

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 342
5332538

BETWEEN SONNY ANDREWS
 Applicant

AND LETS GET IT LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Danny Gelb for Applicant
 No attendance for Respondent

Investigation Meeting: 28 July 2011

Determination: 29 July 2011

DETERMINATION OF THE AUTHORITY

- A. Sonny Andrews was an employee of Lets Get It Limited, not an independent contractor.**
- B. The unilateral decision of Lets Get It Limited to stop paying the agreed base salary to Mr Andrews led to the employment relationship ending by way of constructive dismissal.**
- C. Mr Andrews has a personal grievance which Lets Get It Limited must settle by paying him the following amounts within 28 days of the date of this determination:**
- (i) \$6153 in lost wages; and**
 - (ii) \$710 in reimbursement of his mobile phone accounts; and**
 - (iii) \$6000 as compensation for hurt and humiliation; and**
 - (iv) \$1500 as a contribution to his costs of representation; and**
 - (v) \$71.56 in reimbursement of the fee for lodging his application in the Authority.**

Employment Relationship Problem

[1] Sonny Andrews started work for Lets Get It Limited (LGIL) as a sales representative in October 2010. While he had signed an agreement headed ‘Contract for Services’, Mr Andrews said the relationship was really one of employment for which he received a fortnightly salary of \$1538.46 plus a commission on sales.

[2] The agreement was signed by Tao Zhou, also known as Mike Zhou, on behalf of LGIL. Mr Andrews said Mr Zhou described himself as ‘the face’ of LGIL in New Zealand but Mr Zhou had told Mr Andrews the company was financed by a Chinese businessman, Alex Zhao. Both Mr Zhou and Mr Andrews received directions about their work from Mr Zhao. In Mr Andrews’ case this was by email only. He never met or spoke to Mr Zhao.

[3] On 20 December 2010 Mr Andrews sent Mr Zhao an email asking about future plans for LGIL. He received two replies on 21 December – the first with a proposal to cut his salary but increase his commission rate and the second advising of a decision to pay him on a commission basis only from the following week. The second email said Mr Andrews was not being asked to leave the company and the company was not being shut down but current costs could not be afforded. Mr Zhao referred to new, higher commission rates as “*the new package for you*” and that he would get someone to “*finalize your last pay*”. The email asked Mr Andrews to work on getting two websites going with the promise of a later move to “*management level*” and “*a much better package*”. It concluded:

“... i hope you can understand our decision and work hard yourself and prove to us that you are able to take more responsibility of the company. If you think its not your type of work, I am sure i will feel sorry to see you leave but currently, we just can’t do anything about it”.

[4] Mr Andrews responded with an email asking for time to think about what Mr Zhao had said and to make a decision in the New Year. He asked “*to be paid a normal salary*” until then.

[5] On 29 December Mr Andrews received a direct credit payment in his bank account which he understood was his final salary payment from LGIL. He did no further work for LGIL after having completed sales work on 23 December when he had been due to begin a pre-arranged two week holiday. He raised a personal grievance through his representative on 10 January 2011 and lodged a statement of problem in the Authority on 13 April 2011.

[6] The matter was referred to mediation but mediation sessions arranged on 3 and 5 May did not proceed. On Mr Andrews' application, the Authority issued a direction to mediation but the mediation service was unable to get a response from Mr Zhou. Six weeks after the direction was made the Authority set the matter down for an investigation meeting.

[7] LGIL had not lodged a statement in reply but in an email sent to an Authority support officer on 10 May 2011 Mr Zhou said he was "*not intending to attend any mediation process*". Mr Zhou said Mr Andrews was a "*sales contractor*" whose contract was "*terminated*" because the company was shut down. Mr Zhou said Mr Zhao was a mentor for the business operation, not its company director or shareholder and he had told Mr Andrews "*not to worry too much about what he said*".

The investigation

[8] I am satisfied from courier records on the Authority's file that the notice of investigation meeting was served at LGIL's registered office. The company remained registered as at the day of the investigation meeting. No representative of LGIL attended at the appointed time. I had a support officer telephone the mobile phone of Mr Zhou but there was no answer and a message was left. There was no response after 15 minutes from Mr Zhou. I proceeded with the investigation meeting as no good cause was shown for LGIL failing to attend or be represented.¹ Mr Andrews, under affirmation, confirmed the truth of his written witness statement and answered questions about his evidence. Mr Gelb also asked some questions and made a brief submission.

¹ Clause 12 of Schedule 2 of the Employment Relations Act 2000.

[9] As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received. Rather it sets out findings of fact and law, expresses conclusions on the matters for determination, and specifies orders made.

[10] The issues for investigation and determination were:

- (i) was Mr Andrews an employee or independent contractor; and
- (ii) was his employment ended by constructive dismissal or redundancy; and
- (iii) if Mr Andrews is found to have a personal grievance, what remedies is he entitled to (considering lost wages, mitigation of loss, distress compensation, contribution and costs); and
- (iv) was Mr Andrews entitled to be reimbursed for mobile phone costs?

The nature of the employment

[11] I am satisfied from Mr Andrews' evidence that the real nature of his relationship with LGIL was one of employment. He had signed an independent contractor's agreement only because Mr Zhou said that was the only form available at the time. There was nothing to suggest Mr Andrews was in business on his own account. He did not invoice for his work and his work was in the exclusive control of LGIL.

The end of the employment

[12] I am satisfied from Mr Andrews' evidence that the employment ended when he was not prepared to continue working for LGIL after it was clear the company would no longer honour its agreement to pay him a base salary. The company's decision to switch to commission-only was made unilaterally, without proper consultation, and in breach of the terms of employment which had operated since mid-October 2010. It was reasonably foreseeable to LGIL that Mr Andrews would not tolerate such a breach because he plainly told Mr Zhao in an email on 21 December: "*Alex ideally I would like to stay with LetsGetIt but without pay I cant!*" Mr Zhao responded with his email confirming the decision to stop paying Mr

Andrews' base salary and petrol and phone costs. Mr Zhao's email – from the extracts quoted earlier in this determination – also made it clear that he understood Mr Andrews would leave if he would not accept the change to commission-only remuneration. It was, I find, an action of the employer which made Mr Andrews decision to leave the employment, in law, a constructive dismissal. This was not changed by Mr Zhou's subsequent explanation of events as resulting from closure of the company, that is, in effect, a redundancy and that Mr Andrews should have ignored what Mr Zhao told him. I prefer Mr Andrews' evidence that, from his previous dealings with Mr Zhao, he correctly understood Mr Zhao was the decision maker for the company. It was clear from Mr Zhao's emails that LGIL intended the employment to continue but only on terms which were unacceptable to Mr Andrews.

[13] There was no adequate consultation with Mr Andrews about the proposal to change his remuneration. The email trail shows there was less than 24 hours between the prospect being raised with him and notice of the decision being finalised.

[14] Mr Andrews has a personal grievance which requires remedies.

Remedies

Lost wages

[15] Mr Andrews sought an order for wages lost from 15 January to 16 April 2011 – that is three months. While I accept he would have continued working for LGIL but for its breach of his terms of employment, I do not accept his evidence confirms his loss amounts to that three month period. He actively sought work from late December and through January, despite the difficulty of doing so during the summer holiday period of many businesses. However around two months after leaving LGIL he had decided to enrol in a development course and I consider his efforts to actively mitigate his losses ended at that point. Accordingly Mr Andrews is awarded lost wages for eight weeks only under s123(1)(b) and s128 of the Act. At the rate of \$1538.46 per fortnight, the gross amount due to Mr Andrews under that award is \$6153.84 from which he will need to account to IRD for the appropriate amount of income tax.

[16] Mr Andrews is entitled to an award of a further \$710 in reimbursement of his mobile phone account under s123(1)(b). I accept his evidence that Mr Zhou had undertaken this account would be paid in full by LGIL but no payments were made for Mr Andrews' October, November and December accounts

Distress compensation

[17] I accept Mr Andrews' evidence that he suffered humiliation, loss of dignity and injury to feelings as a result of LGIL's actions. The sudden loss of his job and income meant he could not meet commitments for financial support to his mother and two friends, which he found distressing. Considering the particular circumstances of this case, and the general range of awards in cases of this type, Mr Andrews is awarded \$6000 as compensation under s123(1)(c)(i) of the Act.

Contribution

[18] There is no evidence of any blameworthy conduct by Mr Andrews which would require reduction of the remedies awarded to him.

Costs

[19] Mr Andrews is entitled to a reasonable contribution to his costs of representation in bringing his successful personal grievance application. The investigation meeting took less than a half day and I consider this is a matter to which the notional daily rate may properly be applied. Accordingly LGIL is ordered to pay \$1500 to Mr Andrews in costs and to reimburse him a further \$71.56 for the fee paid to lodge his application.

Robin Arthur
Member of the Employment Relations Authority