



[4] For much of the time that the matter was before the Authority, there were three live counterclaims brought by Carlton against the applicants which included allegations of the gravest kind but which by the commencement of the investigation meeting had been reduced to one counterclaim, the alleged misuse of a credit card.

[5] Mr Magill and Mr Hart both commenced employment with Carlton's film division during 2003, Mr Hart in May 2003 and Mr Magill in August 2003.

[6] Each of their employment agreements contained a base salary component together with a profit share arrangement in the following terms:

*In addition we will pay you 10% of the 131 Division Operating Profit, calculated monthly and paid quarterly on the 20th of the month following each quarter.*

[7] Mr Magill's employment agreement contained that clause in writing; Mr Hart's employment agreement does not but Carlton concedes that his employment was always to be on the same terms and conditions as Mr Magill's.

[8] Although not provided for in the employment agreement, Carlton says there is a gloss on the operation of the subject clause contained in a covering letter addressed to Mr Magill only and dated 9 August 2003 which provides that the operating profit for the film division (131 Division) would need to exceed \$200,000 per annum in order to trigger the profit share clause.

[9] Mr Hart says in his evidence that he never saw this letter until these proceedings were issued and so it cannot apply to him in any event. Both Mr Hart and Mr Magill say that the letter cannot be construed in the way that Carlton seeks to construe it, that it relates to the arithmetical calculation that would have applied for a notional salary of \$70,000 each and, that in any event, the clause says what it says and ought to be construed according to its tenor.

[10] Both Mr Magill and Mr Hart say they took the jobs on offer because of the profit share proposal and for no other reason; both say in their evidence that the base salary was too low to be attractive to them and the only reason they took the role at all was because of the profit share clause.

[11] Mr Hart and Mr Magill effectively co-managed Carlton's film division, Mr Hart having transferred from his previous role as Carlton's Wellington branch manager.

[12] The applicants were frequently away from their Wellington base, essentially seeking to provide support to the burgeoning film industry in this country by hiring to that industry the various commodities and chattels which were needed to make films and which Carlton owned by virtue of its base business.

[13] Carlton says that weekly sales reports were furnished by email to Mr Hart and Mr Magill showing the division's sales and labour costs and that no profits were ever made.

[14] Mr Magill and Mr Hart say that as they were frequently away from their Wellington base and often neither in a position to nor indeed having the time to refer to email traffic, they would not see the email data and certainly were doubtful that they had received it as frequently as Carlton alleged it was sent.

[15] Carlton says that towards the end of calendar 2004, the profitability of the film division was such as to encourage it to think about closing the division down and that it was at this point that there were some discussions between the parties about the prospect of Messrs Hart and Magill franchising the film division by way of purchase from Carlton.

[16] That concept did not eventuate and in the result, Carlton's board made the decision the film division was not viable and the applicants' employment relationship came to an end on 25 February 2005.

[17] In the context of the discussions between Carlton and the applicants towards the end of the employment relationship, the applicants first started raising with Carlton the prospect that they were due a profit share from the film division's activities.

[18] The evidence confirms that the applicants made regular attempts to have Carlton respond to their requests but there was no progress made in commencing to address the matter until the applicants engaged counsel.

[19] Even after counsel was instructed, there was no response from Carlton until the present proceedings were filed.

**Issues**

[20] It will be helpful if the Authority reviews the following issues which are germane to deciding the issue in dispute between the parties:

- (a) The issue of documentation;
- (b) The interpretation of the profit share clause;
- (c) What entitlements flow from that interpretation, if any;
- (d) The counterclaims;
- (e) The parties' behaviour.

**Documentation**

[21] The issue of documentation is fundamental to the dispute between the parties. In a number of respects, the difference between the parties has been exacerbated by the absence of agreed documentary evidence and/or by the failure of Carlton to provide documentary evidence to support its position in a timely fashion. For example, despite the diligent efforts of the applicants' counsel, Carlton failed to provide evidence to support its contention that no money was owed to the applicants, failed to deal appropriately with requests for information from the applicants' counsel, failed to undertake calculations on a running basis of profit due and owing (if any) and applied arbitrary percentages in respect of overhead costs when there had been no buy-in from the applicants.

