

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 42/10

File Number: 5294281

BETWEEN Anthony (Robin) Pennell
 Applicant

AND Interactive Solutions Limited
 Respondent

Member of Authority: Denis Asher

Representatives: Mr Pennell represented himself
 Ms Lesley Harwood for the Company

Investigation Meeting Wellington, 25 February 2010

Submissions Received On the day of the investigation

Determination: 26 February 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Is Mr Pennell owed wages by the respondent (the Company) for July, August, September and December 2009, and January and February 2010?

The Investigation

[2] Because of his financial situation, Mr Pennell sought urgency in respect of his application. Ms Harwood is the director and owner of the Company. During a telephone conference on 12 February 2010 the parties agreed to an investigation in

Wellington on 25 February and a timetable for filing witness statements and documentary evidence.

[3] Following discussion by the parties, and after having regard to the unhappy termination of their personal relationship, I was satisfied mediation would not contribute constructively to the resolution of this employment relationship problem: s. 159 of the Employment Relationship Act 2000 applied.

Applicant's Position Summarised

[4] Mr Pennell seeks unpaid wages of \$21,942 plus PAYE. That figure is derived by averaging his earnings over the past two years and multiplying the result by the number of months he has not been paid (oral evidence).

[5] He says he needs some of that money urgently because (at the time he filed his statement of problem on 1 February 2010) he was *"two weeks away from losing"* his rented home and *"on 18 February I will have no money to buy food. There is only limited help that WINZ can give because I am a pensioner: their current assistance to me is \$100 per week"* (par 3, statement of problem).

[6] He does not know why he had not been paid wages other than that, on 7 September 2009, Ms Harwood told him that *"the money has all gone"* (par 2, above).

[7] Mr Pennell says the Company was formed to provide him guaranteed employment because he periodically experiences poor health and cannot then work: for 9 years he sold his services through his own, and another, company but was made bankrupt and was no longer able to run it.

[8] It was policy that the Company retained earnings so that the applicant's wages could be paid whenever he was unable to work. As at 9 February 2010 \$18,600 had been accumulated for that purpose, whereupon Ms Harwood took those funds for her own purposes.

[9] Monies have been paid to him during the period claimed but, except for October and November 2009 when he accepts wages were paid, these were for business expenses and were not wages.

[10] Despite his efforts to date, Mr Pennell says he has been unable to find fresh employment.

Ms Harwood's and the Company's Positions Summarised

[11] Ms Harwood says she was in a personal relationship with the applicant prior to and during much of the period claimed in respect of unpaid wages and that Mr Pennell's application is "*just one of the ways (he) is attacking me*" (statement in reply filed on 11 February).

[12] Ms Harwood says that, notwithstanding she is the owner and director of the Company, the respondent "*is, and always have been Robin Pennell's company*" (page 2, above). She says that throughout her involvement with the respondent, and during the time of its previous owner and director, Mr Pennell:

made all the financial decisions ... and dispersed the funds. Although I was the titular head after February 2009 he refused to give me the accounts for 2008/9 until they had been certified by an accountant. Until 16 January 2010 he refused to give me a copy of the current accounts. This means, for example that he decided the distribution of the funding from the bank overdraft and my Visa. ...

Robin Pennell has always decided what level of drawings he would have and insisted that his drawing remain the same whilst he was bankrupt so that the Official Assignee saw only consistency.

I attach email which demonstrates his role is (the Company).

(above)

[13] Ms Harwood says Mr Pennell invited her to become first a director and then the owner of the Company because at the time he feared her predecessor might take the collected savings from him; the applicant could not retain those savings as he was bankrupt (being discharged on 16 October 2009).

[14] Ms Harwood says the Company is insolvent, ceased trading as at 31 January 2010 and has advised the Commissioner of Inland Revenue of this. All of its assets are in Mr Pennell's possession, in particular a car, a computer and computer software. It has a debt of \$15,000 (a bank overdraft). One reason the Company has not yet been wound up is to allow Mr Pennell to continue to enjoy the use of those assets.

[15] The contract work which she and Mr Pennell, through the Company, undertook experienced a substantial downturn in July 2009: despite persistent applications no contract work was secured after that date. Because the Company has made no earnings since then it has been unable to pay wages to Mr Pennell.

[16] Ms Harwood negotiated an overdraft of \$15,000 for the Company in September 2009: all of that money went to the applicant, as did a further \$7,500 drawn from her personal savings, and another \$1,000 in January 2010. At Christmas 2009, Mr Pennell advised Ms Harwood he had a job beginning in February 2010. As a result Ms Harwood gave no undertakings of further support. Throughout this period the applicant drew expenses from the Company, for his mobile phone, car and petrol etc. There was an eftpos card on the Company account that Mr Pennell used as his personal card, until he returned it in February 2010.

[17] Mr Pennell was paid every month between July 2009 and February 2010, at an average of more than \$3,000 per month.

[18] The applicant's employment agreement does not specify what he is to be paid.

Discussion and Findings

[19] All matters investigated by the Authority are invariably unusual, i.e. they have facts and issues specific to themselves. However, this is an uncommonly unusual employment relationship problem.

[20] Ms Harwood's uncontested evidence is that the Company has no funds, has had no work from July 2009 and has ceased trading.

[21] It is uncontested that Mr Pennell has an employment agreement that makes no provision for an hourly rate nor an actual salary.

[22] In evidence to the Authority Mr Pennell confirmed that that was a deliberate omission (“*deemed judicious*”). I make the observation is that such a mechanism would allow for a varying rate of pay depending on the varying volumes of work undertaken by the Company: the more work done, then the more Mr Pennell would be paid. The obverse applies also in respect of this flexible arrangement: less or no work done by the Company results in less or no pay to the applicant.

[23] The policy that the Company retained earnings so that the applicant’s wages could be paid whenever he was unable to work is not recorded in Mr Pennell’s employment agreement or in writing anywhere else. Ms Harwood did not appear to accept the respondent was bound by any such policy.

[24] Besides, Mr Pennell is not claiming that, because of health reasons, he was unable to work during the period at issue and was therefore entitled to wages accumulated from another, preceding period. His claim is not that he was owed wages from a previous period of work, but – based on an averaging exercise over actual earnings received for the past two years – he was not paid for July, August, September and December 2009, and January and February 2010 and is thereby owed wages of \$21,942 plus PAYE.

[25] It is clear that, until he returned the card early this year, and consistent with what the parties understood his remuneration package to comprise, Mr Pennell had ready access to Company funds at least for business purposes, including restaurant meals, petrol, etc.

[26] I am not satisfied from the evidence, on a balance of probabilities basis, that any funds were set aside in the Company’s accounts as wages owing to Mr Pennell to be paid out at a future point, or that – as alleged – Ms Harwood has taken funds from the Company that were in some other way owed or payable to the applicant.

[27] I am clear that neither the Company, nor Mr Pennell on behalf of the respondent, have undertaken any work since before July 2009. That is because there

was not any, despite Mr Pennell and Ms Harwood's mutual efforts to bring in contracts. Ms Harwood has been obliged to take up paid employment elsewhere and – as mentioned above – Mr Pennell's efforts so far have been without success.

[28] Taking the above into account, in particular the absence in Mr Pennell's employment agreement of a specified wage rate, I am satisfied this is not a situation in which the law imposes an obligation to pay a reasonable sum (*quantum meruit*): see *Lamont v Power Beat International Ltd*, [1998] 2 ERNZ 20, 31 etc.

Determination

[29] Mr Pennell's claims are dismissed.

[30] While costs are reserved I note that neither party engaged a representative and there is no evidence thus far of seeking legal advice. Subject to submissions it seems appropriate that costs should lie where they fall.

Denis Asher

Member of the Employment Relations Authority