

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 17  
5321180

BETWEEN

DAVID GRAY  
Applicant

AND

CHARITY WORKS TRUST  
Respondent

Member of Authority: R A Monaghan

Representatives: B Edwards, counsel for applicant  
No appearance for respondent

Investigation Meeting: 11 January 2011

Determination: 14 January 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] David Gray says his former employer, Charity Works Trust (the trust):

- (a) owes him wages not paid;
- (b) owes him holiday pay;
- (c) as a consequence of the failures to pay wages, affected his employment to his disadvantage and dismissed him unjustifiably and constructively.

[2] In addition to orders for the payment of wages and holiday pay, and the remedies flowing from his personal grievances, Mr Gray seeks:

- (a) a declaration that the trust breached its obligation of good faith, and in doing so intended to undermine the parties' employment relationship;

- (b) a penalty for breach of good faith pursuant to s 4A and 133 of the Employment Relations Act 2000, and a direction that payment be made to the applicant;
- (c) a declaration that the employment agreement was breached, in particular with reference to the failures to pay wages; and
- (d) a penalty for these breaches of the employment agreement and a direction that payment be made to the applicant.

### **Preliminary matters**

[3] No statement in reply was filed in this employment relationship problem, and there was no request for leave to reply out of time. This is despite a telephone conversation and correspondence in early December 2010 between a support officer and Richard Kirby. Mr Kirby is one of three trustees and was likely to be a principal witness for the trust.

[4] The trust did not appear and was not represented at the investigation meeting.

[5] Mr Kirby had participated in a conference call convened by the Authority on 10 January 2011 to address the trust's request for an adjournment. The request was declined. The reasons were that Mr Kirby's explanation of the failure to file a statement in reply was unacceptable, as was the mere fact that Mr Kirby was on holiday outside Auckland at a location readily accessible to Auckland. He had been aware of the detail of the problem since before its filing in the Authority, and had not taken any steps to resolve it. He had also failed to act on assurances given to the Authority regarding the filing of a reply. Finally he asserted that he had arranged to meet with Mr Gray on Wednesday 12 January to attempt a resolution. If that was the case (and Mr Gray later denied that it was) there was no reason not to make that attempt in the course of attending the investigation meeting on Tuesday 11 January.

[6] Mr Kirby contacted a support officer on the morning of the investigation meeting, checking the commencement time and advising he was on his way. However he did not attend and the Authority has not heard further from him.

[7] I am satisfied as to service of the statement of problem and notice of meeting, and no good cause has been shown for the trust's failure to attend or be represented. I have therefore proceeded in the absence of the trust or its witness under Schedule 2 clause 2 of the Employment Relations Act 2000.

### **Background**

[8] Mr Gray has a background in radio broadcasting, in particular in marketing. Through that background he became acquainted with Thane Kirby and his brother Richard Kirby.

[9] In March 2010 the brothers Kirby approached Mr Gray to discuss a business opportunity. The frequency for a radio station then known as Big FM was for sale, and Richard Kirby was interested in purchasing it. He sought to make use of Mr Gray's experience in the transfer and setting up of a new station on the frequency.

[10] On 14 April 2010 Winstone Investments Limited (WIL), of which Richard Kirby was the sole director and shareholder, entered into an unconditional contract to purchase the frequency and associated equipment. The date of settlement was to be 30 April 2010.

[11] Although the intention was that WIL purchase the assets, it seems both WIL and the trust had discussions with the Ministry of Social Development (MSD) about funding for what was to be the new radio station. The trust is registered as a charitable trust. Its purposes include: providing opportunities in education, health, welfare and employment and cultural development for a range of ethnic groups; establishing opportunities for needy groups; and providing various resources for young people, refugees and immigrants. The concept for the radio station was that it would provide a unique service, addressing the needs of this segment.

[12] Mr Gray was very interested in becoming involved. He entered into a letter of engagement with the trust, with his employment commencing on 22 April 2010. According to the letter, Mr Gray was to hold the position of director of operations, at a salary of \$70,000 pa payable weekly. His duties were to manage the day to day

operations of the business, although the immediate focus in practice was on preparation for the establishment of the new station. The notice period was 6 months.

