

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZ ERA Auckland 128  
5367414

BETWEEN

OXYGEN BUSINESS  
SOLUTIONS LIMITED  
Applicant

AND

EDUARDO MARTINEZ  
GARCIA aka EDUARDO  
MARTINEZ  
Respondent

Member of Authority: R A Monaghan

Representatives: R Price, counsel for applicant  
R Crotty, counsel for respondent

Determination: 13<sup>th</sup> April 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Oxygen Business Solutions Limited (OBSL) seeks:

- a. a declaration that its former employee, Eduardo Martinez Garcia aka Eduardo Martinez, has breached the terms of his employment agreement by failing to make payments owed under the agreement; and
- b. an order that Mr Martinez comply with the terms of the parties' written employment agreement by making the payments immediately.

[2] The amount sought was quantified as \$33,770, comprising the repayment of: a sign on bonus of \$5,000; \$28,555 in relocation costs (being the relocation of Mr Martinez and his family from their home country of Mexico to New Zealand); and \$215 being an overpayment of salary.

[3] There was no dispute as to liability or quantum. Rather the statement in reply asserted that the amounts claimed were payable 'when the non-compete provision is

no longer enforced by the applicant; then on an instalment basis reasonably maintainable in accordance with the respondent's income'.

[4] The reply said further that the employment agreement did not specify a period within which the payments were to be made, so that a reasonable period must be inferred having regard to all the circumstances. The circumstances were said to include the existence of the non-compete provision which the applicant was enforcing. That was a reference to Mr Martinez' resignation from his employment by letter dated 17 October 2011, and - in what OBSL considered a breach of the restraint of trade provision in the employment agreement - his intention to commence alternative employment with a competitor.

### **Attempts to obtain payment**

#### 1. The parties' exchanges

[5] OBSL responded to Mr Martinez's resignation by emailed message also dated 17 October 2011 expressing regret at his departure, providing details of the amounts it required by way of repayment, and requiring payment by no later than 4 pm on 20 October 2011.

[6] A series of exchanges between the parties or the parties' representatives followed. Material filed in the Authority shows the correspondence addressed OBSL's concerns about compliance with the restraint of trade, and that OBSL referred to the possibility of a repayment plan. Regarding the latter, counsel replied on Mr Martinez' behalf by letter dated 20 December 2011, saying:

*We repeat his assurance that he will pay the amount claimed as soon as possible. As your client knows he is transferring from Mexico and awaits funds from sales of assets there.*

[7] Counsel for OBSL replied by letter dated 21 December 2011 setting out the reasons why this response was considered unacceptable. The letter ended by seeking a repayment plan, with a first payment to be received no later than 31 December 2011 and the balance to be paid by 28 February 2012. There was no record of a direct response, although any response may have been overtaken by the following.

## 2. Mediation

[8] The statement of problem was received in the Authority on 22 December 2011 and the matter was referred to mediation. By letter dated 14 February 2012 counsel for OBSL advised the Authority that mediation was scheduled to occur on 13 February 2012, but shortly after 9 am on 13 February OBSL was advised that mediation would not go ahead because Mr Martinez would not be attending.

[9] A telephone conference between the Authority and the parties was conducted on 2 March 2012. OBSL confirmed it would not be enforcing the restraint of trade provision, thereby addressing one of the matters raised in the statement in reply. The remaining matter concerned when Mr Martinez would make the payment and whether a payment plan could be agreed. An investigation meeting was scheduled for 12 April 2012, and a direction to mediation in the interim was issued.

[10] Mediation occurred on 26 March 2012. On 30 March counsel for OBSL advised the Authority the matter had not been resolved, and a further teleconference was sought.

## 3. Directions of the Authority

[11] A second teleconference between the Authority and the parties was conducted on 4 April 2012. Bearing in mind the delay and the unsuccessful attempts to resolve the matter to date, and following a discussion about when and how Mr Martinez might make payment, I made directions which were confirmed in writing on 4 April 2012 that:

- a. Mr Martinez file and serve a proposal for resolving the matter by the close of business on 7 calendar days from 4 April 2012; and
- b. if no proposal was received there will be an order for immediate payment in full of the monies owed.

[12] The investigation meeting scheduled for 12 April 2012 was adjourned.

**Orders of the Authority**

[13] Although the direction warned that the timetable would be adhered to strictly, no proposal was received within the time specified.

[14] On the afternoon of 13 April 2012 Mr Martinez contacted the Authority in a message which described his circumstances and the calls on his income in general, but did not provide any financial details of his income and outgoings. In what was said to be a scenario for resolving the matter he referred to consultancy fees OBSL had earned through offering his services during his employment, and said he was unaware of aspects of the basis for and details of OBSL's claim. The first of these is not relevant to his obligation to pay or to whether any repayment plan can be entered into, and the written record of the history of this matter means I do not accept the second.

[15] None of this material amounts to a proposal for resolving the matter.

[16] Mr Martinez is ordered to make immediate payment to OBSL in the sum of \$33,770.

[17] Mr Martinez is further ordered to pay interest on that sum calculated at the rate of 5% per annum from 17 October 2011 to the date of payment.

**Costs**

[18] OBSL sought costs by memorandum dated 13 April 2012. Mr Martinez is directed to file and serve a reply to the claim in respect of costs by the close of business 14 days from the date of this determination.

R A Monaghan

Member of the Employment Relations Authority