

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Albertus Tijssen and Patricia Ruth Tijssen (Applicant)

AND Robert Cottle (First Respondent)
AND Infratech Inc. (Second Respondent)

REPRESENTATIVES Timothy J Twomey, Counsel for applicant
Bob Cottle on behalf of the respondents

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 22 February 2005

FURTHER INFORMATION 22 February 2005

SUBMISSIONS RECEIVED 23 February 2005
7 March 2005

DATE OF DETERMINATION 11 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination resolves two employment relationship problems separately lodged in the Authority by statements of problem on 7 May 2004 (CEA 156/04) and 12 August 2004 (CEA 287/04). In CEA 156/04 Mr and Mrs Tijssen seek the recovery of arrears of wages and the imposition of a penalty for breach of an employment agreement against Robert Cottle (first respondent) and Infratech Inc. (second respondent). The written employment agreement relied on is expressed to be between Mr and Mrs Tijssen and Infratech Inc. In CEA 287/04 Mr and Mrs Tijssen say Robert Cottle engaged in misleading conduct in breach of section 12 of the Fair Trading Act 1986 and unfair bargaining in breach of section 68 of the Employment Relations Act 2000 in respect of the employment based on the employment agreement between them and Infratech Inc.

[2] In a statement in reply lodged on 19 May 2004, Infratech Inc. says that the problem is between it and Mr and Mrs Tijssen only and acknowledges owing them arrears of wages pursuant to the written employment agreement. Infratech Inc. also says that the parties never intended to be bound by *New Zealand Employment Laws*. In a statement dated 25 August 2004 lodged in the Authority on 1 September 2004, Mr Cottle says that he never had an employment relationship with Mr and Mrs Tijssen and that Infratech Inc. (the employer) is a registered company in Samoa.

The parties

[3] Mr and Mrs Tijsen are middle-aged people who ordinarily reside in Christchurch. Mr Tijsen knew Mr Cottle from primary school days when they were friends. Infratech Inc. is said to be registered in Samoa as an international company. It has no place of business in New Zealand. The address given for Infratech Inc. in New Zealand is said by Mr Cottle to be simply a contact address and it is also Mr Cottle's place of residence. Mr Cottle says that he is the chief executive officer and the sole director, but not a shareholder of Infratech Inc. Mr Cottle further says that the shares of Infratech Inc. are owned by a family trust (the Bellbird Trust) of which Mr Cottle is a trustee but not a beneficiary. Mr Cottle apparently has a structural engineering qualification and international experience at a senior management level in corporates involved in the petro-chemical industry. He says he worked for District Councils between 1994 and 1997 as a general manager and has also worked as a management consultant, having been a member of the New Zealand Institute of Directors. Mr Cottle says that Infratech Inc. has no assets at present and that he personally has no financial resources either to the point that he was not able to travel to Christchurch for the investigation meeting. He participated in the meeting via telephone link.

Background

[4] In a letter dated 11 April 2000 Mr Cottle told Mr Tijsen:

...I would like to offer you the [Project Manager] job provided of course we do actually end up securing the contract like we've been promised. Both you and Trish could run it together if you wish."

This related to a joint venture project between Railtech Inc. and a Brisbane company to manufacture and supply concrete railway sleepers for a new railway line being built from Alice Springs to Darwin. Railtech Inc. is an overseas company but registered in New Zealand under Part 19 of the Companies Act 1993. Mr Cottle said that it is 100 per cent owned by Infratech Inc. but Companies Office records report that Mr Cottle is the sole shareholder and director.

[5] By June 2001, Mr Cottle was telling Mr and Mrs Tijsen that Railtech Inc. required a good capable man who could project manage a creosote treatment plant in Mexico required by Railtech Inc. because of large demand there for their wooden railway sleepers. By October 2001 Mr Cottle was saying that:

During the next few weeks I'll put together a package for your contract and get that to you for approval.

[6] In December 2001 Mr Cottle wrote that:

... we have some substantial orders mounting for our Mexican plant. So the news is good regarding our requirement for a project manager. ... Most urgent is the concrete sleeper plant we need to build in Colombia ... Also we need to build some facilities in Guyana. We clearly have an opening for a competent project manager. ... I'm sorry I can't give you anything more definite at this point other than to say that subject to my fellow directors approval we would definitely like to hire you and Trish for various projects beginning in early 2002.

