Mrs Martin said that on 20 April 2016 she asked Mr Bayliss again for his wife's number but it was not given to her. I do not find given what happened on that date that Mr Bayliss

fully appreciated that request. I accept that Mr Martin made several attempts to call Mr Bayliss on the incorrect number. That conclusion is consistent with other evidence including a recording of a telephone discussion between Mr Martin and Ms Leonard on 27 April 2016 in which Mr Martin advises Ms Leonard about the attempts he had made to contact Mr Bayliss.

[26] Mr Martin did not go further and communicate in writing to Mr Bayliss. I accept that writing was not his preferred method of communication, but he did not attend at Mr Bayliss's home. He had apparently been cautioned against such an approach on the basis it could be seen as bullying.

[27] Mr Sinclair, who knew about Mr Bayliss's concerns, communicated primarily with the third director of Solar Bright, Dr Stephen Hampson. There is some insight into that from an email dated 23 April 2016 from Mr Sinclair to Mr Hampson confirming that he had spoken to Ms Bayliss and Ms Leonard the previous day.

[28] Dr Hampson is chair of the board at Solar Bright and also a shareholder of Powerhouse. Powerhouse had invested in Solar Bright and it was concerned about the situation at Solar Bright earlier than April 2016. At or about April 2016 Powerhouse had concluded that further capital investment would not be possible as sales would not recover to the level required and that Solar Bright's business plan fell short of the investment criteria. On 12 April 2016 the Martins' had arranged for a sum against their personal mortgage for payment of arrears and creditors. Against that background I accept there was a level of existing stress when it came to Mrs Martin's attention that the bank accounts for payments were changed without agreement and/or knowledge of the Board.

[29] Mr Bayliss was expecting to be contacted on 26 April 2016 by the Martins. When he was not he sent Mr Sinclair a series of emails that confirmed he remained available to undertake his duties and that it was his understanding that he remained in full time employment notwithstanding the instruction not to attend at work. He also advised of an intention to raise a personal grievance. Mr Bayliss said that he received no response at least from the Martin's. Mr Sinclair however acknowledged the communications and forwarded them on to Dr Hampson. Mr Sinclair had in all likelihood his own concerns about his role at that time.

Raising personal grievances and attending at Solar Bright on 4 May 2016.

[30] Mr Bayliss instructed Mr Cahill. On 2 May 2016 Mr Cahill raised a personal grievance with Solar Bright that Mr Bayliss was unjustifiably constructively dismissed, unjustifiably disadvantaged and that there was a failure to act in good faith.

[31] Mr Bayliss attended at Solar Bright on 4 May to pick up some personal documentation and was able to have a word with Mr Martin.

[32] Having heard the evidence from both Mr Martin and Mr Bayliss I find that it was common ground that Mr Martin talked about some concerns with the financial position of Solar Bright. Mr Martin expressed some surprise that Mr Bayliss had not tried to contact him earlier and explained that he had tried to contact Mr Bayliss five times by telephone. Mr Martin discussed paying holiday payment. Mr Bayliss said there was discussion about payment of a notice period. There was a concern expressed by Mr Martin of possible liquidation of the company. Mr Martin in his oral evidence said that he advised Mr Bayliss that he did not know what was happening with Solar Bright and "at the rate it was going none of us will have a job." He did not accept that he confirmed there was no role for Mr Bayliss. Having listened to the evidence I find that any conversation about this and Mr Bayliss' view that he was told he did not have a job was in the context of a possibility Solar Bright could not trade out of the situation and therefore a concern as to whether the company could continue. It was not a discussion directed only to Mr Bayliss's future.

[33] On 5 May 2016 Solar Bright's solicitor, Andrew Shaw from the Christchurch firm of Lane Neave, responded to the personal grievance. On behalf of his client he disagreed with many of the issues raised by Mr Cahill and stated that Mr Bayliss' employment has not been terminated by Solar Bright and that he is currently on full pay.

Meeting 9 May 2016

[34] A meeting took place on 9 May 2016 at 9.00am at Lane Neave's office. I conclude its primary purpose was to discuss with Mr Bayliss the status of his employment. Mr Bayliss attended the meeting with Mr Cahill. Mr Shaw attended with the Martin's. I think it less likely that there was anything certain stated about Mr Bayliss' future except that he remained employed. In all likelihood he was advised, after Mr Cahill inquired, that he was not able to resume duties and that a

restructuring was envisaged. That is consistent with Mr Shaw's letter of 11 May 2016 to Mr Cahill. Mr Shaw wrote in that letter that Solar Bright is in "financial strife" and is currently considering a restructuring process. Mr Bayliss asked for the

return of the cell phone, laptop and car. That was declined and I find in all likelihood for the first time there was mention of issues with the car tyres and some damage to the car that Mr Bayliss drove. Mr Bayliss was offered supervised access to retrieve personal information from his phone and laptop.

