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McPherson v EM Solutions Limited AA507/10 (Auckland) [2010] NZERA 914 (10 December 2010)

Last Updated: 17 December 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 507/10 5275416

BETWEEN

AND

ALLAN McPHERSON Applicant

EM SOLUTIONS LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Alastair Dumbleton

Applicant in person

No appearance for Respondent

9 December 2010

10 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Allan McPherson, lodged a claim with the Authority on 30 October 2009. In it he sought to recover from the respondent company, EM Solutions Limited, unpaid wages, payment in lieu of notice and annual holiday pay.

[2] A director of EM Solutions Ltd, Ms Zita Cross, responded to the application on behalf of the company.

[3] The parties went to mediation and apparently there were real prospects of the claims being settled. Settlement was pursued by the mediator, even after the mediation was held.

[4] When settlement remained unconcluded, Mr McPherson asked the Authority to investigate his claim but by then EM Solutions Ltd had been removed from the Register of Companies.

[5] Mr McPherson applied to have the company restored to the Register, on the grounds under [s 328](#) of the [Companies Act 1993](#) that at the time it was deregistered the company remained a party to legal proceedings.

[6] After paying the fee of \$200, Mr McPherson had the company restored, on

8 November 2010.

[7] Notice of an investigation meeting was then served on the restored company and although there was no appearance by or on behalf of it, email correspondence received shortly before the meeting from Zita Cross confirms that she was aware of the meeting. She advised that, for various personal reasons which the Authority accepts, she was unable to attend in person at

the investigation meeting but offered to speak by telephone if required.

[8] In the circumstances, I did not consider it necessary to call Ms Cross and ask her any questions, as there never has been any real dispute that Mr McPherson is owed the money he has claimed. Ms Cross has explained in recent correspondence how the company found itself unable to pay wages due at the end of Mr McPherson's employment, and why it could not perform the undertaking in the written employment agreement to give him 30 days' notice if terminating the employment on the grounds of redundancy. She has also explained that the financial situation prevented the company from paying holiday pay to Mr McPherson.

[9] On 25 June 2009, after Mr McPherson had been employed almost a year as a Fitness Instructor, Ms Cross wrote to him advising that with immediate effect his position was redundant. She referred to the extreme financial difficulties the company had found itself in and advised:

I will deduct the 18 work hours owed to us from your current annual leave and will discuss options with the Department of Labour and WINZ as to how this could potentially be paid back to you. As at present we have no funds to pay for this annual leave and will be working hard to try and pay your last fortnight and hours up until today back to you.

[10] As to the termination with immediate effect, clause 12.1 of the individual employment agreement provided that the employer EM Solutions Limited t/a Shape Up Studio could terminate for cause by giving 30 days' notice in writing to the employee Mr McPherson.

[11] Mr McPherson confirmed to the Authority that since the employment ended in June 2009 he has received no payment from EM Solutions Ltd in satisfaction of the debt for unpaid wages, payment in lieu of notice or holiday pay.

Determination

[12] The Authority is satisfied that the claims by Mr McPherson have been made out and that he is entitled to recover from EM Solutions Ltd the money owed to him.

[13] The employment agreement provided that Mr McPherson was to be employed for 30 hours per week at \$14 per hour. Pay advice sheets he has produced show that he was consistently paid fortnightly on that basis throughout the period of his employment of about 47 weeks.

[14] Three weeks' unpaid wages amounts to \$1,260 gross. The 30 day notice period I have taken to include eight non-work weekend days leaving 22 work days, for which the amount due is \$1,848 gross.

[15] I have calculated Mr McPherson's total gross earnings for the period of employment and calculated proportionate annual holiday pay at 8%. After allowing for the 18 hours on which Mr McPherson did not work but was paid for the amount due is \$1,467 gross.

[16] The total therefore due is \$4,575. The Authority orders EM Solutions Limited to pay that amount to Mr Allan McPherson. In addition the company is to pay the \$70 fee charged for bringing his claim and also the expense he incurred of \$200 in having the company restored to the Register.

A Dumbleton

Member of the Employment Relations Authority