[22] During the period from the point at which the employment relationship terminated down to the commencement of the preparations for the investigation meeting proper, it is common ground that the applicants' made numerous requests of Carlton for advice about the calculation of profit, that those requests fell on deaf ears, that the applicants then instructed counsel that letters forwarded on 7 March 2006 and 20 April 2006 to Carlton were ignored, that further correspondence from the applicants' present counsel dated 29 August 2006 seeking immediate payment of moneys owing, together with a documentary trail demonstrating how such payments were calculated, was itself ignored which resulted in the present proceedings being commenced in the Employment Relations Authority by a filing on 22 September 2006.

[23] The failure by Carlton to provide documentation did not end there. It does not overstate the position to say that Carlton were asked on numerous occasions to supply copies of sub-hire invoices, and on each of the occasions on which that request was made by the applicants, or was the subject of a direction by the Authority, that information was not provided. Indeed in the end, the only source of that information was material from the applicants themselves which Carlton then sought to quarrel with on the basis of its accuracy.

[24] The importance of the sub-hire documents is that the sub-hire calculation is a significant component of the income statement, being in fact the highest expense in the income statement. It follows that having access to the sub-hire information is to use the words of counsel for the applicants, ... *the single most material item to whether or not a profit was achieved*. As the whole argument between the parties is whether or not a profit was achieved and therefore whether Mr Hart and Magill are entitled to certain payments, the failure of Carlton to provide this information in a timely fashion is material to the question of whether or not it behaved in good faith, to say nothing of the fact that its behaviour made it more difficult to reach a proper conclusion in the matter before the Authority.

[25] The information before the Authority in relation to sub-hire invoices all comes from the applicant Mr Hart, who had these copies in his records. It is intimated on behalf of the applicants that there are in excess of 100 invoices in the bundle made available to the Authority and certainly that appears to be an accurate statement of the position. The information all supports the applicants' contention that a sub-hire charge of 60% of the card rate was made to the film division and the contention made by Carlton that a sub-hire charge of 65% of hire revenue applied would seem to be mistaken.

[26] I return to that dispute later on in this determination but for the present I am simply wanting to emphasise the difficulty about obtaining information from Carlton and then Carlton's attempts to distance itself from the documentation which is filed by the applicants.

[27] On the face of it, the sub-hire invoices provided from Mr Hart would appear to be copies of Carlton invoices. Although Carlton wanted the Authority to treat the documentation provided by Mr Hart with suspicion, it was not suggested that the documentation was a forgery or that it was anything other than a Carlton document.

[28] Notwithstanding that, Carlton witnesses wanted the Authority to reach the conclusion that other principles governed the proper calculation of Mr Hart and Mr Magill's entitlement but they were coy about providing the documentation to the Authority so that the Authority could see for itself what principles ought to apply.

### **Interpreting the profit share clause**

[29] The profit share clause says:

*In addition, we will pay you 10% of the 131 division operating profit calculated monthly and paid quarterly on the 20th of the month following the quarter.*

[30] In order for there to be any payment made to Mr Hart or Mr Magill (and it is acknowledged that the selfsame clause applies to both), there must be an operating profit for the 131 division. The 131 division of course is the film division which Mr Hart and Mr Magill jointly managed for Carlton.

[31] Whether there is or is not a profit for the film division can only be established by calculation. Both Mr Patterson and Ms Young, who gave evidence for Carlton, confirmed in response to oral questioning at the investigation meeting that there were no calculations as to profit for the film division done at all.

[32] Worse than that, the calculations provided to the Authority for the years ended 30 June 2004 and 30 June 2005 were prepared in 2007 in anticipation of the Authority hearing. These income statements, which were put into evidence by Carlton in defence of its position, contain assumptions in respect of the application of overhead costs and the like which according to Mr Hart and Mr Magill were neither agreed with them at the time that the film division was operating, nor known by them at any time subsequently, nor even consistent with the contemporaneous records of Carlton (albeit supplied by Mr Hart from his own records). This is a matter I will develop later in this determination.

[33] For present purposes, it suffices to conclude that on the clear testimony of Carlton witnesses, there was never any calculation done at any time during the operation of the film division to establish whether a profit had or had not been made.

[34] Mr Patterson's evidence is that the requisite calculations were not attended to because the regular computer-generated reporting of actual performance of sales

against budget and actual labour costs against budget disclosed there was no profit and so no need for the calculations to be undertaken.

[35] The reason that Mr Patterson advances this view is simply that he considered that the raw numbers from the actual to budget exercise disclosed there was no profit and the process of adding further expenses to the calculation could only make that calculation worse.

[36] But that analysis does not seem to the Authority to stand up to scrutiny. The document that Mr Patterson relies on to reach this conclusion simply shows the performance of the division on two simple indices (one on each side of the ledger) against a budget in each case. It is not in any sense a profit calculation which presumably requires a much more sophisticated analysis.

[37] On the crudest analysis of the figures that Mr Patterson seems to rely upon, I accept the submission of counsel for Mr Hart and Mr Magill that the month to date running balance for actual sales regularly exceeds the month to date figure for actual wages. Even on that very rough analysis, it seems difficult to sustain Mr Patterson's argument.

[38] In any event, it is absolutely plain that Mr Patterson confirmed to the Authority that the calculations required by the relevant clause were never made. Furthermore, the evidence is clear that Mr Patterson gave the applicants a categorical assurance that a financial statement would be undertaken and a summary would be provided to both Mr Hart and Mr Magill.

[39] Further, I accept the evidence from the applicants that they asked for such a calculation on more than one occasion and I prefer their evidence on that point to the evidence of Mr Patterson and Ms Young who could not recall such requests being made. However, even if I am mistaken in my preference for the applicants' evidence on this point, the clause is clear in itself; the employer has an obligation to do the calculation and there is no requirement that the employees must request the calculation to be made.

[40] The unfairness of Carlton's approach to this matter will be self-evident. Had Carlton made the profit calculations which I hold the clause in question required it to make, and made those calculations available to Mr Magill and Mr Hart as a good employer would, then the assumptions behind the calculation could have been

inquired into, and even quarrelled about, at a stage when the issues were fresh in everybody's minds.

[41] As it is, the applicants are forced to now seek information which has been denied them for some significant period of time since the employment came to an end. The applicants' arguments about the various assumptions Carlton had made in the calculation of profit can really be no more than a retrospective complaint about something that has already happened. This is grossly unfair to the employees as the profit share calculation was part of their remuneration package and I accept the evidence of Mr Hart and Mr Magill that they would not have entered into the employment arrangement were it not for the existence of this profit share arrangement. So it follows that the very basis on which these two employees signed up for their roles with the film division of Carlton was immediately undermined by Carlton's failure to provide contemporaneous accounting of the profit performance of the division.

[42] Whether or not Carlton's assumption, for it can be no more than an assumption, that the film division was not making a profit, is substantially correct or partially correct or completely erroneous, is frankly neither here nor there; the obligation to do the calculation is imposed on it by force of contract. The clause says that the applicants will receive 10% of the operating profit calculated monthly and paid quarterly. It does not say that if Carlton believes there has been no profit then Carlton has no obligation to account to the applicants for the position. The clause, I hold, requires a monthly calculation and, by Carlton's own plain evidence, that requirement was not met.

[43] I must say that I am not in the least bit attracted by Carlton's argument that the clause ought to be interpreted as requiring the calculation to be done by way of *a yearly profit*. Mr Patterson says that was what the parties intended and he refers to correspondence which he says supports that view.

[44] The difficulty with that argument is that, again, it is not what the clause says. The Authority's obligation is to determine the meaning of the clause, if that is possible, by looking at its *plain words*. In that light, the meaning of the clause is absolutely plain. *Calculated monthly* means calculated monthly and does not mean calculated over a 12 month period.

