

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 272
5381264

BETWEEN

HOWARD DELL
Applicant

A N D

PRIMARY HEART CARE
LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Applicant in person
No appearance for Respondent
Investigation meeting: 24 July 2012 via Skype
Date of Determination: 10 August 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Dell) alleges that he is owed wages for 28 months work with the respondent (Heart Care). In addition, Mr Dell alleges that he is owed reimbursement for his own health care which Mr Dell says were part of the employment package that he negotiated with Heart Care.

[2] However, Mr Dell elected during the investigation meeting to withdraw the claim in respect to health care costs and in consequence, they no longer form part of the Authority's investigation. In the particular circumstances of this case, it would have been difficult for the Authority to make a finding on that aspect in any event because the health care costs are not specifically referred to in the individual employment agreement.

[3] The investigation meeting in this matter proceeded via skype because Mr Dell, an American citizen, has now returned to his homeland after the collapse of his employment relationship with Health Care in New Zealand.

[4] Despite extensive efforts by the Authority's Support Officer to have Heart Care engage with the Authority's process, the only acknowledgment received was a curious document from a Maori Incorporation styled Ngai Tupango Incorporation which gave notice to the Authority that it acted for Heart Care.

[5] Notwithstanding that missive, the Incorporation took no further part in proceedings, failed absolutely to comply with the Authority's timetable, and did not appear at the hearing.

[6] In order to be absolutely sure that the respondent had a proper opportunity to be heard, at the conclusion of the investigation meeting wherein Mr Dell gave his evidence via skype, the Authority issued a Minute which was served formally on both the Incorporation as representative of Heart Care and on the registered office of Heart Care itself. While the material directed to the registered office came back to the Authority without acknowledgment of receipt, the converse was the case with the notification to the Maori Incorporation. The Authority holds an acknowledgment of receipt on its file.

[7] In those circumstances, the Authority is satisfied that it is appropriate to proceed given that Heart Care has been given every proper opportunity to put its case and has failed to do so. The Authority must conclude that that failure is wilful rather than inadvertent given the history of this matter and the evidence given to the Authority by Mr Dell about his difficulties in dealing with Heart Care, evidence which the Authority has no reason to disbelieve.

[8] Notwithstanding the absence of the respondent at the investigation meeting, Mr Dell was interviewed by the Authority via skype, had a Bible present at the commencement of the interview and was able to satisfactorily show the Authority that he was in a position to take the oath. Accordingly, his evidence via the electronic medium was given and taken on oath. The Authority formed the view that Mr Dell was a straightforward and honourable witness and he gave his evidence clearly and without equivocation.

[9] Mr Dell told the Authority that he had commenced employment with Heart Care at its new Auckland Clinic in September 2007. Almost unbelievably, Mr Dell said that he was never paid for his work. He told the Authority that the only money that he ever received from Heart Care was a sum of \$6,000 which Heart Care had paid him towards the purchase of equipment totalling \$30,000 which Mr Dell had purchased with his own funds for the new Clinic.

[10] The employment relationship continued for some months before there was a written employment agreement. Mr Dell's evidence is that he insisted on this agreement, believing it would be a way of moving towards getting payment from the employer for his services. The terms of that employment agreement are unremarkable. The agreement provides for an annual salary of \$80,000 per annum.

[11] The Authority has sighted a signed copy of the employment agreement executed by both parties. Mr Dell told the Authority that there was a signed copy of the agreement lodged with the Immigration Service of the Ministry of Business Innovation and Employment to support his work visa application for employment in this country, and it is a copy of that document, kindly supplied to the Authority by the Immigration Services, which the Authority has seen.

[12] The Authority is satisfied that Mr Dell was employed, that there was a signed employment agreement, and that in consequence Mr Dell is entitled to the benefit of that employment agreement. Mr Dell, as the Authority has already noted, gave his evidence on oath, and was particularly asked by the Authority to confirm that he had signed the relevant employment agreement, which he did.

[13] The Authority's considered view is that the story Mr Dell tells is so extraordinary as to be almost impossible to invent. It seems remarkable that a man would work for 28 months without remuneration, but Mr Dell assured the Authority that there were always promises from Heart Care about money and he persevered until his health failed, in the hope that he would eventually be paid what he was owed.

[14] The Authority notes that Mr Dell returned to New Zealand in January 2012, some many months after the employment relationship had come to an end, with a view to trying to extract the money that he was owed from Heart Care and to repossess the personal items that he had left at the Clinic when the employment ended.

[15] The contacts between Mr Dell and Heart Care in January 2012 were effectively facilitated by New Zealand Police as Mr Dell had been precluded from entering the Clinic by Heart Care. In the result, Mr Dell told the Authority that the eventual transfer of his personal items took place in an alleyway not far from the Clinic premises.

[16] Subsequent to that visit by Mr Dell to New Zealand, Mr Dell's evidence is that he received by email two remarkable documents. The first is styled "Settlement Agreement and Waiver of Rights" and the second is styled "Waiver of Independent Legal Advice". The first of these remarkable documents purports to be an agreement between Mr Dell and Heart Care by which he waives his entitlement to salary and other emoluments in return for a payment called a separation payment of US\$15,000. Amongst other things in this remarkable document, is a provision which effectively seems to terminate the employment agreement on the date it actually started, that is 1 September 2007. The agreement then goes on to provide in the following terms:

From now until that date, I will not be required to report to work or perform services and will not be paid salary or accrue any bonus. Instead, I will utilise my own resources until it is depleted (sic).

[17] The payment of the US\$15,000, separation payment, was to be made on or before 31 April 2012. Mr Dell told the Authority that no such moneys were received, but equally, nor did he contemplate signing the subject agreement.

[18] The other agreement which came by email with the agreement just referred to was a waiver of independent legal advice. Whatever its title, the agreement is completely unintelligible. Again, Mr Dell told the Authority that he was not disposed to contemplate signing it.

Determination

[19] In the extraordinary circumstances of this case, the Authority is satisfied that Mr Dell is owed wages from his 28 months of unpaid service to Heart Care and on the basis of an annual salary of \$80,000 per annum, he is entitled to be paid the sum of \$186,666.66 gross for his unpaid work.

[20] Pursuant to s.131 of the Employment Relations Act 2000, the Authority directs that Heart Care is to pay to Mr Dell that sum of \$186,666.66 gross in unpaid salary.

[21] A certificate of determination is to issue with this determination.

Costs

[22] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority