

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 75
5343580

BETWEEN

BRENDON ERNEST WARD
Applicant

A N D

TECH BRANDS PACIFIC
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Patrick Weeks, Advocate for Applicant
No appearance for Respondent

Investigation Meeting: 9 March 2012 at Christchurch

Submissions Received: On the day from Applicant

Further Information Received: 21 March 2012

Date of Determination: 23 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Brendon Ward says that he was employed as a Branch Manager of the respondent company Tech Brands Pacific Limited (Tech Brands) from 23 July 2010. The amended statement of problem and Mr Ward's own written evidence provides that he was dismissed unjustifiably on 5 November 2010. In his oral evidence Mr Ward said that he continued in his employment with Tech Brands until a date in December, possibly 15 December 2010. Mr Ward says that the only payment he received whilst employed was a payment for two weeks salary on 20 September 2010.

[2] Mr Ward says that he would like his employment relationship problem resolved by payment of wage arrears and holiday pay in the sum of \$13,957.68 and compensation in the sum of \$10,000 for hurt, humiliation and loss of dignity and

injury to feelings, together with costs. It was confirmed at the Authority's investigation meeting that Mr Ward no longer seeks reimbursement of a sum he says he loaned to the General Manager at that time, the late Brian Isaksson. Mr Isaksson subsequently became a director of the company.

[3] Before the matter could proceed to an investigation meeting the Authority was advised by the solicitor acting for Tech Brands, Simon Graham that Mr Isaksson had died. Mr Graham sought leave to withdraw which was granted. There was no appearance on behalf of the respondent. The Authority proceeded to investigate the matter, hearing evidence from Mr Ward and questioning him about his evidence, statements in the amended statement in reply and other relevant documents.

[4] Tech Brands in an amended statement in reply say that Mr Isaksson presented Mr Ward with an independent contractor's agreement dated 12 July 2010 which was signed by Mr Isaksson and Mr Ward. It says that Mr Ward was primarily responsible for selling company products and also agreed to help recruit new staff. About one month after that agreement Tech Brands say Mr Ward advised that he wanted money and that in order to obtain a loan required an employment agreement from the company to support the loan application. It says that Mr Isaksson agreed to prepare an employment agreement to be signed in the name of Chris Davis Human Resources Manager and Mr Ward. The company says Mr Ward understood he was not an employee of the respondent but that he would rely on that agreement to support his application for a loan. Prior to the loan being approved Mr Ward advised Mr Isaksson that he was required to show payment of his first week's salary into his account and that this duly occurred.

[5] The company says that Mr Ward then presented Mr Isaksson with a letter he had prepared stating that he had been made redundant due to the Christchurch earthquake and that he could claim payment protection insurance to cover the loan.

[6] Further the company say that Mr Ward pawned company property being two mobile phones at Cash Converters and it required the Police to uplift the property and return it to the company. The company counterclaims for unauthorised use of the internet by Mr Ward in the sum of \$1,264.54.

The Issues

- [7] The Authority is required to consider the following issues:
- (a) Was Mr Ward employed by Tech Brands as a Sales Manager;
 - (b) If he was employed then when did that employment commence, what were the terms and conditions of that employment and are there wages owing and if so how much;
 - (c) If Mr Ward was employed then when did his employment end with Tech Brands and what was the reason for the ending of the employment relationship;
 - (d) Was a personal grievance raised within 90 days from the end of the employment relationship and if not are there exceptional circumstances so that leave should be made to extend the time for raising a personal grievance.
 - (e) If it is found that there is a personal grievance then what remedies should be awarded and are there issues of mitigation and contribution.
 - (f) Should there be an award made with respect to the counterclaim.

Was Mr Ward employed by Tech Brands as a Branch Manager?

[8] As will become apparent the relationship between Mr Ward and Mr Isaksson was an unorthodox one. I have not in this case had the advantage of hearing from anyone from Tech Brands but the impression that I gained from hearing evidence from Mr Ward and considering the documentation was that Mr Isaksson was the worldlier of the two men. At the time of meeting up with Mr Isaksson Mr Ward was in somewhat difficult circumstances. It is likely I find that he saw the opportunities offered by Mr Isaksson as a way out of his difficulties.

