

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 83
5359701

BETWEEN RCG LIMITED
 Applicant

A N D GLENN ANTHONY
 BERCICH
 Respondent

Member of Authority: David Appleton

Representatives: John Burley, Counsel for Applicant
 Penny Shaw, Counsel for Respondent

Investigation meeting: Determined on the papers by consent

Submissions Received: 11 March and 22 March 2013 from Applicant
 18 March 2013 from Respondent

Date of Determination: 9 May 2013

DETERMINATION OF THE AUTHORITY NO.2

- A. Penalties totalling \$6,000 are imposed upon the respondent.**

- B. Costs are reserved.**

Employment relationship problem

[1] By way of a determination of the Authority dated 22 February 2013 [2013] NZERA Christchurch 36, the Authority determined that Mr Bercich had breached express and implied terms of his employment agreement, as well as the duty of good faith owed to his employer, RCG, pursuant to s. 4 of the Employment Relations Act 2000 (the Act). These breaches arose out of actions taken by Mr Bercich in

undertaking secret negotiations with the owner of the Bush Inn shopping centre (“Bush Inn”), Mr Budge, to take over for himself and his own company the benefit of a management agreement (“the management agreement”) between RCG and Mr Budge governing the management of Bush Inn.

[2] The determination did not deal with quantum although, as the Authority also found that the management agreement would have been terminated at or around the time of Mr Bercich’s breaches even if those breaches had not taken place, due to the poor relationship between RCG and Mr Budge, no damages flowed from Mr Bercich’s breaches in relation to the loss of the management agreement.

[3] However, RCG had also applied for statutory penalties to be imposed upon Mr Bercich arising from the breaches and this determination therefore considers that application.

The issues

[4] The Authority has to consider the following issues:

- (a) Should a penalty or penalties be levied against Mr Bercich?
- (b) If the answer to the above question is in the affirmative,
 - (i) should the *totality* approach be adopted, or should more than one penalty be imposed to recognise more than one duty was breached?
 - (ii) should the level of the maximum penalty available be that which was in force before 1 April 2011, when the statutory maxima increased?
 - (iii) what should the level of the penalty or penalties be?
 - (iv) should the penalty or penalties be partly or wholly payable to RCG?

Should a penalty or penalties be levied against Mr Bercich?

[5] Section 4A of the Employment Relations Act 2000 (the Act) provides as follows:

Penalty for certain breaches of duty of good faith

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if:

- (a) the failure was deliberate, serious and sustained; or*
- (b) the failure was intended to undermine;*
- ...*
- (ii) an individual employment agreement or a collective agreement; or*
- (iii) an employment relationship;*
- ...*

[6] The duty of good faith in s.4(1) of the Act is expressed as follows:

s.4(1) The parties to an employment relationship specified in sub-section (2):

- (a) must deal with each other in good faith; and*
- (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything;*
 - (i) to mislead or deceive each other; or*
 - (ii) that is likely to mislead or deceive each other.*

1A The duty of good faith in sub-section (1):

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and*
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;*

...

[7] Section 4(4) specifies that the duty of good faith in sub-section (1) applies to, *inter alia*:

- (bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force.*

[8] Section 134 of the Act provides as follows:

Penalties for breach of employment agreement

- (1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.*

[9] The Authority found in its determination that Mr Bercich had breached express terms of his employment agreement by:

- (a) failing to promote, develop and extend RCG's business interests;
- (b) failing to devote his whole time and attention during his working hours to his duties and obligations under the agreement;
- (c) failing to declare his activities of negotiating with Mr Budge, to his benefit, thereby creating a conflict of interest;
- (d) canvassing, soliciting and endeavouring to entice away from RCG the business of Mr Budge;
- (e) endeavouring to entice away an employee of RCG.

[10] The Authority also found that Mr Bercich had breached his duty of good faith, fidelity and trust and confidence.

[11] It was the Authority's finding that these breaches occurred during Mr Bercich's employment, prior to his being dismissed by RCG.

Should a penalty be imposed pursuant to s. 4A of the Act?

Section 4A(a)

[12] I accept the submission of counsel for RCG, relying on the case of *Xu v. McIntosh* [2004] 2 ERNZ 448, that the appropriate burden of proof when the Authority considers the imposition of a penalty is not the higher standard of proof of *beyond all reasonable doubt*, but the lower civil burden of *on a balance of probabilities*.

[13] Addressing the issue of whether Mr Bercich's actions amounted to a deliberate, serious and sustained breach of the duty of good faith, first, I am of the view that his actions were deliberate in that he deliberately set out to mislead and deceive his employer whilst employed when he told his employer that he had not discussed with Mr Budge his resignation (which was not true) and that, after his resignation took effect, he was planning to get involved with his brother and a friend about *residential improvements/developments*, implying that that was what he was going to be doing when he left. That was also untrue.

[14] Accordingly, I am satisfied that there was a deliberate intention to mislead and deceive his employer.

[15] I am also satisfied that this failing was serious. Putting aside my separate finding that the management agreement would have terminated in any event, notwithstanding Mr Bercich's breaches, Mr Bercich's actions in deliberately deceiving and misleading his employer and, further, in negotiating with Mr Budge with respect to taking over the management agreement himself without reference to his employer, had the potential effect of undermining the fundamental employment relationship between Mr Bercich and RCG. Although I found in my earlier determination that RCG had committed a repudiatory act by unilaterally varying an agreement reached with Mr Bercich through a director of the company, Mr Wai, Mr Bercich affirmed the employment relationship despite this breach by choosing to remain employed until 17 January 2011. He was therefore still bound by the duty of good faith.

[16] Accordingly, the actions of Mr Bercich were not trivial and it is not surprising that, when discovered, his actions resulted in his summary dismissal. I am therefore satisfied that Mr Bercich's breach of good faith was a serious one.

[17] Finally, it would appear that Mr Bercich engaged with Mr Budge in negotiations without the knowledge of his employer during the period between 21 December 2010 and 17 January 2011. It is not clear exactly how long they were in communication during this period, but it can safely be assumed that, as they were negotiating with one another on a significant matter, this was not a one-off act. Just how long a breach must continue for it to be *sustained* will depend on the context. However, by its very nature, the negotiating of a complex management agreement for one's own benefit contrary to the interests of one's employer is not an act which happens on the off chance and which occurs on isolated occasions. It is my finding that Mr Bercich undertook a sustained period of negotiations with Mr Budge in order to secure the management agreement.

[18] I therefore am satisfied that his breach of good faith was sustained.

[19] In summary, therefore, I am satisfied that Mr Bercich undertook activities which amounted to a breach of good faith and which were deliberate, serious and sustained and that the trigger for the imposing of a penalty against him pursuant to

s. 4A(a) has been reached. The appropriate amount for this penalty, and whether it should be imposed in addition to, or aggregated with other penalties will be considered below.

Section 4A(b)

[20] Turning to whether a penalty has been triggered under s. 4A(b) of the Act, I am not satisfied that Mr Bercich *intended* to undermine the employment agreement or the employment relationship. First, I believe that Mr Bercich regarded his employment agreement as having already been breached by the actions of Mr Keane in reneging on the agreement reached with Mr Wai regarding his increased remuneration. Second, I believe that Mr Bercich's primary intention was to secure the management agreement. Therefore, I do not accept that the necessary intention was present for the imposition of a penalty under this sub section to have been triggered.

Should a penalty be imposed pursuant to s. 134 of the Act?

[21] In light of the Authority's finding that Mr Bercich breached his employment agreement in the ways summarised above, s.134(1) of the Act appears to have been engaged. These breaches by Mr Bercich were not trivial and, whilst the Authority also found that the management agreement would have been terminated in any event, on the balance of probabilities, it is my belief that Mr Bercich either deliberately breached the terms of his employment agreement or was reckless as to whether he breached them or not.

[22] Accordingly, I find that it is appropriate for a penalty to be imposed upon Mr Bercich in respect of these breaches of his employment agreement. The appropriate amount for this penalty, and whether it should be imposed in addition to, or aggregated with other penalties will be considered below.

Should the totality approach be adopted in assessing the penalties?

[23] The totality approach amalgamates into a single penalty the possible several penalties theoretically arising from a number of breaches arising from a single set of events. Counsel for RCG argues that it is not appropriate for the totality approach to be adopted in this case because of the seriousness of the offending. He submits that the Courts have departed from the totality principle in a number of cases where

breaches of the good faith obligation have occurred, particularly where the breaches were serious.

[24] Assessing the nature of Mr Bercich's breaches, and the actions giving rise to the breaches, they can be analysed as falling into three main categories:

- a. the deliberate misleading of his employer (triggering a penalty under s. 4A),
- b. secretly negotiating a benefit for himself, contrary to the interests of his employer (triggering a penalty under s.135); and
- c. the soliciting away of another employee (triggering a penalty under s.135).

[25] At first blush, this analysis appears to justify the imposition of three separate penalties in respect of the three different actions. However, the deceiving of his employer was an integral part of the secret negotiations. It is safe to say that, if Mr Bercich had been honest and open with his employer, he would have been prevented from undertaking those negotiations. (I believe that Mr Budge would still have terminated the management agreement although it may not have been Mr Bercich's company which replaced RCG). Therefore, I do not believe that the first two categories of breach should trigger separate penalties.

[26] However, I do regard the solicitation of Ms Treleaven as a distinct activity amounting to a breach of an express term of his employment agreement. Although Ms Treleaven was dismissed a few weeks later, Mr Bercich's act was nonetheless an act in breach of his employment agreement. Accordingly, I believe that that breach does justify the imposition of a separate penalty.

What is the level of maximum penalty that should be awarded?

[27] On 1 April 2011 the maximum penalty that could be levied against an individual increased from \$5,000 to \$10,000. Counsel for Mr Bercich argues that the maximum penalty that should be available to the Authority should be that which was in force at the time the breaches occurred, which all predated the amendment to s.135(2) of the Act on 1 April 2011. Counsel for RCG argues that this is incorrect in that the critical event for present purposes is the Authority's determination of breach,

rather than the date when they occurred, in the absence of any transitional provisions in the Act that might otherwise have supported the submission of Mr Bercich's counsel.

[28] In considering this matter, I am mindful that the imposition of a penalty is of the character of a fine under the criminal legislation. Section 6(1) of the Sentencing Act 2002 provides that *an offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.*

[29] Neither counsel referred me to any case law on the appropriate approach to take in the imposition of a penalty under the Employment Relations Act 2000 where a penalty was triggered by an act before the 1 April 2011 change but where the determination was made after that date. I have also been unable to identify any such case law. I must, therefore, be guided by the general principle of the penalty being of a penal character and whether it would be just to impose on Mr Bercich a penalty that exceeded that which was in place at the time he committed his breaches.

[30] In my view it would not be just and, therefore, it is my determination that the maximum penalty available to the Authority in relation to the breaches in question is \$5,000 per breach.

What should the level of the penalties be?

[31] Counsel for RCG submits that it is erroneous to consider that Mr Bercich has already been punished by having been summarily dismissed. I must agree with counsel in this respect. First, of course, Mr Bercich had already tendered his resignation before he was summarily dismissed and there is no evidence to suggest that he suffered a significant period of unemployment between his dismissal and him taking over the management agreement for Bush Inn. Therefore, I do not regard his summary dismissal as any sort of *punishment* which should mitigate against the level of penalty that would otherwise have been imposed.

[32] In respect of the acts which amounted to breaches of his express duties, as well as his duty of good faith and other implied duties, it is my view that these acts were of a serious nature, as explained above, and that it is appropriate to reflect that seriousness in the level of the penalty. Deliberately acting to take on a benefit that

belonged to one's employer was not an appropriate way of dealing with the situation that Mr Bercich found himself in.

[33] It is my belief that the seriousness of the action that Mr Bercich undertook in secretly negotiating with Mr Budge and misleading his employer should be reflected in the imposition of a maximum penalty of \$5,000.

[34] With respect to the separate distinguishable breach of his employment agreement by soliciting away Ms Treleaven, I am mindful of the fact that Ms Treleaven was of a relatively junior level. I am also mindful of the fact that she was dismissed from the employment of RCG shortly afterwards. Therefore, it would not be appropriate to award the maximum level of penalty in respect of this breach, although a penalty of \$1,000 is an appropriate reflection of the action undertaken by Mr Bercich.

Should the penalties be payable to RCG?

[35] RCG has been unable to recover damages from the Authority because I was not satisfied that it sustained any losses given my finding that Mr Budge would have terminated the management agreement with RCG notwithstanding any attempts or solicitation from Mr Bercich. However, I am also mindful of the fact that I have found that RCG repudiated the contract of employment of Mr Bercich by reneging on the agreement that had been communicated to him by Mr Wai, and that Mr Bercich's breaches would not have occurred, in my firm view, were it not for that action of RCG.

[36] In light of this latter factor, I am not satisfied that it would be appropriate for the penalties to be payable to RCG and I therefore direct that they be paid in their totality to the Crown.

Orders

[37] I order Mr Bercich to pay penalties totalling the sum of \$6,000 to the Crown pursuant to s.136(1) of the Act by paying the said sum into the Authority, which will then pay the said sum into a Crown Bank Account.

Costs

[38] Costs are reserved. The parties are to seek to agree how costs should be dealt with between them, including the question of costs arising from the investigation meeting that took place on 13 – 15 November 2012 at Christchurch. In the absence of any such agreement within 28 days of the date of this determination, any party seeking costs should serve and lodge a memorandum of counsel and any reply should be served and lodged by way of a memorandum of counsel within a further 14 days.

David Appleton
Member of the Employment Relations Authority