[35] Included in the documents supplied on behalf of Solar Bright are minutes from a special board meeting called on 2 May 2016. The three directors of Solar Bright were at that board meeting as was Mr Shaw and counsel for Powerhouse. The minutes reflect that the directors agreed on a restructure as an immediate course of action and asked Mr Shaw to act on behalf of the company and its directors in that respect. I find, therefore, that a decision to restructure was reached earlier than 9 May

2016 not just before the meeting on that day as Mr Bayliss said in his evidence. There was likely some confusion between a decision to restructure and the later development of a restructuring proposal.

Letter dated 11 May 2016 about 9 May meeting

[36] I have already referred to the letter Mr Shaw wrote to Mr Cahill dated 11 May

2016 about the 9 May 2016 meeting. Mr Shaw confirmed that Mr Bayliss was still employed by Solar Bright. Mr Shaw noted Mr Bayliss himself had confirmed his acceptance of that position in no less than four emails between him and Mr Sinclair from 26 April to 3 May 2016. Mr Shaw asked Mr Cahill to confirm urgently whether Mr Bayliss considered that he had been constructively dismissed or if he accepts that he remains in employment.

[37] In an email dated 13 May 2016, only disclosed to the Authority by Solar Bright, Mr Cahill responded to Mr Shaw and advised that Mr Bayliss accepts that he is still employed and has not been constructively dismissed. He wrote that Mr Bayliss still wished to continue with his claims for unjustified disadvantage, breach of good faith and to substitute a claim for breach of contract in place of the constructive dismissal about the items that he was asked to leave with Solar Bright on 20 April

2016.

Restructuring process

[38] On 10 May 2016 Solar Bright wrote to Mr Bayliss about a proposed restructure. It wanted to meet with him on 16 May 2016 at a meeting to be attended by Mr Martin and another solicitor from Lane Neave, Gwen Drewitt, to discuss the proposal in detail. Mr Bayliss was advised he could bring a representative with him to the meeting and there was an offer of EAP services.

[39] The letter explained that there had been a review of current operations of Solar Bright and attempts to secure external investment had not been successful. That failure and the drop in the company turnover between 2015 and 2016 of 40% meant Solar Bright was facing some significant financial difficulties. It was proposed, noting that Ms Leonard had resigned and her role had not been replaced, to restructure and disestablish the role of Chief Executive and Solas Engineer (Mr Bayliss' role) which would represent a 30% per annum saving on expenses for Solar Bright. This would mean the company could continue trading. Mr Bayliss was invited to provide feedback at the meeting or earlier and told that he had the right to a representative. It was anticipated that after feedback had been received and considered a decision would be made on 23 May 2016.

Meeting 16 May 2016

[40] Mr Bayliss attended the meeting on 16 May 2016 with Mr Cahill. Mr Martin attended with Ms Drewitt. Mr Bayliss acknowledged that Solar Bright found themselves in difficulties financially and the directors have a duty to attempt to remedy the situation by taking all reasonable and necessary actions to remain in business.

[41] Mr Bayliss maintained however at the meeting that he considered the restructuring was simply an attempt to justify earlier unfair and unreasonable actions with a predetermined outcome. Ms Drewitt clarified that the meeting was to discuss the restructuring proposal and not the dispute with Solar Bright. Mr Bayliss saw the two matters as inextricably linked. It was also discussed that Solar Bright intended to withdraw from the LED lighting market, discontinue the Solas LED lighting range of products and sell the stock. Mr Bayliss did concede that under this scenario the Solas engineer's position would be redundant. He said in his statement of evidence though that he was surprised because over the preceding months the Solas products had

begun to gain some traction in the market and sales were increasing to the extent that

Solas was becoming the primary revenue stream for Solar Bright.

[42] Solar Bright provided some sales invoices to support that the Solas sales for the six months prior to 20 April 2016 were in fact a very small percentage of overall sales. Dr Hampson confirmed that there had been, at the time of the decision to restructure, no significant sales and there was only "two to three week visibility on sales." I am not satisfied that Solas sales

were the primary revenue stream.

[43] After the meeting concluded Mr Bayliss put to Mr Cahill for forwarding onto

Solar Bright some proposals and suggestions about the proposed restructure.

[44] By letter dated 25 May 2015 Mrs Martin wrote to Mr Bayliss and advised that Solar Bright had decided to proceed with the proposal to disestablish the position of Solas engineer. She set out the feedback from Mr Bayliss received both at the meeting and later in writing and responded to it. Mrs Martin set out in the letter that the financial situation for Solar Bright was dire and it had no option but to proceed to disestablish the role and that there are no redeployment opportunities. Mr Bayliss received four weeks' notice of termination of employment with his last day to be 22

June 2016. He was advised that he would remain on garden leave and was not required to perform any duties. He was also asked to return several items by 22 June to the company. There was reference in the letter to a loan made to Mr Bayliss by Solar Bright and a proposal that the balance be payable from monies owed it to it in his final pay. Mr Bayliss was invited to make contact if he wished to be heard on the deduction of money matter but that was not discussed before 22 June 2016 and the money was deducted from the final pay to Mr Bayliss.

[45] There was also an invitation for Mr Bayliss to collect the company car and use it during the notice period. Mr Bayliss said that he did not want to pick the car up because he said that it could be used at a later stage to "mitigate and/or legitimise their original actions" in the circumstances.

[46] Mr Bayliss fortunately obtained employment on a similar salary within seven to eight weeks which he enjoys.

What was the effect of the events of 20 April 2016 and was Mr Bayliss constructively dismissed from his employment

[47] Mr Bayliss was asked to leave the premises on 20 April and told to leave his car, phone, laptop and keys behind. He was told that he would be contacted on 26

April 2016 about what would happen from that point. As it transpired Mr Bayliss was not contacted by Mr and Mrs Martin on or before that date but he commenced sending a series of letters to Mr Sinclair to whom he reported advising, amongst other matters, that he considered himself to still be employed. Following the meeting on 9 May

2016 Mr Cahill sent an email when pressed to do so by Mr Shaw as to whether his client regarded himself as constructively dismissed.

[48] Mr Cahill's email appeared to accept that Mr Bayliss regarded himself as still employed. Consistent with that he continued to be paid and he participated in a meeting about the restructuring proposal. He was then dismissed on notice for reason of redundancy. Grievances of unjustified action and alleged breaches of good faith, Mr Cahill advised in his email, were maintained about the actions of 20 April.

[49] The Arbitration Court in *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich and Associate Employment Agency and Complete Fitness Centre*)1 analysed the meaning of the expression "constructive dismissal" and stated dismissal is not to be construed narrowly.2 There was in this matter an action not unlike a sending away on 20 April 2016 and Mr Bayliss was not able to return to work after that date. He was then dismissed after a restructuring process for reason of redundancy.

[50] It is more usual that a constructive dismissal involves an employee leaving because of his or her employer's actions and in such a way making clear that they are treating the contract as repudiated. That is not what happened here. I find that the evidence considered as a whole supports that Mr Bayliss did not treat the employment agreement as repudiated after the events of 20 April 2016 but instead continued to maintain he was employed reserving the right to pursue disadvantage grievances and/or a breach of contract claim. He remained on full pay and participated in a

subsequent restructuring process.

1 *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC)

2 Above n 1 at page 102

[51] I am not satisfied and do not find that Mr Bayliss was constructively dismissed from his employment on 20 April 2016. I find that Mr Bayliss' employment ended when he was actually dismissed on notice for reason of redundancy. I now turn to the justification of that dismissal.

Was Mr Bayliss dismissed unjustifiably following the restructuring process

The employment agreement

[52] Mr Cahill refers to a legitimate expectation that Mr Bayliss would be employed for three years because of the fixed term nature of the agreement. Having heard from Mr Bayliss it seemed he had a view that he was entitled to expect he would

remain in employment for three years. That appeared to influence his monetary claims. The employment agreement however provided in clause 15 a number of ways in which the employment agreement could be terminated including at clause 15.8 for reason of redundancy.

[53] Looking at the matter objectively I do not accept that there was a lack of good faith in offering Mr Bayliss the second three year agreement. Firstly Mr and Mrs Martin decided to offer this new agreement to Mr Bayliss notwithstanding significant opposition to that by Mr Sinclair. That must indicate that they wanted to retain him as an employee. Secondly I find it likely they were genuinely optimistic that things would improve for Solar Bright.

[54] Clause 15.8 of the employment agreement provided as follows:

15.8.1 If the Employee's position becomes superfluous to the Employer's

needs, then this Agreement may be terminated by reason of redundancy,

15.8.2 The Employer will not pay redundancy compensation to the Employee. The Employee will be entitled to notice as set out in Schedule 1 of the Agreement. The Employee may be required to either work out that notice period or will be paid in lieu, at the Employer's discretion.

15.8.3 Where the Employee's position has been terminated by reason of redundancy, the Employer will follow a good faith process.

[55] The notice period in schedule 1 of the employment agreement provided the period of notice for redundancy was 4 weeks.

The law about redundancy

[56] The Court of Appeal in *Grace Team Accounting Limited v Judith Brake3* confirmed that the test of justification in s 103A of the Act as it was at that time requires the Authority to determine on an objective basis whether the employer's actions and how it acted were what a fair and reasonable employer would have done.4

The test that the Authority will need to apply in this matter is whether the employer's actions and how it acted were what a fair and reasonable employer **could** have done in the circumstances at the time.

[57] It is clear from the judgment in *Grace Team* that the Court of Appeal regarded addressing the genuineness of a redundancy and whether the decision made was based on business requirements is important in addressing justification. The Court of Appeal also stated that if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 have been complied with then that goes a long way towards satisfying the s 103A test.5

[58] A fair and reasonable employer could be expected to comply with statutory and contractual obligations. There are statutory obligations of good faith in s 4 of the Act which require in a redundancy process that parties deal with each other in good faith and consult. Section 4(1A)(c) of the Act states where a decision will have an adverse effect on continuation of employment that information about that decision is provided to the employee and the employee has an opportunity to comment.

[59] The key element of procedural fairness in the context of a proposed redundancy is the provision of relevant information and that there be active consultation before a final decision is made –*Stevens v Hapag-Lloyd (NZ) Ltd*.6

Genuineness of the redundancy

[60] Mr Cahill submits that the restructuring process is a *sham process* designed as he puts it to *reverse the repudiatory action on* [20 April 2016].

[61] Solar Bright advanced its reasons for the proposed restructure in a document provided to Mr Bayliss dated 10 May 2016. The reasons were significant financial

3 *Grace Team Accounting Limited v Brake* [2014] NZCA 541

4 Above n 3 at [84]

5 Above n 3 at [85]

6 *Stevens v Hapag Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [60]

difficulties from a failure to secure external investment and a drop in turnover from the 2015 financial year. The drop in turnover was set out in the document that was provided to Mr Bayliss at the time of the restructure. It represented a 40% drop in turnover and accords with the 2016 financial statements I was provided with in full after the investigation meeting. The drop in turnover was stated to be attributable to non-payment from a major contract, lack of sales and an increase in

overheads. That was supported, I find, by an accountant's letter that accompanied the 2016 financial records. It provided that a large portion of the increase in overheads was due to a rise in salaries and wages paid to employees having increased some $278,000 from 2015.

[62] One employee had already resigned at the time of the restructuring and the proposal was to disestablish the position of chief executive and Solas Engineer. Aside from Mr and Mrs Martin the only other positon Solar Bright proposed to keep was that of Technical Manager. The evidence I heard supported that position was different to Mr Bayliss' and that the position was more of a generalist role than that Mr Bayliss held and covered more areas of the business.

[63] Viewed objectively the evidence is compelling that serious financial difficulties existed for Solar Bright in April/May 2016. There had been a personal injection of funds into the company by Mr and Mrs Martin on 12 April 2016 and for some time, but coming to a head at or about April, the majority shareholder had significant concerns about Solar Bright and any future investment in the company. Mr Sinclair and Dr Hampson confirmed that there were no significant company sales in April and the only sales visibility was two to three weeks. The financial records support the grim financial situation.

[64] I find that there were justifiable financial reasons for commencing a restructure. There was a view that the LED lighting section would be closed down and the existing stock of Solas LED tubes would be sold. Mr Bayliss conceded at the meeting to discuss the restructure that if that happened then his positon would be redundant. Mr Bayliss' positon has not been filled at the time of the investigation meeting and the company continues with the same structure proposed at the time of the redundancy. It has shifted into a smaller office.

[65] On an objective assessment I find the redundancy was for genuine reasons not for other ulterior motives. It was not, I find on the balance of probabilities, a sham decision to make the position redundant and/or a decision made because Mr Bayliss

had raised a personal grievance about earlier events. In respect of any correlation between the decision to restructure and the personal grievance the company was already in significant financial difficulty before that time. Mr Bayliss considered that he was being implicated in issues about the banking transactions but that was rejected by Solar Bright in writing. There is no evidence to support Mr Bayliss' was involved in issues that gave rise to the events of 20 April 2016 or that Solar Bright concluded that he was.

[66] Solar Bright is able to, notwithstanding earlier matters, propose a restructure and made a substantive decision to dismiss Mr Bayliss for redundancy and have that decision assessed on its merits. The employment agreement and statutory obligations require that Solar Bright follow a good faith process. In terms of the employment agreement a situation arose where Mr Bayliss's position did become superfluous to the needs of Solar Bright.

[67] I accept however the restructuring process and the decision arrived at was tainted for Mr Bayliss by what happened on 20 April 2016 and the fact that he did not return to work from that date. I'll turn now to assess that in terms of procedural fairness and whether that suspension should properly be a dismissal or disadvantage grievance.

Procedural fairness

[68] Once legal advice had been obtained by Solar Bright there was consultation about the proposal to restructure and an opportunity for Mr Bayliss when represented to put forward some alternative suggestions to redundancy. There is no reason to conclude these suggestions were not considered and they were responded to on behalf of Solar Bright. Ultimately the financial situation was such while the solutions were sensible they were unlikely to have been enough at that point. I find that there was sufficient financial information available to support the background as set out in the proposal. Notice was paid to Mr Bayliss in accordance with his employment agreement and the placement on garden leave was permitted under his employment agreement.

[69] Mr Bayliss says that the decision to dismiss him was predetermined because he had been since 20 April outside of the workplace and was not able to undertake his duties in the work place and/or use his usual work equipment. He relies on various

statements made by Mr Martin and others to support predetermination. Even before

20 April 2016 Mr Bayliss knew that things were not going well at Solar Bright. Attached to the statement in reply is an email from Ms Leonard to Mr Bayliss dated

12 April 2016 and headed "strictly confidential" suggesting amongst other matters that Mr Bayliss think about jumping ship and that Mr Sinclair did not see how [Solar Bright] could keep going. Mr Bayliss understood from Mr Sinclair and Ms Leonard after 20 April 2016 that there were some serious financial concerns with the company and was alive to the very real possibility of redundancy. Objectively assessed, I find that the decision to restructure and some job loss was more inevitable than predetermined. Once a decision to commence a restructuring process commenced I am not satisfied that the process was other than fair and in accordance with good faith requirements.

[70] That leaves the issue of the suspension from the work place and any good faith matters that arise as a result.

[71] Those matters fall for consideration, I find, as an unjustified disadvantage personal grievance rather that an unjustified dismissal. The Authority is not bound under s 160(3) of the Act to treat a matter as being of the type described by the parties. It may, in investigating the matter, concentrate on resolving the problem however described. Section 122 of the Act provides the nature of the personal grievance may be found to be of a different type to that alleged. I am satisfied that a disadvantage personal grievance was raised by Mr Cahill in his 2 May letter about the event of suspension from work and I heard evidence about that. I will consider the matter of suspension along with the alleged loss of benefits during that period.

Conclusion on dismissal

[72] I have found the redundancy was genuine and the process for restructuring was fair and in accordance with good faith obligations. The decision to disestablish Mr Bayliss' role was a decision a fair and reasonable employer, following provision of a proposal and consultation, could have reached. I do not find that Mr Bayliss was unjustifiably dismissed from his employment with Solar Bright.

Unjustified disadvantage

[73] The concept of an unjustified disadvantage is helpfully set out in the

Employment Court judgment of *Henderson v Nelson Marlborough District Health*

*Board and Nelson Marlborough District Health Board v Henderson.*7 The starting point is s 103(1)(b) that provides:

That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during the employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[74] Employment or a condition of that employment has to be affected. There is a requirement for a corresponding action by the employer that is unjustified and there must be corresponding disadvantage.

[75] Mr Bayliss says that he was required to leave the workplace on 20 April, that there was a lack of communication after that point until early May and he was without the benefit of his car, phone and lap top.

[76] Solar Bright justifies the suspension initially to investigate the banking irregularity and then a number of other matters required their attention because there was some doubt the company could continue. There was also some thought that it was preferable for Mr Bayliss to remain outside the workplace because he may have ongoing issues working with Mrs Martin and then because of the restructuring process. Some reliance was placed by Solar Bright about Mr Bayliss not reporting a flat tyre or tyres on his car and some damage that had been sustained but not reported. Solar Bright says that it could not justify the immediate expense of fixing the tyres and damage and that at the least Mr Bayliss contributed to the loss of the car.

[77] The suspension of Mr Bayliss from his workplace from 20 April until 25 May

2016 and the removal of his car which was a benefit in his employment agreement until the same date was, I find, unjustified. For completeness the cell phone and laptop were not benefits in his employment agreement but rather, I find, work tools. There was no ability under Mr Bayliss' employment agreement to suspend his employment other than for serious misconduct. There was reference in schedule 1 of the employment agreement to the benefit of the company car and fuel with a record of

work and private use kilometres being kept for fringe benefit purposes.

7 *Henderson v Nelson Marlborough District Health Board and Nelson Marlborough District Health*

Board v Henderson [2016] NZEmpC 123

[78] Mr Bayliss was disadvantaged in his employment and conditions thereof. He was suspended from working in circumstances where he did not agree and there was no contractual ability for suspension. He was entitled to a company car including for private use and that was removed between 21 April and 25 May both dates inclusive (five weeks). Mr Bayliss did not have his own car and neither did his wife.

[79] Both parties in this matter thought good faith obligations required the other to have made contact. Mr Martin genuinely attempted to contact Mr Bayliss by phone using the cell phone number that Mr Bayliss provided for an emergency situation. Other attempts to contact Mr Bayliss though could have been made as set out earlier. I do accept that Mr Bayliss previously had a good relationship with Mr Martin asking him for a favour as late as 17 April 2016 which Mr Martin assisted with. Mr Bayliss did initially however communicate with Mr Sinclair after 20 April and that was the person to whom he reported. I find Mr Bayliss was entitled to conclude that those communications would get to Mr and Mrs Martin.