[9] In June 2010 Mr Ward met up with Mr Isaksson whom he had not seen for six years and at that earlier time knew by another name. He said that he was advised Mr Isaksson had a business Tech Brands, although it was under his wife's name for financial reasons. Tech Brands was operating from an office in Dunedin and they had employed staff on the Job Op Scheme through WINZ in Dunedin but wanted to

expand their business and open an office in Christchurch. Mr Ward understood that Tech Brands intended to staff the Christchurch office with Job Op staff for data entry work and that Mr Isaksson told him that they needed someone to be their Branch Manager for the Christchurch office. Mr Ward told Mr Isaksson of the various responsibilities he had in another position he had previously held.

[10] Mr Ward said that he was told that Mr Isaksson would discuss with his wife, at that time the director of Tech Brands, whether they could offer Mr Ward the position of Sales Manager in Christchurch. Mr Isaksson said that when he returned to Christchurch the following week to open the new office he would talk again to Mr Ward. Mr Ward was contacted by Mr Isaksson on his return to Christchurch the following week when he picked Mr Ward up from the City Mission where he was staying. Mr Ward says that he was offered the role of the new Sales Manager for Tech Brands in Christchurch. Mr Ward said that he was very happy and immediately said yes to the offer. He says that he was told there would be a formal job offer and employment agreement for him to sign once the office had been tidied and sorted out and there had been interviews to appoint staff.

[11] Mr Ward initially helped Mr Isaksson set up the office at 116 Branston Street, Hornby by spending the time cleaning and tidying and shopping for supplies. Mr Ward was provided with a company cell phone. In early July 2010 Mr Isaksson commenced phoning and emailing WINZ to get interviews for Job Op staff. Mr Ward said he was also involved in those interviews and the selection of three staff for data entry work. Mr Isaksson also organised some business cards for Mr Ward. Mr Isaksson suggested that these be in the name of Robert Ward as Mr Ward was still on a benefit. The business card referred to Robert Ward as Sales Manager. Mr Ward signed himself on WINZ paperwork as Rob Ward as he says he was instructed to do so by Mr Isaksson. It would have been apparent to WINZ if Mr Ward signed as himself that he was a person in receipt of a benefit as well as being a Sales Manager for Tech Brands.

[12] Mr Ward said that he inquired of Mr Isaksson when the first day of his employment would be so that he would know when he was getting paid. Mr Ward said Mr Isaksson advised him that as soon as he had hired other staff they would all start on wages on the same day. Mr Ward said that he thought this was fair as

Mr Isaksson had given him \$60 in cash over the previous two weeks and bought him lunches and smokes. There is no claim therefore for this initial period of work.

[13] Mr Ward said everyone started in the office officially on 23 July 2010, a Friday. That is the date from which Mr Ward says that he should have been paid. Mr Ward said that he understood he would be getting \$47,500 gross salary per annum which is \$903.85 gross per week.

[14] Mr Ward denies that he ever signed an independent contractor's agreement or was engaged as an independent contractor. Mr Ward maintains the agreement provided with the statement in reply was fabricated. A copy of the agreement was only supplied to the Authority with the amended statement in reply. The Authority has not therefore seen the original agreement. The copied independent contractor's agreement has no first and second schedules. The schedules are said in the body of the agreement to contain the nature of the work to be performed and the payment structure for a percentage of sales. Mr Ward's signature at the back of that agreement does not have the appearance of being a properly made signature. I am not satisfied that Mr Ward signed the independent contractor's agreement attached to the amended statement in reply.

[15] The nature of the business was the sale of cell phones and cameras being amongst, as Mr Ward described it, high tech end gadgets. The company operated through a website where customers would order particular products and they would be shipped from overseas. Mr Ward explained that the people who were employed through the Job Op scheme at WINZ were doing data entry updating the website and its products.

[16] In August 2010 Mr Isaksson came to Christchurch bringing with him a written employment agreement for Mr Ward to sign as well as employment agreements for the other staff employed on the basis of the Job Ops. The employment agreement signed by Mr Ward on 18 August 2010 provided that employment was commenced on 6 September 2010. Mr Ward did not have any real explanation as to why 6 September 2010 was in the employment agreement as a commencement date. Mr Ward said he asked again about his wages when he spoke to Mr Isaksson about his employment agreement but was put off again with a promise.

[17] I have carefully considered the evidence as to whether the employment agreement was prepared simply for the purposes of obtaining a loan. It was certainly the case that Mr Ward made application for a loan and relied on a written employment agreement in order to do that but I am not satisfied from the evidence that he was other than an employee with Tech Brands. There does not seem any real reason Mr Ward's employment was expressed to start on 6 September 2010. It does not accord with the reality of the situation.

[18] I find in all likelihood that Mr Ward was employed by Tech Brands rather than an independent contractor. I have reached that view because in order to obtain the job subsidy for staff it was necessary for Mr Isaksson to have someone in the office to open and close the office and manage the staff. It would be unusual to have someone engaged in that role as an independent contractor. Mr Isaksson also needed someone to have authority with regards to involvement from WINZ. Mr Ward said that Mr Isaksson was reluctant to contact WINZ himself. I have also placed reliance on the fact that Mr Ward did not have the necessary tools to enable particular success in a sales role, let alone a sales manager role.

If Mr Ward was employed then when did that employment commence, what were the terms and conditions of that employment and are there wages owing and if so how much?

[19] I find that Mr Ward started his employment at or about the same time as the other employees. I place the commencement date of employment as Monday 26 July 2010. Mr Ward was advised that he would be paid on the basis of a salary of \$47,500 gross per annum. Three weeks later I find that the terms and the conditions of employment were confirmed when Mr Ward was presented with a written employment agreement which he signed on 18 August 2010.

[20] Mr Ward said it was not until the second pay date after he was employed that he became concerned about his wages and sent Mr Isaksson emails and text messages asking for payment. Mr Ward said that Mr Isaksson was apologetic and advised that his wife was closing a *huge deal* with Spain but Mr Isaksson did reimburse him for items he had supplied to the office in the form of coffee, sugar and milk.

[21] Mr Ward said that over the next two to three weeks after 26 July 2010 Mr Isaksson had still not received the Job Op subsidy of \$3,000 for each person employed under the scheme and he asked Mr Ward to go to WINZ and *hurry them*

along. Mr Ward said he was advised that once the money came through he would also be paid but was then effectively *strung along* by Mr Isaksson in the belief that he would be paid for the work that he had undertaken for the company. Mr Isaksson referred to such matters to support payment shortly as a cheque from a GST claim and a deal with 100% store and 2 Degrees. Mr Ward said that whilst he was required at the office everyday to look after the data entry staff he still could not really undertake his sales role because the situation continued where he was not provided with the necessary equipment.

[22] When the money for the Job Op staff was received Mr Ward was paid in September 2010 for two weeks work in the sum of \$1,826.92 gross. I do not find as alleged in the amended statement in reply that Mr Ward resigned after 23 September 2010.

[23] Mr Ward said that he then received a letter dated 1 October advising him that his position with the company was now redundant. He telephoned Mr Isaksson for an explanation but Mr Isaksson explained this was only to give himself some breathing space and to eliminate some stress in terms of paying wages. Mr Ward said that he reached an agreement with Mr Isaksson that from that time on he would be kept on in the business to answer telephones and paperwork and he would be on a retainer of \$300 per week and 15% of all sales as commission. Mr Ward says that he was happy to accept that deal because he knew that the company was struggling to find his wage and that at least he still had a job. Mr Ward knew that the other staff had had to go as there was no money to pay them either.

[24] Although the employment agreement required any variation to be in writing I find that it was clearly agreed and accepted by Mr Ward that if his employment continued it would be on the basis of \$300 per week and 15% of sales from 1 October 2010 and he accepted work on that basis. Mr Ward said that he would have been quite happy to have received \$300 per week but even that amount was not forthcoming. There was no evidence of any sales. Mr Ward adjusted his work hours to that he had been performing prior to this.

[25] Mr Ward said that because he was becoming quite desperate for cash he decided to pawn one of the company phones at Cash Converters in lieu of wages. Mr Ward said that Mr Isaksson knew that this had taken place in order that Mr Ward could pay for petrol for all the running around he had to do for the company.

[26] There was discussion between Mr Ward and Mr Isaksson about the company needing a shop in Christchurch because people wanted to see the products that they were purchasing and indeed try it out. Mr Ward says that when he obtained a loan in late September 2010 Mr Isaksson suggested that \$3,000 of that loan be paid to him and that he would then become a 50/50 partner in the retail business. Mr Ward said that following a visit to Dunedin with his wife Mr Isaksson showed him some premises and talked about moving Mr Ward and his family to Dunedin to run the business. Mr Isaksson advised that as soon as the store was open he would have to resign from his sales manager position. There were a number of other proposals but nothing came of any of them.