[13] According to companies office records the vendor of the frequency was placed in liquidation on 10 August 2010. The liquidator had WIL placed in liquidation on 3 September 2010. The liquidator's report records that there was a failure to settle the purchase on 30 April and a demand for payment was made by the vendor. However Mr Gray had begun work and said he was told variously that the settlement dates were moved into May, June, then July. Meanwhile he engaged another staff member, worked on budgets, and undertook transfer and set-up work.

[14] Mr Gray was not paid at all during his employment. After not receiving payment for the first three weeks' work, on 11 May 2010 he sent a text message to Mr Kirby enquiring about the matter, with the reply being that his bank account details were needed. Mr Gray provided those details. On 25 May Mr Gray sought confirmation from Mr Kirby that salaries were going into employees' bank accounts, with the reply being that Mr Kirby was working on the transfer. On 10 June he said he needed a straight answer about payment. There were oral discussions between Messrs Gray and Kirby, resulting on 24 June in another promise to pay.

[15] These and later discussions also incorporated representations by Mr Kirby about the obtaining of funds for the purchase. Mr Gray said he was told variously that there were discussions with the MSD and later that a bank was prepared to advance a loan. Thirdly, there were representations that a commercial property in which Mr Kirby had an interest had been sold, thus releasing the necessary funds. The contents of the certificate of title for the property indicate there may have been some truth in that, although settlement of the sale occurred after the termination of Mr Gray's employment.

[16] By letter to Mr Kirby dated 12 July 2010 Mr Gray requested payment of the amount owed as at 1 July 2010, and included his bank account details. There was no reply.

[17] A series of exchanges by text message resumed later in July. There was no reply to requests for payment in July. On 2 August Mr Kirby asked for confirmation

of bank details, which had already been provided twice. Mr Gray provided them for a third time. When Mr Gray sought confirmation that payment would be made, Mr Kirby advised that funds were due 'tomorrow' and would be transferred then. There was no payment on 3 August, so Mr Gray asked when the funds would be transferred. There was no reply.

[18] By August there was no longer any meaningful work left for Mr Gray to do, and he became aware that completion of the purchase of the frequency was unlikely.

[19] In a letter to Mr Kirby dated 30 August 2010 counsel sought payment of the wages unpaid, and advised that Mr Gray believed he would have no option other than to resign if payment was not made by 6 September 2010.

[20] There was no reply and no payment was made.

[21] By further letter to Mr Kirby dated 14 September 2010 counsel confirmed Mr Gray's resignation because of the failures to pay, and raised a personal grievance on the ground of unjustified constructive dismissal as a result. He also raised a disadvantage grievance in respect of these matters.

[22] There was no reply.

### **Unpaid wages**

[23] Mr Gray seeks the payment of unpaid wages calculated as:

$$20.6/52 \text{ weeks} \times \$70,000 = \$27,730.69.$$

[24] I am satisfied the sum is owed. I order payment accordingly.

### **Holiday pay**

[25] No holiday pay has been paid. The calculation of the amount owed is:

$$8\% \times \$27,730.69 = \$2,218.46$$

[26] I order payment accordingly.

### **The personal grievances**

#### 1. Existence of a dismissal

[27] Repeated and extended failures to pay wages amount to multiple breaches of the employment agreement. An employee's resignation as a result of the breaches is foreseeable. In such circumstances the resignation amounts to a constructive dismissal. Mr Gray was constructively dismissed.

#### 2. The disadvantage grievance

[28] This matter is subsumed in my findings on the dismissal. I take it no further.

#### 3. The justification for the dismissal

[29] No justification has been offered for the dismissal, and I find there was none.

[30] Other than the fact that they became aware there was to be an investigation meeting on 11 January, I have no information about the material available to the remaining trustees or the trust's managers regarding Mr Gray's employment or this employment relationship problem. I record, however, that when I asked why no statement in reply had been received Mr Kirby asserted that 'the office' was to have provided one. I make no comment about the truth of the assertion, since in any event the reason was unacceptable.

#### 4. Remedies

[31] Mr Gray seeks reimbursement of the remuneration lost as a result of his personal grievance, inclusive of a payment in lieu of the 6 months' notice provision, and compensation for the injury to his feelings.

[32] Mr Gray commenced alternative employment on 10 January 2011, at a higher salary. Between the date of termination of employment and that date he earned a total

of \$3,160. The remuneration lost between 14 September 2010 and 10 January 2011 is 17 weeks x \$1,346.15 = \$22,884.55.

[33] However Mr Gray was entitled to 6 months' notice of the termination of his employment, which he did not receive. The amount is \$35,000. As the greater amount, I award it.

[34] Mr Gray suffered injury to his feelings in that he suffered from stress and a stress-related medical condition as a result of his personal grievance. An award of \$10,000 under s 123(1)(c)(i) of the Act is warranted as compensation for the injury.

[35] There was no contributory fault and no reduction in these remedies is necessary. Payment is ordered accordingly.

### **Claims for penalties**

#### 1. Breach of the Act

[36] Section 4A of the Act reads in part:

*A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if –*  
*(a) the failure was deliberate, serious and sustained; or*  
 ...

[37] Section 4(1) reads:

*The parties to an employment relationship .. –*  
*(a) must deal with each other in good faith; and*  
*(b) without limiting paragraph (a) must not, whether directly or indirectly, do anything –*  
*(i) to mislead or deceive each other; or*  
*(ii) that is likely to mislead or deceive each other.*

[38] Section 4(1A) says the duty of good faith in s 4(1):

*(a) is wider in scope than the implied mutual obligations of trust and confidence;*  
*(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*

- (c) *without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –*
- (i) *access to information, relevant to the employer's employment, about the decision; and*
  - (ii) *an opportunity to comment on the information to their employer before the decision is made*

[39] Mr Gray believes Mr Kirby lied to him about funding for the new station. While Mr Gray was aware that funding had not been obtained, he believes Mr Kirby was dishonest about the prospects of obtaining it.

[40] Without further information about Mr Kirby's efforts to obtain funding I would not go as far as to say that, but Mr Kirby had an obligation to communicate more information than he did regarding funding. Moreover, in fobbing off Mr Gray's enquiries about payment by making empty promises as he did, Mr Kirby misled and deceived Mr Gray. Overall, Mr Gray was strung along in a manner not consistent with the maintenance of the duty of good faith. The duty in s 4(1) was breached.

[41] To warrant an order for a penalty under s 4A the failure to comply with the duty must be deliberate, serious, and sustained. I find Mr Kirby's actions reached that level and in principle a penalty is warranted.

[42] However there is a discretion as to any award, up to the statutory limit. It is relevant that the harm done to Mr Gray has been addressed in the findings regarding his personal grievance and orders for payment already made. Although I believe punitive action is warranted I also take into account that the trust is a registered charitable trust, dependent on funding. It appears no funding for the broadcasting venture was obtained, so other resources would have to be used in order to meet any payments to Mr Gray to the possible disadvantage of the core activities of the trust.

[43] For these reasons I make no order.

## 2. Breach of employment agreement

[44] Although the failures to pay wages warranted a penalty, for similar reasons to those set out above, I exercise my discretion against ordering payment of a penalty.

**Summary of orders**

[45] The trust is ordered to pay to Mr Gray:

- a. \$27,730.69 as unpaid wages;
- b. \$2,218.46 as holiday pay;
- c. \$35,000 as reimbursement of remuneration lost as a result of his personal grievance;
- d. \$10,000 under s 123(1)(c)(i) of the Act as compensation for injury to feelings arising from the personal grievance.

[46] The payment of interest is ordered on the sums set out at a, b and c above, calculated as 5.2 % pa from 14 September 2010 to the date of payment.

[47] Neither party should have been put in the position indicated by these orders. Mr Kirby should have addressed the problem in a timely and constructive way. However Mr Gray has indicated there is still a possibility the matter can be resolved between the parties. Attempts to do so are encouraged.

**Costs**

[48] The trust is further ordered to pay costs in the sum of \$2,500.

[49] This sum is set with reference to a notional daily rate for a half-day hearing, increased because Mr Kirby's lack of response has led Mr Gray to incur costs he should not have had to incur.

[50] In addition the trust is ordered to reimburse Mr Gray for the filing fee of \$70 and for process servers' fees of \$140.

R A Monaghan

Member of the Employment Relations Authority