

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 386/09
5152115

BETWEEN DARRYL SCOTT HENWOOD
Applicant

AND PIAKO SECURITY LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: Darryl Henwood, In Person
Wayne Henwood, Advocate for Respondent

Investigation Meeting: 8 September 2009 at Hamilton

Determination: 4 November 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The claims that Mr Darryl Henwood (“Darryl”) has placed before the Authority have been somewhat difficult to interpret, but as I understand it, he claims:

- (a) That his employment was effectively terminated because the respondent stopped paying him wages and also removed him from his roles as a director and shareholder of Piako Security Limited (“the Company”). However the applicant has not presented a claim of constructive dismissal and has not sought any remedies in regard to his termination of employment. But in any event, as the following evidence discloses, apart from the doubtful validity of the alleged grounds of termination, pursuant to s.114 of the Employment Relations Act 2000, the applicant is time barred from pursuing a personal grievance.
- (b) That he is owed wages for four years at the rate of \$400 per week in the sum of \$83,000.
- (c) That he is owed holiday pay in the sum of \$7,000.

- [2] Representing the Company, Mr Wayne Henwood (“Wayne”) says that there is no validity to the Darryl’s claims. Firstly, he says that Darryl terminated his employment, and his involvement as a shareholder and director of the Company, via a text message on 1st August 2007. Wayne denies that Darryl is owed any monies.
- [3] It is not disputed that Darryl was an employee of the company but this is not the usual type of dispute which the Authority commonly deals with between and employer and an employee. It is most unfortunate that the dispute also falls into areas of conflict within the Henwood family. It is not the role of the Authority (or within its jurisdiction) to investigate the family conflict. One would hope that in the fullness of time, there will be some reconciliation.

Background

- [4] In 1988, Darryl Henwood incorporated a company, Henwood & Kilburn Security Limited. Some time in 1990, Wayne Henwood joined the business. In 1991, a new company was incorporated; Riteway Security Limited (RSL). The shareholding being: Darryl and Wayne Henwood 45% of the shares each with the other 10% being held by their father, Mr Brian Henwood.
- [5] In 2004, RSL went into voluntary liquidation and from what I understand, the security business transferred to Piako Security Limited (PSL), a company which had been incorporated in 1998. While it is difficult to determine, as there are no records which accurately record such, it seems to be commonly accepted that Darryl had a small shareholding in PSL (9 shares out of a total of 120 shares) and as of February 2004, he was a shareholder, a director and an employee of PSL.
- [6] In regard to Darryl Henwood’s status as an employee, there is no evidence of any employment agreement or any other record of the agreed terms and conditions. It seems to be agreed that an “arrangement” was implemented whereby Darryl would be paid \$400 per week as drawings from the business and \$86 per week as wages. This arrangement appears to have been accepted by all concerned as a tax effective way for him to obtain income from a business which appears to have consistently struggled to keep its head above

the economic tide. It has also been alluded to that some monies were paid from the business to Darryl's stepdaughters; there is no evidence of this.

- [7] While Darryl's claims for payment go back to 2004, there is no evidence of any issue about the payments he was receiving until February 2007, when it appears that he resigned as an employee of PSL. It is the evidence of Wayne that Darryl also resigned as a shareholder and director of the company. This is in dispute but it is not within the brief of the Authority to determine this issue.
- [8] Both parties agree that Darryl resigned as an employee via a text sent to Wayne some time in February. The exact date cannot be identified. The text says:
- “Complete break. Please arrange for vehicle etc to be picked up. Documents to be picked up and delivered from C.H.s by 11am and cash.” Apparently, Darryl worked out one month's notice but then resumed some work for the company from June 2007. In August 2007, he was employed by a business in Cambridge. The bank statements for Darryl show that he continued to be paid by PSL until 31st July 2007.
- [9] The records from Inland Revenue show that from 1st April 2006 to 31st March 2007, Darryl received income from PSL and from four other organisations, with the substance of his income coming from two greyhound racing clubs. The Inland Revenue records from 1st April 2007 to 31st March 2008 show that he received income from six different sources with only a minimum amount (\$600) from PSL, albeit his bank account shows otherwise in relation to the PSL income. I reach no conclusions about this.
- [10] In regard to Darryl's claim for holiday pay, Wayne says that as a director of the company Darryl managed his own time and took time off when he wanted to. He was also working for other organisations at the same time as he was employed by PSL.

Determination

- [11] (a) *The claim for wages*

I find that the claims for wages made by Darryl Henwood cannot be supported by the evidence which is available to the Authority. This claim must be declined.

(b) *The claim for holiday pay*

The claim for holiday pay is not supported by any evidence to show that Darryl Henwood has any entitlement and it also seems that as a director of PSL he had a shared control as to his overall employment arrangements including the taking of holidays and payment for such, by agreement with his brother Wayne. Due to the lack of supportive evidence about any holiday entitlements, I decline this claim.

Conclusion

[12] The circumstances of this case are unusual in that Darryl Henwood was a shareholder and director of the company in addition to being an employee. In effect he was his own “boss” in that he had a shared influence as to how he would be paid, the holidays he took and how the business would function. In normal circumstances involving an employment relationship, there would be an issue about the failure of PSL to keep accurate wage and time records, including holiday entitlements. There is an obligation on PSL to keep such records and that obligation was the responsibility of the directors at the relevant times; Darryl and Wayne Henwood. Any attribution of fault in regard to keep the required records has to be partially shared by Darryl as a director of the company. One can only suggest that in future, when members of the family enter into arrangements which see them as employees, as well as shareholders and directors, that they seek appropriate advice as to their legal obligations under section 130 of the Employment Relations Act 2000 and sections 73 and 81 of the Holidays Act 2003 in particular. They are also advised to make use of the Department of Labour website: www.ers.dol.govt.nz

K J Anderson
Member of the Employment Relations Authority