

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 413  
5467230

BETWEEN                      RICHARD NEWALL  
Applicant

A N D                              STEVEN PRESTAGE  
Respondent

Member of Authority:        Rachel Larmer

Representatives:              Helen Wendelborn, Advocate for Applicant  
Respondent in person (by telephone)

Investigation Meeting:        29 September 2014 at Auckland

Date of Determination:        10 October 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Steven Prestage breached s.134(2) of the Employment Relations Act 2000 (the Act) by inciting, instigating, aiding, or abetting Forte Alpha Operations Pty Ltd's multiple breaches of Mr Newall's employment agreement.**
- B. Total penalties of \$30,000 are imposed on Mr Prestage for his breaches of s.134(2) of the Act.**
- C. Mr Prestage is ordered within 28 days of the date of this determination to pay the \$30,000 penalty imposed on him directly to Mr Newall.**

## **Employment relationship problem**

[1] In April 2013 Mr Steven Prestage, Chief Executive Officer and sole director and shareholder of Australian based Forte Alpha Operations Pty Ltd (Forte Alpha), offered Mr Newall employment as a client specialist providing a range of IT support services to Forte Alpha's clients.

[2] Mr Newall accepted that offer and subsequently entered into a written employment agreement with an entity that did not legally exist. In a determination dated 23 May 2014<sup>1</sup> the Authority held that Forte Alpha employed Mr Newall. Mr Newall says that all of his interactions about his employment, salary and other administrative matters were with Mr Prestage. Mr Prestage did not deny that.

[3] Mr Newall worked for Forte Alpha from 07 April to 01 November 2013. Mr Newall's employment agreement provided for him to be paid monthly on or around the 30<sup>th</sup> of each month. Throughout his employment Mr Newall was never paid on time. When he did get paid it was never his full salary and he has still not been paid his salary arrears. Forte Alpha has not paid any PAYE or KiwiSaver deductions to the Inland Revenue Department (IRD) in New Zealand.

[4] In a substantive determination dated 23 May 2014<sup>2</sup> Forte Alpha was held to have breached Mr Newall's employment agreement multiple times by failing to:

- a. pay his monthly salary when it fell due;
- b. pay him his full salary;
- c. pay him his salary arrears;
- d. pay any KiwiSaver contributions;
- e. pay any PAYE to Inland Revenue Department (IRD);
- f. pay him his annual holiday pay upon termination.

[5] Forte Alpha was also held to have breached the Act in other ways, with the details of its other breaches being set out in the Authority's May determination.<sup>3</sup>

[6] Mr Newall claims that Mr Prestage breached s.134(2) of the Act by inciting, instigating, aiding or abetting Forte Alpha's breaches of Mr Newall's employment agreement and of the Act. Mr Newall seeks that penalties be imposed on Mr Prestage

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<sup>1</sup> [2014] NZERA Auckland 204.

<sup>2</sup> Supra.

<sup>3</sup> Supra.

under s.134(2) of the Act and he asks that some or all of the penalties be paid to him instead of the Crown.

[7] Because an action for recovery of a penalty must be commenced within 12 months<sup>4</sup> Mr Newall is only claiming penalties against Mr Prestage for inciting, instigating, aiding or abetting the breaches by Forte Alpha of his employment agreement that occurred within the 12 months prior to him filing his Statement of Problem for this matter.

[8] In particular, Mr Newall seeks penalties against Mr Prestage for inciting instigating aiding or abetting twenty breaches by Forte Alpha of his employment agreement, namely:

- a. Failing to pay his monthly salary when it fell due in June, July, August, September and October 2013 (5 separate breaches);
- b. Failing to pay him his full salary each month for June, July, August, September and October 2013 (5 separate breaches);
- c. Failing to pay any KiwiSaver contributions to IRD for June, July, August, September and October 2013 (5 separate breaches);
- d. Failing to pay any PAYE to IRD for June, July, August, September and October 2013 (5 separate breaches).

[9] Mr Prestage blames the breaches of Mr Newall's employment agreement on Forte Alpha's former Finance Manager. Mr Prestage claims he dismissed the person who held that role for poor performance on 29 August 2014. That evidence was given verbally by Mr Prestage for the first time during the Authority's investigation meeting.

[10] Mr Prestage was directed to produce the documentation associated with the former Finance Manager's alleged poor performance and dismissal by the close of business on 29 September 2014. Mr Prestage agreed he would do so but that did not occur. On 02 October Mr Prestage told the Authority he would provide the information on 06 October but that did not occur. On 06 October Mr Prestage advised the Authority he would provide the information the next day. That did not occur. On

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<sup>4</sup> Section 135(5) of the Act.

08 October Mr Prestage told the Authority he would provide the information that day. That did not occur and the information has not been provided.

[11] Mr Prestage did not file a Statement in Reply within time. Nor did he seek leave to file a Statement in Reply out of time. Mr Prestage failed to comply with the Authority's timetable directions around the seeking of leave to file a Statement in Reply out of time. Nor did he comply with the Authority's timetable directions. He has also failed to provide information he was directed to provide.

### **Issues**

[12] The following issues are to be determined:

- a. Findings regarding credibility of the witnesses;
- b. Did Mr Prestage breach s.134(2) of the Act?
- c. If so, should penalties be imposed?
- d. If so, should some or all of the penalties be paid to Mr Newall?

### **Credibility findings**

[13] Conflicts in the evidence are to be resolved on the balance of probabilities. I did not find Mr Prestage to be a credible witness. His evidence was internally contradictory in that he could not reconcile parts of his evidence. His evidence when questioned by the Authority was in some respects demonstratively incorrect because it contradicted emails he had sent and received. Also parts of his evidence did not make logical sense and therefore could not withstand scrutiny. I find that all of these factors undermined Mr Prestage's credibility.

[14] An hour before the Authority's investigation meeting started Mr Prestage emailed to the Authority two emails which he claims he sent to Forte Alpha's former Finance Manager on 09 September and 04 October 2013 asking for Mr Newall's pay issues to be resolved.

[15] Mr Prestage put these emails forward to support his claim that it was the former Finance Manager and not him who was responsible for Mr Newall not being paid. Mr Prestage told the Authority he had recently dismissed the former Finance Manager for poor performance and that "*everything had been resolved*". Mr Prestage

could not reconcile that evidence with the fact that Mr Newall is still waiting to be paid salary he earned for work done over a year ago.

[16] Ms Wendelborn claims the two emails to the former Finance Manager submitted by Mr Prestage are not legitimate. She suggests that Mr Prestage wrote these emails for the Authority proceedings.

[17] Ms Wendleborn points to the fact that they were produced at such a late stage that no proper inquiries could be made of them. She also notes that the employee's name is spelt differently from how it appeared in a previous email that employee had sent Mr Newall last year. She further notes that the email address the two emails were sent to cannot be located by clicking on the address field of the email, which she says is unusual.

[18] Mr Prestage told the Authority that none of Forte Alphah's employees were paid on time or paid their full salaries for all of last year. Mr Prestage told the Authority that everyone who works for Forte Alpha still has salary arrears owing to them, including him. This contradicts the advice he gave Mr Newall last year that Mr Newall was the only person who had not been paid correctly or on time.

[19] Mr Prestage claims Forte Alpha is not insolvent. However he was unable to explain why Forte Alpha has still not paid its employees their salary arrears from last year if it is not insolvent.

[20] Mr Prestage's evidence can be contrasted with Mr Newell's evidence. I find that Mr Newall gave clear measured answers that were supported by documentation. In the event of factual conflicts I have preferred Mr Newall's account of events on the basis it is more likely to be correct.

**Did Mr Prestage breach s.134(2) of the Act?**

[21] Section 134(2) of the Act provides that:

*“Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.”*

[22] Mr Prestage blames the multiple breaches by Forte Alpha of Mr Newall's employment agreement that occurred from June to October 2013 on a faulty payroll

system. He did not provide any documentary or corroborative evidence to support his evidence about that.

[23] Mr Prestage also blamed Forte Alpha's breaches on the former Finance Manager. However he failed to produce the documentation that the Authority directed him to provide around that issue.

[24] Mr Prestage says he was not responsible for Forte Alpha's breaches because he did not have access to its bank account. I do not accept that. Mr Prestage was effectively the 'mind' of Forte Alpha. He was the CEO and the sole director and shareholder. The former Finance Manager that Mr Prestage seeks to lay blame on reported to Michael Turner who reports directly to Mr Prestage.

