

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 340/09
5163784

BETWEEN PETER RESTALL
Applicant

AND MEDIPET NEW ZEALAND
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: P Restall in person
No appearance for respondent
P Elder, for M Young

Investigation Meeting: 3 September 2009

Determination: 17 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Peter Restall says his former employer, Medipet New Zealand Limited (“Medipet”) owes him sums of money in respect of unpaid salary, payment in lieu of notice, and holiday pay. Medipet employed Mr Restall as its group general manager.

Preliminary matters

[2] Medipet was a new venture. The failures to pay Mr Restall are associated with its failure to secure the investment funds necessary to establish and support it, and the eventual failure of the business. Mr Restall was aware of that, so sought remedies as follows:

- a. an order that Matthew Young - the director and shareholder of Goodman Trustees Limited (“GTL”), which held 56.5% of the shares in New Zealand Pet Insurance Company Limited (“NZPICL”), which

in turn held 5% of the shares in Medipet - meet the payments in his personal capacity;

- b. that Medipet be placed in liquidation; and
- c. that GTL and NZPICL be placed in liquidation.

[3] Although Mr Young conducted a number of discussions with Mr Restall about Medipet and about Mr Restall's employment, the Authority has jurisdiction only in respect of employment relationships. The employer party to the relationship here was Medipet. There may be other issues concerning Mr Young's activities and in respect of which he may or may not have any personal liability, but these are more appropriately resolved in another jurisdiction.

[4] The Authority has no power to order the initiation of procedures to place a company in liquidation.

[5] The Authority can, however, make orders against the employer in respect of payments owed. I now turn to that matter.

Unpaid salary

[6] Mr Restall began his association with Medipet in or about September 2007, as a consultant under a contract for services. Since a contract for services is not an employment relationship, the Authority cannot make orders in respect of payments owed in respect of the consultancy.

[7] Early in 2008 the parties sought to formalise the relationship as one of employment, with a written agreement dated 5 May 2008 being presented to Mr Restall and subsequently executed. During the investigation meeting I overlooked the existence in the document of a commencement date of 1 April 2008. I apologise to Mr Restall and find the employment relationship commenced on 1 April 2008.

[8] The agreement provided for a base salary of \$80,000 per year. In May 2008 Mr Restall received payment in respect of three weeks' work, but received no other payment during the course of his employment. He says Mr Young gave him verbal notice of redundancy on 5 August 2008.

[9] The total gross payment owed from 1 April – 4 August (inclusive) is \$27,692.28 (gross) - \$4,615.38 (gross) = \$23,076.90 (gross).

[10] Mr Young, who gave evidence under summons and engaged his own representative, denied that notice of redundancy was given on 5 August. He said the inability to obtain funding and the continuing failure to pay Mr Restall's salary meant the employment relationship was already effectively over. Moreover, Mr Restall had indicated he was looking for another job, and Mr Young had encouraged him to do so. Although there was a conversation between the two men on 5 August, Mr Young said the company's director had asked him to clear equipment from the premises and to terminate access. By then there had been no activity in the business for some time. Mr Young regarded the employment relationship as already at an end.

[11] Mr Restall said Mr Young also told him there was no way forward and he was making Mr Restall redundant. A letter would follow. Mr Restall accepted that advice, although no letter was forthcoming.

[12] In reality the employment relationship, and the business, were moribund before 5 August. On the other hand Mr Young said in evidence that, even in July, he was working on obtaining another investor for the company, and that Mr Restall was aware of this. The attempt was not successful. Mr Young acknowledged it had become obvious by the end of July that there was no way forward.

[13] Because efforts to secure an investor were continuing in July, and despite the lack of anything other than minor business activity otherwise, I find the date on which the relationship terminated was 5 August.

[14] Medipet is therefore ordered to pay to Mr Restall \$23,076.90 (gross) in respect of unpaid salary to the date of termination.

Pay in lieu of notice

[15] The employment agreement provided for the termination by either party on giving four weeks' notice in writing, with an election in respect of payment in lieu of notice.

[16] Because I have found 5 August was the date on which the decision that there was no way forward was communicated, thus terminating the employment at that time, I find the notice provision also applied. Mr Restall was entitled to four weeks' pay in lieu of notice, being \$6,153.84 (gross). I order accordingly.

Holiday pay

[17] Mr Restall is entitled to holiday pay calculated at 8% x [\$23,076.90 + \$6,153.84] = \$2,338.46. I order accordingly.

Summary of orders

[18] Medipet is ordered to pay to Mr Restall:

- a. \$23,076.90 (gross) as unpaid salary;
- b. \$6,153.84 (gross) as pay in lieu of notice; and
- c. \$2,338.46 as holiday pay.

[19] Interest is payable on the above amounts calculated as 3% pa from 5 August 2008 to the date of payment.

Costs

[20] Costs are reserved. If either party seeks an order for costs there shall be 28 days from the date of this determination in which to file and serve a written statement of what is sought and why. The other party shall have a further 14 days in which to file and serve a response.

R A Monaghan

Member of the Employment Relations Authority