

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 194
5535258**

BETWEEN GRAEME HICKS
 Applicant

AND INSTANT ACCESS NZ LTD
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Troy Plummer, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 18 May 2015 from Applicant
 16 June 2015 from Respondent

Determination: 26 June 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Graeme Hicks, claims that he is owed unpaid wages and expenses by the Respondent, Instant Access NZ Ltd (Instant Access). Specifically Mr Hicks claims that he was offered an increase of \$10,000.00 per annum upon completion of a 90 day trial period, but this has never been paid.

[2] Mr Hicks also claims that he is owed the sum of \$100.00 in respect of unpaid expenses.

[3] Instant Access denies that Mr Hicks is owed any monies either in respect of a salary increase, or as expenses.

Note

[4] The parties agreed to the Authority determining this issue based on the Statements of Problem and in Reply, sworn affidavits, and on submissions from the parties

Issues

[5] The issues for determination are whether or not Mr Hicks is owed:

- Unpaid wages resulting from the failure of Instant Access to increase his annual remuneration by \$10,000.00 per annum in respect of a salary increase
- \$100.00 as unpaid expenses

Background Facts

[6] Instant Access is part of Access Holdings Pty Ltd which is a provider of Access equipment including aluminium scaffolding, mobile towers, elevated working platform, and swing stages. Access Holdings Pty Ltd currently has 10 branches in 3 Australian states, and 2 branches in New Zealand. Instant Access is a subsidiary of Instant Access Australia Pty Ltd.

[7] Mr Hicks was interviewed by Mr David Rouse, at that time employed by Instant Access as Region Manager New Zealand, reporting to Mr Richard Green, General Manager of Instant Access Australia Pty and Instant Access.

[8] Mr Hicks said that Mr Rouse had verbally agreed that he would receive a \$10,000.00 per annum increase to his salary after completion of a 90 day trial period. This had been the basis upon which he had accepted employment with Instant Access.

[9] Mr Rouse stated that he had reached a verbal contract with Mr Hicks that Instant Access would increase his annual salary by \$10,000.00 per annum after successful completion of a 90 day trial period.

[10] Mr Green stated that Mr Rouse had discussed employing Mr Hicks with him prior to sending him an employment requisition form in respect of Mr Hicks, but Mr Rouse had not advised him that Mr Hicks was to receive a \$10,000.00 per annum salary increase upon completion of a 90 day trial period of employment.

[11] Mr Green stated that it was standard company policy in Instant Access for an employment requisition form to be completed in respect of prospective employees. In accordance with the standard company policy Mr Rouse provided him with a requisition for the employment of Mr Hicks on or about 20 December 2013.

[12] The employment requisition form was attached to an email sent to Mr Green and Mr Troy Plummer, National OH&S Manager, Corporate Counsel Instant Access Australia Pty

Ltd, from Ms Jacqui Baker, Operations Manager for Instant Access. In the email dated 20 December 2013 Ms Baker stated:

Dave has asked me to fill this out and send to you both. ...

The job description will be the same as the one that was set up for Corey Sinclair.

I have signed on behalf of Dave as he has already left for the Xmas break.

[13] The employment requisition form stated that Mr Hicks' salary was \$70,000.00 per annum, but there was no reference on the form to an increase of \$10,000.00 per annum after completion of the 90 day trial period.

[14] The employment requisition form had been signed by Ms Baker on behalf of Mr Rouse on 20 December 2013, by Mr Green on 13 January 2014, and by Mr Stephen Fraser, Instant Access Chief Executive Officer, Instant Access Australia Pty Ltd, on 16 January 2014. Mr Green stated that Instant Access company policy only permitted Mr Rouse to make an offer of employment to Mr Hicks after the employment requisition form had been signed by Mr Fraser.

[15] On 20 January 2014 Mr Plummer emailed a copy of the employment agreement for Mr Hicks to Ms Katrina Dougherty, Wellington Branch Manager, Instant Access. The email was copied to Payroll Head Office and Mr Rouse. In the email Mr Plummer requested that the employment agreement be reviewed and if there were any changes required, Mr Plummer should be advised and he would send a final revised employment agreement for signature.

20 January Employment Agreement

[16] The employment agreement dated 20 January 2014 (Employment Agreement A) set out:

- Mr Hicks position was Account Manager – Access Hire, Wellington Branch
- His employment was subject to a 90 day trial period commencing on his first day of work, that being 13 January 2014¹
- The salary was \$70,000.00 per annum with no reference to an increase following successful completion of the 90 day trial period

¹ I note that as Mr Hicks commenced employment on 13 January 2014 but did not sign Employment Agreement B until 29 January 2014, the terms of the 90 day trial period pursuant to s 67A of the Employment Relations Act 2000 would be invalid because Mr Hicks was an 'existing employee' at the time Employment Agreement B was signed and not a 'new employee' within the terms of s 67A (3).

- Ms Dougherty was the signatory for Instant Access
- His Key Performance Indicators as set out on the attached Schedule 1

[17] More than a week later Mr Plummer in an email to Mr Rouse queried whether or not the employment agreement had been presented to Mr Hicks and signed by him.

