

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 184/07
AEA 251/05

BETWEEN PHILLIP HOUSTON
 Applicant

AND OLDCO PTI LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Penny Swarbrick, Counsel for Applicant
 Emma Butcher, Counsel for Respondent

Investigation Meeting: 19 and 22 May 2006

Submissions received: 17 July 2006 from Applicant
 12 October 2006 from Respondent

Determination: 20 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Phillip Houston has owned travel agency businesses since the 1980s. By the 2000s he had developed a large group of companies, BTI New Zealand Limited. In December 2002 BTI purchased Tek Travel. Pacific Travel Group (“PTG”) was created as a result of this purchase. By 2003 PTG was in financial difficulty.

[2] In April 2004 PTG’s bank, the ANZ, appointed Price Waterhouse Coopers (“PWC”) to review the group’s financial position. Changes in the structure and senior management of PTG followed. In June 2004 Tracey Meade was appointed CEO of PTG. PTG and PWC developed a debt restructuring plan over the succeeding months. Progress with the development of this plan stopped in December 2004 when Mr Houston refused to approve the proposed restructuring plan. Legal proceedings followed, the detail of which do not need to be canvassed in this determination. The

ANZ then placed Mr Houston's family trust ("HFT") into receivership. Sale of properties owned by HFT had originally formed part of the Bank's restructuring plan.

[3] This employment relationship problem arises from the events following the appointment of the receiver to HFT. The respondent, Oldco PTI Limited ("Oldco") is the successor company to PTG.

[4] Mr Houston says he was unjustifiably dismissed from his employment as Group Chief Executive Officer by Oldco PTI Limited ("Oldco") without notice or prior discussion on or about 21 December 2004. He says the respondent has failed to pay moneys due and owing under his employment agreement including holiday pay and expense reimbursement, has used his credit card without authority, failed to deal with him in good faith and caused further and unnecessary distress to him by its post dismissal actions.

[5] Mr Houston seeks the following: a finding that he was unjustifiably dismissed, an order that the respondent comply with the terms of his employment agreement and pay his 18 month remuneration package, payment of outstanding holiday pay, compensation for 18 months of lost benefits, reimbursement of expenses legitimately incurred on behalf of the respondent, compensation for hurt and humiliation consequent to his dismissal and an order for costs associated with this claim.

[6] Oldco disputes Mr Houston's claim. It says he was not an employee; that he did not hold the position of Group Chief Executive; that, if he is an employee that the terms of his employment are unclear and that Mr Houston was not dismissed but chose to resign his employment. Oldco says Mr Houston has received all moneys payable under his employment agreement including holiday pay. Oldco says there has been no failure to reimburse Mr Houston's legitimately incurred expenses, that his credit card has not been used without authority, that Oldco has not failed to deal with him fairly or in good faith and has not caused him distress by events following his resignation.

[7] This employment relationship problem was lodged in the Authority in March 2005. The parties attended mediation and an investigation meeting was scheduled for 13 October 2005. Prior to the investigation meeting Oldco applied for extensive

non-publication orders. Submissions in support and opposition to that application were made at the investigation meeting. The application was declined and the investigation meeting was adjourned pending a challenge to the Employment Court. That challenge was duly lodged and heard by the Court and dismissed in a judgment handed down on 28 March 2006. The Court held that it did not have jurisdiction to hear and decide Oldco's challenge by reason of section 179(5) Employment Relations Act 2000 and that in any event the challenge lacked merit. The Authority was able to reconvene its investigation meeting in May 2006. Submissions were subsequently filed.

[8] During the course of my investigation of this employment relationship problem I received evidence from Mr Houston, Ms Meade, Colin McCloy, of PWC, and Peter Chatfield, the appointed receiver.

Issues

[9] To determine this employment relationship problem the Authority must consider the following issues:

- (i) Was Mr Houston an employee?
- (ii) If so, what were the terms of his employment?
- (iii) Did Mr Houston resign or was he dismissed?; and
- (iv) If he was dismissed, was that dismissal unjustified?

Was Mr Houston an employee?

