

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 711
3182859

BETWEEN BRADLEY WALTERS
 Applicant

AND LIGHTHOUSE DIGITAL
 LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person
 Brian Hanlon, agent for the respondent

Investigation Meeting: 30 June and 22 August 2023 at Auckland

Submissions Received: At the investigation meeting from the applicant
 At the investigation meeting and 29 August 2023 from
 the respondent

Date of Determination: 27 November 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] For a short period in late 2020 Bradley Walters was the NZ Manager Digital Signage and Services for Lighthouse Digital Limited (Lighthouse). He was made redundant but claims he was not paid for a one month notice period. Lighthouse regards this as an issue for the previous owner.

The Authority's investigation

[2] An investigation meeting was held on 30 June 2023. Evidence was heard under oath from Mr Walters and Lighthouse's director Brian Hanlon. At the meeting Mr Hanlon provided a detailed email from the previous chief executive officer of Lighthouse, Ian

Bailey. The Authority indicated that little weight was likely to be given to Mr Bailey's email where it conflicted with Mr Walters' evidence, as Mr Bailey was not available for questioning. The parties were given the opportunity to make submissions at the close of the meeting.

[3] On 4 July 2023 Mr Hanlon asked the Authority to hold a second meeting day to allow Mr Bailey to give evidence, on the basis that Mr Hanlon had not been able to dispute Mr Walters' evidence as he had not been at some meetings whereas Mr Bailey had been. Mr Hanlon emphasised that he was a newcomer to the Authority. Mr Walters' views were sought and he opposed allowing Mr Bailey to give evidence. The Authority decided that it was fair to hear Mr Bailey's evidence.

[4] The investigation resumed on 22 August 2023. Mr Bailey's evidence was heard under oath. As a result, further evidence was heard under oath from Mr Walters and Mr Hanlon. The parties again had the opportunity to make submissions at the end of the meeting with Mr Hanlon also providing later written submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

Issues

[6] At an early stage the main issue was identified as whether Lighthouse owed unpaid notice to Mr Walters. During the course of the investigation meeting this was teased out to examine:

- (a) What was the appropriate notice period, taking into account whether termination of employment was pursuant to a probationary period?
- (b) Did Mr Walters' employment transfer in December 2020 to a company associated with Mr Bailey (referred to as company B)?
- (c) Is Mr Walters owed for unpaid notice and holiday pay by Lighthouse or was the responsibility for any debt somehow with company B?
- (d) Should either party have to contribute to the other's costs of representation?

Lighthouse's directorship and shareholding arrangements

[7] Lighthouse was originally established in 2018 by Mr Hanlon for his media sales business, with him being the sole director and the shares held by his other company (referred to as company C).

[8] For most of 2020 Mr Hanlon was joined by Mr Bailey as co-director, with company B which Mr Bailey was a director of, holding all the Lighthouse shares. Mr Bailey's directorship in Lighthouse ceased in December 2020 with Mr Hanlon again becoming the sole director and company C re-acquiring the shareholding.

[9] Mr Hanlon describes himself, at the time Mr Bradley started work, as contracting with Lighthouse through company C. He was not a Lighthouse employee. He did however, remain a director of Lighthouse.

Mr Walters' appointment

[10] Mr Walters emphasised his connection with Mr Hanlon. Mr Walters was initially interviewed by Mr Bailey in around October 2020 but refers to a second interview with Mr Hanlon. Mr Hanlon describes being pulled by Mr Bailey in to meet Mr Walters, seemingly towards the end of their interview. At Mr Bailey's request, Mr Hanlon demonstrated on his I-Pad how he operated his sales work.

[11] Mr Walters was sent an employment agreement which he and Mr Bailey signed. The document has Lighthouse's logo and name on the front page and its name in the header and footer of subsequent pages. Mr Bailey is identified as signing for Lighthouse. Lighthouse was identified on Mr Walters' payslips, as well as in his IRD and Kiwisaver provider records.

[12] Relevant to the notice claim is a possibility of the employment being subject to a probationary period of three months. The agreement set out a process if the employer had concerns about the employee's performance or suitability. There is no reference to this being a trial period under ss 67A and B of the Act and the clause does not purport to restrict the employee's ability to bring a personal grievance. I conclude it to be a probationary period as described in s 67 of the Act.

[13] The probationary period allowed for termination, where there was a failure by the employee to address issues, on one week's notice. Other than that, the agreement's termination requirement was one month's notice.

[14] Mr Bailey refers to the employment agreement stating that it involves various associated companies. The front page of the agreement includes two large references to Lighthouse. A box describing parties refers to Lighthouse, and its "associates and subsidiaries and its parent companies (referred to in this agreement as the employer)". There is some difficulty with the concept of an employment relationship being with a number of unidentified and presumably changeable companies. In any event in the redundancy clause reference is made to "the company" which I take to be Lighthouse.

[15] I conclude that Mr Walters was employed by Lighthouse subject to a probationary period. The point at which Mr Walters finished was within three months of him starting with Lighthouse.

December 2020

[16] Mr Bailey recalls, in around November 2020, company B becoming concerned about the business and suggesting a restructure.

[17] Mr Hanlon describes being informed at some point that Lighthouse looked like it was going under. He was surprised as he had continued to be paid. Mr Hanlon was asked if he wanted to purchase the media TV part of the business, which he worked in. When he agreed, he was told he should take on the Lighthouse company.

[18] Mr Hanlon told the Authority that on around 10 December 2020 he agreed to buy Lighthouse, signing a heads of agreement. Then in the next few days he signed a sale and purchase document, but he was advised to backdate that document to 1 December 2020, which he did. He estimates the signing of the sale agreement to have occurred between around 12 and 15 December.

[19] In terms of Mr Walters, Mr Bailey refers to having three discussions with him about changes although at another point during his evidence he accepted it could have been two. These may have been group discussions with staff. Mr Walters suggests they

were about Lighthouse being sold with Mr Hanlon taking on some staff, rather than anything about Mr Walters' personal employment situation.

[20] Mr Hanlon's submissions were very critical of Mr Walters' denial at the first investigation meeting day of knowledge in December 2020 of company B's name. However, I do not find a lack of awareness of company B's new name surprising given that the company did not change to that name until 11 December, according to Company Office records.

[21] In his evidence to the Authority Mr Bailey was confident that Mr Walters had moved or transferred to company B, but his basis for this view was less solid. He was unable to specify when the move happened but saw it being as soon as there was a (sale and purchase) agreement in place. Mr Bailey thought they discussed options – including Mr Walters being made redundant or joining company B which Mr Bailey was involved with. However, it seems unlikely that Mr Bailey and Mr Walters would have agreed to Mr Walters moving to another company (company B) and then later the same day he was made redundant.

[22] Mr Hanlon describes he and Mr Bailey splitting the staff with some staying with Lighthouse and others going to work with Mr Bailey, as the different divisions of the business separated. Mr Hanlon accepts that Mr Walters may have been the only person who got made redundant at that point and not transferred.

[23] Mr Walters was aware of talk about money along with the difficulties of pandemic times. At some point there may have been mention of selling the business. Mr Walters says that on 10 December 2020 Mr Bailey told him that he was being made redundant.

[24] That date is in keeping with both text and email communications.

[25] On 10 December in response to a text question from Mr Walters about the notice period, Mr Bailey messaged that to do things properly letters between them were needed. He noted the normal notice was one month but that may be offset by the Christmas break and Mr Walters only having minimal leave.

[26] The following day, 11 December, Mr Bailey emailed Mr Walters, including the following statement:

... Lighthouse Digital is about to be sold to a third party who has no interest in maintaining or continuing with the Digital Signage Division.

As such the role and division will be disestablished and therefore the role of Sales Manager – Lightsignz.com will be made redundant.

Under the terms of your employment agreement we are required to give you 1 month's notice, however this may be impacted by the 3 month Probationary period clause.

...the role is effectively disestablished as of yesterday.

[27] A Lighthouse payslip for the 15 December pay day shows Mr Walters being paid his "final pay" with his working days running to 10 December 2020. He received that pay. The payslip makes no reference to notice.

[28] No documentation was provided to Mr Walters establishing or confirming any transfer. Nor was there a new employment agreement. Mr Bailey did not think there needed to be, as the existing agreement referred to parent and subsidiary companies.

[29] Mr Bailey's description of events did not fit well with a transfer of Mr Walters' employment before he was made redundant. Mr Bailey described, once Mr Hanlon had agreed to take over the TV part of the business, taking time to work out a heads of agreement, move assets around and discussing with everyone.

[30] Mr Bailey also says Mr Walters did not agree to move to company B and they discussed redundancy. Mr Bailey thought everything owing was paid in December 2020.

[31] I conclude that Mr Walters' employment with Lighthouse finished on 10 December 2023.

Post-employment discussions

[32] In the first few months of 2021 there were discussions between Mr Bailey and Mr Walters' representative about what was owing at the end of employment. Mr Hanlon was copied into many of the email communications. At this stage Mr Bailey used an email address of company B.

[33] In March 2021, after receiving an email suggesting Mr Bailey was no longer associated with Lighthouse, Mr Walters' representative emailed Mr Bailey and Mr Hanlon seeking confirmation that Mr Bailey was authorised to bind Lighthouse in

discussions. The representative noted the employment agreement referred to Lighthouse and that company had liability regardless of any asset or share sale. Mr Hanlon replied that Mr Bailey was authorised to bind Lighthouse in discussions. He did note that he had recently purchased 100% ownership of Lighthouse and that “in the transfer Mr Walters’ employment contract should have been transferred to Mr Bailey’s new company...”.

[34] Mr Bailey’s evidence was that, at the meeting which followed Mr Hanlon’s email, he advised Mr Walters and his representative that any obligation was via his company (namely company B rather than Lighthouse). Mr Walters’ denies this. There is no confirmation of Mr Bailey’s suggestion in the pages of contemporaneous emails I have between Mr Bailey and the representative. On the basis of the contemporaneous documentation, I find it more likely that Mr Bailey did not make it clear that his company was taking on responsibility for the payment to Mr Walters.

