

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 2/09
5139826

BETWEEN DECOM LIMITED
 Applicant

AND TANE FRANCIS CLEAVER
 Respondent

Member of Authority: Philip Cheyne

Representatives: Janet Copeland, Counsel for Applicant
 Tane Cleaver, the Respondent in person

Phone Conferences: 11 December & 22 December 2008

Further Information: Correspondence dated 19 December & 23 December 2008
 from the Applicant

Determination: 15 January 2009

DETERMINATION OF THE AUTHORITY

[1] After hearing from counsel and Mr Cleaver on 22 December 2008 my colleague Ms Doyle accorded this matter urgency and directed that it would be determined on the basis of information before her after allowing the applicant to lodge and serve any affidavits by 23 December 2008 and Mr Cleaver to lodge and serve any information in response by 5 January 2009. Unfortunately Ms Doyle is unexpectedly not available to determine the matter and the file has been referred to me.

[2] Decom Limited employed Mr Cleaver for more than five years. When he resigned in February 2008 issues arose about the non-return of tools supplied by Decom to Mr Cleaver. There were attempts to resolve these issues by correspondence after which Decom commenced proceedings in the Disputes Tribunal. On 21 August 2008 the Disputes Tribunal struck out Decom's claim for lack of jurisdiction because it was an employment relationship problem.

[3] Decom lodged a statement of problem with the Authority on 15 October 2008. There was difficulty serving the statement of problem on Mr Cleaver at the address given but he eventually acknowledged receiving it on 7 November 2008 and said he would lodge a statement in reply by 21 November 2008. When no reply was received the Authority scheduled a phone conference which was held on 11 December 2008. Mr Cleaver participated and he agreed to meet with counsel to discuss resolving the problem, to return Decom's tools that he still had and to provide a statement in reply. Those things all happened on or about 17 December 2008 but the problem remained unresolved because only a few extra tools were returned. That left the parties with the prospect of an investigation meeting in February 2009 as foreshadowed by the Authority during the phone conference.

[4] Mr Cleaver's statement in reply found its way to the Authority courtesy of counsel on or about 22 December 2008. It says that Mr Cleaver purchased a substantial amount of the tools for Decom or other employees, not himself.

[5] By letter dated 19 December 2008 counsel reported to the Authority about progress from her meeting with Mr Cleaver. Three items were returned by him and Decom conceded that one item was not Mr Cleaver's responsibility. That left the claim at \$3,088.44 plus a penalty, costs and interest. Counsel also advised that it had heard that Mr Cleaver was moving to Australia prior to February 2009 and sought urgency. That resulted in the 22 December 2008 phone conference, the directions from which are mentioned above. Decom lodged affidavits dated 23 December 2008 from Peter Leith (Decom's managing director) and from Jason Nicolson (Decom's apprentice electrician). With that material the amount claimed was reduced to \$2,990.94. Nothing more has been received from Mr Cleaver.

[6] Decom relies on clause 17.3 of an unsigned employment agreement dated March 2007 which says *Upon termination of the employee's employment the employee shall return all items of clothing and equipment issued to him/her to the employer. Where any item is not returned the employer shall make a deduction from the employee's final pay for the replacement cost of any unreturned items.* The principal remedy sought is a compliance order requiring Mr Cleaver to either return the specified tools or to pay \$2,990.94 being their purchase price. There are also claims for a penalty for breach of clause 17.3, interest and costs.

[7] There is a fundamental problem with a claim based on this document. The information before the Authority about the discussions between Decom and Mr Cleaver is to the effect that Mr Cleaver was never prepared to sign or be bound by the document. Decom nonetheless increased Mr Cleaver's pay on at least two occasions knowing that he had not consented to the offered terms. In these circumstances it is not open to infer consent to the March 2007 employment agreement from the parties' conduct. Decom's claim based on a breach of clause 17.3 of the March 2007 document cannot succeed.

[8] There is no information before the Authority about the terms of the employment prior to the March 2007 document other than clause 2.2 of the statement of problem which says *Upon commencement of employment Mr Cleaver did not sign an employment agreement*. I do not know if Decom complied with the statutory obligation to provide Mr Cleaver with a proposed agreement and an opportunity to seek independent advice when they began their employment relationship, or if a written agreement was proffered shortly after the relationship commenced. It might be possible to infer agreement to proffered terms from the acceptance or continuance of the employment; but even if that was possible I do not know the terms of such an agreement as they relate to the present problem. Given the uncertainty about express terms of the employment it is not appropriate to have regard to implied terms. I note also that the statement of problem does not refer to any implied terms.

[9] This is unsatisfactory from Decom's perspective since Mr Cleaver probably has not returned or accounted for all the tools he was provided with. What I will do is reserve for further investigation the issue about applicable express or implied terms of employment as they relate to Mr Cleaver's obligations for tools issued to him and any damages arising. If it is established that Mr Cleaver has breached contractual obligations then orders for a penalty, damages, interest and costs are likely to follow. The foreshadowed investigation meeting will be in Invercargill and will continue whether or not Mr Cleaver attends. Decom is to serve this determination and the notice of investigation meeting on Mr Cleaver.

Philip Cheyne
Member of the Employment Relations Authority