[27] Over the next few weeks Mr Ward failed to get any payments at all and had to apply for small loans in order to make ends meet. He explained that as a result of financial stress he needed some respite care.

[28] On Saturday 6 November 2010 Mr Ward received a letter advising that his employment was over and he had been dismissed due to his 90 day trial. The letter was signed by a person known as Chris Davis, Human Resource Manager. It is suggested by Mr Ward that Mr Davis was an alias that Mr Isaksson used and I accept that seems likely. Mr Ward said that he tried to contact Mr Isaksson but it took until about a week later before he was able to do so. Mr Ward and Mr Isaksson did have a discussion about what was behind the letter and Mr Ward said they were able to resolve matters.

[29] Mr Ward said he then continued on working but matters came to a head in December when he was not paid. I accept it is likely that the relationship ended in or about December 2010. That accorded with some further enquiries the Authority made and copies of material provided to Mr Weeks after the investigation meeting. Mr Ward said that he then left because he was not paid any money and in January 2011 tried to contact Mr Isaksson but there was no further contact and no further payment. Mr Ward denies and I accept his evidence that he did not receive any other money from Tech Brands aside from the two weeks payment.

[30] I find that Mr Ward was employed from 26 July 2010 and to 1 October 2010 on the basis of a salary of \$47,500 gross per annum or \$913.46 per week. That is a period of ten weeks. He was entitled to be paid for that period in the sum of \$9134.61

gross but was paid \$1826.92 only. There is a balance therefore owing to Mr Ward for that period of \$7307.69 gross.

[31] From 4 October 2010 to 13 December 2010 Mr Ward was to have received a retainer payment of \$300 per week. That is a further period of ten weeks. No payment was ever made so it is difficult to ascertain whether it was to be a gross or net payment. I have treated the sum as gross but any disadvantage to Mr Ward in doing so is overcome by the fact that I have included all weeks during this period notwithstanding Mr Ward was away for a few days because of illness during this period. There is a balance owing to Mr Ward for this period of \$3000 gross.

[32] I order Tech Brands Pacific Limited to pay to Brendon Ernest Ward the sum of \$10307.69 gross being unpaid wages.

[33] I order Tech Brands Pacific Limited to pay to Brendon Ernest Ward holiday pay of \$970.77 gross calculated on the basis of gross earnings \$12134.61 x 8%.

[34] I order interest be payable on the combined amounts of unpaid wages and holiday pay in the sum of \$11278.46 at the rate of 5% prescribed under s. 87 (3) of the Judicature Act 1908 from 1 January 2011 until the date of payment.

Was a personal grievance raised within 90 days from the end of the employment relationship?

[35] As the evidence was given it became clear that Mr Ward was not in fact dismissed on 5 November 2010 but carried on working until about 15 December 2010 when I find it likely he realised that the relationship was over. He said that he just left the keys to the office behind and walked away. In evidence to the Authority Mr Ward did not know if he resigned or was dismissed.

[36] A grievance for unjustified dismissal was therefore raised within 90 days but on the incorrect basis that there had been an unjustifiable dismissal on 5 November 2010.

[37] I consider the claim Mr Ward now relies on to be one in the nature of an unjustified constructive dismissal. To a degree he could see in December 2010 that Mr Isaksson had treated him badly by not paying him but promising great business ventures all of which came to nothing. A constructive dismissal can be founded on a breach of contractual obligation to pay.

[38] Mr Ward elected to remain in an employment relationship in which he was not paid for five months. He did complain about it but also took some steps to get some money by pawning the cell phone. He remained hopeful of business opportunities with Mr Isaksson but continued to receive a benefit and was compliant with instruction to ensure that continued whilst negotiating with WINZ for job subsidies for other employees. I find that by staying on in his employment in the circumstances Mr Ward affirmed the breaches of his employment agreement and was not constructively dismissed. He still of course retained his right to claim from Mr Isaksson recovery of his lost wages.

[39] I do not find that Mr Ward has made out his personal grievance.

Should there be an award made with respect to the counterclaim?

[40] Mr Ward denied the allegation made in this respect and I am not satisfied that there should be any award made with respect to the counterclaim.

Costs

[41] If Mr Ward incurred costs Mr Weeks has ten days from the date of this determination to provide information about these. I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority