

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 51
5469687

BETWEEN ROBERT DAVIS
 Applicant

AND THE NEW ZEALAND
 HEALTH IT CLUSTER
 INCORPORATED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Patrick McGrath for Applicant
 Jodi Mitchell for Respondent

Investigation Meeting: 24 November 2014

Submissions Received: 1, 11 and 16 December 2014

Determination: 20 February 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Davis was not an employee and was therefore not unjustifiably dismissed.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Robert Davis claims he has been unjustifiably dismissed by The New Zealand Health IT Cluster Incorporated (the Health Cluster). The Health Cluster denies the claim and says Mr Davis was not an employee and never intended to be an employee as he had always indicated that he wished to work as an independent contractor.

[2] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Davis and the Health Cluster but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] The Health Cluster is a not-for-profit registered incorporated society focused on health information technology. The Health Cluster is comprised of software and solution developers, consultants, health policy makers, health funders, infrastructure companies, health care providers, and academic institutions which have agreed to work collaboratively.

[4] The Health Cluster is member funded and the directors all work full time in other businesses and provide their services on a volunteer basis.

[5] In February 2014 the Health Cluster advertised for a new CEO through LinkedIn. Mr Davis applied for the advertised position. At the time of his application Mr Davis was involved in four consulting projects and was teaching part-time.

[6] On 3 March, 11 March, 18 March and 21 March 2014 Mr Davis was interviewed separately by each of the four members of the Board of Directors of the Health Cluster.

[7] Mr Davis was interviewed first by Mr Jerome Faury on 3 March 2014. Mr Davis says he was informed that he had been short listed for the role and received positive feedback.

[8] Mr Davis was then interviewed by Ms Kate Rhind on 11 March followed by Ms Jodi Mitchell (Board Chair) on 18 March 2014. Mr Davis says he received positive feedback at each of these two further interviews.

[9] Mr David Worth then interviewed Mr Davis on 21 March 2014. Mr Davis says that during this interview he received further positive feedback and there were discussions about start dates and other operational details such as the date and location

of the next Board meeting. Mr Davis says he left that interview believing he was the only candidate being considered at that point.

[10] Mr Davis was asked for, and provided two formal references. Ms Rhind contacted both referees and spoke to them. Mr Davis says he received positive feedback from both referees following the calls and the referees indicated their view that Mr Davis would be offered the position.

[11] The Health Cluster says that between 24 and 26 March 2014 Mr Davis was advised it would be conducting reference checks based on the referees provided in his curriculum vitae, as well as further requested referees.

[12] On 28 March 2014 Mr Davis was again interviewed, this time by both Ms Rhind and Ms Mitchell. Mr Davis says he was told this was the final interview. Mr Davis says that during the interview he was made an offer of employment which included the proposed remuneration, commencement date, that the employment was for a fixed term of three years and that a handover of two weeks would occur with the then current CEO. Mr Davis says he accepted the offer.

[13] The Health Cluster says Mr Davis was told he was the preferred candidate, but noted that the appointment was subject to the parties agreeing to the contract terms.

[14] Based on his understanding that he had accepted an offer of employment Mr Davis says he announced his new position to family, friends, students, colleagues and professional contacts. Mr Davis says he also began to make other changes to accommodate a start date of 14 April 2014. These included:

- a) attending a final interview for a second job Mr Davis had applied for concurrently with the job at the Health Cluster during which he advised that he had accepted a position with the Health Cluster earlier that day;
- b) resigning from his part-time teaching role; and
- c) terminating current and future consulting contracts.

[15] Mr Davis emailed the four Board members on Monday 31 March 2014 thanking them for the interview process and expressing his excitement about being appointed to the role. Mr Davis told the Board members that it was “*Great to be appointed*” and he was happy to start envisioning and seeing action for the next three years. In response Mr Faury emailed Mr Davis and told him it was “*Great to have you on-board Robert! Let’s make it rain :)...*”

[16] That same day Mr Davis emailed Ms Rhind to begin the process of documenting his contract. In this email Mr Davis requested a start date of 2 April 2014 and confirmed that the term would be for three years. He asked Ms Rhind for the contract so that he could begin to get things set up and asked about resources such as computers, mobile etc. He also requested the contact details of the current CEO.

[17] In response Ms Rhind provided Mr Davis with the contact details for Ms Susan Wells, Administration Support for the Health Cluster and set out her expectation that he would take over the current CEO’s computer on his exit. Ms Rhind also stated her preference that the contract be finalized before having any discussions with the current CEO.