[10] Oldco says that Mr Houston's role within the group was solely as a director. The evidence in support of Oldco's claim that Mr Houston was not an employee is effectively that he was not doing the job the title states in the January employment agreement, that this was Ms Meade's job and that notwithstanding he did not appear to be doing any work. This is not convincing evidence that no employment relationship existed particularly in light of evidence given on behalf of the respondent that Mr Chatfield was advised an employment relationship existed between Mr Houston and BTI.

[11] Mr Houston had a written employment agreement (which one was in force at the relevant time will be considered below) and he received a salary. He was an employee.

What were the terms of Mr Houston's employment?

[12] Mr Houston says he and Oldco's predecessor, BTI New Zealand Limited, entered a written employment agreement on 27 January 2003. He has produced a copy of a document executed on that date. The document is signed by him on behalf of BTI and witnessed by the then chief executive officer of BTI. Given Mr Houston was the sole director of BTI, it is reasonable that he would sign the employment agreement on behalf of the company.

[13] Oldco says it is far from clear which employment agreement was in force at December 2004 because an unexecuted employment agreement dated August 2004 exists. Mr McCloy says the first he knew of the January agreement was when Mr Houston lodged his personal grievance.

[14] Mr Houston says he started to redraft his employment agreement and that of Ms Meade on August 2004, that that process was never completed and the relevant document is the signed and executed January 2003 employment agreement. Mr Houston said that he took a 25% pay cut in June 2004 and continued to be paid all allowances as per the January employment agreement. He says he continued to fulfil the duties of the position and that if there was a problem with it, then why had the company's concerns not been raised with him?

[15] The witnesses for Oldco could not give direct evidence of the execution of the January document. The original of the January document has not been located. Mr Houston says it is locked in a filing cabinet. Oldco says no such cabinet exists. There is no evidence that Ms Meade and Mr McCloy ever discussed with Mr Houston the legal basis of his salary and expenses payments.

[16] I find that the January employment agreement is the relevant employment agreement in force at the material times.

[17] For the purposes of this determination the relevant clauses of the agreement are:

No fault termination

- 8.5 *The Company and the Executive agree that it is essential for there to be a high degree of trust, co-operation and support for this employment relationship to be effective. There may be circumstances where, the Company considers its interests may be best served by replacing the Executive. For example, there may be circumstances where the Executive's skills, fitness for the job, abilities or attributes may no longer be appropriate following a change in then (sic) Company's requirements of the position. It may also be that the Company seeks a different style of leadership.*
- 8.6 *The parties agree that, in addition to the other termination rights provided for in this Agreement, the Company shall be entitled to terminate this Agreement without cause, or any fault by the Employee, and without working through any warning or disciplinary process, by requiring the Executive to resign and paying the Executive a gross payment equal to :*
- (i) *Eighteen (18) months total remuneration package.*

...

Redundancy

- 8.10 *If the Executive's position is surplus to the Company's requirements the Executive shall be entitled to eighteen (18) months' notice or the equivalent total remuneration package in lieu of notice."*

Did Mr Houston resign his employment?

[18] On the afternoon of 17 December 2004 Mr Houston meet with the receiver appointed by the ANZ, Peter Chatfield. The following resignation letter was prepared by Mr Chatfield (who later copied it to Mr McCloy) and signed by Mr Houston during that meeting:

"To the Shareholders of:

*Network Travel International Limited
Oldco PTI Limited
Oldco Business Limited
Pacific Travel Group Limited
BTI New Zealand Limited
Travel Online Limited
Tek Management Services Limited
Oldco TT Limited*

I, Phillip Eric Houston, hereby tender my resignation from all the above companies with immediate effect.

Dated this 17th day of December 2004.

*[Signed]
PE Houston”*

[19] Mr Houston says in signing this letter of resignation he resigned from the directorships of the companies. He says his letter was not a letter of resignation from his employment with BTI.

[20] Mr Chatfield says he made it clear to Mr Houston that he (Mr Houston) had little choice but to resign all involvement with the companies; that that was the condition the ANZ had made on providing any further financial support, which was required to keep BTI and the other companies in the group trading. He says Mr Houston understood this and was in no doubt that by resigning he would cease to be an officer and employee of any companies in the group.

[21] Mr Chatfield’s notes of that meeting have been made available to the Authority. Those notes refer to Mr Houston’s company directorships but not to his employment. The oral and written evidence does not establish that Mr Houston’s resignation from his employment was expressly discussed and agreed.

[22] It may well have been Mr Chatfield’s intention to convey to Mr Houston the necessity for him to resign his employment as well as his directorships however that intention has not been expressed in the letter of resignation. It is not clear, on the face of the resignation document, that the resignation applies to Mr Houston’s employment with BTI. The resignation document does not expressly refer to Mr Houston’s employment. The resignation document does not describe Mr Houston’s legal relationship with the listed companies. The common legal relationship Mr Houston held with those companies was of director. The only company he was employed by was BTI.

[23] For these reasons I find Mr Houston did not resign his employment on 17 December 2004.

Was Mr Houston dismissed?

[24] For the same reason I find Mr Houston was not dismissed on 17 December 2004. Neither the letter of resignation nor the discussion with Mr Chatfield expressly canvassed the need for Mr Houston to resign his employment with BTI.

[25] Mr Houston cleared out his office over the weekend and called in sick on Monday 20 December. He advised his secretary that he would be away until at least Wednesday.

[26] On Tuesday 21 December 2004 Mr Houston attempted to access his work system from home and was unable to. He emailed Ms Meade advising of the problem and asking whether this was a mistake or had been deliberately disconnected from the system. In the same email he advised Ms Meade that this situation was adding to the stress he was experiencing, reminded her he was on sick leave and required an urgent response.

[27] At about this time Mr Houston learnt Ms Meade had advised the senior management team to answer questions about the HFT by saying Mr Houston had personal financial problems which did not affect the business. Mr Houston wrote to Ms Meade on 22 December 2004 asking her to respond to him about the comments she had made about his financial position.

[28] Mr Houston then received a letter under Ms Meade's name dated 22 December 2004 which began:

“Dear Phil

*Following your resignation on Friday there are some practical issues to address
....”*

[29] Ms Meade's letter went on to discuss arrangements for the transfer of telephone and car leases from the company to Mr Houston, request the return of all company property, confirm that Mr Houston and his wife's salary payments would cease at date of resignation, that a one month's ex gratia payment would be made and ended:

“Communication

We have not made any general communications that you have left the business and believe it is (sic) everyone’s best interest to keep things as low key as possible. At this time only Senior Managers are aware of your resignation and it is our intention that we will respond only if asked directly of your position.

Should you have any questions or need clarification please let me know.”

[30] Mr Houston replied by email the same day advising that he had been forced to resign from his directorships and that he had not resigned his employment. He advised that he would seek advice on Ms Meade’s letter in the New Year, that he would take annual leave from Friday and would remain on sick leave until then.

[31] Ms Meade responded by email that same day:

“Phil,

We have now transitioned to “Newco” and you do not have an employment contract with this company, nor will you be offered one.

In terms of the “Oldco” environment we have copies of your resignation from all companies though this is largely moot at this point as the restructure has been completed.

I expect all company property returned as per my letter, by Friday 24th December. As regards your question on VPN access, it has been turned off as per our computer policy.

I suggest if you have any further questions you get in touch with one of our Directors.”

[32] Ms Meade understood Mr Houston resigned his employment on 17 December. As discussed above this did not occur on 17 December. Mr Houston advised Ms Meade of this on 22 December. By this stage his computer access had been cut off and all staff and assets had been moved to another legal entity. Clearly Mr Houston’s employment had ended by initiative of the employer.

[33] The business had moved on without Mr Houston – he was redundant. Mr Houston is entitled to 18 months’ remuneration as per clause 8.10 of the January employment agreement.

Holiday pay

[34] Mr Houston has not been paid holiday pay. He said at the investigation meeting that he is owed about 50 days accrued annual leave. Ms Meade said Mr Houston was not entitled to any payment of annual leave because he hardly attended work during 2004.

[35] Subsequent to the investigation meeting the respondent provided a summary of an annual leave balance for Mr Houston. The balance is 46.53 days.

[36] Mr Houston is entitled to be paid outstanding holiday pay and I so order.

Expenses

[37] Mr Houston seeks orders for the reimbursement of the following expenses he says he legitimately incurred during the course of his employment - \$667.43 and \$1100.

[38] Mr Houston's claim for payment of these sums was declined by the respondent. The basis for declining the amounts is that they were understood to be for personal use and not work related. Mr Houston disputes this; he says they were work related expenses.

[39] I cannot see how the respondent is in any position to challenge Mr Houston's evidence that the costs were work related. If it had been then I would have expected the evidence to have been provided at the Authority investigation meeting. An email exchange between Murray Page, the Chief Financial Officer, and Mr Houston provided to the Authority refers to Ms Meade not being aware that the claimed expenses are legitimate company expenses. Clearly this matter was referred to Ms Meade. Ms Meade did not provide any detailed reasons why the expense claims were declined.

[40] Mr Houston provided explanations for the expenses incurred, these explanations were provided to respondent, and there is no evidence that the

explanations were not legitimate. Mr Houston is entitled to be reimbursed for the sums claimed, to the total \$667.43 and \$1100 and I so order.

Remuneration

[40] Mr Houston is entitled to a payment of an equivalent amount of his 18 months' total remuneration package. The details of that remuneration package are set out in schedule 2 of the January employment agreement and include:

- (i) \$300,000 salary, \$50,000 of which is paid to Mrs Houston (reduced by 25% to \$237,000 - \$187,500 plus \$50,000);
- (ii) Vehicle lease of up to \$45,000 per annum, plus expenses allowance of \$6000;
- (iii) Directors and officers liability insurance and travel insurance (claimed at \$120.00 pa);
- (iv) Life and disability insurance (claimed at \$184.20 per month);
- (v) Southern Cross Ultra Care family cover (claimed at \$2956.00 per annum);
- (vi) Personal overseas travel to the value of \$30,000 per annum;
- (vii) Home internet (claimed at \$143.90 per month); and
- (viii) Mobile telephone (claimed at \$38.25 per month); and
- (ix) Sim card (claimed at \$10 per month).

[41] Mr Houston's 18 month remuneration package totals \$494,688.30. These figures have not been challenged by the respondent. I accept they are accurate.

[42] Mr Houston gave evidence that the airfare component covers domestic travel as well as international travel. He says this was the invariable practise of the respondent and this is what his employment agreement should say. However, that is not what the employment agreement says. There will be no order to vary the employment agreement to include domestic travel.

[43] The respondent is ordered to pay Mr Houston the sum of \$494,688.30 (gross) with those portions identified as non-taxable remaining so. This sum is a contractual entitlement. No issue of contribution arises.

Compensation for hurt and humiliation

[44] Mr Houston was made redundant. There is no dispute that there was no consultation about that process. It would be usual that an award for compensation for hurt and humiliation would flow from such circumstances. However, the facts of this employment relationship problem are not usual. It is clear from the evidence that by mid December 2004 the relationship between the parties was in serious difficulties. Mr Houston's understandable activity to take the steps he thought appropriate to save his business put him at odds with the steps the Bank and senior executives of the company were taking to also meet that goal.

[45] Having considered all the evidence it is not appropriate to make any order for hurt and humiliation pursuant to section 123(1)(c)(i).

[46] Oldco's claim of conduct amounting to serious misconduct by Mr Houston arises from the circumstances leading up to his dismissal. Given that no award for compensatory damages will be made there is no requirement to inquire further into these issues.

Good faith obligations

[47] Mr Houston asserts that Oldco have breached the good faith obligations owed to him and exacerbated his distress by its attempts to stop him receiving his contractual entitlements and continually referring to the parlous state of the respondent company's finances in a situation where the group must be meeting legal and accounting costs.

[48] Oldco says these assertions are baseless and that the Authority cannot make the ruling sought as to how the respondent's legal fees are paid.

[49] There is insufficient evidence to make the findings sought in relation to the respondent's conduct, in good faith or otherwise, towards Mr Houston. I can take this issue no further.

Compliance orders

[50] The application for compliance orders requiring the respondent to comply with its contractual obligations, including holiday pay is declined. I am not satisfied that the circumstances warrant compliance orders at this stage either against the respondent or directors of the respondent company.

Costs

[51] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If these attempts are unsuccessful a timetable will be set on application.

Marija Urlich

Member of the Employment Relations Authority