

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 448
5423037

BETWEEN

CHRIS REDSHAW
Applicant

A N D

HYGIENE FOUNDATION
LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Applicant in Person
No appearance for Respondent
Investigation Meeting: 30 September 2013 at Auckland
Date of Determination: 30 September 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Redshaw), in his statement of problem filed in the Authority, identified two claims against the respondent (Hygiene Foundation), namely a personal grievance based on constructive dismissal and a wages claim.

[2] The wages claim has been dealt with in a separate determination of the Authority issued as [2013] NZERA Auckland 372. The constructive dismissal claim falls for determination here.

[3] As has become commonplace with the claims brought by former staff against Hygiene Foundation, that Hygiene Foundation has not engaged with the Authority, has declined to participate in the Authority's process in any way and not appeared at the investigation meeting.

[4] Despite those failures, the Authority is satisfied that Hygiene Foundation knew about the issue, was notified appropriately of the investigation meeting, but simply decided not to engage.

[5] In an earlier determination of the Authority issued as [2013] NZERA Auckland 353, the Authority dealt with a similar claim brought to it by former colleagues of Mr Redshaw. In that investigation, the Authority went to some lengths to try to encourage Hygiene Foundation to engage but to no avail.

[6] The only relevant communication from Hygiene Foundation before the Authority is an email dated 23 September 2013 which indicates that Hygiene Foundation is no longer trading and that it has sold its business to another entity which had failed to settle the purchase price. Legal proceedings to recover the purchase price are apparently in train.

[7] Whatever the financial position of Hygiene Foundation, Mr Redshaw wished to have a determination of the Authority in relation to his claim although the Authority had made clear to him his pursuit of finality in the matter might well be futile.

[8] Mr Redshaw was employed by Hygiene Foundation in a role styled Regional Manager with a start date of 26 November 2012. Mr Redshaw resigned his employment on 13 May 2013 to take effect a calendar month later. Mr Redshaw had had discussions with Hygiene Foundation about becoming an independent contractor after his employment ceased, but not unnaturally, Mr Redshaw insisted that Hygiene Foundation settle his outstanding wages in full before he concluded the arrangement with Hygiene Foundation about contracting.

[9] In fact, the final pay was never received and it is the failure to pay salary and other entitlements that forms the basis of Mr Redshaw's claimed personal grievance. That personal grievance was first raised in his statement of problem received in the Authority on 18 June 2013. For the avoidance of doubt, the Authority is satisfied that the personal grievance for unjustified constructive dismissal was raised with Hygiene Foundation within the statutory time limit when that statement of problem was served on Hygiene Foundation by the Authority.

[10] Mr Redshaw's personal grievance for constructive dismissal proceeds essentially on the footing that by failing to pay wages in a timely fashion during the

employment, Hygiene Foundation committed a breach of its duty as employer of which the foreseeable consequence was that the affected employee (Mr Redshaw) would be forced to relinquish his employment.

[11] It is a truism that an employee is entitled to be remunerated for his work; that is in essence why he provides his labour.

[12] Furthermore, the evidence before the Authority, which includes the voluminous email traffic between Mr Redshaw and Hygiene Foundation, supports the conclusion that Hygiene Foundation accepted that Mr Redshaw was providing work, accepted that wages were due and owing, but simply failed to pay those wages.

[13] The Authority is satisfied that Mr Redshaw's resignation was not a voluntary one, but was a resignation forced on him by the breach of duty committed by Hygiene Foundation which would cause a reasonable independent person to regard the resignation as a reasonably foreseeable consequence of the breach of duty by Hygiene Foundation. It follows that Mr Redshaw's personal grievance is made out.

[14] However, there is another matter which Mr Redshaw refers to in his evidence before the Authority. Like his former colleagues, Mr Redshaw was required to facilitate the provision of certain equipment which was allegedly required to enable him to fulfil his obligations as a regional manager of Hygiene Foundation.

[15] As part of that obligation, Mr Redshaw entered into an arrangement with a company called Flexi Group (New Zealand) Limited (Flexi Group) which purports to be an operating lease for the equipment just referred to.

[16] The way in which this arrangement apparently worked was that Flexi Group provided Hygiene Foundation with the capital funds necessary to purchase the equipment and Mr Redshaw was responsible, as part of the obligations of his employment, with making the payments as guarantor.

[17] Under the terms of his employment agreement, Mr Redshaw was required to "provide ... at his ... cost", inter alia, "a HFNZ Starter Pack". That HFNZ Starter Pack was the equipment which Mr Redshaw referred to in his evidence and HFNZ refers to Hygiene Foundation, the respondent.

[18] Mr Redshaw is still being pursued by Flexi Group in relation to the payments for the operating lease just referred to. Mr Redshaw seeks a determination of the Authority that he no longer has obligations in that regard.

[19] Of course, the Authority has no power to direct compliance of a stranger to the employment relationship which Flexi Group is. All the Authority is able to do is direct that the obligations that previously may have subsisted in respect of Mr Redshaw ought now to be borne by Hygiene Foundation. But given the likelihood that Hygiene Foundation is without funds, that is of little use. The Authority is able to observe, however, that Flexi Group seems to have taken a different approach with Mr Redshaw than the approach it took with other staff in precisely the same position who have been caught up in the Hygiene Foundation debacle.

[20] The Authority has before it documentation provided to it by a former colleague of Mr Redshaw. The documentation appears to be on all fours with Mr Redshaw's documentation. Notwithstanding that, in relation to Mr Redshaw's position, Flexi Group is continuing to pursue him for payments, whereas in respect to other staff in an exactly similar position, Flexi Group very honourably cancelled the agreement having been apprised of the circumstances by the affected former colleagues of Mr Redshaw.

[21] On documentation for an operating lease entered into by one of Mr Redshaw's colleagues, there is annotated in the following terms, apparently in the handwriting of the signatory:

Agreement is cancelled. As per meeting 20/12/2012. has no further obligation to pay.
Signed
Russell Webber
General Manager

[22] The Authority notes that at the relevant time, Mr Webber was the New Zealand General Manager for Flexi Group. The Authority is unable to discern any difference between Mr Redshaw's position and the position of other staff such as the former staff member referred to above. The Authority commends to Flexi Group the view that it should take the same approach with Mr Redshaw's position as it has with other staff. To assist in the resolution of this matter, the Authority directs that a copy of this determination is to be made available to Mr Webber at Flexi Group.

Determination

[23] The Authority is satisfied that Mr Redshaw has suffered a personal grievance by reason of having been constructively unjustifiably dismissed. That personal grievance was a constructive dismissal of Mr Redshaw where, as a consequence of Hygiene Foundation's breach of duty in failing to pay Mr Redshaw during the employment, Mr Redshaw was forced to resign and a reasonable person looking at the facts of the matter would think that that resignation was reasonably foreseeable.

[24] The Authority is satisfied that Mr Redshaw did not contribute in any way to the circumstances giving rise to his personal grievance: s.124 of the Employment Relations Act 2000 (the Act) applied.

[25] To remedy the grievance the Authority has found, the following remedy is to be made available to Mr Redshaw by Hygiene Foundation:

- (a) Compensation under s.123(1)(c)(i) of the Act in the sum of \$5,000;

[26] Mr Redshaw's evidence of the hurt and loss of dignity was very clear and the Authority is satisfied that the award above can be made.

[27] The Authority also commends to Flexi Group the view that Mr Redshaw is entitled to be treated in the same way as other former staff of Hygiene Foundation such that Mr Redshaw is entitled to have the Flexi Group operating lease agreement cancelled, as Flexi Group has very honourably done in relation to other former staff of this entity.

[28] In making that observation, the Authority notes that, like other staff, Mr Redshaw was required by the effect of his employment agreement with Hygiene Foundation to provide this gear, or more accurately to fund its purchase. That was done through Flexi Group and the Authority is satisfied that a proper construction of the agreement between Flexi Group and Mr Redshaw is that Mr Redshaw was no more than a guarantor of the payments as was the case with the other staff affected.

[29] The capital sum was paid by Flexi Group to Hygiene Foundation or one of its associated companies, and was never received by Mr Redshaw and as a matter of fact, the Authority is satisfied that Mr Redshaw did not even retain possession of the

equipment for use in his role as an employee of Hygiene Foundation, beyond the middle of January 2013.

[30] The Authority directs that Hygiene Foundation pay to Mr Redshaw the sum of \$5,000 as compensation under the Act and requests that Flexi Group cancel the operating lease agreement to which Mr Redshaw is a party.

James Crichton
Member of the Employment Relations Authority