

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 191
3112852

BETWEEN ZAID ISMAIL
 Applicant

AND HEARTLAB LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Dave Vinnicombe, advocate for the Applicant
 Daniel Erickson and Tanzam Hossain, counsel for the
 Respondent

Investigation Meeting: 24 June 2021 in Auckland

Submissions [and further On the day and in writing from both parties
Information] Received:

Date of Determination: 9 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Zaid Ismail claims he was unjustifiably dismissed from his employment with HeartLab Limited on 25 June 2020. He seeks wages, compensation and payment for the value of shares in HeartLab as well as reimbursement of legal costs.

[2] HeartLab Limited (HeartLab or the company) denies it was in an employment relationship with Mr Ismail and says the Authority has no jurisdiction to determine his claims.

[3] This determination deals only with the issue of Mr Ismail's employment status. If he is found to have been an employee of HeartLab, the Authority will refer the parties back to

mediation. If he is found not to have been an employee, the Authority will dismiss his application for lack of jurisdiction to consider it further.

The parties

[4] Mr Ismail has a background in technology, sales and management. He has worked in industries in New Zealand and overseas covering corporate development, management and enterprise sales. Mr Ismail describes himself as having a passion for innovation and says he has personally established more than five start-up companies over the last decade, two of which were in the health/medical technology industries.

[5] HeartLab is a company that develops artificial intelligence software for analysing and interpreting data obtained from echo cardiograms. It was started by Will Hewitt in 2018 while he was a student at the University of Auckland. Mr Hewitt is the founder, Chief Executive Officer, and majority shareholder of HeartLab. Dr Patrick Gladding, a cardiologist, has also been involved in the company from the outset.

Legal considerations

[6] Section 6 of the Employment Relations Act 2000 (the Act) confirms the meaning of employee and provides, at s 6(2), that:

In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

[7] In order to determine the real nature of the relationship the court or Authority:

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.¹

[8] The Supreme Court judgment in *Bryson v Three Foot Six Limited* (No. 2) remains a leading case in determining the real nature of the relationship.² In that case the Court held that: “all relevant matters” included the written and oral terms of the contract between the parties and the way it operated in practice.³ It required the court or Authority to “have regard to

¹ Section 6(3) of the Act.

² [2005] ERNZ 372.

³ Above at [32].

features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test)".

The Authority's investigation

[9] In the course of the investigation meeting, I heard evidence from Mr Hewitt and Mr Ismail and submissions made by their respective representatives. I have not set out all the evidence and submissions heard but have instead, in accordance with s 174E of the Act, set out the material facts and made findings on issues relevant to the determination of Mr Ismail's claim to have been an employee.

[10] The determination has been issued outside the timeframe at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Relevant background, events and evidence

[11] Mr Ismail and Mr Hewitt were already acquainted with each other when, in December 2019, HeartLab advertised for a Business Development Manager. Mr Ismail was in full-time employment in Sydney, as well as running a start-up company he had established, but happened to be visiting Auckland at this time. After indicating his interest in the position, he and Mr Hewitt met on 18 December 2019 to discuss the possibility that he join HeartLab.

[12] They continued communicating after Mr Ismail returned to Sydney. HeartLab was in a capital-raising stage and Mr Ismail provided some contacts and suggestions to Mr Hewitt to accelerate the process of finding investors.

[13] Mr Hewitt described his discussions with Mr Ismail as informal and said nothing was agreed at the time. He understood Mr Ismail was providing friendly advice and there were no formal arrangements between them.

[14] Mr Ismail told the Authority he was undertaking work in good faith on the understanding it would translate to employment.

[15] In late January 2020, Mr Ismail informed Mr Hewitt that he had resigned from his position in Sydney and would be returning to Auckland to live as that was best for his family.

It was clear from email that he was unsure what he would be doing but saw an involvement in HeartLab as one possibility.

[16] Mr Hewitt shared that view and emailed Mr Ismail a Mutual Confidentiality Agreement (the NDA) saying “*Lets get things rolling!*” Mr Ismail signed and returned the NDA on 20 March 2020 and returned to New Zealand on 22 March 2020.

[17] Mr Hewitt responded to the signed NDA by emailing Mr Ismail with his view of what the next steps would be, the first being to get Mr Ismail more familiar with the company. Mr Hewitt said that, with the NDA signed, he could now be more open about sharing “*financials, contracts, relationships etc and some of the behind the scenes stuff.*” He immediately began making that information available to Mr Ismail.

[18] The next step was “*figuring out exactly how your (Mr Ismail’s) role looks*”. Mr Hewitt’s email referred to a telephone conversation between himself and Mr Ismail that morning in which Mr Hewitt had proposed two options. These were either:

“...low salary upfront, with equity available or the guarantee of a role at more market salary with a better chunk of equity post successful raise.”

[19] Mr Hewitt asked Mr Ismail which option he preferred and indicated that, if he chose the first option, that would need to be run past Dr Gladding, who was a Director of HeartLab at the time, as it was money set aside for technical resource. If he chose the second option, Mr Hewitt said it would be good to get an indication from Mr Ismail of the timeframe he could “*sustain that model for before you would need to start taking on a paid role, or whether you’d look to part time HeartLab until a raise was there that could support a larger paycheck*”.

[20] Mr Ismail’s response on 22 March 2020 included the following:

With respect to remuneration, I have HeartLab’s best interest at heart above all things. I am going to give it more thought and propose some options that align with your suggestions above. What I can comfortably and confidently say is having skin in the business is of much greater weighting to me than a salary right now. I have strategic long term ambitions for HeartLab and believe it’s a risk worth taking with you.

[21] By “*skin in the business*” Mr Ismail confirmed during the Authority’s investigation that he was referring to having a shareholding. He and Mr Hewitt agree that on 24 March 2020 Mr Ismail started work for HeartLab. Their recollections differ about a number of other matters, however.

[22] Mr Ismail recalls Mr Hewitt predicting that, if he chose equity over salary, he would likely be working without pay for at least four months. Mr Ismail said he accepted that on the basis of an undertaking from Mr Hewitt that he would be paid back pay for the months he had worked. With regard to shareholding, Mr Ismail is adamant Mr Hewitt offered 15 percent shareholding in HeartLab on 24 March 2010 for his skills and experience and for taking on the risk that Mr Ismail said he accepted. He agreed that was not recorded in writing.

[23] Mr Hewitt's recollection is that he told Mr Ismail the possibility of a salary being paid was subject to HeartLab being able to raise sufficient capital. Mr Hewitt does not believe they discussed back pay at this time. Mr Hewitt says he discussed the possibility of Mr Ismail taking a shareholding in HeartLab of up to 15 percent. He told Mr Ismail the arrangement would be subject to a number of details being formalised and there would be some conditions attached to any shareholding, such as the vesting of shares over time and the achievement of unspecified milestones. He said they did not discuss the details of those matters at that time.

[24] Mr Hewitt said he expected an arrangement over shareholding would be formalised and that Mr Ismail's financial reward for the work he was doing for HeartLab would be the payment for his shares when there was a subsequent liquidity event. Mr Hewitt's understanding was that Mr Ismail was taking a risk on the success of the company, just as he himself was: if HeartLab did not succeed, there would be no significant liquidity event and the work he did would be largely unrewarded.

[25] On 26 March 2020 Mr Hewitt sent Mr Ismail a template Co-Founder Agreement, advising that the document needed to be finalised and agreed. It had been agreed between them that Mr Ismail's title would be Chief Operating Officer (COO) in the company. Mr Hewitt also referred to Mr Ismail as a partner/co-founder. In a Team Chat message that day Mr Hewitt referred to needing time to "turnaround" the Agreement with the company's accountant and then lawyer.

[26] Over the next two months both Mr Ismail and Mr Hewitt worked from their respective homes during the first national level 4 Covid-19 lockdown. Little appears to have happened to formalise the working arrangement but on 13 April 2020 Mr Ismail posted on his LinkedIn page that he had joined HeartLab as Chief Operating Officer and Co-Founder. Mr Hewitt responded to the post with a "*clapping*" emoji, signifying his approval of it.

[27] On 21, 22 and 25 May 2020 the two men spoke again, with HeartLab's legal advisor at the time, Arran Hunt, also taking part in the 25 May discussion. Mr Ismail recorded the latter two Zoom call conversations without Mr Hewitt's knowledge.⁴ By this stage it had become clear to Mr Hewitt there were restrictions on his ability to transfer to Mr Ismail the 15 percent shareholding they had previously discussed. When he communicated to Mr Ismail that 15 percent no longer seemed possible, Mr Ismail expressed his view that, while they had to operate within the legal parameters, he wanted to ensure his share was fair within the framework. He also said:

“...I don't want to do a 180 turn where it's all about hey um you're another number with a very small equity and...you get a salary, I mean that's never been my intention...”

[28] In the 25 May 2020 Zoom call, Mr Hewitt, Mr Ismail and Mr Hunt further discussed the restrictions on transferring equity to the extent Mr Ismail was seeking and the option of Mr Ismail taking shares under an Employee Share Option Plan (ESOP) which could only be offered in connection with an employment agreement. Mr Hewitt conveyed to Mr Ismail that a three percent shareholding could be offered, which Mr Ismail described as very weak. The conversation ended with no resolution but with Mr Ismail saying he would take some advice on the matter.

[29] Further discussions took place between Mr Ismail and Mr Hewitt in late May and early June 2020, including a discussion of the possibility of a five percent equity transfer to Mr Ismail and five percent ESOP.

[30] On 24 June 2020 Mr Hewitt phoned Mr Ismail to update him about a discussion he had had with the newly appointed Independent Director of HeartLab who had advised Mr Hewitt of the unlikelihood of other stakeholders approving the transfer of any shareholding to Mr Ismail of greater than five percent. The new director had also advised Mr Hewitt that HeartLab should engage a COO who was based in the US, or with considerable experience in the US, as it was in that arena that HeartLab would be focussing its efforts.

[31] Mr Hewitt says he made it clear to Mr Ismail during their conversation on 24 June 2020 that they could explore the option of paying him a salary as an employee as well as taking the smaller shareholding. Mr Ismail was disappointed by this and asked if he could work from

⁴ Copies of the voice recordings and transcripts of them, and of later calls recorded by Mr Ismail, were made available to the Authority.

home while their discussions continued. That was agreed between them although Mr Hewitt's view was that Mr Ismail did not require his permission.

[32] The following day Mr Ismail phoned Mr Hewitt and advised him he had taken legal advice about the situation and had been recommended to pursue legal action for a 15 percent shareholding in HeartLab. Mr Ismail made it clear he intended to take that advice; he was not willing to negotiate any further; and would only accept a 15 percent shareholding and "*backpay from day one at a market rate.*"⁵

[33] Events occurred the following day resulting in the severing of Mr Ismail's involvement in HeartLab. As those events are not relevant to the issue of Mr Ismail's status it is not necessary for them to be disclosed in this determination.

What was the real nature of the relationship between Mr Ismail and HeartLab?

The intention of the parties

[34] As noted earlier, this is a relevant factor, but not determinative of the relationship. It was clear from Mr Ismail's evidence that his attraction to being involved with HeartLab was sparked by his experience and enthusiasm for establishing start-up companies in the technology area, especially in the technology/health area. I conclude he was enthusiastic from the outset about HeartLab's potential and keen to assist it in its capital-raising stage, with an eye to his future participation in the company's success.

[35] It is fair to say Mr Hewitt, who is younger and less experienced than Mr Ismail, was pleased to benefit from the knowledge and skill that Mr Ismail could offer HeartLab, and was open to exploring a relationship between the company and him.

[36] In December 2019 when Mr Ismail and Mr Hewitt began their discussions, there is no evidence to support an intention from either party to form an employment relationship. Mr Ismail was working in Sydney and there was no indication that he intended returning to New Zealand. I find at this stage there was a mutual interest in keeping contact and exploring if and how their interests might align but I would not put it more strongly than that.

⁵ From transcript of the voice recording Mr Ismail made of his 25 June 2020 telephone discussion with Mr Hewitt..

[37] At the end of January 2020 when Mr Ismail informed Mr Hewitt of his resignation from his work in Sydney and his intention to return to Auckland, he attributed his decision to family reasons. Mr Ismail's email included the words "*...if it's HeartLab next or something else...*", which signifies his involvement with the company was just one of a number of possibilities for him.

[38] By 20 March 2020 it was clear from Mr Hewitt's request that Mr Ismail sign an NDA that he was interested in a continuing relationship, the form of which was as yet undefined. Mr Hewitt's discussion with Mr Ismail that day, and his follow up email presenting options, further evidenced his interest in exploring the form Mr Ismail's relationship with HeartLab could take.

[39] The two options Mr Hewitt offered in that email were: either a "*low salary upfront*" but with a shareholding in the company; or the "*guarantee of a role at more market salary*" when the company could afford it, with a shareholding to be taken later as well. Both of those options could entail an employment relationship or a contract for service arrangement. Mr Ismail's response that he was more interested in a shareholding than a salary signals where his focus lay. The shareholding was the most important factor for him.

[40] Mr Ismail's responses to the slowly evolving situation over the next three months do not suggest any change to his main focus, which was to obtain a significant shareholding in the company. When it became clear that a lower shareholding, connected to an employment agreement, was the only option on the table, Mr Ismail was no longer willing to negotiate.

[41] I find there was no mutual intention by the parties to enter into an employment relationship. Their initial discussions were focussed more on how the fledgling start-up could attract investors rather on the form their relationship might take. As discussions progressed, employment became an option, but not one Mr Ismail was willing to accept unless HeartLab met his condition of a 15 percent shareholding. HeartLab also saw employment as an option but was not willing to accept the condition Mr Ismail specified.

Control test

[42] The work Mr Ismail was doing for the company mainly concerned research into the United States market, where HeartLab wished to focus its efforts. Mr Ismail undertook preliminary financial modelling and initiating contact with clinicians in the US as part of that.

[43] Both men gave evidence of being in contact on a daily basis. Mr Hewitt said they both came up with ideas as to what Mr Ismail could do. I accept that evidence, on the basis it is more likely than not that Mr Ismail, with his personal experience of having established a number of start-ups, was more knowledgeable than Mr Hewitt about what was required in the early capital- raising stages. I accept Mr Hewitt's evidence of being comfortable to let Mr Ismail get on with what he was working on for the most part.

[44] Mr Ismail asserted that he worked from 9 a.m. to after 5 p.m. five days a week and in the weekends as well when work required it. He said he had to ask permission from Mr Hewitt if he wanted to take personal time off or was ill. Mr Hewitt denied he had asked Mr Ismail to work specific hours or that there was any requirement for Mr Ismail to ask permission for time off on personal matters or for illness. I find it more likely that Mr Ismail alerted Mr Hewitt to times he would not be available as a matter of courtesy rather than obligation.

[45] While the work Mr Ismail was undertaking would have been within broad parameters set by Mr Hewitt, I am not persuaded there was a high degree of day to day control by Mr Hewitt of that work.

Integration test

[46] The integration test entails examining factors such as whether the person was performing a role that was part and parcel of the business or whether it was more of an adjunct to the business. Where the person is performing the former type of role they are more likely to be considered to be an employee.

[47] Mr Hewitt acknowledged in submissions that Mr Ismail was integrated into the business during his time with the company. I agree. However, I do not find it to be determinative when assessing the type of relationship he had with the company.

[48] Mr Ismail's efforts were part of the groundwork needed to assist HeartLab achieve its aspiration of entering the US market and successfully launching its product there. His work was aimed at increasing the spread of the product, which would affect the company's future profitability. That would positively affect the value of the shareholding Mr Ismail was hoping to acquire.

[49] I do not consider in the particular circumstances that Mr Ismail's integration into the business of HeartLab necessarily meant that he had an employment relationship with the company.

Fundamental test

[50] This test examines whether Mr Ismail performed work as someone in business on his own account or not.

[51] Mr Ismail, by the account he gave of himself, is an entrepreneurial person who has a history of establishing start-up enterprises. He referred in evidence to sweat equity and agreed under questioning that he was content to forego salary for a trade off in equity, which he saw as the more profitable option.

[52] He was emphatic Mr Hewitt had offered him a 15 percent shareholding in the company in recognition of the benefit he had brought to HeartLab between January and March 2020. I prefer Mr Hewitt's evidence that he spoke of an up to 15 percent shareholding, with conditions attached that had been outlined but not detailed in their discussions. While Mr Ismail was the more experienced of the two, from my observation Mr Hewitt was the more considered of them. He was aware of his inexperience in business matters and was unwilling to commit the company without the approval of his fellow director.

[53] Mr Ismail did not raise his belief that he was an employee until the latter stages of the breakdown of his relationship with Mr Hewitt. He made clear his preference for having "*skin in the game*" over salary throughout his discussions with Mr Hewitt and in the final discussions that he recorded Mr Ismail tried very hard to persuade Mr Hewitt to find a way to make the 15 percent a reality.

[54] Taking these factors into account, I find Mr Ismail's efforts for HeartLab was for the main purpose of increasing the company's viability as that would benefit him in the longer term. I find he performed that work on his own account.

[55] Mr Ismail took the risk of not receiving payment for his work because he anticipated receiving a 15 percent shareholding in the company which was potentially worth far more.

Conclusion

[56] Mr Ismail was not an employee of HeartLab Limited and I have no jurisdiction to further consider his claim.

Costs

[57] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[58] If they are not able to do so and an Authority determination is needed, HeartLab may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Ismail would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[59] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Trish MacKinnon
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].