[80] Mr and Mrs Martin say in their evidence that Mr Bayliss was simply setting up for an employment relationship problem

by the lack of contact. Ultimately even though the view of Solar Bright may have been that Mr Baylss was intent on pursuing a claim against the company, he had been asked to leave work by Solar Bright with no knowledge of how long he was to be away and I cannot be satisfied that he knew exactly why he was not able to work. In those circumstances the responsibility and obligation to be active and constructive to maintain a productive employment relationship in which the parties are responsive and communicative fell more to Solar Bright. The steps taken before early May and the meeting of 9 May were inadequate. The level of communication after 20 April 2016 was not in accordance with good faith obligations.

[81] Mr Bayliss has a personal grievance that he was unjustifiably disadvantaged in his employment and is entitled to an assessment of remedies.

[82] I find that an appropriate award for the suspension and breach of good faith obligations which takes into account that Mr Bayliss was on full pay throughout his suspension is the sum of $5000 without deduction. I do not find any issues of contribution. It is common ground that it was not the fault of Mr Bayliss that he remained away from the work place.

[83] Mr Bayiss has claimed the sum of $15,000 for the loss of benefit of the car which I find could only have been for the five week period, because after that date he could reasonably have picked the car up in accordance with the offer of 25 May 2016. I explored with Mr Bayliss the reason for the amount claimed and he said that would have been the cost of obtaining a rental car. There was no evidence that that is what he did. On any objective basis I find this is an excessive claim for the loss of a benefit of a car for five weeks. Mr Bayliss could have purchased a car for that amount.

[84] A fair method on which to consider compensation is assessing the benefit of the car as part of a salary package on a yearly basis. I assess the value at $20,000 per annum or $384.61 per week. For five weeks that is the sum of $1923.07. Mr Bayliss did not, I find on the balance of probabilities, clearly report an accident that led to moderate damage to the car. Ms Leonard on the recorded conversation with Mr Martin said that Mr Bayliss wanted it kept quiet. Whether this was just until Mr Martin was back in the country or not as Mr Bayliss says is neither here nor there. There had been damage to company property and it should have been reported. There were also tyres that needed to be replaced. The evidence supported that when the car was removed from Mr Bayliss it was not in a safe condition to drive and needed the tyres to be replaced.

[85] Looking at the matter in the round, if discovered whilst Mr Bayliss was working then he would no doubt have had to have been provided with another vehicle so that he could undertake his role. Apparently a rental car had been provided for Mr Bayliss on two previous occasions. There could have been a disciplinary outcome about the failure to report. I am of the view there should be some contribution to reflect these matters but a moderate sum because a replacement car would no doubt have had to have been obtained even for a short time if Mr Bayliss was still at work. I intend to make a moderate assessment of contribution of 10%.

[86] I order Solar Bright Limited to pay the sum of $5000 compensation to John Bayliss without deduction under s 123(1)(c)(i) of the Act for the first unjustified action of suspension.

[87] I order Solar Bright Limited to pay to John Bayliss taking contribution into account the sum of $1730.76 for the loss of the benefit of the car between 20 April and 25 May 2016.

Deductions of money and the requirements under the Wages Protection Act 1983

[88] Mr Bayliss had money deducted from his salary starting from May 2015 which he says was not authorised by him. Whilst he seems to accept that he owes some money to Solar Bright he disputes other amounts. He says that any debt still existing was forgiven before the entering into of the second fixed term agreement and in any event seems to want all money deducted reimbursed. Some emphasis was placed on a two week payment when he was unwell and had exhausted his sick leave. This was to be a loan but then Mrs Martin sent an email stating that it was not a loan.

[89] One of the difficulties in this matter is establishing exactly what Mr Bayliss said he owed to Solar Bright. For example one answer he gave me was that he would probably have agreed he owed money for visa costs but only if the second fixed term agreement ran for three years. Mr Bayliss has, however, continued to have the benefit of a visa in his new role. There seemed agreement that Solar Bright would pay the

2014 visa costs including for Mrs Bayliss as a one off. There is no evidence in front of me to support that money for reimbursement for 2014 visa costs were ever deducted from Mr Bayliss's salary. The only deductions from the company document headed JB loan are for visa costs for 2015 and 2016. Mr Bayliss seemed to accept that he owed $1000 for an insurance excess when his son had an accident in the company car which was also reflected in the loan document.

[90] Solar Bright says that it may under clause 20.5 of the employment agreement deduct any money legally due and owing by the employee to the employer and clause

15.14 provides that an obligation on termination is for the employee to pay any account owing to the Employer.

[91] Section 5 of the Wages Protection Act 1983 provides that deduction can only be made with the written consent of a worker or on the workers written request.

[92] I have, in determining this problem, focussed on how best to resolve the matter in accordance with the objectives of the Act and the role of the Authority. Mr Bayliss says that he owes some money. On any sensible assessment those monies must under clause 20.5 and/or 15.14 of his employment agreement be payable. It would not be in keeping with the objectives of the Act or the role of the Authority to simply require all money to be returned because it would encourage further litigation.

[93] I am going to suggest that the parties either themselves or with the help of a mediator agree what Mr Bayliss owes and what is in dispute. Under that process it would seem that Mr Bayliss will be entitled to some reimbursement but not for all money deducted.

[94] To assist that process, on the evidence I heard and the documents I have seen, I am not satisfied payment of the two weeks salary whilst Mr Bayliss was sick and his sick leave exhausted was in the nature of the loan. There seemed to have been a change of heart on this matter supported by an email from Mrs Martin. Two weeks salary is $2,493.

[95] Further I find that the discharge of the debt in terms of the letter from Mr Sinclair dated 25 January 2016 was on the basis that Mr Bayliss' first fixed term agreement was to expire and it would not be renewed. It was, I find, conditional on the relationship ending and a handover going well and administrative matters resolved. There was a renewal of the fixed term agreement. The conditions under which Solar Bright was to discharge the debt did not therefore come to be satisfied and I do not find Solar Bright bound by the discharge because a new agreement was entered into.

[96] I reserve leave for either party to return to the Authority if matters remain unresolved.

Penalty for a breach of good faith

[97] I do not find that the threshold for the failure by Solar Bright to be active and constructive in being responsive and communicative during the suspension has been reached under s 4A of the Act. The failure was not deliberate even if serious and sustained and I could not be satisfied that it was intended to undermine the employment agreement. Mr Bayliss was concerned about the communication with his new employer about the non-solicitation clause in his employment agreement. This, however, was after the employment relationship with Solar Bright and the duty to deal in good faith had ended.

[98] I make no award of a penalty for a breach of good faith.

Did Mr Bayliss breach his obligations under the employment agreement that survive termination

[99] Solar Bright says that Mr Bayliss breached clause 17 of his employment agreement when he commenced working with Bright Light. Clause 17 contains restrictive covenants for a period of six months after termination of the agreement within New Zealand. Solar Bright does not seek to enforce the restraint of trade provision in clause 17.1.2 of the employment agreement preventing Mr Bayliss from accepting an offer of employment in any competing business but says that Mr Bayliss has breached the following provisions:

17.1.1 canvas, procure or solicit in competition with the Employer the custom of any person or entity who has at any time during the period of this Agreement been a client, customer or supplier of the Employer;

17.1.3 interfere with the relationship between the business of the Employer and its customers, employees, clients, contractors or suppliers; or

17.1.4 accept, refer away from the Employer to any person/entity or undertake work for any previous customer or client of the Employer, who was a customer or client of the Employer during the term of this Agreement.

Reasonableness of the restrictive covenants

[100] The starting point is the reasonableness of the restrictive covenants and whether they are enforceable. I find in Mr Bayliss's role at Solar Bright he interacted with and had an opportunity to build relationships with its clients. It was not unreasonable for Solar Bright to want some protection from the knowledge and influence that Mr Bayliss had with its customers for a period of time after termination of employment. Mr Bayliss's salary was $85,000 plus the benefit of a car that I have assessed earlier in this determination at a value of $20,000 per annum. In his employment agreement it stated that the value of his remuneration is reasonable consideration.

[101] Some weight has been placed on the reason for termination by Mr Cahill. I have found the dismissal was for reason of redundancy. There is case law to suggest that some care should be taken in such circumstances with determining the

reasonableness of a restraint of trade clause because that impacts on the ability of an employee to earn a living. I am not persuaded in this case that the non-solicitation clauses are unreasonable because Mr Bayliss' employment ended for reason for redundancy. Mr Bayliss was advised that Solar Bright may no longer be involved in Solas LED but knew Solar Bright would have to sell its existing stock.

[102] The Employment Court in *Air New Zealand v Kerr*8 held that a garden period should be taken into account when considering the reasonableness of the duration of any post-employment restraint covenant. In terms of the length of restraint

I find that it was not unreasonable for the period Mr Bayliss was formally on garden leave from

25 May until termination on 22 June is taken into account. During that time Mr Bayliss was not in a position to influence clients and customers of Solar Bright. The geographic restriction is not unreasonable for a non-solicitation clause although may have been for a restraint of trade.

[103] Subject to modification that the six months should run from 25 May and not from 22 June 2016 the restrictive covenants in 17.1.1, 17.1.3 and 17.1.4 are reasonable and enforceable.

Modification requires a direction to mediation

[104] An issue then arises under s 164 of the Act which provides the Authority may only make an order cancelling or varying an individual employment agreement if it has identified the problem in the agreement and directed the parties to attempt in good faith to resolve that problem. If the matter then remain unresolved and the Authority is satisfied that any remedy other than such an order would be inappropriate or inadequate the Authority can modify the restrictive covenant provision to reflect the restrictive covenants commence from the start of the formal garden leave on 25 May. I'll return to this. On the basis that modification would mean the covenants are reasonable and enforceable I shall consider whether they were breached.

On the basis that modification would mean the restrictive covenants are enforceable was there a breach of the covenants?

[105] On 2 November 2016 Solar Bright's lawyers wrote to Mr Bayliss and Bright

Light. It advised of concerns that there had been a breach of non-solicitation

8 *Air New Zealand v Kerr* [2015] ERNZ 581 at [71]

provisions and confidentiality provisions. The four customers known at that stage to have been contacted were set out and information was requested about interactions with them. Undertakings were requested within 3 days that such breaches not continue.

[106] The only response was that Mr Cahill refuted on Mr Bayliss' behalf any breach, denied any obligation existed under the employment agreement and stated that Solar Bright had advised they were withdrawing from the LED market and that Bright Light is not a competitor. Mr Cahill maintained and seems to have continued to do so that raising the matter was vindictive and that such a claim was vexatious and frivolous.

[107] When Solar Bright lodged its counterclaim, Mr and Mrs Martin explained to the Authority, on a conference call Mr Cahill also attended, that it wanted to obtain information to see the extent of any breach. There is no claim for a penalty. If there is a breach or breaches found Solar Bright will have to lodge a further statement of problem about that.

[108] Mr Bayliss says even if he is bound by restrictive covenants he has not solicited in breach of his employment agreement. Although he accepts that both Solar Bright and his new employer are in the lighting market and that there is some overlap in the products they sell he says his new employer is in the wholesale market. I find, having heard the evidence, that Bright Light is a competitor in the LED market.

[109] Mr Bayliss agreed that he had made contact with the four customers referred to in Solar Bright's lawyer's letter. They are all customers of Solar Bright. The communications commenced from early September.

[110] Mr Bayliss initiated communication with an individual at Queenstown airport by email on 1 September 2016 advising that he had moved on from Solar Bright and wanted the individual's cell phone so that he could *give him a buzz*. Further interactions appear to have taken place in December/January. Whilst Mr Bayliss says that Queenstown airport will never be a customer of Bright Light they use engineers who specify Bright Light products in their design. There was the ability therefore to influence. I find that that contact was in the nature of canvasing/soliciting in breach of clause 17.1.1 and interference in breach of clause 17.1.3.

[111] Emails were sent on 9 September and 11 October 2016 by Mr Bayliss to an individual from the CDHB. Mr Bayliss again advises he had moved on from Solar Bright and wants to chat and needs a cell phone number. CDHB is another organisation who uses an engineer that specifies Bright Light products in their designs. There was no response to Mr Bayliss's email. This was, I find, in all likelihood an attempt to canvas or interfere but there is no evidence that any damage could flow as a result because the email was not responded to.

[112] There was contact by Mr Bayliss with Signz NZ and a request for pricing. Mr Bayliss says that they have been a customer of Bright Light for some years and the product they purchase is not sold by Solar Bright. I cannot be satisfied there was a breach of the restrictive covenants in term of that customer.

[113] The final information disclosed about contact was that initiated by Mr

Bayliss with an individual from a company called Innotrade. There is an email dated

1 September 2016 from Mr Bayliss to this individual again advising he has moved on from Solar Bright and wanted a cell phone number. The number was provided and he visited the individual on 8 September 2016. Mr Bayliss said he simply wanted a social chat but he did end up discussing possible solutions to lighting problems that Solar Bright had been unable to resolve. He suggested products that he said were not part of the Solar Bight portfolio and left information. I find that there was a breach of clause 17.1.1 in that Mr Bayliss tried to canvas or solicit the customer of Solar Bright. There was a breach of clause 17.1.3 that there was interference with the relationship between Solar Bright and its customers. There was a breach of clause 17.1.4 in that there was a referring away from Solar Bright to Bright Light.

[114] I have concluded that there were breaches of the restrictive covenants with contact by Mr Bayliss with three of the four customers.

[115] Mr Bayliss provided no documentary evidence about whether work was undertaken for those clients. He does not accept he holds any confidential confirmation although he clearly had access to some Solar Bright customer email addresses. I make no orders about confidentiality. I do remind Mr Bayliss that he has express obligations for confidentiality in his employment agreement with Solar Bright that survive termination. These obligations include not to use confidential information to his own advantage.

What now

[116] Under s 164 of the Act having identified a problem about the commencement date of the restrictive covenants I am requirement to direct the parties to mediation in good faith to see if they can resolve the problem. I suggest that discussion takes place about that problem, the deduction from pay issue and any remedies for breaches found.

[117] If the matter cannot be resolved then the Authority is to be advised. Although there is reference in submissions for Solar Bright to a penalty for the breaches, no action for a penalty has been commenced. I refer the parties to the time frame for commencement of an action for the recovery of a penalty in s 135(5)(a) and (b) of the Act.

Costs

[118] I reserve the issue of costs until all matters have been concluded.

Helen Doyle

Member of the Employment Relations Authority
