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Fry v Panel Holdings Limited AA517/10 (Auckland) [2010] NZERA 938 (17 December 2010)

Last Updated: 6 January 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 517/10 5313071

BETWEEN

AND

JOHN FRY Applicant

PANEL HOLDINGS LIMITED
Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Vicki Campbell

Bridie Chote for Applicant

No appearance for Respondent

22 November 2010

at Taupo

17 December 2010

DETERMINATION OF THE AUTHORITY

[1] Mr John Fry has claimed unpaid wages in the amount of \$207,000.00 being wages he says is due to him under a fixed term contract he entered into with Panel Holdings Limited.

[2] The Authority was unsuccessful in having the statement of problem served on Panel Holdings Limited and so instructed Mr Fry's representative to affect personal service. Personal service occurred on 10 August 2010.

[3] Having received no statement in reply Panel Holdings Limited was advised that if it failed to lodge a statement in reply by 7 September 2010 it would require the leave of the Authority to respond or defend the matter.

[4] On 16 September 2010 Ms Boon Lee, a Support Officer of the Authority spoke to a Mr Kris Sagmyr who was listed as a director and shareholder of Panel Holdings Limited. Mr Sagmyr was also the person who had accepted service on behalf of the Panel Holdings Limited of the statement of problem.

[5] Mr Sagmyr advised the Authority that he had posted the relevant paperwork two weeks earlier. He was advised it had not been received by the Authority. Mr Sagmyr undertook to collate the relevant documents and resend them. Mr Sagmyr was adamant that the employment relationship between Mr Fry and Panel Holdings had not eventuated as the commercial contract stipulated in the employment agreement did not eventuate.

[6] By 23 September 2010 the Authority had not received any documents or other responses from Panel Holdings Limited. The matter was therefore set down for an investigation meeting on 22 November 2010.

[7] Panel Holdings Limited was served with the Notice of Investigation meeting on 22 October 2010.

[8] In accordance with the timetable set by the Authority, Mr Fry lodged his witness statement and associated documents on 5 November 2010.

[9] On Friday 19 November 2010 Mr Sagmyr made direct contact with the applicant's representative via email and stated (verbatim):

We have no problem with the document received from the (Employment Relation Problem) but will like to clarify some of the claims by John Fry and the situation with relation to Panel Holdings Ltd.

Panel Holdings Ltd has not traded for over three years.

The contract referred to in the document was signed off by the company and John Fry but with a proviso. The contract would come into force at start of the panel construction by Flakeboard US.

The responsibility and job description referred in the contract makes this abundantly clear. Due to Global depression and total failure in the building industry we have as yet not commenced any panel manufacture in the US. When and if we commence manufacturing we will be happy to comply with John Fry's contract.

His claim for at least \$17,250 we agree is probably justified and once we are in a position to do so he will be paid.

[10] Ms Chote provided a copy of the email to the Authority and enquired as to whether, given the concession by Panel Holdings Limited, an investigation meeting was necessary or whether a determination could be made on the papers. As I had another hearing set down for the same day in Taupo, it was decided to proceed to have the investigation meeting so that Mr Fry could provide evidence in response to Panel Holding's email, under oath.

[11] The investigation meeting proceeded as timetabled. No representative from Panel Holdings Ltd appeared at the investigation meeting. Panel Holdings had not shown good cause for its failure to appear or be represented and I proceeded under clause 12 of Schedule 2 to the [Employment Relations Act 2000](#) to hear and determine the matter as if Panel Holdings had attended or been represented.

Arrears of wages claim

[12] In his evidence to the Authority Mr Fry conceded that the employment agreement was conditional on a manufacturing agreement being entered into by Panel Holdings Ltd and Flakeboard USA. He also accepted the notification from Panel Holdings Ltd that no contract had been entered into. Mr Fry accepted on that basis, that he was owed an amount of \$17,250 in accordance with the employment agreement.

[13] Ms Chote requested a short adjournment to allow her time to contact Mr Sagmyr by telephone in an effort to resolve the matter of payment between them. I granted that adjournment.

[14] After some time, Ms Chote advised the Authority that she had not been able to reach an agreement at that time but would appreciate more time. A further adjournment was sought for 7 days to allow further discussions to ensue. That adjournment was granted.

[15] On Monday, 29 November 2010 the Authority was advised that Ms Chote had been unsuccessful in coming to any arrangements as to the payment of the outstanding wages and has asked the Authority to make a determination.

[16] The written employment agreement between the parties provides for the minimum payment of \$17,250 in the event that Panel Holdings Ltd is not successful in entering into a contract with Flakeboard USA.

[17] There is now no dispute that the sum of \$17,250 is owing to Mr Fry on the basis that the commercial contract did not eventuate.

Panel Holdings Limited is ordered to pay to Mr Fry the amount of \$17,250 gross within 28 days of the date of this determination pursuant to [section 131](#) of the [Employment Relations Act 2000](#).

Changes to the Company's Register

[18] On 23 November 2010, the day after the investigation meeting and the conversations between Mr Fry's representative and Mr Sagmyr took place, the Company's Register was changed deleting Mr Sagmyr as both a director and shareholder of the company.

[19] I am satisfied that at the time the concession as to liability was made it was made by a registered director of Panel Group Holdings Limited who had the authority to make such concessions.

[20] The sole director is now Mr Clive Parker of 86 Solomon Street, Brookfield. The address for service for the company has also been changed to the same address. The applicant is to affect personal service of this determination on the respondent.

Costs

[21] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Fry may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell

Member of Employment Relations Authority

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