

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Damian Kennedy (Applicant)

AND Dean Stockman (First Respondent)
AND Human Resources Integrated Solutions Limited (Second Respondent)

REPRESENTATIVES Kristina Andersen, counsel for the applicant
No appearance for the respondents

MEMBER OF AUTHORITY Marija Urlich

INVESTIGATION MEETING 2 May 2006

DATE OF DETERMINATION 16 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Damien Kennedy says that he was unjustifiably dismissed from his employment with Dean Stockman or Human Resources Integrated Solutions Limited (HRIS) on 7 July 2005. He says he was an employee of one of the named respondents for one month from 1 July 2005, but is unsure which because the identities were used interchangeably by Mr Stockman. Mr Kennedy seeks reimbursement of lost wages, payment of notice and compensation for hurt and humiliation consequent to his dismissal.

[2] The respondents' statement of reply states that; Mr Kennedy had been a contractor to HRIS and became an employee after a verbal agreement to sell software to a client had been achieved, no formal agreement was made in relation to Mr Kennedy's employment, but that HRIS was the employer and Mr Stockman was acting as a director of HRIS at all times, the employment relationship ended because of Mr Kennedy's behaviour and Mr Kennedy's final pay has been withheld because he retains property of HRIS.

[3] The Authority has not received any evidence from the respondents because they did not attend the investigation meeting. No adjournment was sought. The investigation meeting started 15 minutes after the scheduled start time to accommodate possible lateness on behalf of the respondents. I am satisfied that the respondents were served with the notice of investigation meeting.

[4] To resolve this employment relationship problem the Authority must determine whether Mr Kennedy was an employee from 1 July 2005, if he was, then who was his employer, and whether his dismissal was unjustified.

Issues

(i) Was Mr Kennedy an employee from 1 July 2005?

[5] Mr Kennedy gave evidence that in May 2005 Mr Stockman asked him if he would become an employee. The software, that he had been contracted to develop since November 2004, was now a working product and Mr Stockman proposed that Mr Kennedy become the development manager.

[6] Mr Kennedy said they agreed to an annual salary of \$80,000, to be paid on the 25th of the month, that Mr Kennedy would work from an office located in Mr Stockman's residence and that the start date of employment would be 1 July 2005. This evidence was not challenged. I accept that Mr Kennedy agreed to become an employee from 1 July 2005.

(ii) Who employed Mr Kennedy?

[7] Mr Kennedy says he is unclear who employed him and that is why he has named Mr Stockman personally and Human Resources Integrated Solutions Limited, a company of which Mr Stockman is the sole director and shareholder, as the respondents. There is no dispute that Mr Kennedy did not have a written employment agreement and has not been paid for the period of his employment.

[8] In November 2005, at the outset of the contracting relationship Mr Stockman presented Mr Kennedy with a contract agreement, the parties to which were Mr Kennedy and Human Resources Integrated Solutions Ltd. This agreement was never executed because Mr Stockman told Mr Kennedy that he wanted to amend the document but these amendments were never presented. Mr Kennedy's bank records show that from December to May his invoices were paid by HRIS and that the last payments received in June and August were made by Mr Stockman personally.

[9] It does not necessarily follow that because on the evidence received by the Authority, it is more likely that a contracting relationship existed between Mr Kennedy and HRIS, that those were the parties to the employment relationship. However, given the proximity of these relationships, that Mr Kennedy and Mr Stockman discussed the possibility of a shareholding in HRIS and Mr Stockman's electronic signature was "Director, HRIS Limited" I find it was clear Mr Stockman was acting as a representative of a company whose identity was known to Mr Kennedy. Mr Kennedy is entitled to name Human Resources Integrated Solutions Limited as his employer.

[10] In failing to provide Mr Kennedy with a written employment agreement HRIS has breached its obligations under section 65 of the Employment Relations Act 2000. Mr Kennedy has not sought a penalty and I decline to do so; while this failure has caused uncertainty in relation to this claim I am not satisfied that it occasioned any disadvantage to Mr Kennedy during his employment.

(iii) Was Mr Kennedy unjustifiably dismissed?

[11] Mr Kennedy emailed Mr Stockman on 7 July reminding him that his invoices for April and May remained outstanding. Mr Stockman replied by email at 3.38pm that same day:

"Many thanks for your email and concerns. As I (sic) of today I am postponing all activities, and can no longer afford your contract past the end of this month in any case until the NSU has been returned.

...

This does not affect your stake-holding in the company and I have no doubts about the NSU, it is a matter of timing, however, my finances are in no condition at present to keep employing someone. Once this situation has improved, I am more than willing to employ you on a full time basis."

[12] I accept Ms Andersen's submission that the effect of Mr Stockman's email was to dismiss Mr Kennedy. Mr Stockman gives Mr Kennedy three weeks notice of his dismissal. The stated reason is he can not afford to employ him beyond the end of July due to his financial situation.

[13] Over the following days Mr Kennedy and Mr Stockman agreed that Mr Kennedy would remain working until the end of July. Following the 7 July email, which I have found was a dismissal, Mr Stockman wrote to Mr Kennedy asserting he had resigned and that he would not accept his resignation. Mr Kennedy says this was an attempt by Mr Stockman to rewrite the dismissal as a resignation. Mr Kennedy emailed Mr Stockman on 11 July that he did not want to work somewhere where he was fired one day and hired the next. This was a reasonable comment in the circumstances.

[14] Mr Kennedy had had no indication prior to his dismissal that the business could not afford to pay him; before agreeing to become an employee Mr Kennedy had discussed with Mr Stockman the financing of the business, and had been told that though in a start-up phase the business had the necessary financial support. There was no discussion with Mr Kennedy as to the reasons for dismissal and he was not given an opportunity to comment. Mr Kennedy's dismissal was unjustified.

Remedies

[15] Mr Kennedy has established that he was an employee, that he was dismissed and that that dismissal was unjustified. He is therefore entitled to a consideration of the remedies he seeks.

[16] Mr Kennedy's salary for July 2005 remains outstanding and he is entitled to that payment at the rate of \$6666.66 (gross). No lawful grounds exist for HRIS to retain these wages.

[17] Human Resources Integrated Solutions Limited is ordered to pay Mr Kennedy the sum of \$6666.66(gross) in outstanding salary pursuant to section 131 of the Employment Relations Act 2000.

[18] Mr Kennedy seeks payment of one month's salary in lieu of notice. There was no written employment agreement. While there was no evidence the parties had agreed on a period of notice they had agreed Mr Kennedy's salary would be paid on the 25th of the month. Reasonable notice in the circumstances would be one month. Following the 7 July dismissal Mr Kennedy negotiated a leaving date with Mr Stockman of 28 July, effectively a notice period. There is no basis for an order that a notice period in addition to that negotiated by the parties should be ordered.

[19] Mr Kennedy seeks compensation for hurt and humiliation caused as a consequence of his dismissal. He was employed for a period of one week. The dismissal was the response to Mr Kennedy's reminder that a payment from the former contractual relationship remained outstanding. The dismissal was abrupt and unexpected. The email record shows that Mr Kennedy continued to work diligently through the remaining period of his employment and that it was necessary to assert he had been dismissed when Mr Stockman attempted to rename it a resignation. I accept this aggravated what was already an unsatisfactory situation for Mr Kennedy.

[20] Human Resources Integrated Solutions Limited is ordered to pay Mr Kennedy the sum of \$1500 in compensation for hurt and humiliation caused as a consequence of his dismissal.

[22] The claims in the statement of reply that Mr Kennedy retains property of HRIS cannot be dealt with in this determination.

Costs

[23] Costs are reserved. Ms Andersen may file costs memorandum within 14 days of the date of this determination. HRIS may file a memorandum in reply within a further 14 days.

Marija Urlich
Member of Employment Relations Authority