IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 59
EMPC 45/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	ELENA KAZEMI Plaintiff
AND	RIGHTWAY LIMITED First Defendant
AND	EDWIN FREDERICK SHAND READ Second Defendant
AND	GREGORY MICHAEL SHEEHAN Third Defendant
AND	DARRYL DEVENDRA JHINKU Fourth Defendant

Hearing:	26–30 November, 17 December 2018 (Heard at Auckland)
Appearances:	T Drake, counsel for plaintiff B Smith and M McGoldrick, counsel for defendants
Judgment:	15 May 2019

JUDGMENT OF JUDGE J C HOLDEN

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[1] The plaintiff, Ms Kazemi, commenced employment as a Regional Partner with the first defendant, RightWay Limited (RightWay) on 7 December 2015.[1] Prior to her

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[1] The title later changed to "Business Partner" but for ease of reference the term "Regional Partner" will be used throughout this judgment.

starting with RightWay, Ms Kazemi paid $125,000 (the buy-in fee) to join RightWay's Regional Partner Programme (the Programme).

[2] The key issue in this case is whether the buy-in fee constituted a premium in respect of Ms Kazemi's employment, contrary to s 12A of the Wages Protection Act 1983.

[3] Ms Kazemi says that the buy-in fee was a premium. She also claims that she was induced by RightWay to enter into the employment agreement by misrepresentation, that the employment agreement was an illegal contract and that RightWay breached the terms of her employment agreement by failing to act in good faith, failing to treat her fairly and by conducting itself in a manner that caused her harm.

[4] Ms Kazemi seeks repayment of the buy-in fee, along with interest, bank charges and expenses and legal expenses. She also seeks three months' remuneration and general damages of $40,000.

[5] If the buy-in fee is not held to be a premium, she seeks recovery of the sale value of her RightWay Client Register (the Client Register), which she says is $120,810, and interest.

[6] Ms Kazemi also claims penalties for breaches of the Wages Protection Act and of her employment agreement. Penalties are sought against RightWay and against the other defendants, Mr Read, Mr Sheehan and Mr Jhinku, who Ms Kazemi says aided and abetted RightWay's breaches of her employment agreement. She seeks $20,000 for each breach from RightWay and $10,000 from each of the other defendants for each breach. Ms Kazemi seeks an order that any penalties are to be paid to her in accordance with s 136(2) of the Employment Relations Act 2000.

[7] Mr Read was a founding director of RightWay. He was a director of RightWay until the end of January 2018 and held numerous roles within the company. Mr Sheehan also was a founding director and continues to be a director of RightWay. He was the Chief Executive Officer of RightWay until August 2017. Mr Jhinku was

employed by RightWay between approximately October 2014 and May 2017 as the Chief Financial Officer.

[8] The position of the defendants is that the buy-in fee was paid by Ms Kazemi to acquire a commercial interest that was separate from Ms Kazemi's employment.

[9] They say that by joining the Programme, Ms Kazemi (directly or indirectly) gained a joint property right in the Client Register that could gain in value over time, and also allowed Ms Kazemi to receive rewards in the form of commission on recurring revenue received from clients who were in the Client Register.

[10] They deny the other claims made against them.

[11] On the key issue I find that the buy-in fee was a premium, contrary to s 12A of the Wages Protection Act. RightWay is to pay Ms Kazemi the $125,000 she paid as a buy-in fee, together with interest on that sum to be calculated in accordance with sch 2 of the Interest on Money Claims Act 2016.

[12] RightWay also is to pay a penalty of $8,000 for its breach of s 12A, such sum to be paid to Ms Kazemi.

RightWay established Regional Partner Programme

[13] RightWay was founded in 2011, aiming to be a market-leading and different accountancy practice.

[14] As part of achieving this, RightWay created a scheme (which became the Programme) that it considered was a way its accountants could share in RightWay's and their own success. RightWay says that the Programme was intended to enable the accountants to develop a base of clients, which became their Client Register, and by doing so to create a joint property right over the Client Register. Mr Sheehan said that the basic idea was that the directors wanted to give people "skin in the game" and benefits that they may have accrued had they started their own practices, but where they were free from the hassle of having to establish all their own systems, processes and back-end administration.

[15] The Regional Partners were to use a company, controlled by them, as the entity through which they received the benefits of the Programme (the RP Owner).

[16] The Regional Partners were also contemporaneously employed by RightWay, earning a base salary of $100,000 per annum.

Ms Kazemi became a Regional Partner

[17] In mid-July 2015 Ms Kazemi was approached by RightWay's Recruitment Manager to see whether she was interested in becoming a Regional Partner for RightWay. Ms Kazemi is an accountant by profession and, at that time, was a Senior Associate at a large firm that provides accountancy and other business services.

[18] Ms Kazemi was provided with promotional material about the Programme along with a draft employment agreement, a Deed Poll establishing the Programme and a draft Deed of Adherence.

[19] The promotional material compared the choice of being a RightWay Regional Partner with other business choices for accountants entering the world of public practice such as starting up a business, going into partnership or buying into a franchise. Becoming a Regional Partner was described thus:

- We are a partnership, we are in this together – our success is your success and vice versa
- You are part of the fastest growing business advisory and accounting firm in New Zealand
- Your fee/capital base will grow faster as your focus is on winning your clients and advising them – all the actual accounting (and admin work) is done for you at our cost
- You get all the support and training you need to succeed from a highly talented team
- You get paid a salary from day one

[20] On the page headed "WIIFM"[2] these matters are further spelled out – equipment, administration and support would be provided by RightWay, lead generation and referrals would be passed on to the Regional Partner, and there would be a "great starting salary, earning commission and part of an equity programme".

[21] In September 2015 Ms Kazemi responded to RightWay. She was interested in the opportunity that the Programme seemed to offer and she met with Mr Sheehan and with the Recruitment Manager with whom she had previously dealt.

[22] The meetings Ms Kazemi had with Mr Sheehan and with the Recruitment Manager were not in the nature of a job interview; rather they were informal discussions over coffee at which the basis for the Programme and its perceived benefits were explained to Ms Kazemi. Mr Sheehan gave evidence of explaining that the Programme enabled the RP Owner to achieve additional commissions through growing the client base, but also to obtain a saleable asset and to grow that asset based on the Regional Partner's efforts. In evidence the Recruitment Manager said he gave potential Regional Partners a reasonably high level "spiel" about how being a Regional Partner was like starting your own business and growing a client base. He said he would tell them that, separately to receiving a salary and having RightWay working on their behalf doing the compliance or administrative-based accounting work, the buy-in fee bought them the right to earn a potential revenue stream from a client base that they were establishing and growing. He said he would also explain that they were purchasing a right to generate growth in a saleable asset in and of itself, which once they wished to exit the business they could sell to an incoming Regional Partner for a profit or gain.

[23] Ms Kazemi recalled getting the clear impression that the option of becoming a Regional Partner was akin to being the owner of a business and that the position would be long-term, at least several years. Her evidence was that the Recruitment Manager told her that the base salary would be $100,000 per annum with additional benefits making the total remuneration for the first year $150,000 and, depending on individual performance, $200,000 in year two with further growth potential. The

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2 Presumably 'What's In It For Me'.

Recruitment Manager agrees that he would have explained that while the Regional Partner's salary remained static, the more that they built their client base, the more revenue the company would make for them. He did not recall mentioning the remuneration figures Ms Kazemi remembered but said, if those numbers were mentioned, he would have said they would be based on spectacular performance against target projections.

[24] There were communications between Ms Kazemi and RightWay regarding the $125,000 buy-in fee, which included Ms Kazemi saying that she would need to obtain bank funding to join the Programme.

[25] RightWay knew some relationship managers at banks who understood the RightWay structure and business operations and it was able to put Regional Partner candidates in contact with those relationship managers. After Ms Kazemi raised the financing issue, Mr Jhinku put Ms Kazemi in contact with someone at the ANZ Bank. Ms Kazemi took legal advice in relation to the arrangements and she borrowed $125,000 from ANZ to fund her buy-in fee. That sum was secured by a registered mortgage over Ms Kazemi and her husband's home. Ms Kazemi signed the employment agreement, the Deed Poll (the Deed) and the Deed of Adherence. Mr Read and Mr Sheehan signed those documents on behalf of RightWay. Ms Kazemi incorporated a company, Kaz Limited, which she says she understood was required by the Deed.

[26] After the documents were signed, the Recruitment Manager went back to Ms Kazemi by email to confirm to her that the buy-in fee was payable in full by the end of October 2015. Ms Kazemi made that payment personally, within the stipulated time, and commenced employment on 7 December 2015.

[27] When Ms Kazemi started at RightWay there were no clients in her Client Register, except for one firm that Ms Kazemi had previously worked with and who asked her to continue with some services.

There is reference to the buy-in fee in the employment agreement

[28] In many respects, the employment agreement entered into between RightWay and Ms Kazemi is fairly standard; however, there are several provisions that are relevant to the issues in this proceeding.

[29] There is reference to the buy-in fee. The commencement clause in the employment agreement provides:

> Your employment will commence on the date stated in Part 1 and is subject to payment of the Regional Partner "Buy In Fee". This is Payable in full no later than Friday 30th October 2015…

[30] The employment agreement included a non-solicitation clause, providing that during her employment and for 12 months after that employment ceased, Ms Kazemi was not to directly or indirectly approach RightWay's customers, other staff or contractors with the intention of enticing them away from RightWay, or to assist anyone else to do so.

[31] The employment agreement prohibited involvement in any other business or employment that may compete with RightWay in any material respect or involve any of RightWay's customers or suppliers, without RightWay's consent.

[32] The employment agreement also included a restraint of trade clause that prevented Ms Kazemi, for three months following the termination of her employment, personally providing or offering to provide or arrange "Similar Services", including services carried out by RightWay or which form part of the industry in which RightWay operates, to or for any client with whom Ms Kazemi had dealings during the 12 months preceding the termination of her employment. Nor was she to become or remain personally engaged, concerned or interested in an enterprise that provided such services in the Auckland region.