[25] Apart from two discussions with Michael Turner and an email from the former Finance Manager, all of Mr Newall's communications regarding salary issues were with Mr Prestage. It is clear from the telephone recordings presented to the Authority that Mr Turner deferred to Mr Prestage over the salary payment issues.

[26] Mr Newall also produced a telephone recording to the Authority in which Mr Prestage states words to the effect that he is the boss and what he says goes and that it is his way or the highway.

[27] I do not accept Mr Prestage's evidence that he was not aware of Mr Newall's salary payment problems until September 2013 or that Mr Newall only raised concerns about non-payment of his salary five times with Mr Prestage. This evidence flies in the face of the multitude of emails and text messages sent by Mr Prestage and contradicts the detailed contemporaneous diary notes Mr Newall made of conversations between them. It also contradicts emails sent by Mr Prestage about salary arrears prior to September 2013.

[28] Mr Prestage's evidence that he was not aware of Mr Newall's salary payment problems until September 2013 cannot be reconciled with Mr Prestage's evidence that he personally paid Mr Newall money out of his own pocket in July and August 2013 because he felt bad about the salary payment issues that were occurring.

[29] It is also inconceivable that Mr Newall who was the sole earner in his family would work without complaint and without payment for five months before raising an issue about not being paid the salary he was contractually entitled to.

[30] The evidence shows that Mr Prestage is a hands on Director. He personally dealt with Mr Newall around all employment related issues including the offer of employment, the negotiating of an employment agreement, the signing of a confidentiality deed, the provision of laptop, ipad and email set up. I find that Mr Prestage was well aware of the contractual terms that applied to salary matters having been the person who provided the employment documentation to Mr Newall.

[31] Mr Newall sent Mr Prestage all of the administration information associated with his pay, such as signed contracts, IRD number, tax information and details, bank account details, and KiwiSaver deduction form. They also discussed KiwiSaver obligations and requirements.

[32] Mr Newall produced emails which show he was raising concerns with Mr Prestage about the non-payment of his salary as early as 06 May 2013. Mr Newall specifically referred Mr Prestage to the contractual obligation to pay salary around the 30<sup>th</sup> of each month. I find Mr Prestage was aware of the obligations in Mr Newall's employment agreement and was also aware that the employment agreement was being breached on an ongoing basis.

[33] Mr Newall also raised concern about not receiving his salary on 07 May with Mr Prestage who suggested they set up a skype call to discuss it. Mr Prestage said he would call Mr Newall about pay arrears on 08 May (but he did not do so). He failed to respond to Mr Newall's email on 09 May asking him to call.

[34] Mr Newall emailed Mr Prestage on 10 May asking where his pay was and Mr Prestage arranged to skype him but then failed to do so. In a phone conversation on 15 May 2013 Mr Prestage told Mr Newall his pay had been sent (it had not).

[35] On 20 May Mr Newall emailed Mr Prestage that his pay situation was of "*great concern as he had outstanding obligations falling due and he cannot afford not to meet them.*" When Mr Newall eventually tracked Mr Prestage down at home he was told his salary had been paid that day (it had not).

[36] On 04 June Mr Newall called Mr Prestage and said it was a necessity that he be paid to which Mr Prestage agreed and said that his pay had been sent the day before (it had not). Mr Newall emailed Mr Prestage full details of his salary arrears on 05 June and also reminded him of the requirements to pay PAYE and KiwiSaver contributions to IRD. He did not get any response from Mr Prestage.

[37] When Mr Newall contacted Mr Prestage on 06 June about not being paid Mr Prestage said the money was in Mr Newall's account (it was not). When Mr Newall phoned Mr Prestage on 07 June to say he had still not been paid Mr Prestage said he would call him later (he did not).

[38] Mr Newall called Mr Prestage on 10 June and was told that the bank was looking into it so Mr Prestage would call him when he got an answer (he did not call). Mr Newall called Mr Prestage on 11 June and was told to be patient and that the new payroll system which would be in place from July 2013 would fix the problems (it did not). Mr Prestage told Mr Newall he would have an answer to his missing salary tomorrow (he did not).