[18] Mr Davis received an email from Ms Wells suggesting that the laptop currently in use be replaced with a new one and set out the costs of a new laptop she had recently purchased. Ms Wells also advised that she had a set up list and suggested she and Mr Davis compare notes and work out what needed to be done so that once the contract was signed they could get started.

[19] Mr Davis requested a copy of the list while confirming his expectation that the contract would be ready to go that day.

[20] In a further email that day Mr Davis sought clarification as to the nature of the engagement (verbatim):

I did have one small question that I need direction on from you or Kate.

Because I will be located in Auckland there will be some time where I will be using my home office as the base on a regular basis. Plus NZTE in Auckland. I also have other sources of income/expenses from a book I have published and academic supervision work that I am engaging in currently. Will the payments for the CEO service be as employee or independent contractor? I would prefer the later for tax reasons through my company which is GST registered. But this can’t solely be determined by me. I would appreciate the direction from

the cluster. I know independent contractor payments are common in the IT sector but not sure in this context. [my emphasis]

[21] Following this email, Mr Davis sent a further email to Ms Mitchell and Ms Rhind with a list of points he wished to have considered as part of the contract discussions. This list included matters relating to leave, laptop, mobile, the term of the contract, professional memberships, bonus payments etc. In this list Mr Davis also included the item of Kiwisaver contribution “*if on employee status*”.[my emphasis]

[22] On 1 April 2014 Ms Mitchell emailed Mr Davis and confirmed that the planned start date was 14 April 2014 and advised him that the plan was to finalise a contract document and have that sent to him for his review. Ms Mitchell advised Mr Davis that the handover needed to be financially managed as the Health Cluster did not want to pay for two CEO’s for a long period. In response Mr Davis advised that a start date of 14 April would not allow a lot of time for orientation prior to the first Board meeting (planned for 17 April 2014). Mr Davis suggested a compromise of 7 April 2014.

[23] On 9 April 2014 Mr Davis says he received a call from Ms Mitchell during which Ms Mitchell advised him that the offer was being withdrawn and the Board would like to meet with him the following day.

[24] Mr Faury emailed Mr Davis in which he stated:

“At present the offer is still conditional on agreeing contract terms (contractor vs. employee, remuneration, overseas travel, holiday leave etc) and reference checks. It was our intent to work through these; however, a few concerns have been raised around the suitability of the role for you due to some of the requests and expectations raised during the negotiation process and some non-favourable comments from our own reference checks. With that in mind, I would suggest viewing this as more of a final interview, not simply a contract negotiation and would like to give you the chance to give us the necessary confidence that you are the best person for the role.”

[25] Mr Davis met with Mr Faury, Ms Mitchell, Ms Rhind and Mr Worth on 10 April 2014. The discussion in the meeting was focused on the matters raised by Mr Davis in his email dated 1 April 2014. Mr Davis and the Board members had differing expectations on these matters, however, Mr Davis agreed to accept the Board’s requirements on all matters.

[26] Mr Davis says that at the meeting there was confusion about several issues. He says Ms Rhind indicated that the Wellington Cluster offices were to be closed, but seconds later Mr Faury said that they were not to be closed. Ms Rhind also indicated to Mr Davis that he worked at AUT when in fact he worked at Unitec. Mr Davis says that during the meeting Mr Faury was frequently on his mobile.

[27] On 11 April 2014 Ms Mitchell called Mr Davis and advised him that he did not get the job.

Issues

[28] The issues for determination are:

- a) Was Mr Davis an employee as defined by the Employment Relations Act 2000 (the Act)?
- b) If Mr Davis was an employee was he unjustifiably dismissed?
- c) If Mr Davis was unjustifiably dismissed what, if any, remedies should be awarded?

Was Mr Davis an employee as defined by the Employment Relations Act 2000?

[29] The Employment Relations Act 2000 (the Act) defines an employee as meaning any person of any age employed by an employer to do any work for hire or reward and includes a person intending to work.¹

[30] Mr Davis says the employment relationship came into being on 28 March 2014 when he was offered employment by Ms Rhind and Ms Mitchell which he accepted. Mr Davis says the offer he accepted included details about the remuneration, commencement date, that employment would be fixed term for three years and that a handover of two weeks would occur.

[31] Ms Mitchell confirmed Mr Davis's evidence that he was the preferred candidate at the meeting on 28 March 2014 but denies making any offers of employment. Ms Rhind and Ms Mitchell both gave evidence that the purpose of the

¹ Employment Relations Act 2000, section 6(1)(a)-(b).

meeting was to discuss negative feedback which had been received about him from his time in previous employment.

[32] Following the meeting on 28 March 2014, on 31 March 2014 Mr Davis emailed Ms Rhind seeking clarification on several matters, in particular:

- a) The start date – Mr Davis wanted a start date in two day's being Wednesday, 2 April 2014;
- b) Seeking a copy of the “*contract*” so that he could get it signed up before Wednesday;
- c) Information about administration matters and resources; and
- d) The contact for the existing CEO.

[33] In response Ms Rhind provided Mr Davis with Ms Wells contact details and stated that she would prefer to finalise the “*contract*” prior to any discussions with the existing CEO.

[34] Ms Wells responded by providing a list of items that needed to be arranged so that Ms Rhind and Ms Mitchell could compare her list with any list provided by Mr Davis. Ms Wells concluded her email by stating: “*We can then get started on it as soon as the contract is signed*”.

[35] After receiving a copy of Ms Wells’ list, Mr Davis sought clarification from Ms Rhind as to the nature of the relationship, outlining his preference to be an independent contractor. This email shows that as at 31 March 2014 Mr Davis was not clear about the nature of his engagement and whether he was intending to be an employee or a contractor.

[36] From the email correspondence from Mr Davis, the Board became concerned about the way Mr Davis was pushing for an early start date and his desire to be an independent contractor. Ms Mitchell and Ms Rhind wanted to meet with Mr Davis to discuss his various emails and the points he had raised in them.

[37] On 1 April 2014 Ms Mitchell advised Mr Davis that while a handover was preferred the Cluster needed to manage the handover so that it was not paying two CEO's for too long. Ms Mitchell advised that the planned start date was 14 April 2014. Ms Mitchell advised Mr Davis that Ms Wells would be in touch with a contract either that day or the next and requested Mr Davis to put any other issues on the table now.

[38] In response Mr Davis advised that he had sent through a list of points the previous day and expected further points would arise once he had received the documentation. Mr Davis advised Ms Mitchell that he had put off a lot of consulting work to support a timely start and requested that they compromise on a start date of 7 April 2014. This chain of emails contradicts Mr Davis's evidence that part of the offer he received on 28 March 2014 included an accepted start date. It is clear that as at 1 April 2014 no agreement as to the start date had been reached.

[39] On 31 March 2014 Mr Davis sent through to Ms Rhind and Ms Mitchell a list of 17 items which he wished to put forward for the contract discussions. The list included a number of items which would be a direct cost to the Health Cluster in addition to any salary and bonus payments. By way of example Mr Davis was seeking payment of two annual professional memberships estimated by Mr Davis to amount to \$2,000 and international conference travel estimated by Mr Davis to amount to \$25,000 per annum.

[40] The receipt of this list from Mr Davis caused the Board to pause and reconsider whether Mr Davis was the right person for the role. His expectations of the terms of the contract went far beyond the terms being considered by the Board.

[41] Mr Davis relies on email correspondence between Board members which states that Mr Davis would be offered the job after the reference checks had been carried out. Mr Davis says that this is what occurred on 28 March 2014. Mr Davis' evidence ignores the fact that for the better part of 45 minutes the discussion centred on the negative feedback received from Mr Davis' previous employment. While the formal reference checks had been undertaken, further information had been received about Mr Davis which required further investigation. Quite properly this information was put to Mr Davis directly for his response.

[42] The overall effect of section 6 is that a person who has concluded arrangements to work for an employer but has not yet started is as much an employee as one who is already at work.²

[43] I find that the parties had not concluded arrangements for work. A key outstanding issue was whether Mr Davis would be an employee or provide services through his company as an independent contractor. Further, even if I had found there had been an offer capable of acceptance by Mr Davis on 28 March 2014, his emails on 28 and 31 March amounted to a counter offer. Through his counter offers Mr Davis sought to significantly increase the remuneration by seeking additional terms and conditions.

[44] The effect of a counter offer is that it extinguishes the original offer. I find there was no concluded agreement and the employer was entitled to reject the counter proposals made by Mr Davis as I find it did after its meeting on 10 April 2014.

[45] No concluded agreement was offered and accepted by Mr Davis. Mr Davis was not an employee and the Authority does not have jurisdiction to consider his application for unjustified dismissal. I can be of no further assistance to Mr Davis.

Costs

[46] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Health Cluster shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Davis shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority

² *Weal v Leusen Holdings Ltd t/a Heather-lea Rest* [2002] 1 ERNZ 655.