The Client Register had to be transferred on cessation of employment

[33] The value of the Client Register is defined in the Deed to be "as determined by the Board [of RightWay] using the formula in Schedule 1 or such other formula or

valuation methodology as the Board may from time to time select". So, although Schedule 1 of the Deed provided a formula for valuing the Client Register (being 75 per cent of the annualised average monthly Recurring CER[3] of the Client Register for the most recently completed three calendar months) the agreement left the actual valuation methodology to the Board.

[34] Although cl 3.1 of the Deed stated that participation in the Programme was "separate and independent of a regional partner's employment relationship with the Company" other provisions of the Deed show a link.

[35] Clause 6 of the Deed set out what was to occur when there was an "Early Termination Event". The cessation of the Regional Partner's employment was an Early Termination Event.

[36] If there was an Early Termination Event (that was not as a result of redundancy), the RP Owner's rights to the Client Register would be suspended indefinitely. The RP Owner would be taken to have given an irrevocable transfer notice on the date the Early Termination Event occurred, that the RP Owner wished to sell its interest in the Client Register for a purchase price equal to the lower of the Client Register Value and the initial buy-in price.

[37] This was subject to the proviso that, if the Early Termination Event occurred within 12 months of signing the Deed of Adherence (which was signed at the same time as the Deed), the purchase price was to be not less than:

(a) 50 per cent of the initial buy-in price (if the Early Termination Event occurred within three months of the commencement date);

(b) 25 per cent of the initial buy-in price (if the Early Termination Event occurred within six months but later than three months of the commencement date);

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[3] Recurring CER being payments for services provided by RightWay where those payments were of a regular and recurring nature, but not including taxes or certain disbursements.

(c) 10 per cent of the initial buy-in price (if the Early Termination Event occurred within nine months but later than six months of the termination event);

(d) 5 per cent of the initial buy-in price (if the Early Termination Event occurred within 12 months but later than nine months of the commencement date).

[38] Therefore, the guaranteed value of the Client Register reduced over the course of the first year. Further, should the Regional Partner's employment cease within that year, even taking account of the salary being earned, the amount guaranteed to be paid to the Regional Partner (or RP Owner) for his or her involvement with RightWay was less than the amount of the investment.

[39] In addition, the Deed provided that if the Regional Partner was dismissed for serious misconduct, RightWay could, by written notice, terminate the Regional Partner and RP Owner's involvement in the Programme. The RP Owner's interest in the Client Register then would be forfeited without any entitlement to any payment or other consideration.

[40] Clause 5 of the Deed included provision for an RP Owner to initiate the sale of its Client Register, but RightWay retained control over to whom that could be sold and, if an approved purchaser could not be found, could purchase the Client Register back from the RP Owner, for the lower of:

(a) the amount specified by the RP Owner in its Transfer Notice;

(b) the Client Register Value; and

(c) the initial buy-in price of the Client Register.

[41] Once the clients in the Client Register were reallocated, neither the RP Owner nor its associated Regional Partner would have any further rights in respect of the Client Register or the Programme.

[42] The buy-in fee was paid into RightWay's "00" bank account, coded as "Regional Partner Income", recorded as the receipt of income on a non-recurring basis and used in the ordinary course of business to pay for normal expenses incurred by RightWay. Mr Sheehan says that the treatment of the buy-in fee as income was because all costs that were attributable to the underlying work of Regional Partners were costs of the business, including the payment of commissions.

The position description aligns with the Programme

[43] When Ms Kazemi was sent the individual employment agreement, she also was sent a position description. The responsibilities described in the position description for the employment were intertwined with the expectations of the Regional Partner as a business partner of RightWay to build a Client Register.

[44] The position description includes accountabilities and expected targets under the heads "Business Development" and "Client Management and Operations". The bullet points in the section headed "Business Development" essentially comprise sales work: identifying potential clients and opportunities, developing leads, fostering new leads and opportunities, and bringing on clients.

[45] The "Client Management and Operations" part of the position description refers to managing clients, including providing liaison between the people who carry out the actual accounting and other work for the client and the client itself.

[46] On commencement of her employment Ms Kazemi attended an induction course and a training session. The material she was provided at the training session outlining the RightWay sales process was directed at how a Regional Partner starting from scratch could build a pipeline to get leads, and ultimately clients.

Changes made to the Programme

[47] Both parties gave considerable evidence about events that occurred after Ms Kazemi was employed, including evidence involving other Regional Partners. The key facts in relation to the issues I must decide are summarised below.

[48] RightWay says that initially the Programme went really well, with both RightWay and Regional Partners enjoying good success, and RightWay growing significantly. When Ms Kazemi joined there were approximately 28 Regional Partners in New Zealand and others in Australia. Ultimately there were 32 Regional Partners.

[49] Ms Kazemi was seen as performing well as a Regional Partner but RightWay says that other Regional Partners were not and, in 2016, those Regional Partners became subject to performance management. In this context Mr Drake, who was acting for those Regional Partners, claimed the buy-in fee was a premium for employment and unlawful.[4]

[50] RightWay says it had no previous inkling that this could be an issue and that the premium issue really "shot out the tyres" in the business. RightWay put a stop on hiring Regional Partners from about August 2016 and, in November 2016, RightWay determined it needed to change the Programme.

[51] By mid-November 2016 the Board of RightWay signed off on changes that were seen as improvements to the Programme, intended to make the Programme more sustainable and also more beneficial to existing and potentially incoming Regional Partners. One significant change was that, if a Regional Partner opted to exit within 12 months of joining the Programme, RightWay would return the $125,000 buy-in fee, which would be paid back in 12 equal monthly instalments.[5]

[52] This offer was available to Ms Kazemi, but she did not take it up.

[53] In April 2017 RightWay restructured its business. This involved ceasing its Australian operations and disestablishing some New Zealand positions. Five New Zealand Regional Partners were made redundant. Ms Kazemi was not among those made redundant.

[54] As at the date of hearing there were seven Regional Partners left at RightWay.

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4 Mr Drake is the solicitor now acting for Ms Kazemi.

5 RightWay also extended the offer to Regional Partners who had joined within 13 months, provided it was advised of the Regional Partner's decision by the end of November 2016.

Ms Kazemi claims repayment of the buy-in fee, then resigns

[55] On 3 May 2017 Mr Drake wrote to RightWay on Ms Kazemi's behalf alleging that the buy-in fee was an unlawful premium under s 12A of the Wages Protection Act and demanding repayment of the $125,000 together with interest.

[56] RightWay's Chief Operating Officer emailed Ms Kazemi, attempting to persuade her not to leave. Ms Kazemi responded that she had not made any decision about leaving her employment with RightWay. She said she would make a decision on that after the matter set out in Mr Drake's letter had been addressed and satisfactorily responded to.

[57] RightWay's then solicitors responded to Mr Drake advising that RightWay's preliminary position was that the claim made had no merit. Ms Kazemi filed a statement of problem in the Employment Relations Authority (the Authority) on 19 May 2017, to which RightWay responded.

[58] By letter dated 14 July 2017 Ms Kazemi resigned from RightWay, effective 11 August 2017.

[59] RightWay advised Ms Kazemi that it was using all reasonable endeavours to find a Regional Partner to buy Ms Kazemi's Client Register. Ms Kazemi declined to be involved with that, saying she would not be "taking any action to assist RightWay to require another of its employees to pay more money as part of [its] unlawful arrangements".

[60] The Authority directed the parties to mediation, but the dispute was not resolved.[6]

[61] During Ms Kazemi's notice period she attended to the handover of her work, including her client list, which she did professionally.

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6 The proceedings were later removed to the Employment Court: *Kazemi v RightWay Limited* [2018] NZEmpC 3.

[62] She has not received any payment from RightWay for her Client Register or in repayment of her buy-in fee.

[63] Between 7 December 2015 and 11 August 2017, the total amount of commission earned by Ms Kazemi (and Kaz Ltd) was $31,369.63. When she left RightWay Ms Kazemi was advised that the value of the Client Register was $120,810.00.

No premium to be charged for employment

[64] Section 12A(1) of the Wages Protection Act provides that no employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[65] Where an employer receives any amount of money in contravention of s 12A(1), then, irrespective of any penalty to which the employer thereby becomes liable, the person who paid the money may recover that amount from the employer as a debt due.[7]

[66] "Premium" is not defined in the Wages Protection Act.

Previous cases have been in quite different circumstances

[67] There is only a handful of cases dealing with s 12A and both parties referred to the decisions of the Court in those cases. However, the arrangements at issue in this case are unlike any the Court has previously considered.

[68] In *Labour Inspector v Tech 5 Recruitment Ltd*[8] a full Court of the Employment Court was convened to consider s 12A of the Wages Protection Act, recognising the lack of developed case law. The context was recruitment of overseas employees who were required to repay certain costs associated with their recruitment. The Court

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7 Wages Protection Act 1983, s 12A(2).

8 *A Labour Inspector of the Ministry of Business, Innovation and Employment v Tech 5 Recruitment Ltd* [2016] NZEmpC 167, [2016] ERNZ 552.

examined the costs being recovered to determine if any were premiums, which may not be recovered from an employee.

[69] The Court considered the history of the provision and its underlying intent, including the desire to protect vulnerable employees from potential exploitation. The Court found this to be consistent with the aim of the Wages Protection Act overall, to provide broad protection to an employee from overbearing conduct undermining that employee's financial independence from his or her employer.[9]

[70] As to the term "premium" itself, the Court noted dictionary definitions that demonstrate that it is an elastic word capable of referring to consideration provided for a contract (such as for insurance) while being broad enough to cover a reward and enhanced payment reflective of higher quality or value. The Court went on:[10]

> That elasticity is consistent with "premium" in s 12A being used as a compendium to apply to straightforward cases of payment being sought or received to purchase a job, or to more subtle or ingenious arrangements.

[71] Because of the ingenuity with which agreements can be drafted, the Court noted that the consideration of each case had to be fact-specific. In the case before it, the feature that stood out was the lack of any benefit to the employee in meeting the trade-testing costs at issue, other than getting the job. It contrasted this situation with bonds to cover where the employer has paid for the employee to complete a recognised course of training, leading to a qualification for the employee and to a better qualified employee for the employer. In those circumstances, the Court said that, provided the duration of the bond was reasonable, and the other features of it were in proportion to the commitment made by the employee, it doubted a premium would be created in the sense prohibited by s 12A.

[72] In *Holman v CTC Aviation Training (NZ) Ltd,* which shortly followed *Tech 5,* the Court was considering a situation whereby CTC Aviation Training agreed with Mr Holman that he would undertake an instructor training course with CTC Aviation Training.[11] Mr Holman would pay fees and, following satisfactory completion of the

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9 At [50].
10 At [53].
11 *Holman v CTC Aviation Training (NZ) Ltd* [2017] NZEmpC 60.

course, he would be offered employment at CTC Aviation Training, if a position was available.

[73] The test applied by the Court, taken from *Tech 5*, was whether the payment made by the employee to the employer: [12]

> (a) was a condition for the obtaining of employment so that the employment would not be obtained without making the prior payment; and
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> (b) did not benefit the employee in any way other than obtaining employment.

[74] Neither limb was satisfied on the facts – it was not the payment of the fees that was a condition of employment, but the qualification the course led to (which could have been obtained elsewhere), and the employee obtained a valuable qualification from the course that he retained permanently.

[75] The situation here is more complex and is illustrative of the need to examine each case on its own facts.

Employment was subject to the prior payment of the buy-in fee

[76] Although RightWay says that the payment made by Ms Kazemi was not a condition of her obtaining employment, that argument is unsustainable. The employment agreement expressly provided that employment was subject to prior payment of the buy-in fee, and this requirement was reinforced when the Recruitment Manager went back to Ms Kazemi by email to confirm to her that the buy-in fee was payable in full by the end of October 2015. There was no evidence of any suggestion that Ms Kazemi could become an employee without also being part of the Programme, which required payment of the buy-in fee. I am satisfied that Ms Kazemi's employment by RightWay was conditional on her paying the buy-in fee.

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[12] At [20].

For her fee Ms Kazemi obtained the right to monetary reward for her work

[77] RightWay then says that the payment benefitted Ms Kazemi (or Kaz Ltd) in two ways, both of which were separate to the benefits of the employment:

(a) the ability to obtain a share of the revenue generated from the clients allocated to the Client Register, in the form of commissions; and

(b) the ability of Kaz Ltd to grow the Client Register and sell or transfer it for a capital gain.

[78] In this context, the Court must look at the true nature of the arrangement to ascertain whether there were benefits to Ms Kazemi separate from the benefits of employment.

[79] As reflected by the position description and the induction material, Ms Kazemi's Regional Partner roles as an employee of RightWay and through her ultimate ownership of Kaz Ltd in terms of the Programme, were in all material respects the same. On joining RightWay, Ms Kazemi was advised that her salary would remain static, but over time, she also would receive commission payments through the Programme. Thus, the commission payments were simply another element of Ms Kazemi's reward for her work as a Regional Partner, bringing in clients for RightWay.[13]

[80] RightWay referred to a proprietary interest and to it being in partnership with the Regional Partners. There was no legal proprietary interest. Ms Kazemi was not in law a partner, nor was she a shareholder of RightWay. Importantly at the time Ms Kazemi paid $125,000 to RightWay as a buy-in fee, the Client Register was worth nothing.[14]

[81] The most telling difficulty with the Programme in the current context is that it did not provide any ongoing benefit to the employee once the employment had ended.

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[13] Although in fact, the salary did increase slightly during Ms Kazemi's time at RightWay.

[14] As previously noted, Ms Kazemi brought one client with her when she joined RightWay.

That can be contrasted with the situation in *Holman* where the employee obtained a valuable qualification that he could use in future employment.[15] Ms Kazemi's involvement in the Programme was in parallel with her employment. The interest in the Client Register was part and parcel of the overarching employment relationship that existed between Ms Kazemi and RightWay.

[82] The termination of her employment triggered the buy-back provisions in the Deed, as an Early Termination Event. Ms Kazemi had no ongoing right to use the Client Register once employment had ended and was constrained by the provisions of the employment agreement from working with the clients included in the Client Register.

[83] In essence, Ms Kazemi paid $125,000 to obtain the right to receive monetary reward for her work. It is immaterial that Ms Kazemi's monetary reward for performing the role of Regional Partner was divided into salary paid directly to her and then the commission and, potentially, an increase in the valuation of the Client Register. It also is immaterial that these sums were, in some cases, paid to Ms Kazemi through a company set up for that purpose. Everything Ms Kazemi received was as a result of her efforts as a Regional Partner performing sales work for RightWay.

[84] On the facts of this case, the buy-in fee amounted to a premium as that term is used in s 12A of the Wages Protection Act.