[45] If, as Mr Patterson asserted in his evidence, the parties intended that profit be assessed on a year to date basis, then presumably that is what the clause would have said. There could be no possible reason for including the words *calculated monthly* if in fact the intention of the parties was that the calculation was to be done on a year to date basis.

[46] I note Mr Patterson's reliance on a letter dated 9 August 2003 addressed to Mr Magill as evidencing the *year to date* principle. I do not think the letter does anything of the kind. I accept the applicants' evidence that the letter in question is no more and no less than an intimation that, in order for Mr Magill to earn \$70,000 a year (apparently his aspiration), there would need to be an annual operating profit in excess of \$200,000. In my opinion, that view is absolutely consistent with the words in Mr Patterson's letter and the meaning Mr Patterson seeks to derive from his words does violence to the actual language.

[47] In any event, the very same letter goes on to refer to the clause in question (along with other salient clauses from the employment agreement), in exactly the same terms as appears in the agreement proper. I am absolutely clear that the words in Mr Patterson's letter do not in any sense modify the plain words of the employment agreement between the parties.

[48] For the sake of completeness, I also accept Mr Hart's evidence that he did not see this letter until the proceedings were under way and it follows that even if Mr Magill were to be caught by the terms of this letter (and I hold that he should not be), then Mr Hart certainly is not as I accept his evidence that he did not see the letter when it was written.

[49] By way of summary, then, it follows from the conclusions that I have reached under this head that, in my opinion, Carlton has failed to meet its obligations as a good and fair employer by not calculating the profit of the film division on a monthly basis and providing those calculations to the applicants. Further, I reject Carlton's contention that the profit calculation was always intended to be on an annual basis.

### **What entitlements flow?**

[50] Counsel for Mr Hart and Mr Magill persuaded the Authority at an early stage that the best way of progressing this matter was by focusing on three months' profit figures being October, November and December 2004.

[51] Mr Hart has presented calculations to the Authority which give his view of the operating profit for each of those months. In his calculations, he contrasts the calculations done using Carlton's figures with calculations using his own figures. What is particularly intriguing is that, for the three months that I directed should be the subject of examination, in two of the three months under examination, both Mr Hart's figures and Carlton's figures disclose a monthly profit and in the third month (as it happens the last one, December 2004), neither Mr Hart's figures nor Carlton's figures disclose an operating profit. It follows that even on Carlton's figures, there would have been a profit share amount paid to Mr Hart and Mr Magill for two of the three months in contention, albeit at a lower figure than the one that Mr Hart claims is due and owing.

[52] I am drawn to the conclusion that I should direct that Carlton pay to Mr Hart and Mr Magill 10% of the operating profit for the months of October and November 2004 based on the computation presented by Mr Hart rather than the calculation of Carlton.

[53] I make this choice for two fundamental reasons. The first is the absolute absence of any criticism of Mr Hart's calculations during the investigation meeting. I would have thought that Carlton, if it disputed Mr Hart's figures, would have used the opportunity to explain to me why those figures were misleading, but in fact it did not take that opportunity, preferring rather to suggest that I should ignore some of the principal elements of Mr Hart's calculations, including the 176 pages of Carlton's own documentation in relation to sub-hire charges, because they were allegedly unable to be relied upon.

[54] The second principal reason for my preferring Mr Hart's calculations of profit share to Carlton's own calculation is my preference for the transparent and open way in which the applicants have advanced their cause. Unlike Carlton, which has failed to provide documentation in a timely way, failed to fulfil its obligations in relation to the calculation of profit share in terms of the agreement, and then, when pushed, changed the basis for which the overheads were to be apportioned to film division profit so as to suppress or partially suppress profit, the applicants have used what scarce information was provided by Carlton together with their own recollection of matters when they were employed, to cobble together a credible position. Mr Davenport, for the applicants, quite properly concedes that in Mr Hart's profit

calculations, there are assumptions and some rounding of figures but I accept his observation that, given the paucity of material supplied by Carlton, that is simply in the nature of things.

[55] It is appropriate at this juncture to comment on one of the key issues in the difference between the parties and an absolutely fundamental difference in terms of the calculation of the profit for the selected months. As I have already made clear, the sub-hire invoices which Mr Hart had retained, which are plainly Carlton documents prepared on Carlton letterhead and containing Carlton information, disclose that the sub-hire was levied at 60% of the card rate of the item in question.

[56] However, Mr Patterson, for Carlton, urges on me the proposition that I should ignore the pages and pages of documentation all disclosing sub-hire computations at that percentage figure, because they are allegedly unreliable and instead that I should accept his oral testimony that at some unspecified point in the past, Carlton decided to change the calculation of sub-hire to some higher figure. I am disinclined to accept that evidence, given it runs absolutely counter to documents which, although not produced by Carlton, are plainly Carlton documents and ought to be relied upon. The suggestion that they are unreliable in some way is made orally without any evidence to support why I should reach that conclusion and I reject that conclusion absolutely.

[57] I am supported in reaching the view that I do by the extraordinary admission by Mr Patterson that the rate that is included in the calculations put before the Authority in the income statement for the years to 30 June 2004 and 30 June 2005 and which includes the 65% of hire revenue for sub-hire calculation, was actually the consequence of a decision made in 2007. The decision was made then, according to Mr Patterson, because the proceedings were then on foot and it seems for no other reason. What this means is, two years after the employment was ended, Carlton chose to unilaterally alter the basis on which the overhead was apportioned to the film division's profit and loss statement.

[58] Mr Magill and Mr Hart gave evidence that the only basis for sub-hire that they knew about was a computation at 60% of the card rate. They said they had never had any discussion with Mr Patterson about changing that rate, and of course that rate was consistent with the invoices that Mr Hart himself produced but which were in fact Carlton invoices.

[59] Conversely, Mr Patterson was quite unable to produce any evidence at all by way of a documentary trail that there had been a change to this rate contemporaneous with the existence of Carlton's film division. Had he been able to do so, I might well have been able to reach a different conclusion, but on the face of it, all of the evidence suggests that the rate that applied was the 60% of card rate calculation which is provided for in the Carlton documentation before the Authority, and is supported by the oral testimony of the applicants who understood that to be the rate.

[60] Mr Hart has used that rate in the calculation of the profit sums that he says has been earned by the film division for the months of October and November 2004 and, in the absence of a more robust calculation from Carlton, I accept those calculations at face value.

[61] Mr Davenport has helpfully used his calculator to demonstrate the effect of changing just the sub-hire figure in doing the profit calculation for the three months under review, and in each case, simply making that one change, effectively at least doubles the eventual operating profit and in one case triples the operating profit.

[62] I also note that Carlton accepted, during the course of the investigation meeting, that it had not sought and obtained the agreement of Mr Hart and Mr Magill about the levying of what I would loosely refer to as administrative costs to the film division. It is, of course, common practice for firms to seek to recover corporate overheads from individual divisions, but in the circumstances of this particular case where the remuneration of the individual managers was to be determined by a calculation of profit, it is, in my judgment, bad faith for the employer (Carlton) to seek to make unilateral decisions in respect of the level at which those charges should be levied.

[63] Again, I note that Mr Hart's evidence is that he has included what he considers to be an appropriate level for those kinds of charges in the calculations that he has made and which I now adopt as the basis for reaching a conclusion as to the entitlement that Mr Hart and Mr Magill have in respect of the three months in question.

[64] As I have already noted, the month of December does not have an operating profit and accordingly there is no entitlement there. However, the month of November has an operating profit of \$86,551.94 and accordingly Mr Magill and

Mr Hart are each entitled to a payment from Carlton of \$8,655.19 in relation to that month.

[65] In relation to the month of October 2004, the operating profit was \$76,514.27 so both Mr Hart and Mr Magill are each entitled to a payment of \$7,651.27 from Carlton.

### **The counterclaim**

[66] As I noted at the beginning of this determination, when these proceedings first commenced, there were three counterclaims filed by Carlton. It is fair to say that the applicants took grave exception to the counterclaims being raised. Mr Hart and Mr Magill argued vociferously that there was no merit to the counterclaim allegations and they took particular exception to the allegation of financial impropriety which was advanced by Carlton in its pursuit of the various counterclaims.

[67] It is, however, not appropriate for the Authority to dwell on matters that have, in fact, been withdrawn except to the extent that in an extraordinary development towards the end of the investigation meeting, Mr Patterson threatened to reopen one of the counterclaims which Carlton had previously withdrawn having been satisfied by the evidence provided by Mr Hart and Mr Magill that it had no reason for complaint.

[68] Mr Patterson became incensed while giving his evidence and, in the Authority's judgment, made a clear threat to reopen the so-called Dockside claim, indicating that there was nothing stopping him from doing this.

[69] Mr Patterson is mistaken. Carlton has, through counsel, indicated that the Dockside matter and the mobile phone claim are both satisfied by reason of the information that has been provided to it, principally by the efforts of Mr Hart and Mr Magill and their counsel. For the avoidance of doubt, I will be making an order that the Dockside counterclaim has been withdrawn and that Carlton has acknowledged to the Authority that the payments it alleged were still due and owing had in fact been made and that in consequence there is now no claim against either Mr Hart or Mr Magill in that regard.

[70] The factual position is that a second counterclaim of Carlton relating to the reimbursement of personal cellphone expenses has also been withdrawn as having been satisfied.

[71] That leaves one allegation that Mr Magill has failed to reimburse Carlton for personal expenses charged to his Carlton credit card for an amount of \$1,330.81. When the counterclaim was originally filed in the Authority, the claim was for \$3,200 but Carlton has subsequently accepted that that quantum cannot be sustained and the lower figure is now what is sought.

[72] In response, counsel for Mr Magill sought copies of the receipts and other documentary evidence which Mr Magill said in his evidence that he provided to Carlton to justify the complaint about expenditure.

[73] Mr Magill's evidence is quite unequivocal; he says that the amounts complained about are business expenses for which he feels certain he will have provided the receipts and other documentary evidence. He told me that that was his usual pattern and he cannot see why the position would have been any different in this particular case.

[74] Mr Magill said that he habitually wrote a weekly letter to Mr Patterson to report on progress, particularly as he and Mr Hart were away from their base so much and that his usual practice would have been to put the receipts for work-related expenditure in with that letter.

[75] Mr Magill also makes the observation in his brief of evidence that he finds it quite extraordinary that Carlton has only raised the counterclaims when he and Mr Hart started pressuring Carlton for disclosure of the profit share entitlement. Mr Magill points out that the counterclaim was raised two years after the costs in question would have been incurred and he finds that *staggering*.

[76] I agree with him. The evidence that he gave on the point I found credible and the process he described for giving the receipts to the employer have the ring of truth about it. Mr Magill also tabled a document which is the Visa printout with his handwritten notes on it as to what the amounts were for. While those notes are not a contemporaneous written record (Mr Magill acknowledges that), I think it more rather than less likely that his evidence that these were work-related expenses is absolutely truthful.

**The parties' behaviour**

[77] Mr Davenport, counsel for Mr Hart and Mr Magill, makes the claim that some of the behaviour of Carlton in the present case has been completely unacceptable. I agree with Mr Davenport's view.

[78] I am troubled by Carlton's handling of the counterclaim issue particularly where Carlton plainly alleged that money had been misappropriated. That is a serious allegation, and one which in proper circumstances an employer party may reasonably make. The difficulty here is that Carlton had within its power the opportunity to properly research the allegations before it brought them before the Authority. For instance, in relation to the two counterclaims which have been withdrawn, Carlton could readily have discerned from its own documentation, or from making the most rudimentary inquiries from third parties, that its allegations were entirely without foundation.

[79] Notwithstanding that, what Carlton did was make the allegation and leave it hang in the air until Mr Hart and Mr Magill were able, through counsel, to persuade Carlton that it had within its own power the opportunity to satisfy itself that the allegations were in fact groundless.

[80] For reasons which I have already elaborated on, I am also troubled by Carlton's persistent refusal to supply relevant material to Mr Magill and Mr Hart in a timely way. Indeed, there is a real sense in which, if Carlton had fulfilled its obligations to the applicants by properly providing relevant and timely information about the profit share clause while the applicants were still employed, any dispute which may have arisen would have been able to be resolved in a less dramatic way. As it is, the applicants not unnaturally say that they are entitled to look to Carlton for the legal costs which the applicants incurred in forcing Carlton to at least go some way towards fulfilling its obligations as a good and fair employer.

**Determination**

[81] I am satisfied, on the balance of probabilities, that the profit sharing clause which is accepted applied both to Mr Hart and Mr Magill, ought to have been the subject of calculations by Carlton on a monthly basis to identify profit from the film division.

[82] When there was such profit, then Mr Hart and Mr Magill were entitled to 10% of the operating profit to be paid to them at quarterly rests.

[83] In the particular circumstances of this dispute, I am satisfied that Mr Hart and Mr Magill are owed each the sum of \$16,306.46 in respect of the months of October, November and December 2004 (noting that there was no payment due to them for the month of December because the month of December made a loss). Interest at 7%pa is to apply from the time these payments were first due and owing down to the date of payment.

[84] For the avoidance of doubt, I direct that the parties are to negotiate with each other in order to identify the operating profits (if any) that apply in respect of each and every one of the other months that Mr Hart and Mr Magill were employed in the film division of Carlton, and that those calculations of operating profit for those other months will be derived using the same principles that Mr Hart used to reach the calculations upon which I rely for the months of October, November and December 2004. Interest is to be paid on the same basis as is provided for in para.83 above. Leave is reserved for the parties to come back to the Authority if required.

[85] I am satisfied that Mr Hart and Mr Magill are entitled to special damages such that they can be recompensed on a solicitor/client basis for the costs that they have incurred through Mr Davenport's diligent pursuit of their interests from the ending of the employment relationship down to the point in 2007 at which it could reasonably be said that the basic information was provided: *Binnie v. Pacific Health Ltd* [2002] 1 ERNZ 438 applied.

[86] Next, I am satisfied that Mr Hart and Mr Magill are entitled to general damages for the distress they have suffered by reason of the treatment they have received from their employer. I do not accept the submission of Carlton that the distress suffered by Mr Hart and Mr Magill is what could be called litigation anxiety. In my view, Mr Hart and Mr Magill have amply demonstrated that their distress is a function of the failure of Carlton to pay them in accordance with their employment agreement, perform appropriate calculations of profit share and address their legitimate concerns on these matters in a timely way. I direct that Carlton is to pay to Mr Magill and Mr Hart the sum of \$3,000 each in that regard.

[87] Given the way in which the employer has behaved in this manner, I think the awarding of a penalty against Carlton is appropriate and I certainly do not accept Carlton's submission that the raising of a claim for a penalty is out of time. Once Mr Hart and Mr Magill became aware of the nature of Carlton's response, which was in 2007 they brought their application to the Authority for a penalty to be imposed within the statutory time limit.

[88] Further, the factual matrix in this case is the clearest demonstration of a breach of good faith by an employer party that is possible to imagine. Carlton is to pay to Mr Hart and Mr Magill each the sum of \$8,000 for its continuing breach of good faith behaviour. Given the *flagrant nature* of Carlton's breaches, I direct that those penalty sums are to be paid to the applicants: Section 4A(a) applied. I consider payment of this sum adequately responds to the applicants' claims for penalty for general breach (s.134) and penalty for breach of good faith (s.4A).

[89] The counter claim is dismissed for the reasons advanced earlier in this determination. I now direct that all three counter claims are disposed of, the Dockside claim and the Telecom claim having been properly withdrawn and the credit card claim having been found to be without substance.

### **Costs**

[90] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority