

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 69

File Number: 5312497

BETWEEN Jeffrey & Patricia Churchill
Applicants

AND Cognition Consulting Limited
Respondent

Member of Authority: Denis Asher

Representatives: Robert Brace for the applicants
Stephen Langton for the Company

Investigation Meeting Wellington, 17 March 2011

Submissions Received 8 April 2011

Determination: 4 May 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Does the respondent (Cognition) owe each of the applicants (the Churchills) one month's salary, as they claim? If it does, should interest also be awarded?

The Investigation

[2] During a telephone conference on 10 November 2010 the parties agreed to a one-day investigation of the employment relationship problem in Wellington on 17 March 2011 and to a timeline for the provision of witness statements.

[3] The parties agreed to a closing submissions timetable during the investigation.

Relevant Facts

[4] The relevant facts are not in dispute whereas the applicants' contractual entitlements are.

[5] The Churchills are secondary school teachers with 30 years experience.

[6] Cognition provides services to the education sector in New Zealand and it also works on education projects with governments and organisations overseas.

[7] In 2007 they signed the first of three consecutive contracts with Cognition to work on a project in Doha, Qatar.

[8] The contract incorporated the parties' agreement – at clause 33.1 and Schedule 3 – that any employment relationship problem would be resolved via the provisions of the Employment Relations Act 2000 (the Act)

[9] The contracts provided for, amongst other things, variation to the start and end dates in the event of the school term changing.

[10] The first example of the parties' third contract was dated 3 August 2009. It provided for start and finish dates of 9 August 2009 and 15 July 2010.

[11] However, on 7 August 2009 the Churchills received another copy of the contract which was the same as the first example except the start and finish dates were now provided as 1 August 2009 and 31 July 2010: they signed that contract.

[12] Because of a rumour that Cognition would be out of Qatar in June 2010, the Churchills wrote to the respondent and, by email dated 12 January 2010, were advised:

- a. They would receive their usual monthly pay on 16 July 2010;

- b. They would receive 21 days gratuity on 31 July provided they had completed a full 12-months with the Company; and
- c. Their ability to travel away from Qatar from 1 July was not certain as the respondent had not been told of the term end date by the contract partner, the Supreme Education Council (SEC).

(attachment E to applicants' first witness statement dated 9 February 2011)

[13] The Churchills now rely on the assurance, that they would receive their usual monthly pay on 16 July 2010, as well as what the Churchills describe as a record of "*an official Cognition meeting on 4 January 2010*", and the advice contained therein that "*staff can now proceed with arrangements to leave Qatar after 30 June 2010*" (attachment G, above).

[14] By subsequent email dated 13 April Cognition advised that its contract with the SEC would now finish on 30 June 2010. Because the parties' employment agreement had an end date of 31 July, the respondent proposed that the applicants "*would continue to be employed with Cognition until this date. However, as our project work ... completes on 30 June 2010, we would require you to take all annual leave entitlements between 1 July ... and 31 July 2010*" (attachment F, above).

[15] In reliance on the record of the 4 January 2010 meeting and the respondent's assurance they would receive their usual monthly pay on 16 July 2010, the Churchills proceeded to book travel some time before their departure date on 1 July 2010.

[16] At that time they had already taken 10 days annual leave and had another 20 days owing to them.

[17] On 16 July 2010 the Churchills were paid \$9,808, a figure they say was equal to the usual monthly salary received throughout the contract, and which was expressed to be 20 days leave owed to them, plus a further 10 days (a payment which they do not understand as it was described as salary whereas they did not work in July). They were also paid other monies not in dispute.

[18] The applicants seek one month's pay each for July 2010, i.e. \$9,808 each, plus interest on the same.

Discussion and Findings

[19] The parties agree that the relevant employment agreements provided for a fixed term with a specified starting date and a finish date of 31 July 2010 (see par 10 above).

[20] It is not in dispute that the Churchills did not work out their final month's employment: Cognition could no longer provide work for them for July 2010 and the applicants had already left Qatar (on 1 July).

[21] The Churchills says they left in reliance on a minute of the respondent's dated 4 January 2010 (attachment G, above). Cognition does not accept the minute as official advice. But I find here anyway that the Churchills' claim ignores advice provided to them by the respondent just a few days later, on 12 January, in response to Mr Churchill's inquiry as to whether he (they) would "*be able to travel away from Qatar anytime from the 1st July 2010*" (attachment E).

[22] Cognition's reply was unequivocal: it could not "*... answer this question just yet ...*" (above).

[23] I am therefore satisfied that, by the time the Churchills booked their travel (and at the time of their departure), they had conflicting advice from Cognition as to their ability to leave Qatar from the 1st of July 2010. They did not raise any concerns with Cognition about that conflict. I find that the applicants elected instead to rely on the minute of the 4 January meeting and ignore the communication shortly thereafter, of 12 January.

[24] The Churchills' employment agreements contain several provisions relevant to the resolution of this problem. They include:

- a. 13.3 *In the event the contractual relationship between Cognition and (the Qatari Government) ceases for any reason, your employment will be terminated.*

You will receive one month's written notice of termination ... or ... payment in lieu

- b. 12.8 *In the event of termination of employment on the grounds of redundancy:*
- a) *You will be given one month's notice of termination, or payment in lieu thereof; and*
- b) *Redundancy compensation is not payable.*
- c. 17.2 *No annual holiday is to be taken during any period when the Cognition contract schools are open for student and/or teacher attendance*

[25] Schedule 3 of the applicants' employment agreements also required them to raise an employment relationship problem with their employer, in the first instance by raising the matter in writing.

[26] These provisions are relevant because they contemplate the circumstances now in dispute, and how the parties might attempt to resolve their problem.

[27] Also relevant were the Churchills' obligations under s. 4 of the Act, to act in good faith obligation. Those obligations extend to not doing anything that might mislead or deceive, and being active and constructive in maintaining a productive employment relationship by, amongst other things, being responsive and communicative.

[28] I am satisfied the Churchills acted in breach of Schedule 3 of their employment agreements and s. 4 of the Act by not communicating their concerns to their employer and by not advising Cognition of their intentions to depart Qatar by 1 July 2010, notwithstanding Cognition's clear notice to them in its email of 13 April as to its expectations.

[29] The undisputed evidence before the Authority is that Cognition's contract with the SEC finished on 30 June 2010, and not – as anticipated – 31 July 2010 (attachment F, above). From the earlier date, no "*Cognition contract schools (would) be*

open for student and/or teacher attendance” (above). In other words, Cognition had no teaching facilities or employment opportunities to make available to the Churchills.

[30] It is not Cognition’s position that the applicants were terminated because of redundancy although arguably that is what they were, from 30 June.

[31] As it happened, the final pay received by the Churchills was a combination of their outstanding holiday pay and a top-up or a “*good will gesture*” (par 4 of the respondent’s submissions received on 17 March 2011), resulting in payment for the relevant period, the month of July, of a sum equivalent to what they would have received had they worked during that month.

[32] It can be seen from the above that the Churchills received all of the contracted holiday pay entitlement, enjoyed clear notice greater than that set out in their employment agreements of the cessation of the contract between the respondent and the Qatari Government and – had they been declared redundant – similar notice of the same. What they did not get was their final month’s pay, for which they did no work.

[33] This was a matter begging for proper resolution in the time available to the parties, i.e. the latter half of April, and all of May and June 2010). Good faith and fair treatment requirements are mutual obligations. It was incumbent on the Churchills to communicate clearly their concerns, in particular to require compliance by Cognition with their employment agreements, i.e. as originally agreed, to permit them to work through the full term of their fixed term employment to 31 July 2010: see *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ 917. They did not do so, and I did not receive any explanation for that failure.

[34] Consistent with the Authority’s statutory obligation to act in equity and good conscience (ss 157 (3) of the Act), and because of the applicants’ failure to engage in advance with the respondent in respect of their concerns, and because they made themselves unavailable to work out the final month of their employment which they now seek – via contractual provisions – to be paid for, I am satisfied it would be inequitable to award lost earnings for a period of time when the claimants made themselves unavailable to work.

Determination

[35] The applicants' claims do not succeed.

[36] Costs are reserved. I note this was a half day investigation. As the parties were advised during the investigation, costs typically follow the event and, subject to their submissions, an award of \$1,500 to \$2,000 may be deemed appropriate.

Denis Asher

Member of the Employment Relations Authority