[85] As a result, pursuant to s 12A(2), Ms Kazemi is entitled to recover that amount from RightWay as a debt due.

[86] It follows that she is also entitled to interest on the amount of $125,000 from 30 October 2015 until the date of payment. That interest is to be calculated in accordance with sch 2 of the Interest on Money Claims Act.

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15 *Holman*, above n 11.

RightWay misrepresented the basis of employment

[87] Ms Kazemi claims that RightWay:

(a) made a representation that it was lawfully entitled to charge a premium for the offer of employment;

(b) made misrepresentations in relation to the levels of future income and financial benefit Ms Kazemi would obtain if she agreed to pay the buy-in fee and join the scheme; and

(c) misrepresented that the terms and conditions contained in the Deed Poll and Deed of Adherence constituted a lawful basis on which RightWay could employ Ms Kazemi as one of its Regional Partners.

[88] If a party to a contract has been induced to enter into that contract by a misrepresentation, whether innocent or fraudulent, made to it by or on behalf of another party to that contract, then they are entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been breached.[16] Here Ms Kazemi would need to show that either RightWay intended that she would be induced by the misrepresentation to enter the contract, or that RightWay used language that would induce a reasonable person in the same circumstances to enter the contract.[17]

[89] There was no specific representation made by RightWay to Ms Kazemi that the arrangements were lawful. Nevertheless, RightWay accepts that, if the buy-in fee was a premium (as I have found it was), Ms Kazemi was induced to enter into an employment agreement that misrepresented the basis upon which she could be employed.

[90] However, the claimed misrepresentations regarding the potential levels of future income and financial benefits are not made out. This was a relatively new

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16 Contract and Commercial Law Act 2017, s 35(1)(a).

17 *Magee v Mason* [2017] NZCA 502 at [42], citing *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) at 145-146.

programme that was largely untested. The schedule to the Deed Poll included an example, but that was to demonstrate the way in which the Client Register Value Formula worked. It cannot be established that by including that example, RightWay was representing that the figures used would be the amounts that Ms Kazemi would earn. RightWay expressly advised Ms Kazemi to take her own advice in relation to the arrangements.

[91] The issue then is what damages flow from the misrepresentation of the lawfulness of the arrangements. RightWay says the relief granted under the first cause of action for a premium will suffice.

[92] The remedies that Ms Kazemi sought certainly overlapped to a significant degree with those sought for the first cause of action, but she also claims compensation covering bank charges and expenses incurred in respect of the premium, three months' remuneration and legal expenses.

[93] Ms Kazemi's evidence did not separate out the bank charges and expenses from the interest that she has paid. I have found she is entitled to interest on the $125,000. In the absence of evidence of separate, identifiable amounts for bank charges and expenses in relation to the loan she obtained to pay the buy-in fee, I make no award for those amounts.

[94] She claims three months' remuneration because her employment agreement included a restraint of trade clause that effectively prevented her from working for three months following the termination of her employment. However, there has been no claim that the restraint of trade was unlawful. Any loss of earnings for the three months following the end of her employment flowed from that aspect of the employment agreement, not from any misrepresentation. It is not recoverable.

[95] The legal expenses Ms Kazemi seeks are those she incurred between 19 April and 26 June 2017. Her demand for payment was made on 3 May 2017 and her statement of problem was filed on 19 May 2017. Accordingly, the legal fees which

she incurred relate entirely, or almost entirely, to the proceedings. Those are properly dealt with through an award of costs.[18]

Including the requirement for a premium does not render the employment agreement illegal

[96] An "illegal contract" is a contract that is illegal at law or in equity, whether the illegality arises from the creation or the performance of the contract; and includes a contract that contains an illegal provision, whether that provision is severable or not.[19] However, a contract lawfully entered into does not become illegal or unenforceable by any party because its performance is in breach of an enactment, unless the enactment expressly so provides or its object clearly so requires.[20]

[97] There is nothing in the Wages Protection Act that provides that the inclusion of a premium renders the employment agreement between the parties illegal or unenforceable. Rather a breach of s 12A of the Wages Protection Act makes an employer liable to the employee in the manner set out in s 12A(2). The employer may also be liable to a penalty.[21] The employment agreement otherwise remains on foot. It is not an illegal contract.

Not in dispute that monies are due to Ms Kazemi

[98] The fourth cause of action, recovery of monies payable, calculated under the Deed was an alternative cause of action in the event that the buy-in fee of $125,000 was not held to be a premium under the Wages Protection Act. The defendants say there is a jurisdictional issue as to whether there has been a default in the payment to Ms Kazemi of any "wages or other money payable ... under an employment agreement".[22] If the $120,810 is not due under her employment agreement, the Court has no jurisdiction.

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18 *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433 (EmpC) at [37], cited with approval in *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, [2015] ERNZ 502 at [111].
19 Contract and Commercial Law Act 2017, s 71(1).
20 Section 72.
21 Wages Protection Act 1983, s 13(1).
22 Employment Relations Act 2000, s 131(1)(a).

[99] It is not necessary for me to resolve that issue because I have found the buy-in fee to be a premium and recoverable as a debt due. In any event, RightWay accepts that the value of the Client Register at the ending of the relationship was $120,810 so that this sum, plus interest, is due to Ms Kazemi.

[100] RightWay says that the payments would be made in 12 equal monthly instalments under cl 5.8 of the Deed. Given Ms Kazemi left RightWay more than 12 months ago, it would seem to follow that RightWay accepts that all the money is now due, even though, for reasons that are not clear, no monies have been paid to Ms Kazemi.

No separate remedies for breach of contract

[101] The alleged breaches of contract are of:

(a) an incorporated term of good faith (derived from s 4 of the Employment Relations Act);

(b) an implied term that RightWay would treat Ms Kazemi reasonably and fairly; and

(c) an implied term that RightWay would not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage Ms Kazemi's reputation or to cause her undue anxiety, humiliation, loss of dignity or injury to feelings, or to damage the relationship of trust and confidence between them.

[102] It is unclear why Mr Drake refers to the section 4 duty of good faith as an incorporated term of the agreement. It is not enough that a party to an employment agreement has a statutory obligation, for that obligation to become an incorporated term. Generally, for an obligation that arises outside of the employment agreement itself to be incorporated into the agreement, it will exist in a form that parties are aware of prior to signing the employment agreement and will be referenced in the contractual documents. Common examples of incorporated terms are those found in workplace

policies that are referred to in the employment agreement.[23] Here there was nothing in the written employment agreement or surrounding offer documents that referenced or otherwise incorporated the statutory duty of good faith. That is not to say that the duty does not exist, but its existence does not make it an incorporated term of Ms Kazemi's employment agreement.

[103] The breach of contract claim overall would seem to relate to the requirement that Ms Kazemi pay the buy-in fee, and then to the refusal to repay that fee when demanded.[24] RightWay accepts that, if the buy-in fee was a premium, there was included within the terms and conditions of employment a requirement to pay a premium, and the question of appropriate redress arises.

[104] The remedies sought by Ms Kazemi overlap with those sought and awarded for her claim for a premium, the only additional one being a claim for general damages of $40,000.

[105] General damages, are, on occasion, awarded for breach of an employment agreement, to compensate for non-pecuniary loss. In *Whelan v Waitaki Meats Ltd*, for example, general damages were awarded for undue mental distress, anxiety, humiliation, loss of dignity and injury to the plaintiff's feelings.[25]

[106] Here it is unclear what loss Ms Kazemi is seeking to have compensated through an award of general damages. She gave evidence of continuing anxiety, humiliation and loss of dignity, but only in relation to pursuing her claim. Her submissions simply say she suffered loss because of RightWay's breach of contract. There is no basis for an award of general damages.

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23 See, for example, *Mathews v Bay of Plenty District Health Board* [2019] NZEmpC 49 at [69]; *Ruddlesden v Unisys New Zealand Ltd* [2004] 2 ERNZ 163 (EmpC) at [42]; the Employment Court's approach was upheld in *Unisys New Zealand Ltd v Ruddlesden* [2004] 2 ERNZ 301 (CA).

24 Other allegations were made in the statement of claim, but those were directed at alleged actions towards other employees.

25 *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74 (HC).

RightWay must pay a penalty

[107] I have found that RightWay was in breach of s 12A of the Wages Protection Act. That means that RightWay is liable to a penalty, imposed under the Employment Relations Act.[26]

[108] Ms Kazemi seeks a penalty for that breach solely against RightWay, which is appropriate as, pursuant to s 13(2) of the Wages Protection Act, she may recover a penalty only in relation to her employer.

[109] Ms Kazemi also seeks a penalty against RightWay for breaches of her employment agreement, and against Messrs Read, Sheehan and Jhinku for aiding and abetting those breaches of the employment agreement. As the found breaches of the employment agreement mirror the breach of s 12A of the Wages Protection Act, I consider the claim for penalties should simply be dealt with under that Act. This means no penalties are payable by the named individuals. In any event, I consider their individual culpability was, at best, low. Mr Read was not involved in the employment process and did not meet with or correspond with Ms Kazemi; he merely signed the employment agreement as director. Mr Sheehan also signed the employment agreement. In addition, he met with Ms Kazemi prior to her joining RightWay but otherwise was not involved with the negotiations. Mr Jhinku was an employee of RightWay and his role was to implement the financial arrangements. In submission, Ms Kazemi accepted that his level of culpability was lower than the other named defendants.

[110] Section 133A of the Employment Relations Act, which now sets out some matters to which the Authority or Court (as the case may be) must have regard in determining an appropriate penalty, was introduced on 1 April 2016. Ms Kazemi paid the premium to RightWay at the end of October 2015 and was employed by RightWay from 7 December 2015. Therefore, s 133A of the Employment Relations Act does not apply specifically to these proceedings. However, as found by the full Court in *Borsboom v Preet PVT Ltd*, the considerations set out in s 133A confirm largely, but

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[26] Wages Protection Act 1983, s 13(1).

not completely, the previous judge-made law applicable to cases before it.[27] The Court said that the new s 133A is not exhaustive and noted additional factors that should be considered.

[111] Subsequently, in *Nicholson v Ford*, Chief Judge Inglis drew the threads together and provided a list of 12 considerations that must be considered in assessing penalties in particular cases:[28]

> (1) the object stated in s 3 of the Employment Relations Act;
>
> (2) the nature and extent of the breach or involvement in the breach;
>
> (3) whether the breach was intentional, inadvertent or negligent;
>
> (4) the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person in breach, or involved in the breach, because of the breach or involvement in the breach;
>
> (5) whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
>
> (6) the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee;
>
> (7) previous conduct;
>
> (8) deterrence, both particular and general;
>
> (9) culpability;
>
> (10) consistency of penalty awards in similar cases;
>
> (11) ability to pay; and
>
> (12) proportionality of outcome to breach(es).

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27 *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514 at [64]; see also *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110 at [22].

28 *Nicholson v Ford* [2018] NZEmpC 132 at [18].

[112] The judgment in *Preet* identified a four-step process that the Authority or Court might usefully apply when setting penalties.[29]

Step 1 Identify the nature and number of statutory breaches.[30]

Step 2 Assess the severity of the breach to establish a provisional penalty starting point. Consider both aggravating and mitigating features.

Step 3 Consider the means and ability of the person to pay the provisional penalty arrived at Step 2.

Step 4 Apply the proportionality or totality test to ensure that the amount for each final penalty is just in all the circumstances.

[113] Here, there is only one breach for which the maximum penalty is $20,000.[31]

[114] RightWay did not set out to breach the Wages Protection Act. It acted on legal advice; in fact, it was RightWay's solicitors who suggested that the Programme, designed in the way set out in the Deed, was the best way to achieve the outcomes that RightWay and its officers sought.

[115] Ms Kazemi was advised to take independent advice, including legal advice, on the arrangements, and no issues were raised by her with RightWay as to the lawfulness of the proposed arrangements.

[116] The figure of $125,000 is substantial, however, and was raised in the context of a wider scheme. The monies received from Ms Kazemi went to the operating expenses of the company, thereby providing it with income and allowing it to avoid the costs of obtaining that level of financing elsewhere.

[117] While RightWay pointed to the buy-back offer made to Ms Kazemi and others in November 2016, there was no suggestion that Regional Partners could receive a

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29 *Preet*, above n 27, at [151].
30 With sub-steps, when there is more than one breach: see *Nicholson*, above n 28, at [19].
31 Employment Relations Act 2000, s 135(2)(b).

refund of their buy-in fee and remain employees of RightWay. Further the offer was to pay back the buy-in fee in 12 monthly instalments. Accordingly, I do not place a great deal of weight on the offer. Also, as noted, RightWay has not made any payment to Ms Kazemi, even on the basis it considered it was obliged to do so, being the valuation under the Deed of $120,810.

[118] Ms Kazemi was not a vulnerable employee in the sense the Court uses that term. She was effectively a party to the arrangement, obtained her own professional advice and used her own expertise in considering whether the 'bargain' she was offered was one that was worth her taking up. I do not consider any additional culpability attaches to the breach in relation to the circumstances in which it occurred.

[119] There is no relevant previous history raised.

[120] In terms of deterrence, this case highlights the need for businesses to ensure the investment arrangements they enter with their employees are lawful.

[121] As already noted, this case is dissimilar to previous cases, so the issue of consistency is not front and centre. The appropriate penalty falls to be considered on the particular facts.

[122] Standing back and considering the relevant matters as outlined, I assess an appropriate penalty would be $8,000.

[123] RightWay has not raised any issue of ability to pay. I consider a penalty of $8,000 is proportionate to the breach and just in all the circumstances.

[124] Ms Kazemi seeks an order that the penalty be paid to her.[32] While the key purposes of penalty provisions are to deter breaches and publicly denounce actions, it is Ms Kazemi who has gone to the trouble of bringing this matter to the Court. Her doing so has been not only to her own benefit but also to the benefit of other employees and former employees of RightWay, and for the broader public good. In those

[32] Employment Relations Act 2000, s 136(2).

circumstances, it is appropriate for the full amount of the penalty to be paid to Ms Kazemi.

Costs at Category 2B generally is appropriate, but some steps warrant Category 2C

[125] This proceeding was provisionally assigned Category 2B for costs purposes under the Practice Directions Guideline Scale.[33] The defendants submit that, given the nature of the preparation required for the hearing, and the scope and length of the hearing, the categorisation should be confirmed as Category 2C. I agree that Category 2C is warranted for the pleadings, and for preparation for hearing. Otherwise I consider Category 2B remains appropriate.

[126] The parties now should endeavour to agree on costs. If that is not able to be achieved, an application for costs may be made within 20 working days. The response to the application is to be filed and served no more than 15 working days later with any reply filed and served within a further five working days.

J C Holden
Judge

Judgment signed at 2.30 pm on 15 May 2019

[33] Employment Court Practice Directions, No 16 (<www.employmentcourt.govt.nz/legislation-and-rules>).