

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN William Falcone (Applicant)
AND Civic Corporation Limited (Respondent)
REPRESENTATIVES Maxine Knowler, Counsel for the Applicant
Alastair Logan, Counsel for the Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING Queenstown 8 February 2007
DATE OF DETERMINATION 12 April 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant ("Mr Falcone") seeks a determination that he was an employee of the respondent Civic Corporation Limited ("Civic") in order that he can progress his alleged personal grievance claiming unjustifiable dismissal and seeking the usual remedies.

[2] Civic on the other hand resist that claim on the footing that there was never an employment relationship between Mr Falcone and itself and that the nature of any arrangement between the parties was never agreed.

[3] Mr Falcone had applied unsuccessfully for a position with Civic as a Hazardous Substance Compliance Officer early in calendar 2005.

[4] When that same position became vacant a few months later, Mr Falcone was overseas. Notwithstanding that, Civic contacted Mr Falcone in relation to the vacancy.

[5] On 21 July 2005, Civic emailed Mr Falcone with an offer of employment in the role of Hazardous Substance Compliance Officer.

[6] On Mr Falcone's return to New Zealand, there were discussions between the parties and in a significant discussion on 8 August 2005, Civic says Mr Falcone was asked by an officer of Civic if he accepted the offer of employment contained in Civic's email of 21 July 2005.

[7] Mr Falcone's evidence is that the effect of that 8 August meeting was to confirm his acceptance of Civic's offer. For their part, Civic deny that interpretation and say that Mr Falcone never accepted the offer. Indeed, Civic say that Mr Falcone assertively rejected the offer and proposed different terms and conditions.

[8] Both parties agree that one of the alternative proposals advanced by Mr Falcone was that he would receive a lesser salary from Civic but in return he would derive income from Civic by leasing to them accommodation and chattels that could be used in the prosecution of Civic's business.

[9] Civic also allege that Mr Falcone proposed yet another scheme whereby he would work for Civic exclusively as a contractor but Mr Falcone denies that that option was ever proposed.

[10] There was a further meeting between the parties on 15 August 2005 at which Civic's Managing Director Mr Kampman was present. There was discussion about Mr Falcone's proposal wherein he would receive a lower salary payment but also derive income from the lease of his property to Civic. Mr Kampman expressed Civic's reservations about this proposal.

[11] Civic sought an opportunity to consider Mr Falcone's proposal and in the result advised Mr Falcone that his proposal was not acceptable and further indicated to him that it no longer wished to negotiate with him.

[12] There is dispute about exactly how and when that message was conveyed but there was no dispute that the substance of the message was that Civic rejected Mr Falcone's proposal and reached the conclusion it no longer wished to engage with him.

Issues

[13] The first and undoubtedly the primary issue for determination is whether there ever was an employment relationship between the parties.

[14] If the answer to that question is in the affirmative then the next matter for determination is whether Mr Falcone was unjustifiably dismissed from his position and what remedies ought to flow from that decision.

Was there an employment relationship?

[15] It is clear from the evidence and accepted by both parties that there was an offer of employment. It was contained in the email dated 21 July 2005 sent by Civic to Mr Falcone while he was overseas. That email which was sent by Mr Peter Laurenson an officer of Civic is, as to its relevant portions, in the following terms:

... on the topic of which I thought it would be good to touch base to make sure that you are keen on starting into the Hazardous Substance Compliance Role. We would certainly like to offer you the position and work through the details and any questions you have. I will get Jill to draw up a full contract for you – which is pretty standard stuff, but obviously needs to be gone through. The basic components which will make up the job offer include the following:

- *Full time position*
- *Fixed term contract through to 30 June 2006 (sic) (this is the period of the initial OSH contract which although not guaranteed, they have mentioned a reasonable likelihood of continuing funding for some period at least*
- *Salary of \$50,000 per annum*
- *Four weeks annual leave*
- *Additional "snow day" leave*
- *Start date as soon as possible for you*

Bill there are plenty of other items to clarify, and I am sure you will want to discuss further, but I thought it at least worthwhile to get this to you to have a look at and perhaps come back to me with your thoughts. ...

[16] It seems to me clear that this email does indeed constitute an offer of employment on terms and conditions which are sufficiently certain to enable acceptance and, if acceptance were forthcoming, an employment relationship could and would be constituted.

[17] Having established that an offer of employment was made the next issue was whether there was an acceptance of that offer. The evidence is clear that Mr Falcone did not immediately communicate his acceptance of the offer to Civic prior to his return to New Zealand. No doubt he recognised that he would be back in New Zealand on 31 July (only 10 days after the email was sent) and so he took the option of leaving the matter until his return to New Zealand.

[18] There were various exchanges between the parties on the issue but it is common ground and I accept that the focus must be on the meeting of 8 August 2005. This was a meeting between Mr Falcone and Mr Laurenson on behalf of Civic.

[19] Mr Laurenson's evidence is unequivocal. He says in his brief of evidence:

On 8 August 2005 at a meeting between Bill (Mr Falcone) and myself, I raised the question as to whether the general terms of employment covered in the email of 21 July were acceptable, and if they were then Civic Corp would produce a written employment agreement for Bill. It was at that point that Mr Falcone advised that he had not accepted the terms of the employment offer, and was interested in offering an alternative arrangement. ...

[20] Mr Laurenson's brief of evidence then goes on to refer in broad terms to the nature of the alternative agreement which Mr Falcone was advancing. In his oral evidence before the Authority, Mr Laurenson indicated that his hand written diary entry for the day of the meeting includes reference to the figures given by Mr Falcone for his proposal.

[21] Mr Falcone's own evidence at the investigation meeting was revealing. His brief of evidence spends ten paragraphs on the 8 August 2005 meeting but at no stage does it refer to Mr Falcone accepting the position offered by Civic. I asked Mr Falcone why this was. He said acceptance was *a given*. He says that he said to Mr Laurenson *when do I begin*. Mr Falcone acknowledged that he did not say at any point words to the effect that he accepted the position but he believed that the matter was free from doubt by the behaviour of the parties.

[22] On the basis of the evidence I heard, I am satisfied that there was no acceptance of the position offered in any formal sense. That finding is consistent with the evidence from both parties. However, the wider question is whether the behaviour of the parties ought, as Mr Falcone contends, to lead inevitably to a conclusion that there has been an acceptance of the position offered.

[23] In this latter regard, it is important to note a significant difference between the parties on the question of what actually happened at the 8 August 2005 meeting. There is much common ground but an absolute difference on the question of whether Mr Falcone's "new" proposal (the suggestion that he has a reduction in salary but derive income from leasing property to Civic) was advanced for the first time at the 8 August meeting or later. Mr Falcone says that the first occasion at which he advanced this proposal of his was at the meeting at which Mr Kampman attended on 15 August 2005. Mr Laurenson is equally clear that the Falcone proposal was first advanced at the 8 August meeting.

[24] I prefer Mr Laurenson's evidence on this point for two reasons. The first is that Mr Laurenson gave evidence of having written down in his diary under the date of the 8 August meeting, the figures which Mr Falcone referred to in his proposition. Mr Falcone denies absolutely raising his proposition with Mr Laurenson at the 8 August 2005 meeting and his evidence is that the first occasion on which his proposal was advanced was at the meeting on 15 August when Mr Kampman was present.

[25] As well as the evidence about the recording of the rough details of the Falcone proposal in Mr Laurenson's diary on the 8 August date, there is also the question of why Mr Kampman got involved in the second meeting on 15 August. Mr Laurenson says that he involved Mr Kampman because he had no authority to contemplate the sort of arrangement that Mr Falcone was talking about on 8 August but Mr Kampman as Managing Director did. Mr Falcone, denying that he raised his proposal on 8 August says that Mr Laurenson told him in

a telephone discussion after the 8 August but before the 15 August that he wanted Mr Falcone to raise all of his ideas about the job in the presence of Mr Kampman.

[26] I prefer Mr Laurenson's recollection of events on this matter. It seems to me, on the balance of probabilities, more rather than less likely that Mr Laurenson did get an indication from Mr Falcone of what Mr Falcone was proposing when the two of them met on 8 August. Mr Laurenson struck me as an honest and straightforward witness and I accepted his evidence in its totality. There was, in consequence, no reason for me to doubt his assertion that he had recorded details of the bare bones of what Mr Falcone's proposal was in his diary entry for the day of the 8 August meeting. Further, arranging the subsequent meeting with Mr Kampman in attendance is consistent with Mr Laurenson's evidence that he had already heard from Mr Falcone something which was outside his normal authority as a senior officer of Civic.

[27] If Mr Falcone had indeed, as he contends, accepted the position but then raised other matters which were somehow ancillary to the position then Mr Laurenson would, on his evidence, have immediately arranged for that employment agreement to be reduced to writing and would have had both execute it after due deliberation. That steps never took place and it is my conclusion that it never took place because Mr Laurenson never understood that Mr Falcone was accepting the position on the terms offered.

[28] Indeed it would be difficult to imagine how Mr Laurenson could reach that conclusion because, even if I am mistaken in the conclusion that I reach about when Mr Falcone raised his alternative proposal, it is common ground that alternative proposal was indeed raised and it seems to me inconceivable that the parties could have believed that they had a settled bargain in the context of talking about matters as fundamental as a dramatic reduction in salary to be set off against what amounts to a partial sub-contract arrangement for the balance of the income that Mr Falcone sought to derive from the proffered position.

[29] Quite clearly, there was such a degree of uncertainty about the terms of the bargain that might be in contemplation between the parties that there could be no sense in which there existed a settled understanding as to the nature of any arrangement between them.

[30] I am satisfied then that at the meeting on 8 August 2005, the evidence available to me discloses that there was no acceptance by Mr Falcone of the position offered by Civic and indeed no wider context which would allow any impartial observer (or even the parties themselves) to reasonably believe that there had been an acceptance of the offer made. Indeed, as I have already indicated, I think the position is otherwise. Mr Falcone, I find, advanced an alternative view which was so fundamentally different to the offer made by Civic as to be a counter offer, a counter offer which on the basis of the evidence was firmly and unequivocally rejected by Civic after due reflection and consideration.

[31] The only other matter which I need to deal with is the contention by Mr Falcone that because Civic sent him on training and provided him with material to read in anticipation of his joining Civic's employment, those acts, of themselves, constituted behaviour which suggested that Civic believed there was a concluded bargain.

[32] I do not accept that contention at all. I prefer the evidence of Civic's witnesses to the effect that, as had happened on a previous occasion, Civic simply wanted to make Mr Falcone ready for his hoped for take-up of the position. Clearly Civic sought an engagement with Mr Falcone but the facts do not disclose a concluded bargain.

Determination

[33] It follows from the foregoing analysis that Mr Falcone's claim fails in its entirety for the reasons I have just advanced.

Costs

[34] Costs are reserved.

James Crichton
Member of Employment Relations Authority