IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 68
3136853

	BETWEEN	BENJAMIN HESSELL Applicant
	AND	LIGHTFORCE LIMITED Respondent

Member of Authority:	Antoinette Baker
Representatives:	James Turner, counsel for the Applicant Richard Harrison, counsel for the Respondent
Investigation Meeting:	05 May 2022 and 24 August 2022 at Auckland
Submissions received:	24 August 2022 from Applicant 24 August 2022 from Respondent
Final evidence provided:	24 November 2022 from Applicant
Determination:	14 February 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Hessell and his former employer, the respondent (LF) dispute the meaning of wording in Mr Hessell's individual employment agreement (IEA). Mr Hessell says that when

he resigned from his employment, he was entitled to be paid within a timeframe, the then market value of a '1% share' in LF's business, a 'gift' that Mr Nutting when a sole director of LF had earlier gifted to him for his hard work in helping to develop LF's electrical business into solar energy supply and installation. Mr Hessell says the IEA is clear in its meaning. In the alternative he says that he has been disadvantaged due to a lack of communication by Mr Nutting about the operationalising of the entitlement during his notice period.

[2] LF says that either Mr Hessell did not want anything for the share entitlement and or that the IEA Schedule is unenforceable in that the '1% gift' was drafted as coming from the 'Lightforce group of companies', an entity group that has never existed. LF further says that in any event the '1% gift' of the shares was something that would only crystalise once LF became successful and this had not yet happened. LF further says that if the entitlement is found to be enforceable, the number of shares to be valued were only those relating to shares belonging to Mr Nutting and not the total number of shares for LH, which at the end of Mr Hessell's employment had significantly increased in number due to new shareholder investment. To this extent LF submits that this would have the effect of an unjust 'windfall'. If any share entitlement is to be found owing, LF also disputes the way that Mr Hessell has valued the share units which includes a value based on what the new investors would have paid for their shares (around the time Mr Hessell left his employment) as willing experienced investors.

[3] Mr Hessell says the IEA is clear in that the Schedule refers to the '1% gift' coming from the 'Lightforce group of companies' and this means LF and the company currently showing as its ultimate holding company, Lightforce Power Limited (LP). He submits that based on the valuation of his expert witness he should receive from LF the value of $83,334.40 based on a $1.00 value per share and from LP $10.00 based on a $1.00 value per share.

[4] Mr Hessell asks to be paid this contractual loss together with interest and costs including the $17,609.96 he has paid to a valuer, being an obligation on LF in the IEA. Alternatively, he raised a personal grievance and claims compensation due to disadvantage in his employment in that LF did not communicate in good faith with him to operationalise the share entitlement. He also seeks a penalty for breach of good faith, and costs.

The Authority's investigation

[5] For the Authority's investigation a meeting was held across two dates. Three witnesses appeared, Mr Hessell, Mr Nutting and an expert valuer called by Mr Hessell. Counsel gave oral submissions at the end of the second investigation meeting, each providing a written synopsis of the same.

[6] I have considered the submissions, the filed documentary evidence and the evidence given by witnesses. Sometime after the investigation meeting, I asked for further information from the parties and gave a timetable to provide this and to comment. Only the applicant's counsel supplied further information. I have considered this information provided.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and any specified orders made. It has not recorded all evidence and submissions received.

[8] As a preliminary issue it was agreed by the parties at the first investigation meeting day that the employer of Mr Hessell was LF and not as erroneously recorded in the IEA, 'LightForce Solar & Electrical Limited' which is a non-existent entity according to the New Zealand Companies Office Register (the Register.)

Issues to be determined

[9] The issues for determination are:

a. Did LF breach the IEA by not paying to value and then paying Mr Hessell the market value of the 1% share to him when he left his employment?
b. If so, how much is Mr Hessell to be paid to compensate him for
    i. The market value of the 1% share
    ii. The cost he paid to a valuer
    iii. Interest on money owed?
c. In the alternative has Mr Hessell been unjustifiably disadvantaged in his employment and if so what, if any, compensation should be awarded to him for this?
d. Should any compensation be awarded for unjustified disadvantage be reduced by any blameworthy conduct by Mr Hessell that contributed to the disadvantage?
e. Did LF breach its duty of good faith to Mr Hessell?
f. If so, should a penalty be ordered against LF for breach of good faith and if so, should any of this amount be paid to Mr Hessell?
g. Should either party contribute to the costs of the other?

Further background to the employment relationship problem

[10] In March 2018 Mr Hessell, started his employment as a salesperson for LF. At the time, Mr Nutting was the sole director and shareholder of LF and the company was moving from just electrical work into the supply and installation of solar energy power systems. During 2018 into 2019 Mr Hessell and Mr Nutting continued to work alongside each other, two young men with a common entrepreneurial goal of growing the business. Accounts for LF reflect a significant increase in revenue for ‘Solar Sales’ between 31 March 2019 and 31 March 2020.

[11] On 15 February 2019 Mr Nutting sent a text message to Mr Hessell:

> I just put $500 into your account. I am also happy to give you 1% of Lightforce as I really appreciate all your work and want you to get something out of it when we hit the big time!
>
> Let's go out for dinner sometime soon with the girls and we can sign all the paperwork.
>
> Ps. Keep that very quiet as I wouldn't want the other staff members finding out just now.

[12] Approximately a year passed before the two men started a process towards the promised 'paperwork' which eventually became an IEA and schedule that Mr Hessell drafted. Mr Hessell says he had been trying to get Mr Nutting to complete this process during 2019 without success. Mr Nutting says he does not recall Mr Hessell asking him 'multiple times' and or says that he was too busy during 2019.

[13] The '1% gift' was reinforced by Mr Nutting in an email dated 3 February 2020. By this time the two men were talking about enhanced terms and conditions for Mr Hessell to reflect what his, by then, senior role had become. The relevant parts of the email include:

> "Hi Ben
>
> Thanks for your patience on this, I understand it has taken a long time but we are finally closing things off. I see you as a key partner in the future of Lightforce and I want you on board for the journey to become a billion-dollar company. I'm so impressed with everything you do and have done for Lightforce to date and really

appreciate how much effort you have put into helping LF achieve the growth we have experienced to date.

…[sets out Mr Hessell's new role] …

As you know you have been gifted 1% of my shares and there will be a key staff share option in the way of sweat equity or discounted sale price once we restructure post investment.

…[sets out predictions for post investment salary for Mr Hessell and projects he would be working on] …

We are going to be the google and apple of the solar world and create a movement throughout NZ!
…
Regards
Luke
Managing Director

[14] On 13 March 2020 when there was still no progress with the paperwork (the IEA about the new terms and conditions as well as the 1% share entitlement) Mr Hessell communicated to Mr Nutting that he needed to confirm what was agreed or the "conversation would have to change". Mr Hessell said he needed clarity to enable financing to buy a house and wanted to stop borrowing a car pending the provision of a company car.

[15] The parties eventually signed the IEA on 28 May 2020 after exchanging further emails and having discussions mainly about Mr Hessell's new terms and conditions as a senior employee in the post restructured business. This was the first and only IEA entered into

between the parties. As well as including the various things that accorded with Mr Hessell's more senior role, Mr Hessell drafted a schedule to the IEA (the Schedule) as follows:

Shareholding Entitlement

Gift of 1% Shareholding of the Lightforce group of companies.

Access to purchase up to 4% of 'Lightforce' at the rate discounted by 10% of current market value at the time of purchase. Through the way of sweat equity or outright purchase.

Shares are to be surrendered by the employee at the end of the employment and first offer of purchase to be available to Luke Nutting at the current market value rate at that time.

- If Luke Nutting does not purchase shares, then they will next be offered to any remaining shareholders in Light force's business in order of largest to smallest shareholding percentage.
- If no shareholders purchase shares an independent purchase can be explored by the employee.
- If shares have not been transferred into the employee's names or an entity controlled by the employee then the equivalent market value of the share is to be paid in full to the employee if the employment is ended in one payment within 30 days of the end of the employment.
- Market value to be determined by an independent valuation of Lightforce agreed upon by both the employer and employee.

> This is to be completed within 20 days of the employment ending.
>
> Lightforce is to cover the cost of valuation.
>
> Market value of Lightforce in March 2020 of contract signing is $7,000,000 NZD.
>
> Shares will be transferred to Benjamin Hessell at the time of company restructuring due to restructuring with an investor or no later than 30th September 2020 in the event investment restructuring has not been finalised.

[16] Mr Hessell resigned on 28 July 2020, two months after signing the IEA that included the Schedule. His last day of employment was 4 September 2020. Before he finished his employment, he sent emails to Mr Nutting asking that his share entitlement be sorted out before he left. Mr Nutting says he did not receive these emails due to a firewall issue. Evidence of a third party investigating this issue refers to two of the emails falling into this category. There were verbal conversations and messages about setting up to meet during this time.

[17] From the time Mr Hessell resigned to when he left his employment LF had issued a significant increase in shares to investors. The Register shows that a detailed constitution was adopted for LF on 20 August 2020. Mr Nutting also entered and signed personally and on behalf of a company he a director of, a 'Shareholders Agreement' on 18 August 2020. Signatories include the new shareholder investors. That agreement includes comprehensive rules for the ownership of new shareholdings in LF going forward. There is no reference to the existing agreement that Mr Nutting had entered with Mr Hessell about gifting the '1% gift' of shares as recorded just months before in the Schedule.

Did LF breach the IEA by not paying to value and then paying Mr Hessell the market value of the 1% share to him when he left his employment?

[18] Mr Hessell says that he had an enforceable entitlement to be paid the value of his 1% share entitlement when he left LF's employment. For me to be satisfied that Mr Hessell is entitled to claim a breach of the IEA in this way I have to be satisfied that the entitlement he seeks to enforce is clear in its meaning as to what the parties had agreed would happen if Mr Hessell resigned when he did. This involves an exercise of contractual interpretation to determine what it was that the parties intended the Schedule to mean. If I find the Schedule wording is unclear as to meaning, I can consider context to decide whether I can imply that meaning. However, such an implication needs to be made on the basis that it seems obvious to imply.

[19] The Supreme Court [1] has set out the objective approach to be used in contractual interpretation which involves as the 'ultimate objective' the establishment of what the parties intended their words to bear. Background material can be helpful as a 'cross check', even if the words used appear to be unambiguous. It describes ambiguity as follows:

> "Ambiguity arises when the language used is capable of more than one meaning, either on its face or in context and the Court must decide which of the possible meanings the parties intended their words to bear".[2]

[20] The Employment Court has confirmed that background material must be reasonably relevant, objective and should not include a party's subjective intentions about what was meant.[3]

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[1] *Vector Gas v Bay of Plenty Energy Limited* [2010] 2 NZLR 444 (SC) at [4] and [19].
[2] See above at [461], Tipping J.
[3] *Kiwirail Limited v Mobbs* [2020] NZEmpC 139 at [19]

[21] If a contract is silent about a certain term or condition, then to imply the term later includes asking amongst other things whether a term is so obvious that the parties might be heard to say, "we didn't bother to say that; it is too clear." [4] An implied term is not a term that is added to a contract, but the implying is simply to recognise it should be there as a matter of construction.[5]

What is the definition of "Lightforce group of companies"?

[22] I find that the Schedule wording of "Lightforce group of companies" to denote where the 1% share gift would come from is not clear as to what entities are in this group. What is missing is a definition of what this crucial part of the agreement meant. To this end the wording is silent about the definition. I will therefore consider context.

[23] I have been asked in submissions for Mr Hessell to accept as fact that the 'Lightforce group of companies' includes two companies: LF and Lightforce Power Limited (LP) which is currently showing on the Register as an ultimate holding company for LF. LP was not incorporated until 17 December 2019 which was after Mr Nutting's first text to Mr Hessell saying he gifted "1% of Lightforce" in early 2019 but before Mr Nutting reiterated the gift in his 3 February 2020 email to Mr Hessell as "my shares." LP did not appear on the register as an ultimate holding company for LF until March 2022.

[24] Mr Hessell's oral evidence was that he had the "impression" that it was LF and LP that formed the 'Lightforce group of companies'. He explained to me that he formed this impression because he recalled Mr Nutting talking about the incorporation of a new company. Mr Hessell refers me to the Information Memorandum dated May 2020 (IM) that was published to attract investors. Mr Nutting is front and centre on this marketing document. Mr Hessell also appears as part of the senior staff team in the IM. Mr Hessell says the IM

[4] *Relgate v Union Manufacturing Co (Ramsbottom)* (1918)1 KB 592 (PC), Scrutton LJ at 605.
[5] *Dysart Timbers Limited v Nielsen* [2009] NZSC 43, Tipping and Wilson JJ.

supports his impression that it was LF and LP that form the 'Lightforce group of companies.' I do not accept the IM supports Mr Hessell's 'impression.' My reasons follow.

[25] The IM was released to attract investors and while it includes in Mr Nutting's forward that LP had by then been incorporated, the end of the document includes that:

> The Lightforce Group will consist of separate legal entities that will be formed as part of a capital raising process. The current entity is Lightforce Electrical Limited [later named LF].

[26] Several paragraphs later there is reference to the 'proposed Lightforce Group.'[6] The IM also includes a 'warning' that the IM is 'not an offer of equity in the Lightforce Group, it is to assist you in assessing a future offer of equity in the proposed Lightforce Group.[7]

[27] A diagram is included in the IM. It is headed 'long-term structure proposal for the Lightforce group' and it shows a dotted line for at least two further companies to be included in the proposed group structure. Under the diagram the IM says that a foundation investor (the type of investor the IM was aimed at) would have a share across all the eventual proposed group entities as opposed to other investors coming later who may only have the opportunity to invest in separate entities[8]. Taking this material into account as context, I accept the submission for LF that any reference to the 'Lightforce group of companies' in the Schedule could not refer to something that existed by the time Mr Hessell made the choice to resign from his employment. The language used in the IM can reasonably be interpreted as meaning that the 'group' of companies had yet to be formed and was a proposal only.

[28] I also find Mr Hessell's evidence about his 'impression' that it was LF and LP making up the 'Lightforce group of companies' is inconsistent with an attachment to Mr Hessell's

[6] *Important Notices & Disclaimers* at page 128
[7] As above in a text box.
[8] As above page 61 at section 4b.

own evidence. After the investigation meeting, I noted that there was an attachment called 'meeting notes' to an email in Mr Hessell's evidence that I did not have available. I asked the parties about this as it looked like it had been inadvertently left off the bundle of evidence provided. I gave a timeframe for its provision and for any comment about this additional material. Only Mr Hessell's counsel replied by providing what has been put forward as the attachment that I asked. The document is headed 'Contract Updates'. I understand it to be reflective of Mr Hessell's electronic notes of a discussion leading to the IEA and Schedule being drafted by him and then signed by both parties. It contains among other things a single reference to the shareholding entitlement and the 'Lightforce group of companies':

> Contract updates
> Contract Schedule 1
> Shareholding entitlement
> • Gift of 1% Shareholding of the Lightforce family of companies currently including "LIGHTFORCE ELECTRICAL LIMITED" and "LBN HOLDINGS LIMITED" – if business restructure/ownership changes then this will be updated to include the updated family of businesses.

[29] LBN Holdings Limited (LBN) is a company registered as having Mr Nutting as the sole director and shareholder. Its only connection to LF is that it is currently a 17.5% shareholder. LBN is not connected to LP or LF as a holding company of either. In short it is a separate corporate entity from both. These 'Contract Updates' are the only possible notes I have before me that may indicate anything of what may have been discussed about the definition of the 'Lightforce group of companies' pending the drafting and the signing of the IEA and Schedule. This is in the context of Mr Hessell and Mr Nutting disputing much of what they may have said in verbal discussions between just the two of them leaving it difficult to assess what was actually discussed between them just on that basis.

[30] If the ‘Contract Updates’ represent what Mr Hessell recorded was discussed between himself and Mr Nutting during the negotiations pending the signing of the IEA and the Schedule, the reference to LBN Holdings Limited as a third potential company that might make up the ‘Lightforce group of Companies’ adds to the lack of clarity as to what was meant by this phrase.

[31] Based on a consideration of the above I am far from satisfied that after finding the wording in the Schedule silent as to where the 1% share was to come from (due to lack of a definition of ‘Lightforce group of companies’), my consideration of the context does not lead me to imply that the two entities from which that shareholding would obviously come from are LF and LP as submitted for Mr Hessell as fact. Even if I had implied this, given the agreements between new LF shareholders in August 2020 there would then likely have been a challenge to the way Mr Hessell submits LF should pay him a percentage of market value from each company, a split that is also lacking any definition in the Schedule wording.

[32] While I am satisfied that Mr Nutting, for LF, clearly rewarded Mr Hessell with a 1% share in his business for good work done, I find it was from a casually named ‘corporate group’ that has never existed or was planned for the future. Accordingly, Mr Hessell is unable to enforce the obligation against LF his former employer and his claim for breach of the IEA has to be dismissed.

What did the parties intend had to happen to trigger any share value entitlement to be paid to Mr Hessell at the end of his employment?

[33] For the sake of completion I will consider the submission for LF that Mr Hessell left his employment too soon for any entitlement in the Schedule to have crystalised.

[34] The Schedule says any shares transferred by the end of employment must be surrendered for purchase by a cascade of options to purchase being Mr Nutting first, followed

by a hierarchy of shareholders, followed by a right for Mr Hessell to 'explore' an independent purchaser. At the end of his employment Mr Hessell held no shares to surrender. LF submits that I should consider the wording in the schedule that says:

> Shares will be transferred to Benjamin Hessell at the time of company restructuring due to restructuring with an investor or no later than 30th September 2020 in the event the restructuring has not been finalised.

[35] LF says that the restructuring was never completed. Mr Hessell says it was because all investors were on board and there is evidence to support that this significant investment occurred if not before Mr Hessell resigned then during his notice period. However, while the word 'restructuring' is used in the Schedule it relates to the transfer of shares. Even if there had not been the problem of identification about the 'Lightforce group of companies' the Schedule also says that all shares are to be surrendered by employees when they leave their employment.

[36] While the Schedule nominates 30 September 2020 as a date to transfer the shares, I find this could only make sense if the employee remained in the employment given that in the same Schedule employees are to surrender shares at the end of employment. This is consistent with Mr Nutting's evidence that he expected Mr Hessell to remain working for LF to enjoy the rewards of the business success.

[37] I take what Mr Nutting frequently referred to as 'sweat equity' to align with my observations about the way both men communicated and envisioned their work together as the business as it grew. All the communications mentioned above relating to the pre contractual negotiations were forward thinking.

[38] If no share entitlement could have been transferred to Mr Hessell by the time that he left his employment or even by 30 September 2020 then it would not be a reasonable

interpretation that Mr Hessell now receive an equivalent market value for that share because it could never have been brought into existence. Even if I am wrong about this it still remains that the lack of clear definition about where the share gift was to come from is fatal to Mr Hessell's claim for breach of the IEA. I have not then considered the evidence presented about valuing the shares.

[39] In summary, Mr Hessell's claim that LF has breached the IEA, namely its obligations in the Schedule to have paid him the market value of a 1% share in the 'Lightforce group of companies' is dismissed.

In the alternative has Mr Hessell been unjustifiably disadvantaged in his employment and if so what if any compensation should be awarded to him for this?

[40] Mr Hessell alternatively claims he was disadvantaged in his employment because LF was not justified when through Mr Nutting it did not communicate with him about the operationalising of his share entitlement during his notice period.

[41] Section 103(1)(b) of the Act allows an employee to bring a personal grievance if the employee's employment, or one or more conditions of the employee's employment, is or are affected to the employee's disadvantage by some unjustifiable action by the employer.

[42] The question of whether a dismissal or other action by an employer is justifiable is determined on an objective basis by applying the test at s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. A breach of good faith as a statutory duty can constitute an unjustifiable action by the employer.

[43] It is submitted for Mr Hessell variously that his disadvantage claim is also based on not receiving a company car. I have not considered this part of the disadvantage claim beyond noting it here. This is because I heard no real evidence about this. It appeared to be raised in the periphery of Mr Hessell's claim, it was not raised when the grievance was raised or in the statement of problem and no specific remedy is sought.

[44] I will now consider the claim that LF disadvantaged in his employment.

[45] Mr Hessell's says he was disadvantaged in his employment when Mr Nutting did not respond to his communications during his notice period about getting the share entitlement resolved before Mr Hessell left. I accept the submission that this amounted to a breach of good faith on the part of LF. My reasons follow.

[46] Mr Nutting says he did not know Mr Hessell was communicating with him about the share entitlement during this time. I do not accept this as plausible. He has provided evidence of a third party finding that some of these emails were blocked by a firewall but not all of them. Mr Hessell's '1% gift' had been a live issue since Mr Nutting made the gift in early 2019. Emails confirm this. I accept Mr Hessell was frustrated and had to push the issue of getting something onto paper to confirm the agreement. Mr Nutting's evidence is that he did not take any notice of the wording in the Schedule when he signed off on it and then only a short time later decided it did not make any sense and likely stopped communicating for a time with Mr Hessell.

[47] Mr Nutting gave oral evidence that Mr Hessell told him during the notice period that he did not want anything for the share entitlement and that had he said he wanted to be paid, there would not have been a dispute. I found this evidence equivocal. I prefer Mr Hessell's evidence that he had never resiled from wanting to discuss the operationalising of his '1% gift', and that Mr Nutting avoided communicating about this.

[48] I find Mr Nutting's behaviour for LF amounted to a breach of good faith and as such accept that the lack of communication during the notice period in all the circumstances was unjustified.

Was Mr Hessell disadvantaged by the breach of good faith by LF?

[49] Mr Hessell says that he eventually felt misled by Mr Nutting who in his view reneged on the commitment to him about the share entitlement. I find Mr Hessell genuinely believed what had been agreed to albeit based on a poor understanding and his own poor drafting. Mr Nutting for LF took no steps to ensure that the wording was enforceable or workable and then likely avoided discussing this with Mr Hessell. I do not find this is what a reasonable employer could have done in all the circumstances at the time.

[50] While Mr Hessell might have taken steps to get independent advice, I find he likely was swept into the encouragement he was given by Mr Nutting and his words of encouragement and reward. While Mr Hessell has resigned of his own accord, I find that it is not a stretch to see he was disadvantaged in his employment by being misled with a reward that did not eventuate as he thought it might and a lack of communication from Mr Nutting during the notice period about this.

What compensatory remedy should be awarded for the unjustified disadvantage?

[51] It is submitted for Mr Hessell that he should receive $15,000.00 for the hurt and humiliation associated with the disadvantage to him. I find this amount too high. Mr Hessell was not in fact disadvantaged due to not receiving the share entitlement because I have found that agreement unenforceable. However, I accept he was affected by feeling let down in a way he describes as 'misled' by Mr Nutting so soon after Mr Nutting had appeared to have agreed for LF to an agreement about his share entitlement.

[52] Mr Hessell referred to symptoms of anxiety and having to seek help for these. I find it plausible that Mr Hessell who had appeared so positive about a way forward in LF likely felt a sense of humiliation and loss of dignity when Mr Nutting confirmed he had not taken much notice of what was so important to Mr Hessell, the gift that represented to Mr Hessell a reward for his employee efforts. Mr Hessell's evidence is that Mr Nutting said the Schedule would be 'laughed out of court'. I find some likelihood in the overall context that words to this effect were said by Mr Nutting. This would have added to what Mr Hessell had communicated to Mr Nutting in his email raising a personal grievance[9] when he said:

> Your communications to me are not in good faith, and disregard my good service and efforts to build up the business of Lightforce.

[53] In all of these circumstances I find that LF is to pay $5,000.00 compensation to Mr Hessell under s 123(c)(i) of the Act.

[54] I do not find the remedy awarded should be reduced under s 24 of the Act due to any blameworthy conduct by Mr Hessell.

Should a penalty be ordered against LF for breach of good faith and if so, should any of this amount be paid to Mr Hessell?

[55] Parties to an employment relationship must deal with each other in good faith which includes being 'active and constructive in establishing maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.[10]' A party to an employment agreement who fails to comply with this duty is liable to a penalty for reasons that include that the failure was 'deliberate, serious, and sustained'.[11]

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[9] Email Mr Hessell to Mr Nutting dated 8 September 2020
[10] Section 4 Employment Relations Act 2000
[11] Section 4A Employment Relations Act 2000

[56] LF was a party to the employment agreement as Mr Hessell's employer. I find it likely that through Mr Nutting it failed to act towards Ms Hessell in good faith by not communicating during the notice period to address issues relating to the share entitlement as well as taking no notice of the way Mr Hessell '1% gift' was to be operationalised. Accordingly, I find that LF is liable to a penalty.

[57] Section 133A of the Act sets out that in determining the amount of a penalty I need to consider the following:

> (a) the object of the Act
> (b) the nature and extent of the breach
> (c) whether the breach was intentional, inadvertent, or negligent
> (d) the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person in breach
> (e) whether the person in breach has taken steps to mitigate the potential adverse effects of the breach
> (f) the circumstances in which the breach occurred including the vulnerability of the employee
> (g) whether the person involved in the breach has previously been found by the Authority or the court to have been engaged in similar conduct.

The nature and extent of the breach

[58] I have no evidence that LF has had prior penalties awarded against it for breach of good faith. The penalty sought relates to a single situation in a specific set of circumstances between a senior employee and a managing director both of whom were keen to further the aspirational goals for the business they worked in. The nature and extent of the breach is therefore not by nature at the serious end of a matter that requires a high level of deterrence.

Whether the breach was intentional, inadvertent, or negligent

[59] Mr Nutting had every opportunity to get advice for LF and I accept Mr Hessell's evidence that he said he would do this before signing the IEA and the Schedule. Mr Nutting confirmed he did not actually take this step. The communications show no form of malice between the two men when they negotiated the IEA and in fact, they both appeared well and truly on the same page about the future of the business at least until Mr Hessell made a choice to leave. What the two men likely lacked between them was the sensible insight to realise the importance of careful drafting of an employee share entitlement so that it would make sense and be understandable so that they could have continued to be on the same page.

[60] On the other hand, I do not find Mr Nutting's lack of communication for LF about the share entitlement was as inadvertent as he wants me to accept. I have already given reasons above. Mr Nutting acknowledged in glowing terms his senior employee's work performance and the value it had to the vision he had for his business. I find this praise was likely a prime motivator for Mr Hessell. To then be told by Mr Nutting that he had simply not taken any notice of the wording that Mr Hessell believed secured the operationalising of the gift is in my view something that attracts a modest sanction for Mr Nutting's lack of care for LF.

The nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person in breach

[61] Other than the loss of dignity that has been covered in the compensation award above I find the loss is similar to the loss of a chance in a commercial opportunity which had Mr Hessell better understood how it would operationalise he may have stayed on and worked through any issues that he says he had with his employment. However, this is speculative. On the other hand, I find a likelihood that Mr Hessell had clearly been a benefit to LF. He developed systems that were a likely platform for LF to attract significant investment. The increased 'solar' sales after Mr Hessell's first year are also consistent with this contribution.

This work was at the heart of Mr Hessell's 'reward' given to him by Mr Nutting. Given this context it is understandable Mr Hessell felt taken for granted. However, in the circumstances of losing out on what might have been a commercial type gain this only supports a modest sanction.

Whether the person in breach has taken steps to mitigate the potential adverse effects of the breach

[62] I have no evidence to support that LF sought to mitigate the adverse effects of its non-communication or lack of attention to how Mr Hessell's gift could be clarified.

The circumstances in which the breach occurred including the vulnerability of the employee

[63] I find that Mr Hessell is not without ability. His emails show him taking the lead with negotiations for his IEA and enhanced employee entitlements. I do not find him at the high end of vulnerability compared to cases at potentially the other end of the scale where an employee may for example be in a junior position and paid minimum entitlements where the employer is attached to their legal entitlement to work in New Zealand. This relationship did not have that level of power imbalance.

[64] Mr Hessell in his oral evidence says he knew little of what was happening in relation to the 'restructuring'. I do not find this wholly plausible, but I do find he had a poor understanding of how to draft a complex legal agreement including how to best describe corporate entities and how they need to be clearly identified when this relates to share entitlements. This is not a criticism of Mr Hessell. He was not employed to be LF's lawyer. He was in a senior position working closely with Mr Nutting using his engineering and systems-based skills. I can understand why Mr Hessell felt so aggrieved that a reward for good work did not eventuate. However, I am not satisfied this is a situation of a truly

vulnerable employee. This and other factors above weighs against the ordering of anything more than a modest penalty.

[65] Based on the above I find that a penalty of $2,000.00 is appropriate and the whole of this amount is to be paid to Mr Hessell.

Summary of outcome and orders

[66] The claim and associated remedies by Mr Hessell that the IEA has been breached is dismissed.

[67] The claim for disadvantage succeeds. Lightforce Limited is to pay Benjamin Hessell $5,000.00 in compensation under s 123(1)(c)(i) of the Act.

[68] LF is ordered to pay a penalty of $2,000.00 for breach of good faith. The whole of this penalty is to be paid to Mr Hessell.

Costs

[69] The outcome of this matter is one of mixed success. The parties are encouraged to reach their own agreement as to costs. If they do not and a determination is needed from the Authority Mr Hessell may lodge and serve, a memorandum on costs within 14 days of the date of issue of this written determination. From the date of service of that memorandum LF would then have 14 days to lodge and serve a reply. Costs will not be considered outside this timetable unless prior leave is sought and granted.

[70] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or

downward adjustment of that tariff.[12] The parties are referred to a recently published practice note on costs in the Authority dated 29 April 2022.

Antoinette Baker
Member of the Employment Relations Authority

[12] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].