[7] In an email dated 23 January 2002, Mr Cottle said:

We are not in the position to make a formal cast iron offer to you just yet but it is coming. We would like however to begin to negotiate with you regarding our package etc so that when the time comes we are all go.

...

The following is the offer for you to consider at this time. This is a combine package for both you and Trish. All figures are in US dollars and the current exchange rate is \$2.33NZ = \$1.00US.

- *Return economy class airfares from Christchurch to Guyana (each 12 months).*
- *Living allowance of \$1000 per month for food and local expenses.*
- *Free rented house in Guyana with local maid service (cleaning and household chores)*
- *Full use of vehicle for business and private use in Guyana.*
- *Base salary \$30,000 paid to you tax-free.*

This is our offer at this time subject to final confirmation by us. It is not quite as much as I would have preferred but I have other directors to account to. Perhaps you can give this some thought and let me know. Your term of employment will be on a monthly basis open ended. Currently we envisage you spending approximately 6 months in Guyana then perhaps moving on to our development in Mexico. ...

Mr Cottle also sets out in the email some details of Railtech Inc.'s recent financial performance and pending orders ... *for all our operations of approximately \$US53 million over the next two years.*

[8] Next there followed several emails in which Mr Cottle set out reasons for delay which included continuing problems with the issue of a letter of credit and Mr Cottle buying out one of the principal stakeholders in Railtech Inc.. Mr Cottle continued to provide encouraging information about customer orders that would bring on the business development in Mexico. By 6 May 2002 Mr Cottle said:

So Bert if you and Trish can hold out for another week or two it looks very much like Mexico is now the final destination instead of Guyana.

However more delays and explanations followed. Later, on 13 February 2003, Mr Cottle proposed that Mr and Mrs Tijssen commence employment in Whangarei on 24 March 2003 in preparation for a departure for Guyana on Sunday, 6 April 2003. About the same time Mr Cottle apparently attempted to forward a written employment agreement, but that was not received by the Tijssens. There was then a further delay until 30 April 2003 when Mr Cottle sent a further email saying:

The day has finally arrived! I need your help – now.

[9] On 9 May 2003, Mr Cottle sent a further email in which he said :

Infratech is 100% owned by my family trust.

About the same time Mr and Mrs Tijsen also received the proposed written employment agreement. It commenced:

*THIS AGREEMENT is made by and between **Infratech Inc**, located at 1386 Whangarei Heads Road, RD4, Whangarei, New Zealand and **Bert and Trish Tijsen**, located at 48D Bristol Street, Merivale, Christchurch.*

The attached job descriptions described Infratech Inc. as a *Samoa registered company*. These were the first references by Mr Cottle to Infratech Inc.

[10] Mr and Mrs Tijsen signed the written employment agreement and dated it 12 May 2003. The written agreement includes Mr Cottle's signature *on behalf of Infratech Inc.* and was dated 7 May 2003 by Mr Cottle. Having signed the employment agreement, Mr and Mrs Tijsen departed New Zealand for Guyana and arrived there on 17 May 2003.

[11] Mr Cottle was with Mr and Mrs Tijsen in Guyana for about four days. There was apparently a problem with a letter of credit in relation to an order of railway sleepers by or for Estonian Railways. Mr Cottle says that he had been told by the manager of the Demerara Bank in Georgetown that funds would be released based on a letter of credit and he (Mr Cottle) then confirmed the employment agreement with Mr and Mrs Tijsen. However, on arrival in Georgetown, Mr Cottle was apparently told by the same manager that funds would not be made available. As a result, Infratech Inc. had no funds to pay Mr and Mrs Tijsen.

[12] Mr and Mrs Tijsen stayed in Guyana for some weeks during which they received a number of emails from Mr Cottle intended to impress them with his efforts to secure funding. Mr and Mrs Tijsen eventually left Guyana and returned to New Zealand on or about 3 July 2003, having received no pay from their employer.