[18] In response Mr Rouse advised in an email to Mr Plummer that same day that Employment Agreement A needed to be amended in respect of Mr Hicks' job title and the substitution of his (Mr Rouse's) name for that of Ms Dougherty. The email stated: "*Job Title needs to be Area Sales Manager EWP/Alloy Wellington and remove Katrina and details at the end of the contract and replace with me.*". There is no reference by Mr Rouse in the email to the omission of the post probationary increase of \$10,000.00 per annum.

29 January Employment Agreement

[19] An amended employment agreement dated 29 January 2014 (Employment Agreement B) set out:

- Mr Hicks position was Area Sales Manager EWP/Alloy Wellington Branch
- His employment was subject to a 90 day trial period commencing on his first day of work, that being 13 January 2014
- The salary was \$70,000.00 per annum with no reference to an increase following successful completion of the 90 day trial period
- Mr Rouse was the signatory for Instant Access
- The Key Performance Indicators as set out in Schedule 1 had been crossed through and Mr Hicks had written next to them: "*TO BE CONFIRMED BY DAVID ROUSE*".

[20] Mr Hicks stated that although amended Employment Agreement B was not correct, he had been instructed by Mr Rouse to sign it or forfeit being included in the payroll run which was due to take place imminently. He stated he had initially signed only the back page; however he had been instructed to initial each page or forfeit being included in the payroll run, and he had done so.

[21] In an email sent to the Head Office Payroll Supervisor on 13 February 2014 Mr Hicks stated: *“Hi Andrew, Please find attached copy of signed contract for Graeme Hicks – Wellington Branch New Zealand.”*

[22] Mr Hicks completed the 90 day trial period on 13 April 2014. Mr Rouse left the employment of Instant Access during May 2014. There is no documentary evidence that Mr Hicks raised the issue of the \$10,000.00 per annum increase with Mr Rouse, or that Mr Rouse raised this issue with Mr Green on Mr Hicks behalf, prior to his departure.

[23] On 29 May 2014 Mr Hicks wrote to Mr Green by email stating:

Hopefully the following is just a pay role (sic) error or simple oversight and not a rude surprise for you.

Prior to commencing with Instant Access I reached an agreement with David Rouse that my 90 day trial pay would be calculated at NZ\$70K PA.

Post completing my 90 day trial my pay would increase to NZ\$80K. Regrettably the latter hasn't happened.

David confirmed on more than one occasion that this would happen and had been supported and agreed to by you. This was later checked with David the week prior to his resignation and I was again advised that my pay would increase at the next pay period post my completing the 90 day trial.

Richard, can you please look into this for me and confirm the status of my pay going forward.

[24] Mr Green responded by email the same day asking Mr Hicks for a copy of his employment agreement. Mr Hicks responded:

Richard,

The attached is the contract I signed.

David had a couple of goes at getting this right. The KPI's were taken out and were to be re entered once fully established between David and I. A hard copy evidencing this should be in his files somewhere.

Regrettably, it does not contain reference to the \$10K increase after the completion of my trial period.

I asked David to have Australia redraft it yet again with reference to the \$10K increase included however this never eventuated.

David said you and he agreed that the increase would go ahead and to not worry about this not being included in my contract and to sign the document that was the last output (Attached).

[25] The following day, 30 May 2014, Mr Green responded to Mr Hicks by email stating:

Hi Graeme, your email yesterday was the first I had heard about this matter. I have checked with the physical copy in the Payroll office and there is no reference either on the contract or under separate email with regards to any review. That said any review would usually take place once all of the Kpi's had been achieved given that for some reason the Kpi's have been crossed out this makes the situation even more difficult.

[26] There were further emails between Mr Hicks and Mr Green on 17 June 2014. At 7.51 a.m. Mr Hicks emailed Mr Green stating: "... *To recap, David Rouse did confirm my PAYE would increase from NZ\$70,000.00 P.A to NZ\$80,000.00PA post my completing a mandatory three month probationary period. This has not eventuated*" Mr Green responded at 11.19 a.m.:

Thank you for your email Graeme, with regards to a pay review after three months I can find no record of this with the payroll office, can you forward to me a copy of the letter please. All three month reviews are subject to the probationary Kpi's being achieved (in the case of sales positions these are usually target number of machines on hire, target utilisation in % terms and hire revenues). These Kpi's will have been included in your original offer letter.

[27] Mr Hicks emailed Mr Green at 10.44 a.m. reiterating that Employment Agreement B had only partially corrected the errors in Employment Agreement A, and explaining that he had been asked by Ms Dougherty to sign and email Employment Agreement B in order to meet a payroll pay run deadline.

[28] The matter was not resolved between the parties and on 9 February 2015 Mr Hicks filed a Statement of Problem with the Authority.

Determination

Is Mr Hicks owed unpaid wages as a result of Instant Access not increasing his salary by the sum of \$10,000.00 per annum in respect of a promised salary increase?

[29] The Wages Protection Act 1983 defines wages as: “...*salary or wages, and includes time and piece wages, and overtime, bonus, or other special payments agreed to be paid to a worker for the performance of service or work*”. An employee may make a claim for wages due but not paid within a period of 6 years in accordance with s 11(2) of the Wages Protection Act 1983.

[30] The Employment Relations Act 2000 (the Act) states at s. 131:

131 Arrears

(1) Where-

(a) There has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement ...

The whole or any part, as the case may require, of any such wages or other money may be recovered by the employee by action commenced in the prescribed manner by the Authority.

[31] An employment agreement may either oral or in writing. A written employment agreement provides certainty to the terms and conditions of employment agreed between the parties.

[32] Mr Hicks claims that he was offered a salary of \$70,000.00 per annum plus a salary increase of \$10,000.00 per annum upon successful completion of a 90 day trial period.

[33] This agreement is not reflected in the employee requisition form signed by Ms Baker on behalf of Mr Rouse. Whilst it is possible that Ms Baker completed the employee requisition form and accidentally omitted to include the \$10,000.00 per annum salary increase reference, Mr Rouse and Mr Hicks did not take the opportunity to address the omission when they received Employment Agreement A, although in the email dated 29 January 2014 Mr Rouse requested other aspects, namely the job title and name details at the end, be amended.

[34] Upon receipt of Employment Agreement B, Mr Hicks initialled each page and signed and dated it. There is no evidence that either he or Mr Rouse raised the omission of the \$10,000.00 per annum increase upon successful completion of the 90 day trial period at that time.

[35] Whilst Mr Hicks may have relied upon Mr Rouse's representations as to the intention regarding the \$10,000.00 per annum salary increase, significantly Mr Hicks had initialled page 17 of Employment Agreement B containing clause 30.9 and 30.10 which state:

30.9 This agreement supersedes and replaces all prior representations and agreements concerning your employment with the Company.

30.10 Any amendment or addition to this contract must be in writing, and signed by both parties.

[36] Mr Hicks had signed and initialled page 18 of Employment Agreement B which stated:

The parties acknowledge that this agreement was negotiated fairly. You acknowledge you have read this agreement, and understand and accept it. You confirm that you have been given the opportunity and have had sufficient time to take independent advice about it and have raised and settled with us any issues you have about it.

[37] Employment Agreement B is dated 29 January 2014, Mr Hicks signed it and dated it 10 February 2014. Accordingly I find that there was sufficient time for him to have read it, considered it, taken independent advice and have raised any issues about it prior to initialling and signing it, however there is no evidence that he did so.

[38] Having considered all the circumstances I determine that Mr Hicks is not owed unpaid wages as a result of Instant Access failing to implement a salary increase of \$10,000.00 per annum.

Is Mr Hicks owed the sum of \$100.00 in respect of unpaid expenses?

[39] Employment Agreement B states at clause 7.4:

You shall be reimbursed for any expenses incurred by you on behalf of the Company, which have been approved in advance by the Company and on provision of receipts evidencing the expenditure.

[40] In the Statement in Reply Instant Access claim that it is usual for company employees to use their personal credit cards for business expenses and to be subsequently reimbursed for the expenses incurred whilst engaged on company business and it is not Instant Access' policy to reimburse personal credit cards fees as these are personal in nature.

[41] Mr Rouse states that Mr Hicks needed to use his personal credit card to meet expenses incurred whilst travelling on company business and he agreed on that basis that Instant Access would reimburse Mr Hicks' yearly Credit Card Account Fee.

[42] Mr Rouse refers to Mr Hicks needing to use his personal credit card to fund company business expenses which I find infers that Mr Hicks already had a personal credit card rather than being required by Instant Access to acquire one to meet company business expenses.

[43] There is no claim by Mr Hicks for non-payment of business expenses *per se* which implies that Instant Access refunded such company business expenses as were incurred in line with the clause in Employment Agreement B i.e. approved in advance and receipts provided.

[44] Mr Hicks believed that Mr Rouse had approved payment of the yearly credit card fee, a reasonable belief on the basis of the evidence in Mr Rouse's affidavit. Mr Rouse was Mr Hicks' immediate manager and I accept that Mr Hicks believed that Mr Rouse had the authority to authorise payment of his company expenses, and in particular the credit card annual fee

[45] In *Nelson v Porirua Community Law Resource Centre Incorporated*² the then Chief Judge Goddard set down the test to be applied in a situation in which there is an issue regarding ostensible authority:³

² [1993] 2 ERNZ 1109 (WEC39/93)

³ Ibid at page 17

“Ostensible means overt. The test is how did it look to the applicant? How would it have looked to any reasonable person in the same situation? ... The fact that as between them and the respondent there is a limitation of authority unknown to the applicant cannot be allowed to affect his position. It was up to the respondent to notify him of the existence of the limit.”

[46] I determine that Mr Hicks believed on reasonable grounds that Mr Rouse had the authority to authorise the payment of his annual credit card fee

Remedies

[47] I order that Instant Access pay Mr Hicks the sum of \$100.00 in respect of unpaid expenses.

Costs

[48] Costs are reserved. Given the extent to which both parties have been successful I am of a mind that costs should lie where they fall, however in the event that costs are sought, the parties are encouraged to resolve that question between themselves.

[49] If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority
