

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 339
5386240

BETWEEN ALBERT GRANT BIRCHALL
Applicant

AND BREZNAQ LIMITED
First Respondent

CONVERGING EQUITIES
LIMITED
Second Respondent

BRIAN RANKIN
Third Respondent

JONATHAN WOODHAMS
Fourth Respondent

Member of Authority: R A Monaghan

Representatives: A G Birchall in person
B Rankin for respondents

Investigation meeting: On the papers

Determination: 1 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Albert Grant Birchall seeks orders for the payment of:

- (a) unpaid salary in the sum of \$132,307; and
- (b) unpaid expenses in the sum of \$35,000 (net) less \$26,991.37 received in advance, or \$8008.63.

Quantum not denied

[2] During a conference call on 26 July 2012 between the Authority, Mr Birchall and Brian Rankin (who with Jonathan Woodhams is one of two directors of both

Breznaq Limited (BL) and Converging Equities Limited (CEL)) Mr Rankin acknowledged that Mr Birchall's employer owes the amounts specified, but has been unable to pay because attempts to raise capital have not come to fruition.

Who must make the payment

[3] Mr Rankin said BL was Mr Birchall's employer. Because an order for payment can be made only against Mr Birchall's employer, and Mr Birchall maintained that all four respondents were his employers, it is necessary to resolve that matter before the order is made.

[4] The matter was discussed during a conference call on 5 September 2012 between the Authority, Mr Birchall and Mr Rankin. Mr Birchall advanced no factual or legal basis at all for citing Messrs Rankin and Woodhams as the employer, or why they might otherwise be liable to make the payment in their personal capacities. The claims against them are dismissed.

[5] The remaining issue was whether BL alone, or BL jointly with CEL, is the employer. Affidavits addressing the issue were lodged after the conference call.

1. Background

[6] CEL is in the business of identifying and acquiring companies, or holdings in companies, then using its management expertise to add value to the company. It may also acquire the rights to products or technologies, and form companies to operate the associated business.

[7] BL is one such company.

[8] Mr Birchall developed a non-chemical water treatment technology, the rights to which were the subject of a sale and purchase of intellectual property agreement involving CEL. In an associated transaction, and with the benefit of legal advice, Mr Birchall entered into an employment agreement with BL. The agreement was to commence in October 2008, and among other things provided for a base

remuneration, an incentive component, and other benefits including expenses. Under the agreement Mr Birchall was to provide water divining services for BL.

[9] Mr Birchall began receiving fortnightly payments of salary in November 2008. Payments continued on a reasonably consistent basis until the end of 2010, when they ceased. Payments at a much lower rate, and described as advances against expenses, were made in 2011. These ceased in February 2012. Mr Birchall seeks to recover the shortfall.

[10] During this time CEL was working with investors to raise capital for BL. Pending the raising of capital it was also providing funding for Mr Birchall's salary and expenses, except for a short period during which a company associated with Mr Woodhams contributed funds.

2. The identity of the employer

[11] None of the parties had professional representation in this matter. Accordingly I explained at some length during the 5 September conference call what evidence was necessary in order to establish the identity of the employer. In particular I explained to Mr Birchall that, while it was relevant that even if CEL's was the bank account from which his salary, expense and Kiwisaver payments were made, that factor alone was not determinative. Mr Birchall would also need to give his own account of the matters discussed by Mr Rankin during the call, and subsequently included in the affidavits of Mr Rankin and Mr Woodhams.

[12] I did not understand Mr Birchall to dispute the matters Mr Rankin in particular raised, but nor has he given his own account of them. He has continued to rely on the fact that his salary, expenses and Kiwisaver payments were made from CEL's bank account.

[13] Other relevant factors are:

- Mr Birchall knew when entering into the arrangements he did with CEL and BL that CEL was acquiring the intellectual property but that BL was to be the operating company

through which the technology he had developed would be put to business use;

- He entered into a written employment agreement citing BL as the employer;
- He had the benefit of legal advice in respect of both of the above;
- He carried out activities associated with BL's business;
- BL carried out business activities in its own name, albeit hampered by the lack of capital; and
- BL maintained its own business records.

[14] These factors favour a conclusion that BL was the employer. I find the fact that CEL provided funding pending the raising of capital does not outweigh these factors. Accordingly I conclude BL was the employer.

Order of the Authority

[15] Mr Rankin has been saying for many months that there is a firm commitment from an investor to provide sufficient capital to allow BL to develop Mr Birchall's technology. Mr Birchall is aware of the efforts to obtain capital, and in particular of the efforts involving the investor in question, but his patience is exhausted.

[16] There is no documentation in support of any arrangement, undertaking or agreement entered into with the investor. However the investor apparently advised Mr Rankin in early August 2012 that a transaction on which he was reliant himself had been completed and that preliminary funds should be available in early September 2012. In an exchange with Mr Rankin in mid-September the investor apparently advised that there had been further delays but they were not of a kind that placed the transaction in jeopardy. It was still hoped that funding would soon be available.

[17] I was asked to allow further time for the completion of the transaction with the investor but the delays have been too lengthy and repeated, and too inadequately explained, to persuade me to do this. I decline to allow any further time, although when and how Mr Birchall enforces the Authority's order is up to him.

[18] BL is therefore ordered to make immediate payment to Mr Birchall of:

- (a) unpaid salary in the sum of \$132,307; and
- (b) \$8008.63 in respect of expenses.

Costs

[19] BL is further ordered to reimburse Mr Birchall for the Authority's filing fee of \$71.56.

R A Monaghan

Member of the Employment Relations Authority