[13] Upon their return to New Zealand Mr and Mrs Tijsen drove from Christchurch to Whangarei where they stayed at Mr Cottle's invitation to await resolution of Infratech's funding difficulties. They received two payments totalling \$US3,700.00 paid into their New Zealand bank account. These funds came from Bellbird International Limited, a New Zealand registered company apparently wholly owned by the Bellbird Trust. While in Whangarei Mr and Mrs Tijsen did some work related to the Guyana business project but very little could be achieved. Mr and Mrs Tijsen travelled to Christchurch over Christmas and then returned to Whangarei by about 21 January 2004. Mr Cottle presented them with a letter on computer-generated Infratech Inc. letterhead signed by Mr Cottle that stated:

This is to certify that we hereby mutually agree to terminate the employment contract ... It is further agreed that payments were made to the Tijssens, in accordance with this contract, during this period in the amount of \$3,700 USD and that a remaining balance of \$US34,300.00 is outstanding at the date of this agreement.

The letter provided space for Mr and Mrs Tijsen to sign but they refused to do so. Mr Cottle then gave them a similar letter, signed by himself, that acknowledged the same debt and also stated:

This is to certify that the employment agreement signed between Bert & Trish Tijsen and Infratech Inc dated 17th May 2003 is herewith terminated effective on 17th January 2004.

[14] In the statement in reply for Infratech Inc. Mr Cottle says that the agreement in the letter of termination that \$34,000 USD was owing to Mr and Mrs Tijsen was *...a generous offer made to them because of the delay in payment*. He also says that after allowing for the holidays taken by

Mr and Mrs Tijssen in excess of their contractual entitlement, they were due \$US25,106.39 as at 17 May 2003.

Issues

[15] Throughout, Infratech Inc. has raised the issue about the governing law of the contract. Mr Cottle points out that, although the employment agreement says at clause 7 *This Agreement shall be governed by the laws of New Zealand*, the parties always knew that it was employment overseas for an overseas company. He also says that Mr and Mrs Tijssen wanted to ensure that they would not be liable for PAYE or New Zealand tax. In *Clifford v Rentokil Ltd* [1995] 1 ERNZ 407, the Employment Court held that the rules for determining the proper law of a contract are:

- (i) by express selection; or
- (ii) by inferred selection from the circumstances; or
- (iii) judicial determination of the system of law with which a transaction has the closest and most real connection.

[16] The present contract was entered into in New Zealand between parties both described as being located in New Zealand. In these circumstances, the parties elected New Zealand law to govern the relationship so it is not necessary to take that any further. To some extent, Infratech Inc. seems to be arguing that New Zealand law but not New Zealand employment law applies. The arrangement between the parties was obviously a contract of service. The Employment Relations Act 2000 provides that it is not permissible to contract out of the Act: see section 238. Accordingly, I find that the Authority has exclusive jurisdiction to make determinations about employment relationship problems related to the written employment agreement between Mr and Mrs Tijssen and Infratech Inc..

[17] As earlier noted, Infratech Inc. is (or was) apparently Incorporated as an international company on 12 December 2002 in Samoa pursuant to the International Companies Act 1987. The office of the Registrar of International and Foreign Companies gave notice dated 16 February 2004 striking the company from the register and thereby dissolving it. Mr Cottle indicated that steps were in hand to restore the company to the register, and I will assume that has been done. All that may have consequences for the effective enforcement of the determination, but it does not affect questions of liability.

[18] The Companies Act 1993 requires an overseas company that is carrying on business in New Zealand to be registered under that Act: see section 334. Infratech Inc. is not registered under the Companies Act 1993, but even if entering into an employment agreement in New Zealand did amount to *carrying on business in New Zealand*, the failure to register does not affect the validity or enforceability of the employment agreement: see section 335 of the Companies Act 1993. Mr and Mrs Tijssen argued that Infratech Inc.'s failure to register under the New Zealand Act meant that it no longer has a separate legal personality. I disagree. Assuming the New Zealand Act applies, the consequence of carrying on business without registering is liability on the company and its directors for a fine, or eventually liquidation of the company's New Zealand assets. That implies that the company maintains its separate legal personality. The common law position is that a company has a separate legal personality to its shareholders: see *Salmon v Salmon* [1897] AC 22 (HL) and *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 (PC). I therefore find that Infratech Inc. as the employer remains liable for the arrears of wages and that Mr Cottle is not liable as the employer.

[19] Mr and Mrs Tijssen are entitled to arrears of wages for the period from 17 May 2003 until their employment was terminated by Infratech Inc. on 21 January 2004. I do not accept that the termination was by mutual agreement. Rather, I find that Mr Cottle, acting for Infratech Inc., terminated the agreement. They are further entitled to payment in lieu of the three month period of notice stipulated at clause 4 of the agreement. Counsel argued that the intention was for a fixed term of two years employment. However, as I read the agreement, that expressed intention is subject to the power for either party to terminate on three month's notice.

[20] The agreement provides for an allowance of \$1000.00 per month as a living allowance in Guyana so that must apply between 17 May 2003 and 26 June 2003, the date of departure from Guyana. There is also a profit-sharing provision but it has never been suggested that Infratech Inc.. derived any profit from the intended Guyana business. Mr and Mrs Tijssen took annual leave in advance over Christmas and returned to Whangarei around 20 January 2004. I was not given the exact date of departure prior to Christmas, but I will treat Mr and Mrs Tijssen as having taken approximately three week's annual leave over that period, plus the four statutory holidays.

[21] 17 May 2003 to 26 June 2003 is one month 10 days. The living allowance is therefore \$1000 x 1.333: a total of \$1,333.33. 17 May 2003 to 21 January 2004 is 250 days. The combined rate of salary is \$45,000.00 pa, so that makes a total of \$30,821.92 owing. The time taken as annual leave in advance approximates the proportionate holiday pay based on the contractual four weeks per year: so no adjustment or addition needs be made to account for that. Three month's salary is \$11,250. Accordingly, Mr and Mrs Tijssen should have been paid \$43,405.25. Mr and Mrs Tijssen received \$3,100.00; so the balance owing is \$40,305.25. They received a further payment on their return to New Zealand, but that was to reimburse them for expenditure they incurred on behalf of Infratech Inc. so it is not relevant to the present calculations. Mr Tijssen's salary was 25% higher than Mrs Tijssen's (\$25,000 v \$20,000), so I order Infratech to pay \$22,391.81 to Mr Tijssen, and \$17,913.44 to Mrs Tijssen. I also make an order for Infratech Inc. to pay interest on these sums, commencing on 21 January 2004 until the arrears are paid in full. All figures are in United States dollars in accordance with the employment agreement. I was not asked to compensate or adjust for the effect of currency movements.

[22] I am asked to impose a penalty for breach of the employment agreement. The failure to pay wages and allowances due under the employment agreement continued throughout the duration of the employment. A breach of that nature is significant and it is appropriate to impose a penalty for reasons of deterrence and punishment. I impose a penalty of \$2,000.00 on Infratech Inc.. and order the whole of the penalty to be paid to the applicants.

[23] The problem set out in CEA 156/04 is one between an employee and their employer. Mr and Mrs Tijssen were employed by Infratech Inc. not Mr Cottle. They entered into that agreement knowing full well that the proposed employer was a limited liability company so there is no basis to treat Mr Cottle personally as their employer.

[24] As indicated above, CEA 287/04 is a claim that Mr Cottle breached section 12 of the Fair Trading Act 1986, that he breached the fixed term employment agreement, that he breached section 68 of the Employment Relations Act 2000 (unfair bargaining) and that he personally is liable for a penalty for a breach of the Employment Relations Act 2000 and the employment agreement pursuant to sections 133(1), 134(1), 135(1)(a) and 135(1)(b) of the Act.

[25] The finding that the employment agreement was not for a fixed term disposes of the second part of CEA 287/04. The penalty claims cannot succeed because they are formulated on the basis that Mr Cottle was a party to the employment agreement. He was not, so I dismiss the penalty claims. That leaves the Fair Trading Act 1986 and the unfair bargaining issues.

[26] The unfair bargaining action is intended to fix some liability on Mr Cottle personally rather than treat his actions as those of an agent for the employer, Infratech Inc.. Compensation is sought against him, not the employer. Section 69 does not allow the Authority to impose that remedy against Mr Cottle personally when he is not a party to the relevant employment agreement. The words *...the party ...* in section 69 (1)(a) relate back to the opening phrase of section 69 (1) *If a party to the individual employment agreement....* Section 69 (1)(b) can only affect the employment agreement and therefore the rights of the parties to it. This is a widely expressed power in section 69 (1)(c) but I do not consider that it allows the Authority to order a non-party to the employment agreement to pay compensation to one party for unfair bargaining by another. The unfair bargaining action must be and is dismissed.

[27] The claim that Mr Cottle engaged in misleading conduct in breach of section 12 of the Fair Trading Act 1986 remains. Under section 161 (1) of the Employment Relations Act 2000, the Authority has exclusive jurisdiction to make determinations about employment relationship problems, including actions arising from or related to the employment relationship. Section 162 empowers the Authority, in any matter related to an employment agreement, to make any order that the High Court or District Court may make under the Fair Trading Act 1986. I find that the claim of misleading conduct by Mr Cottle during the exchanges with Mr and Mrs Tijssen that culminated in the employment agreement is a problem related to or arising out of that employment relationship. Accordingly, the Authority has exclusive jurisdiction to investigate and determine the problem.

[28] In the course of the dealings with Mr and Mrs Tijssen that resulted in the employment agreement, Mr Cottle did engage in conduct that was likely to mislead as to matters relating to their employment. In his written submissions counsel for Mr and Mrs Tijssen identified a series of actions by Mr Cottle (paragraph 3.19) that placed Mr Cottle in breach of section 12. Without repeating those actions here, I accept that the submission is correct. Any person in the position of Mr and Mrs Tijssen would have taken from those exchanges that they were to be employed by an organisation with substantial resources and business activities in a number of countries. They would have been misled, as were Mr and Mrs Tijssen, about their employer's financial capacity to meet the agreed terms of employment.

[29] Pursuant to section 43 (2)(c) of the Fair Trading Act 1986, Mr and Mrs Tijssen seek an order directing Mr Cottle to refund monies to them. There is no money paid by Mr and Mrs Tijssen to Mr Cottle, or Infratech Inc. or anyone else which Mr Cottle should be ordered to refund it. I consider the appropriate basis for any orders is to be found in section 43 (2)(d) which empowers the Authority to order Mr Cottle to pay Mr and Mrs Tijssen the amount of the loss or damage suffered by them. It is necessary to assess that loss.

[30] In the statement of problem, Mr and Mrs Tijssen sought compensation for distress. In my view, the damage suffered by Mr and Mrs Tijssen was not limited to distress. Their employment agreement was able to be lawfully terminated on three months notice. They were contractually entitled to that period of notice or payment in lieu even in the worst circumstances. That they have not been paid such notice is directly linked to Mr Cottle's breach of section 12 of the Fair Trading Act 1986. Accordingly, I order Mr Cottle to pay Mr Tijssen \$6,250.00 and to pay Mrs Tijssen \$5,000.00 compensation for that loss (these sums are denominated in United States dollars in accordance with the employment agreement). I also accept that Mr and Mrs Tijssen suffered a measure of emotional distress caused by Mr Cottle's breach of section 12 of the Fair Trading Act 1986. Mr Cottle is to pay \$2,500.00 to Mr Tijssen and a further \$2,500.00 to Mrs Tijssen to restore that loss. The damages awarded for distress are denominated in New Zealand dollars.

Summary

[31] Infratech Inc. not Mr Cottle employed Mr and Mrs Tijsen. Infratech Inc. is to pay US\$22,391.81 to Mr Tijsen and US\$17,913.44 to Mrs Tijsen, both sums being arrears payable under the employment agreement.

[32] Infratech Inc. is to pay interest on those sums to Mr and Mrs Tijsen at the rate of 8.5% commencing on 26 June 2003 until the arrears are paid in full.

[33] I impose of penalty of NZ\$2,000 on Infratech Inc. for the breach of Mr and Mrs Tijsen's employment agreement in failing to pay them wages and order the whole of the penalty be paid to Mr and Mrs Tijsen.

[34] Mr Cottle is to pay damages of US\$6,250 to Mr Tijsen and US\$5,000 to Mrs Tijsen. This award relates to the loss arising from Infratech Inc.'s failure to give the notice specified in the employment agreement. The award against Infratech Inc. includes the same loss. Mr and Mrs Tijsen are not entitled to recover the same loss from both Mr Cottle and Infratech Inc. To the extent that Mr Cottle pays this award, the award against Infratech Inc. is to be reduced.

[35] Mr Cottle is to pay further sums of damages of NZ\$2,500 to Mr Tijsen and NZ\$2,500 to Mrs Tijsen.

[36] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority