

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 407
3034671**

BETWEEN

ANDREW PLIMMER
Applicant

AND

MOTIM TECHNOLOGIES
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Michael Keall, Counsel for Applicant
No appearance for the Respondent

Investigation Meeting: 11 November 2018 at Auckland

Submissions received: 11 November 2018

Determination: 19 December 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Andrew Plimmer, claims that he is owed unpaid salary arrears and annual leave entitlements by the Respondent, Motim Technologies Limited (Motim).

[2] Motim acknowledged that it owed the sum claimed as salary arrears by Mr Plimmer but denies it owes any holiday pay entitlement to Mr Plimmer.

Issues

[3] The issues for determination are whether or not:

- Mr Plimmer is owed unpaid salary arrears of \$35,083.44 net
- Mr Plimmer is owed unpaid holiday entitlement in the sum of \$128,158.71 gross
- A penalty should be awarded against Motim in respect of the failure to pay Mr Plimmer's holiday pay entitlement

Note

[4] The Investigation Meeting was set down to be held on 11 and 12 December 2018 as agreed with the parties in a case management conference held on 30 August 2018.

[5] The date was confirmed to the parties by means of a Notice of Investigation Meeting dated 30 August 2018.

[6] Motim was not represented at the Investigation Meeting. The sole director at Motim, Mr John Whalley, advised the Authority that he had resigned in October and was no longer employed by Motim. The Chairman of Powerhouse Ventures Limited, a shareholder in Motim, advised the Authority that it would not be seeking to appoint another director of Motim.

[7] In the absence of representation on behalf of Motim, I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2017.

Background

[8] Motim, previously known as HIT Lab NZ Ltd, was a business venture in a new and emerging field of technology initially developed in liaison with Canterbury University. Mr Cunningham, Chairman and director until January 2018, explained that Motim is a technology firm developing products in augmented reality via mobile telephones.

[9] He said Motim had experienced some success with international firms including Universal Studios and Sony, but cash flow had been a constant challenge and Motim needed financial support from the shareholders.

[10] Mr Plimmer was employed by Motim as its Chief Executive Officer (CEO) from 1 October 2007 until 4 May 2018. He was employed pursuant to an individual employment agreement signed on 17 August 2007 (the Employment Agreement). The Employment Agreement included the following clauses:

13.2 Annual Leave

- a. You will be entitled to four weeks' annual leave.
- b. Annual holidays are to be taken by arrangement with the HIT Lab NZ Ltd and at a time or times which will not unduly disrupt the HIT Lab NZ Ltd.'s operations.
- c. Annual holidays will be taken within twelve (12) months of them falling due.

15. Termination

15.2 You shall give no more and no less than the notice specified in the First Schedule, unless agreed to in writing by the HIT Lab NZ Ltd.

21. Deductions

During your employment or upon termination of your employment, you hereby authorise the HIT Lab NZ Ltd to deduct from your pay (including holiday pay) any over-payments, outstanding debts or monies owed to you by the HIT Lab NZ Ltd, the value of any unreturned property, or in the event you fail to give the agreed notice of termination, a sum equivalent to the remuneration that would have been payable over the period of notice.

First Schedule

Commencement Date

1 October 2007

Notice Period (Termination)

Three (3) months

[11] The Second Schedule of the Employment Agreement was headed '**Resolution of Employment Relationship Problems**' and contained an explanation of the process to be followed in the event of an employment relationship problem developing. It specified initial steps as being to discuss the issue with HIT Lab NZ Ltd and if not resolved, to refer the problem to the MBIE Mediation Services. If not resolved at that stage, to escalate the employment relationship problem to the Authority.

[12] Motim employed Mr Plimmer as the CEO and approximately two product developers, in addition to contract staff from time to time. The employees reported to Mr Plimmer. At the time his employment ended, Mr Plimmer's annual salary was \$195,000.00.

[13] Mr Plimmer's responsibilities as set out in his job description included to:

- Establish the full business operational, financial and human resource practices for the new company
- plan, direct, manage and administer the financial and budgetary operations of the company.

Share Sale Proposal

[14] During 2017 Powerhouse Ventures Limited (Powerhouse) which was the largest shareholder of Motim, proposed selling its shareholding in Motim to an American business, CrossTech LLC.

[15] Mr Plimmer and Mr Cunningham said that the CrossTech LLC proposal was opposed by the Motim Board and by the majority of shareholders, including themselves, other than Powerhouse.

[16] During January 2018 Mr John Cunningham and another director were formally removed as directors of Motim by Powerhouse. Other directors resigned on or about this time and Powerhouse appointed Mr John Walley as sole director of Motim on 25 January 2018.

Salary Arrears and Holiday Pay Entitlement

[17] Mr Cunningham said that the Board regularly discussed the financial situation of Motim and were aware that Mr Plimmer was foregoing salary in order to assist with Motim's cash flow situation. A good cash flow position was preferable for seeking investment.

[18] Mr Cunningham said the Board were also aware that Mr Plimmer was not taking annual leave, but it was supportive of Mr Plimmer, who was the sole sales and marketing resource of Motim, focusing on sales activity rather than taking leave

[19] Mr Cunningham said the Board had been aware of, and approved the increasing liability in respect of Mr Plimmer's salary arrears and holiday entitlement accrual but did not include any reference to it in the Board Minutes.

[20] Shortly after Mr Walley's appointment Mr Plimmer said he supplied him with information detailing Motim's debt position including the salary arrears and holiday entitlement accrual owed to him and other employees.

[21] On 4 April 2018 Mr Walley emailed Mr Plimmer stating: "This will need some commentary, did the previous board have no policy on holidays, you must not have taken any time off for years?"

[22] Mr Plimmer said that on 2 May 2018 he gave Mr Walley his calculation of his accumulated annual leave and holiday pay entitlements. At that date he said his unpaid accumulated annual leave and holiday pay totalled \$128,158.71 gross. Mr Walley had not contested his calculation of the amount..

[23] Mr Plimmer said he had been advised by Mr Walley not to have any development work carried out by Motim and was asked to go to America in April 2018 and meet with CrossTech LLC. As a result of the meetings with CrossTech LLC he had formed the view that the proposed deal with CrossTech LLC was not tenable and would not yield value to Motim.

[24] He said that while his salary arrears had not increased since 2016 they had not reduced and at the date of his resignation on 4 May 2018 totalled \$52,587.40. In his resignation letter addressed to Mr Walley Mr Plimmer stated:

Despite my direct investment and previous willingness to accept some delays in my salary, this is no longer tenable due to the recent aggressive dilution of my shareholder position and intended disposal of Motim's assets in the proposed transaction to CrossTech, a transaction that was previously voted against by all shareholders other than Powerhouse.

I consider the non-payment of my salary as a material breach of my employment contract by Motim Technologies Ltd, and therefore any notice period or restraint of trade obligations are null and void.

[25] Mr Plimmer said that he did not believe that Motim would pay him his salary arrears and therefore he filed a Statutory Demand against Motim on 7 May 2018 seeking payment of salary arrears totalling \$52,587.40. He said he had filed a Statutory Demand rather than following the process set out in the Second Schedule to the Employment Agreement because he believed it necessary to take steps to secure payment of the salary arrears before the assets of Motim were dissipated.

[26] Mr Walley responded by filing an affidavit in support of an application to set aside the Statutory Demand in which he noted that it was Mr Plimmer who had controlled Motim's finances and that Motim had a counterclaim against Mr Plimmer which included a claim in respect of Mr Plimmer's failure to provide the contractual three months' notice.

[27] The parties subsequently attended mediation and reached an agreement which was signed by the parties on 10 March 2018 (the Agreement) and included the following clauses:

1. Motim Technologies Limited ("Motim") acknowledges that arrears of salary in the sum of \$50,083.44 net of taxation ("the arrears of salary") is due and owing to Andrew John Plimmer ("Andrew").
 2. Motim will pay the whole sum of \$15,000.00 net of taxation in reduction of the arrears of salary to a bank account to be nominated by Andrew within 7 days of the date of this agreement ("the payment").
- 3 On the condition the payment is made in full by the agreed date, time being of the essence, the parties agree as follows:
- a. The statutory demand issued by Andrew shall be immediately withdrawn and the High Court proceedings in CIV2018404961 shall be immediately discontinued.
 - b. The parties will refer the following claims to the Employment Relations Authority ("the Authority")
 - c. Andrew will seek an order for the payment of the balance of the arrears of salary subject to such counterclaims, cross-demands or set offs that Motim is able to establish in the authority.
 - d. Andrew will also seek an order requiring Motim to pay all outstanding holiday pay to him together with such further or other relief or penalties he may seek.

[28] In accordance with the Agreement Motim paid Mr Plimmer the sum of \$15,000.00 net in respect of a total salary arrears amount of \$50,083.44 net and Mr Plimmer withdrew the Statutory Demand on the basis that he would seek redress for the residue of the arrears of salary in the Authority.

Is Mr Plimmer owed unpaid salary arrears by Motim?

[29] In accordance with the Agreement between the parties signed and dated 20 July 2018 Mr Plimmer was owed the sum of \$50,083.44 net. Motim has paid \$15,000.00 net in respect of that amount owed.

[30] I determine that Mr Plimmer is owed the sum of \$35,083.44 net, being the remaining amount of salary arrears owed to him by Motim.

[31] I order Motim to pay to Mr Plimmer the sum of \$35,083.44 net within 28 days from the date of this determination.

Is Mr Plimmer owed holiday pay entitlement by Motim?

[32] Mr Plimmer has raised a claim for unpaid holiday leave entitlement covering the period from the commencement of his employment on 1 October 2007 until his employment ceased on 4 May 2018.

[33] . Pursuant to s 142 of the Employment Relations Act 2000 (the Act):

No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[34] From the information supplied I find that Motim was aware of and agreed that Mr Plimmer was to accrue his holiday entitlement not taken in each specific year until such time as was acceptable to both parties, indeed such financial accruals were made in Motim's accounts.

[35] I find that the cause of action arose when the breach of the Holidays Act 2003(the HA) occurred, namely when Motim failed to pay Mr Plimmer his outstanding entitlements at the date of his ceasing employment. Therefore his claim is not statute barred pursuant to s 24 of the HA.

[36] Mr Plimmer was entitled to four weeks annual leave entitlement in accordance with clause 13.2 of the Employment Agreement. Mr Plimmer's employment with Motim ended on 4 May 2018.

[37] Motim has not supplied any wage and time records however Mr Plimmer has given evidence and provided his own record of the annual leave taken in the period between 1 October 2007 and 4 May 2018, his last day of employment with Motim. I am satisfied that Motim failed to comply with s81 and s82 of the HA and therefore pursuant to s83 (4a) of the HA accept Mr Plimmer's record of the annual leave taken by him.

[38] In accordance with s24(2) of the HA calculation of holiday pay when the employment ends and entitlement to holiday pay has arisen:

(2) An employer must pay the employee for the portion of the annual holidays' entitlement not taken at a rate that is based on the greater of

- (a) the employee's ordinary weekly pay as at the date of the end of the employee's employment, or
- (b) The employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

[39] During the periods 1 October to 30 September Mr Plimmer had an entitlement of 20 days annual leave in each entitlement year which is the statutory requirement in accordance with s 16 of the HA. During the period from 1 October 2007 to 1 October 2017 Mr Plimmer had earned 200 days as annual leave, and he had taken 90.5 days as set out in the table below.:

Period	Entitlement; Days	Taken: days
1 October 2007 – 30 September 2008	20	0
1 October 2008 – 30 September 2009	20	0
1 October 2009 – 30 September 2010	20	5
1 October 2010 – 30 September 2011	20	2
1 October 2011 2012 – 30 September 2012	20	8.5
1 October 2012 – 30 September 2013	20	16
1 October 2013 – 30 September 2014	20	12.5
1 October 2014 – 30 September 2015	20	8

1 October 2015 – 30 September 2016	20	17.5
1 October 2016 – 30 September 2017	20	21
Total	200	90.5

[40] Mr Plimmer was entitled to 200 days during the period. He had taken 90.5 days as annual leave in the period. Accordingly I find that Mr Plimmer is owed 109.5 days as an accrued annual leave entitlement for that period, equating to \$82,125.00 gross (\$750 x 109.5 days)

[41] Mr Plimmer ceased employment with Motim on 4 May 2018. During the period 1 October 2017 to 4 May 2018 he had taken 10 days annual leave. . As Mr Plimmer had not completed a full entitlement year at the date of leaving he was therefore pursuant to s 25(2) of the HA entitled to paid at the rate of 8% of his gross salary for that period less any amount paid to him for annual holidays taken in advance.

[42] I find that in respect of the period 1 October 2017 to 4 May 2018 Mr Plimmer was entitled to 8% of his salary for that period, less the amount paid to him for the 10 days annual leave taken, which equates to \$3,600 gross (calculated as 8% of \$11,100 (185 Days at \$750 per day) gross less \$7,500 (10 days at \$750 per day)).

[43] I order that Motim pay to Mr Plimmer the sum of \$85,725.00 gross in respect of unpaid annual leave entitlement pursuant to s24 and s 25 of the HA.

Notice Period

[44] Mr Plimmer was contractually required to provide Motim with three months' notice. He did not do so on the basis that he regarded that Motim's failure to pay him his full entitlement to salary meant that he was no longer bound by its requirements.

[45] I find that a breach by one party to an employment agreement may give rise to grounds for the aggrieved party to bring a personal grievance pursuant to s 103 of the Act and to seek remedies in respect of the breach or breaches. However it does not mean that the other party to the employment agreement is released from the contractual requirements into which he or she had entered.

[46] Motim had filed a counterclaim seeking that any award made to Mr Plimmer by the Authority be offset by an award to Motim in respect of the breach of the contractual notice period by Motim.

[47] However the counterclaim whilst not withdrawn, was not actively pursued in the Authority by Motim which did not attend the Investigation Meeting, and in these circumstances I have not determined this issue at this time.

Should a penalty be awarded against Motim in respect of the failure to pay Mr Plimmer holiday pay entitlement?

[48] Motim did not pay Mr Plimmer outstanding holiday leave entitlement in respect of which he has applied for a penalty to be awarded against Motim.

[49] Penalties are to be assessed by having regard to the relevant matters set out in s 133A of the Act and the judicial guidance on setting penalties as summarised by the Chief Judge in *Nicholson v Ford*.¹

[50] I consider that a penalty is appropriate in this case because an object of the Act is to promote effective enforcement of employment standards. Globalising the failure to pay leave entitlement as one failure means that Motim was liable to a penalty of up to \$20,000.00.

[51] Mr Plimmer had made Motim aware of the outstanding leave entitlement due to him, and this appears not to have been contested. The outstanding payments remain unpaid at the date of this determination. At this stage I consider that an appropriate amount in respect of the penalty is \$8,000.00.

[52] The evidence of Mr Plimmer and based on the company documentation supplied which included balance sheets, other documentation which sets out the financial position of the company, and a Notice of Special Meeting sent to the shareholders in respect of a proposed meeting to be held on 28 May 2018, I am satisfied that Motim faces a precarious financial situation. Accordingly I consider it appropriate to reduce the amount ordered as a penalty by 40% to \$4,800.00.

[53] Taking into consideration a need for proportionality, I adjust that figure to \$4,000.00.

[54] Mr Plimmer acknowledged during the Investigation Meeting that in his position as CEO with responsibility for financial and budgetary control in Motim, he was to some extent responsible for the situation which had arisen in regard to his annual leave entitlement accrual.

¹ [2018] NZEmpC 132 at [14] – [19]

[55] This situation had arisen prior to Mr Walley's appointment and as such he had not condoned the accrual. However the issue had not been addressed after that time despite Mr Plimmer raising the situation and seeking redress.

[56] I order that Motim is to pay a penalty of \$4,000.00, of which 15% is to be paid to Mr Plimmer and 85% to the Authority for transfer to the Crown account. Payment is to be made within 28 days of the date of this Determination.

Costs

[57] The matter involved a half day Investigation Meeting.

[58] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[59] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ (*Da Cruz*) as confirmed in *Fagotti v Acme & Co Ltd*.⁴

[60] The Authority usually proceeds on a daily tariff basis, in accordance with which a half day hearing equates to \$2,250.00.

[61] Mr Keall submitted that whilst Motim did not attend the investigation meeting and consequently did not pursue the counterclaim, it had involved Mr Plimmer in preparation for that eventuality. I accept that this issue added to Mr Plimmer's costs unnecessarily and accordingly I consider it appropriate to increase the usual daily tariff amount.

[62] I order that Motim pay to Mr Plimmer the sum of \$3,000.00 costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2015] NZEmpC 135 at [114]