[39] Mr Prestage also told Mr Newall "*you have my commitment we will fix this.*" It is now more than 14 months after that statement was made and Mr Newall has still not been paid his salary arrears.

[40] On 12 June Mr Newall emailed Mr Prestage that the continuing situation of not being paid was "*highly embarrassing*" for him. On 13 June Mr Prestage told Mr Newall he had been paid (he had not). On 14 June Mr Prestage told Mr Newall he "*can't apologise enough*" and he would call him back with a status update (he did not). He also said the new payroll system going live on 1<sup>st</sup> July would fix the problems (it did not).

[41] On 17 June Mr Newall emailed Mr Prestage again saying he had still not been paid. Mr Prestage said he would call Mr Newall (he did not). Mr Prestage told Mr Newall on 19 June that he would pay him from his own bank account (he did not).

[42] On 01 July Mr Prestage told Mr Newall that his money had been sent (it had not). On 03 July Mr Newall advised Mr Prestage that he had had to rearrange his finances due to non-payment of wages. Mr Prestage told him "*I will personally reimburse you for costs of refinancing*" (he has not done so). On 10 July Mr Prestage said he would transfer from his own account the money Mr Newall was owed to him (he did not do so).

[43] On 11 July Mr Prestage told Mr Newall his salary arrears had been sent the previous day (it had not). On 15 July Mr Newall told Mr Prestage he had still not been paid his salary arrears. On 16 July Mr Prestage told Mr Newall he had sent his salary

arrears to him (he had not). Mr Newall emailed Mr Prestage on 18 July about his salary arrears and Mr Prestage said he would call him to discuss it (but he did not).

[44] On 19 July Mr Newall emailed Mr Prestage about his salary arrears. They spoke on 20 July and Mr Prestage told Mr Newall that if he had not received his money in two days Mr Prestage would send the money himself from his own account (he did not do so).

[45] On 22 July Mr Newall told Mr Prestage he had still not been paid and Mr Prestage asked how much he needed until the next week when he would be paid all arrears. On 24 July Mr Prestage paid Mr Newall \$2,388.04 on 31 July he paid him \$203 and on 02 August 2013 he paid him \$4973. The payment of \$203 on 31 July was to reimburse an expenses claim of \$230. All three payments were made by Mr Prestage from his personal account to Mr Newall.

[46] Mr Newall asked on 24 July for payslips and confirmation of when he would be paid in full (neither of these were provided). On 30 July Mr Newall again asked Mr Prestage for all of his pay to be paid. Mr Prestage said he needed until next week to be able to do that (it never happened).

[47] On 28 August Mr Newall emailed Mr Prestage a summary of his wage arrears which at that date were \$22,600 not including what was owed to IRD for PAYE and KiwiSaver contributions. Mr Newall set out his imminent financial commitments and expressed concern that he may have to cancel a long planned trip if his financial situation was not sorted. He referred to feeling panicky about the salary arrears and signed off the email saying he was *“tired stressed and very, very worried.”*

[48] Mr Prestage responded to the email by saying he would send the money (he did not). Mr Newall called Mr Prestage on 29 August saying no money had been received and Mr Prestage told him he had sent \$10,000 the previous day (he had not).

[49] On 30 August Mr Newall emailed Mr Prestage. He set out his embarrassment at having to borrow money from relatives to pay bills because he had not had one correct pay in the entire time that he had worked for Forte Alpha. He noted that despite Mr Prestage promising many times that the salary arrears would be paid that had still not happened. Mr Newall noted that the *“stress and anxiety is becoming intolerable”* wondering when he would be paid his salary arrears. He said his holiday

to USA which he was due to depart for in two weeks was in jeopardy due to the ongoing non-payment of his salary.

[50] Mr Prestage responded by texting Mr Newall that he would call him to discuss (he did not call). On 31 August Mr Prestage told Mr Newall during a telephone conversation that he “*will fix it*” and would call Mr Newall the next day with the money transfer receipt number (he did not pay the money and he did not call).

[51] On 02 September Mr Newall emailed Mr Prestage saying no money had arrived and that he was owed \$22,676.66 and was having to borrow to meet debts that were falling due. Mr Prestage did not respond. On 03 September Mr Newall called Mr Prestage and was given a so called bank receipt number to prove the money he was owed had been paid.

[52] On 04 September Mr Newall emailed Mr Prestage advising no money had been paid and that his bank had no record of any transactions for the so called bank receipt number Mr Prestage had given Mr Newall. He also advised Mr Prestage that his longstanding overseas holiday to the USA was in jeopardy if he was not paid what he was owed. Mr Prestage did not respond.

[53] On 05 September Mr Newall emailed Mr Prestage suggesting he fly to Sydney to collect his wage arrears in person given that getting his salary put into his bank account seemed to be such a problem. Mr Prestage responded on 06 September saying they were investigating the situation with their bank and would call as soon as he heard back from the bank. He did not call.

[54] On 09 September Mr Newall called Mr Prestage who told him “*should receive his money tomorrow or the next day.*” When Mr Newall asked how much he would be receiving Mr Prestage said \$10,000 and when Mr Newall pointed out that he was owed \$23,000 Mr Prestage told him “*one thing at a time.*” When Mr Newall asked when he would get the balance of his salary arrears he was told “*before you fly out (for your holiday)*” Mr Prestage confirmed Mr Newall would be paid \$10,000 the next day and the balance of what he was owed (another approximately \$13,000) within four days. He was not paid anything.

[55] Mr Newall emailed, called and texted Mr Prestage on 11 September saying he had not received any money. Mr Newall again offered to fly to Sydney the next day to collect his money in person. Mr Newall also called Michael Trainer (who reports to

Mr Prestage) expressing concern about his salary arrears. Mr Trainer said he would raise it with Mr Prestage.

[56] Mr Newall emailed Mr Prestage on 04 October saying he was reliant on being paid on time and in full and that had not happened throughout his entire employment. He referred to Mr Prestage's assurance he would be paid in full at the end of September and asked why that had not happened. On 06 October Mr Prestage told Mr Newall in a phone conversation that Mr Newall was the only employee not being paid properly and that he would discuss it with him the next day. Mr Prestage did not contact Mr Newall the next day.

[57] Mr Newall emailed Mr Prestage on 07 and 08 and texted him on 09 October but got no response. On 18 October Mr Newall emailed Mr Prestage saying that he was still waiting for a response to his email about his salary arrears and that the situation cannot continue. He also texted Mr Prestage saying he was waiting for him to call about the salary arrears.

[58] Mr Newall sent a second email on 18 October setting out the details of his salary arrears of \$35,973.59. He noted no payments had been made to IRD and he again referred to the contractual obligation to pay his salary monthly. Mr Newall stated he had exhausted his finances and needed his salary arrears urgently. Mr Prestage did not respond.

[59] Mr Newall emailed Mr Prestage on 19 October asking to be contacted urgently to resolve the salary arrears issues. There was no response. Mr Newall sent another email to Mr Prestage on 21 October saying they needed to discuss how and when he would be paid what he was owed. There was no response.

[60] On 30 October Mr Newall emailed Mr Prestage again noting he had not received any response to his last four emails. He noted he had not once been paid on time and had not once been paid his full salary. He attached a spread sheet which set out the calculations and advised the total gross amount owed was \$46,952.42. Mr Newall advised that if the matter was not resolved by 01 November he would have to resign, and would be pursuing a personal grievance.

[61] No response was received but Mr Newall subsequently discovered he had been locked out of his work email. He sent an email to Mr Prestage from his gmail account

advising he was unable to access his work emails. No response was received so on 01 November Mr Newall sent his resignation and raised his dismissal grievance.

[62] I am satisfied that Mr Prestage was ultimately responsible for ensuring Mr Newall was paid his salary. Mr Prestage as CEO and as sole director had the power to direct Mr Newall's employer Forte Alpha to pay his salary in full and on time. Mr Prestage was aware from as early as 06 May that Mr Newall had not been paid on time and had not been paid his full salary. He was also aware that was an ongoing situation that occurred throughout the duration of Mr Newall's employment.

[63] I consider that Forte Alpha's breaches of Mr Newall's employment agreement were incited, instigated, aided or abetted by Mr Prestage in breach of s.134(2) of the Act.

### **Should penalties be imposed on Mr Prestage?**

#### *Need for penalties*

[64] Penalties are required to signal disapproval of Mr Prestage's conduct and to punish him for inciting, instigating aiding or abetting multiple and ongoing breaches of Mr Newall's employment agreement. Penalties are appropriate to act as a deterrent to others who may be tempted to engage in similar actions.

#### *Totality approach*

[65] As an individual, Mr Prestage is liable under s.135(2)(a) of the Act to a maximum penalty of \$10,000 per breach. I have found Mr Prestage is legally responsible under s.134(2) of the Act for 20 of breaches by Forte Alpha of Mr Newall's employment agreement. The maximum potential penalty is therefore \$200,000.

[66] I adopt the totality approach to imposing penalties. That means one overall penalty will be imposed to reflect the seriousness of all of the breaches in all of the categories, including the multiple breaches which have occurred in each category.

*Level of penalty*

[67] In deciding whether penalties should be imposed and if so at what level I am guided by the criteria the Employment Court set in *Xu v McIntosh*<sup>5</sup> which included:

- (a) How much harm has been occasioned by the breach?
- (b) How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?
- (c) Was the breach technically inadvertent or was it flagrant and deliberate?
- (d) What is the degree of harm suffered as a result of the breach?

[68] I consider Mr Newall has been caused real harm as a result of Mr Prestage's breaches of s.134(2) of the Act.

[69] Mr Newall is the sole income earner for his family. He was reliant on his income from Forte Alpha to pay his normal outgoings. Mr Newall made Mr Prestage aware that he had not received an income of the four months before he started work with Forte Alpha so his salary was extremely important to him.

[70] I accept Mr Newall's evidence that he was caused considerable stress distress and anxiety as a direct result of Forte Alpha's multiple and ongoing breaches of its obligations to him.

[71] I find that Mr Prestage was the individual responsible for inciting, instigating aiding or abetting all of these breaches. He was the person who could have resolved Mr Newall's pay problems but Mr Prestage failed to do so. Mr Prestage was well aware that Mr Newall was under serious financial pressure because he had not been paid his full salary and had not been paid on time.

[72] Mr Newall made Mr Prestage aware on many occasions of the financial embarrassment he had suffered with his bank as a result of his salary not being paid on time. Mr Newall also made Mr Prestage aware that Mr Newall was having to borrow money off family members to cover basic outgoings because he was not being paid.

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<sup>5</sup> [2004] 2 ERNZ 448.

[73] There is ample evidence before the Authority in terms of diary notes of telephone conversations and email exchanges that show Mr Newall's real distress about his financial situation as a result of Forte Alpha's breaches of his employment agreement.

[74] Mr Prestage was responsible for deliberately leading Mr Newall to believe his salary arrears were about to be paid. He always had an excuse about why full payment had not occurred and he would reassure Mr Newall that his outstanding salary payment was imminent. These empty promises went on and on with Mr Newall never actually being paid what he was owed. Mr Newall has still not been paid for the work he did last year.

[75] Mr Prestage's empty reassurances to Mr Newall appear to be a cynical exploitation designed to keep Mr Newall working for Forte Alpha notwithstanding he had not been paid correctly. If Mr Newall had realised he was not going to be paid for the work he was doing for Forte Alpha he would likely have ended the employment relationship far earlier than he did.

[76] It was Mr Prestage's personal promises and reassurances which kept Mr Newall from seeking alternative employment for such a long time because he believed Mr Prestage's assurances that payment was about to or had already occurred.

[77] I consider the breaches Mr Prestage incited, instigated, aided or abetted went to the very heart of the relationship. Mr Prestage appears to have exploited Mr Newall by receiving the benefit of Mr Newall's time and labour over an almost seven month period without fully paying him for it. Mr Prestage has obviously caused Forte Alpha to apply its financial resources in ways that have not included paying Mr Newall his contractual salary either in full or on time.

[78] Mr Prestage has incited, instigated, aided or abetted multiple breaches of Mr Newall's employment agreement. These are all serious breaches which must attract a significant penalty. It is very important to bring home to Mr Prestage that his conduct is unacceptable.

[79] Mr Prestage's breaches have not only impacted Mr Newall but also affect others. IRD has been deprived of the PAYE which should have been paid on Mr Newall's salary but which has still not been paid. Forte Alpha has also gained an

unfair competitive advantage by obtaining labour without paying for it over other employers who comply with their statutory and contractual rights to pay employees.

[80] I do not consider Mr Prestage's breaches were technical or minor breaches only. They are flagrant, deliberate and ongoing breaches that have still not been remedied. Mr Prestage appears to have engaged over many months in a deliberate course of conduct which has deprived Mr Newall of the fundamental contractual right to be paid for the work he did.

[81] I find that Mr Prestage's multiple breaches of s.134(2) of the Act are deliberate serious and sustained. They were ongoing throughout the duration of the employment relationship and resulted in considerable hardship stress and anxiety to Mr Newall and his family. Forte Alpha was put on notice by Mr Newall of the severe adverse effects its breaches of his employment agreement were having on him yet nothing was done to address his legitimate concerns.

[82] As a result of Mr Prestage's breaches of s.134(2) of the Act Forte Alpha derived a benefit for itself at Mr Newall's expense by deliberately using him to provide services to its clients (whom it presumably billed for Mr Newall's services) whilst simultaneously not paying Mr Newall his contractual remuneration for the days and hours he worked.

[83] Forte Alpha, by the person of Mr Prestage, also deliberately misled and deceived Mr Newall about repaying his salary arrears and about the timeliness of future salary payments in order to convince him to stay working for it. There is a need for the penalties to be fixed at a high enough level to act as a deterrent to other persons who may be tempted to breach s.134(2) of the Act.

[84] I recognise that Mr Prestage appears as a first offender in this jurisdiction. He also apologised to Mr Newall at the investigation meeting today and submitted a written apology to him. However I consider that Mr Prestage's expressed remorse to Mr Newall is undermined by the fact that Mr Newall has still not been paid for all of the hours he worked. There has been no explanation for that, although it is clearly within Mr Prestage's control to ensure Mr Newall is paid the money he is owed.

[85] However weighed against those mitigating factors are the aggravating features that Mr Prestage was responsible for Forte Alpha engaging in 20 multiple serious and

repeated breaches of Mr Newall's employment agreement over a five month period (June – Oct 2013).

[86] I also consider Mr Newall was vulnerable in the sense he was the sole income earner for his family and he relied on his salary to meet his outgoings. He wanted to continue working for Forte Alpha and he believed Mr Prestage's ongoing assurances that the salary arrears issues would be resolved. To say these events have financially embarrassed Mr Newall is to understate the adverse impact on him. The level of penalties must reflect that.

#### *Outcome*

[87] I consider it important for the Authority to send an unequivocal message that not paying employees for work they have done is wholly unacceptable. Mr Prestage is ordered to pay a total penalty \$30,000 encompassing all his breaches of s134(2) of the Act.

#### **Should some or all of the penalties be paid to Mr Newall?**

[88] It is usual for penalties to be paid to the Crown. However I consider it is appropriate in this case for the entire penalty to be paid directly to Mr Newall. He has personally suffered harm as a result of these breaches. He is still suffering ongoing harm because he has still not been paid.

[89] Mr Prestage's breaches relate to Mr Newall's contractual relationship with Forte Alpha rather than to breaches of statutory obligations. Mr Newall remains out of pocket for work he did last year and it appears likely he will face challenges obtaining payment from Forte Alpha. In these circumstances I consider it appropriate for Mr Newall to receive the entire penalty.

#### **Orders**

[90] I find that Mr Prestage engaged in twenty breaches of s.134(2) of the Employment Relations Act 2000 (the Act) by inciting, instigating, aiding, or abetting Forte Alpha Operations Pty Ltd's of Mr Newall's employment agreement.

[91] A total penalty of \$30,000 is imposed on Mr Prestage for his multiple breaches of s.134(2) of the Act. Mr Prestage is ordered to pay this penalty to Mr Newall within 28 days of the date of this determination.

### **Costs**

[92] Mr Newall as the successful party is entitled to a contribution towards his actual costs. The parties are encouraged to resolve costs by agreement.

[93] If that is not possible then Mr Newall has 14 days within which to file his costs application, Mr Prestage has 14 days within which to respond, with Mr Newall having a further 7 days within which to reply.

[94] This timetable will be strictly enforced and any departure from it requires the prior leave of the Authority.

**Rachel Larmer**  
**Member of the Employment Relations Authority**