[35] Although there was no formal settlement concluded, an understanding was reached about what was owing. A Lighthouse payslip was received by Mr Walters which referred to a pay day of 14 May 2021 and his finish day now noted as 12 January 2021, with payment to be made until then. Mr Bailey describes the payslip as having Mr Walters’ historical Lighthouse data on it as use of Lighthouse’s payroll system was the only way to work out the final payment.

[36] Despite the payslip indicating Mr Walters was to be paid \$8,598.64 gross with a take home pay of \$6,140.32 net, he did not receive it. Mr Bailey’s evidence was that he thought he had given instructions for it to be paid. Bank statements, from the account which the payslip indicated the pay would be made to, show no such payment. Mr Walters confirms he has still not received it.

[37] Mr Hanlon suggests Mr Walters did not pursue Lighthouse earlier as it was only when company B went into liquidation that Mr Walters began pursuing Lighthouse for payment. Mr Walters’ explanation for not pursuing Lighthouse earlier was that he was not expecting payment until mid-2021, then with the long lockdown in Auckland in late 2021 he was advised not much could be done until later. I did not find Mr Hanlon’s concern sufficient to persuade me that Mr Walters did not genuinely believe his claim was against Lighthouse.

Payment owing

[38] I do not accept that the shorter notice period in the probationary period is applicable. There is little evidence of any concern about Mr Walters' performance or suitability and nothing to show the process under the probationary clause was implemented. Rather Mr Walters made some sales, entitling him to commission and was later informed he was redundant. I conclude the termination of employment was not pursuant to the probationary clause.

[39] Therefore, Mr Walters should have been paid for one month's notice and holiday pay on that sum but did not receive those amounts.

Responsibility for payment of notice

[40] Mr Walters seeks payment of notice and holiday pay from Lighthouse. Mr Hanlon opposes any order being made against Lighthouse. He was a Lighthouse director throughout but argues that the debt was incurred during the time Mr Bailey was in charge and that Mr Walters and his representative knew that was the case during the 2021 discussions.

[41] Mr Bailey's recollection was that Mr Hanlon was clear that Mr Walters' employment agreement had been transferred to company B.

[42] In addition to saying Mr Walters' employment had moved from Lighthouse Mr Bailey's view was that he made it very clear to Mr Walters and his representative in 2021 that whilst the original contract was in Lighthouse's name, at the time of Mr Hanlon's purchase of the business "all contracts were transferred" to Mr Bailey's company (company B).

[43] There are several difficulties with Mr Hanlon and Mr Bailey's position:

- I have no documentation showing any attempt to transfer, or gain Mr Walters' agreement to a transfer, of his employment to another company. Mr Walters did not receive any offer that his employment transfer and did not agree to such transfer.

- It seems unlikely that that, if in that pre-Christmas period, Mr Walters was offered a transfer, he would have turned it down in favour of redundancy when there was no contractual redundancy compensation provision.
- The 11 December 2020 email confirming Mr Walters' redundancy is from a Lighthouse email address and uses that company's name in the signature.
- On the information available, the sale of Lighthouse was by way of share transfer.
- The timing does not work. Companies Office records show Mr Bailey ceased to be a director on 18 December 2020 and the transfer of Lighthouse shares registered on 19 December. By these dates Mr Walters had already been made redundant. Any backdating of the sale and purchase agreement does not change that.
- Mr Hanlon, then Lighthouse's sole director, indicated in March 2021 in response to the specific request for confirmation of Mr Bailey being authorised to bind Lighthouse in discussions, that he was authorised.
- Mr Walters did not agree to the transfer of what was otherwise a Lighthouse debt to company B, even if there was an understanding to this effect between Mr Hanlon and Mr Bailey.

[44] I conclude that neither Mr Walters' employment nor the notice period debt were transferred to another company. Lighthouse was Mr Walters' employer and owes Mr Walters payment for his notice period, even though there is now a different shareholding arrangement.

[45] On the information before me, amounts which were to be deducted for PAYE and KiwiSaver from the last payment were in fact forwarded to the IRD. However, Mr Walters was not paid. It is therefore appropriate to make a net order regarding the remaining amount. Lighthouse is to pay Mr Walters \$6,140.32 net.

Costs

[46] Mr Walters represented himself in the Authority so seems unlikely to be able to claim any costs in relation to the Authority's process. If he considers he is, the parties

should attempt to reach agreement on costs. If unsuccessful, Mr Walters may apply for costs within 14 days of the date of this determination. From the date of service of that application, Lighthouse would then have 14 days to respond. Costs will not be considered outside that timetable unless prior leave to do so is sought and granted.

[47] Mr Walters is entitled to be reimbursed for the Authority's filing fee of \$71.56 by Lighthouse.

Orders

[48] Lighthouse Digital Limited is to pay Bradley Walters within 21 days of the date of this determination:

- (a) \$6,140.32 net wages for his notice period and holiday pay; and
- (b) \$71.56 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority