

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 291
5431573

BETWEEN DAMIEN GOLDSMITH-JENNINGS
Applicant

A N D GONET COMMUNICATIONS
LIMITED
Respondent

Member of Authority: G J Wood

Representatives: M Harrison, for the Applicant
M Sperry, for the Respondent

Investigation Meeting: 5 June 2014 at Whakatane

Date of Determination: 9 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Damien Goldsmith-Jennings claims that when he left the full-time employment of the respondent, GoNet Communications Limited (GoNet), to take up full-time study for a year it was agreed that his employment would continue for ten hours a week and that he would return to GoNet full-time at the end of his course. He claims that he was unjustifiably dismissed when, a few weeks into his study year, GoNet refused to offer him any more work. Mr Goldsmith-Jennings claims that GoNet failed to pay him holiday pay and has not returned some of his personal property to him.

[2] GoNet considers that Mr Goldsmith-Jennings resigned to take up a full-time course and that it offered him up to ten hours a week as a contractor, but that it soon discovered that there was no additional work for him and therefore his services were no longer required. GoNet has counterclaimed over several amounts of money and

property it claims Mr Goldsmith-Jennings owes to it for advances, in particular to his salary, together with overpaid holiday pay, and company property he has not returned.

[3] Mr Goldsmith-Jennings accepts that he has company property he is willing to return, but denies that he has over-claimed or been overpaid for holidays. He also considers that some moneys owed by him are owed to one of GoNet's former directors, Mr Michael Sperry, personally, and not to GoNet.

Factual discussion

[4] GoNet, which is based in Whakatane, is an internet service provider providing internet voice services to its customers. Mr Goldsmith-Jennings was employed by it for several years as a technical support engineer.

[5] The company has never been profitable and was struggling to meet its financial obligations in 2013. As a result, it's then managing director, and a major shareholder, Mr Michael Sperry, was regularly injecting capital into the business and was working unpaid in his role as managing director. Mr Goldsmith-Jennings was aware of the financial difficulties facing GoNet. As a result of this and his desire to improve his education, Mr Goldsmith-Jennings approached Mr Sperry with a proposal that he undertake a full-time study course in Hamilton for a year and that he remain employed for 20 hours a week doing work for GoNet, for which he would be paid \$20 per hour. In addition he sought a contribution towards his course costs of \$65 per week.

[6] I accept that this arrangement was agreed to for two particular reasons. First, for the three pay periods that GoNet paid Mr Goldsmith-Jennings under the new arrangements, he was paid exactly for 10 hours per week plus \$65 in course costs. I do not accept Mr Sperry's evidence this was merely a coincidence and that Mr Goldsmith-Jennings had done exactly 13¼ hours a week for more than four weeks under what Mr Sperry alleged was a casual arrangement. Second, GoNet's other witnesses supported Mr Goldsmith-Jennings' evidence that there was a continuing relationship and that it was expected that he would continue in GoNet's employment on a full-time basis at the end of his course, and that Mr Goldsmith-Jennings was to be paid \$65 per week to assist with course costs.

[7] As the course approached and the amount of course work required was rightly perceived to be heavy, it was later agreed that the hours be reduced to 10 per week.

There was no written contract of services entered into that would change the real nature of the relationship, which was one of employment.

[8] I should note that this case was clouded by extensive efforts by Mr Sperry and another of GoNet's witnesses to besmirch Mr Goldsmith-Jennings' character. I have not needed to address these issues because they are not necessary to determine the employment relationship problems, given my findings over an agreement, between Mr Goldsmith-Jennings and Mr Sperry on behalf of GoNet, for the repayment of any moneys owing to Mr Sperry and/or GoNet to GoNet by way of deductions from Mr Goldsmith-Jennings' pay. As Mr Sperry was funding GoNet privately, it was not clear on many occasions whether expenditure he made was on his own behalf or GoNet's behalf. Further complicating matters, Mr Sperry, and at times Mr Goldsmith-Jennings, resided together, along with another GoNet employee, in a flat attached to GoNet's commercial premises. This meant they not only worked, but often socialised, together.

[9] In respect of a number of claims that GoNet has against Mr Goldsmith-Jennings, it is suffice to note that at some point Mr Goldsmith-Jennings and Mr Sperry agreed that Mr Goldsmith-Jennings owed GoNet \$3,000 for advances and other costs incurred by Mr Sperry/GoNet, and that this amount would be deducted from his wages. Such deductions were at the rate of \$250 per fortnightly pay and continued for three pay periods before Mr Goldsmith-Jennings left to go on his course. I have concluded that Mr Goldsmith-Jennings did agree to this, despite his protestations and denials at the investigation meeting, because Mr Goldsmith-Jennings does not appear to be the sort of person who would accept any infringement on his rights, yet over a six week period (namely the three pay periods) he made no complaint whatsoever over the \$250 deductions. I also accept that this arrangement was made in accordance with the deductions clause in the employment agreement and that it covered all matters that are subject to the counterclaim, other than the holiday pay and the return of property. In this regard, I accept that Mr Goldsmith-Jennings did in fact work at least 10 hours a week each week for GoNet, together with his view as to what property needs to be returned to GoNet. It was further agreed that Mr Goldsmith-Jennings had repaid GoNet for international calls he had made and any company equipment used.

[10] I do not accept that Mr Goldsmith-Jennings has misappropriated any company property for his own or friends' use, because Mr Sperry's evidence was too vague to make any such findings in the face of Mr Goldsmith-Jennings' explanations.

[11] GoNet's claims that Mr Goldsmith-Jennings was not debited annual leave he took have been shown to be correct, for which it is entitled to credit. On the other hand, GoNet's claims to reduce any moneys owing because of alleged abuse of sick leave have not been proved. Mr Goldsmith-Jennings maintained that he was sick on the day in question and that was accepted by GoNet at the time. There is insufficient evidence to prove otherwise over a year later. As a result it is my conclusion that neither party owes the other anything for holiday pay.

[12] Mr Goldsmith-Jennings accepts that he has the following items of company property, which he will return after liaison with one of GoNet's witnesses. These items include a Nanobridge router, 70 metres of cable, a laptop and a smartphone. In return GoNet has agreed that Mr Goldsmith-Jennings can, at the same time, uplift from it the following items of his property – a 55 inch TV, a Freeview digital dish and a decoder.

[13] As all the other claims by GoNet for damages pre-dated the agreement around 17 June 2013, it is clear that they were encapsulated in the agreement to repay \$3,000 to GoNet. \$2,250 is therefore still owing.

[14] I accept that GoNet stopped providing Mr Goldsmith-Jennings with 10 hours' work a week because it genuinely did not consider that it needed his support or assistance any longer. In this respect it might be said that Mr Goldsmith-Jennings was made redundant, but this was done without any consultation with him and without any acknowledgement that there was an agreement in place, or that Mr Goldsmith-Jennings had a legitimate expectation that he would return to full-time employment at the end of his course.

[15] GoNet has not justified its dismissal of Mr Goldsmith-Jennings in these circumstances, because what it did and how it did it were not actions open to a fair and reasonable employer. Had consultation been held with Mr Goldsmith-Jennings it is quite possible that arrangements could have been put in place that would at least have maintained Mr Goldsmith-Jennings' right to return to GoNet full-time at the end of his course. Mr Goldsmith-Jennings was accordingly unjustifiably dismissed and is

entitled to claim for 13 weeks lost remuneration, including his course subsidy costs, totalling \$2,600 gross and \$845 net respectively. There is no reason to extend the period of the subsidy beyond 13 weeks, especially given that Mr Goldsmith-Jennings may have been made redundant because of a lack of work, even for a 10 hour per week position, during the year that he was away from full-time work on GoNet.

[16] Mr Goldsmith-Jennings claims \$4,000 compensation for humiliation, loss of dignity and injury to feelings. He gave evidence of how he has been affected financially as a result of lesser income, and how he has been hurt by the actions of GoNet towards him. In all the circumstances I consider that \$4,000 is a reasonable sum and award it accordingly.

[17] There is no contributory fault by Mr Goldsmith-Jennings in the way that he was dismissed because it was a decision made by GoNet without any input from him, or any blameworthy behaviour by him while on his course.

Summary of orders

[18] I order the respondent, GoNet Communications Limited, to pay to the applicant Mr Damien Goldsmith-Jennings, the following sums: \$4,000 in compensation under s.123(1)(c)(i) of the Employment Relations Act 2000; \$2,600 gross in lost remuneration; and \$845 net in unpaid course subsidy costs.

[19] I also order the respondent, GoNet Communications Limited, to return to the applicant, Mr Damien Goldsmith-Jennings, when he attends its premises as set out below, the following items: one 55 inch TV, one Freeview digital dish and one Freeview decoder.

[20] I order the applicant, Mr Damien Goldsmith-Jennings, to return to GoNet Communications Limited at its premises as soon as possible, in arrangement with one of GoNet's employees, the following property: one Nanobridge router, 70 metres of cable, one smartphone and one laptop.

[21] I also order the applicant, Mr Damien Goldsmith-Jennings, to pay to the respondent, GoNet Communications Limited, the sum of \$2,250 net for moneys owing to GoNet.

[22] It should be apparent to the parties that the monetary issues could be dealt with by way of set-off, but that is a matter for them.

Costs

[23] Costs are reserved.

G J Wood
Member of the Employment Relations Authority