

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 31/09
5137726

BETWEEN	HANS GELTON COLIN MCKENZIE PETER HAACK Applicants
AND	NEAL SALES Respondent
AND BETWEEN	ALLAN EVANS Applicant
AND	RED SAILS LIMITED Respondent

Member of Authority: Philip Cheyne

Representatives: Hans Gelton, Advocate for Applicants
Neal Sales, Advocate for Respondents

Investigation Meeting: 27 February 2009 at Christchurch

Determination: 17 March 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants had written individual employment agreements with an employer identified in those agreements as *Grey Skills Employment*. Each of them dealt with Neal Sales when forming their employment agreement and they worked at the Christchurch Engine Centre. They started work at different times in 2007 and 2008 but the employment of them all came to an end in September 2008 on one week's notice. There are two parts to the applicants' employment relationship problem. First, they say that there was deducted from their wages a commission which should not have been deducted which they seek to recover. Secondly, they say

they should have been given four weeks notice of redundancy and seek to recover the balance.

[2] In reply Mr Sales says that the employer and therefore the proper respondent was always a company called *Red Sails Limited* whose trading name is *Grey Skills Employment*. He says that no commission was ever deducted from the wages paid or payable to the applicants and that the company exceeded its contractual obligations when ending the applicants' assignments.

[3] It is convenient to first resolve the issues about the identity of the respondent before determining the two parts of the applicants' problem.

The identity of the respondent

[4] *Grey Skills Employment* is not a legal entity; it is simply a trading name. Mr Sales explained the history of ownership of the name *Grey Skills Employment* which for the whole of the relevant period resided with the company *Red Sails Limited*. The difficulty is that the applicants did not know, that when they contracted with *Grey Skills Employment*, they were dealing with Mr Sales as agent for the company *Red Sails Limited*. Because Mr Sales did not disclose this agency and *Grey Skills Employment* is not a legal entity capable of being sued, the applicants are entitled to sue Mr Sales, as they have done. Mr Sales is therefore the respondent to these proceedings in respect of Hans Gelton, Colin McKenzie and Peter Haack. The one exception is Allan Evans who signed another employment agreement shortly before September 2008 identifying his employer as *Red Sails Limited*. As foreshadowed prior to the investigation meeting I make appropriate orders identifying the respondents accordingly.

[5] Mr Sales explained why the original employment agreements and other documentation did not refer to the existence of the company, essentially for administrative reasons. There is no reason to doubt this evidence. All current employment agreements comply with the requirement to properly identify the employer's legal identity.

[6] For convenience in the remainder of this determination I will use the trading name *Grey Skills Employment* as a reference to the correct respondent to each applicant's claim.

Commissions

[7] *Red Sails Limited* operates an employment agency business called *Grey Skills Employment* and employs employees to work on assignment for its clients. The duration of the assignments vary depending on client requirements which may change at any time.

[8] A clause in each of the employment agreements reads

4.5 *The Employee understands and accepts that commission of 20% of all gross wages and/or commissions earnings are to be paid by the Employee to the Employer on each assignment, for the first 13 weeks of any assignment: and a commission of 10% of all gross wages and/or commissions earnings for the 2nd 13 weeks up to a maximum of 26 weeks paid employment in any single Assignment.*

[9] The applicants say that they worked for longer than 13 weeks so the commissions charged to them should be reduced from the original 20% to 10%; and for those who worked longer than 26 weeks the commission should be reduced further. The problem with the claim is that *Grey Skills Employment* did not charge any of the applicants any commission during their employment. Mr Sales said that this clause in the employment agreements was never given any effect because he understood it to be illegal to charge an employee a commission or premium for their job. He explained that *Grey Skills Employment* always paid each applicant the negotiated hourly rate in full. Mr Sales also explained that *Red Sails Limited* invoices its clients at a rate higher rate than it pays its employees to cover operating expenses and to allow for profit. The Employment Court in *Mehta v Labour Inspector* [2003] 1 ERNZ 451 raised doubt about whether employment agencies may be caught by s.12A of the Wages Protection Act 1983. However, in the present case I am satisfied that no money was deducted by *Grey Skills Employment* from any applicants' wages so that brings the matter to an end. This part of the applicants' complaint fails.

Notice of redundancy

[10] As noted each applicant received a letter on or about 16 September 2008 telling them that their assignment at the Christchurch Engine Centre had been cancelled by the client, that *Grey Skills Employment* was looking for other placements for them but that they were being given one week's notice. Mr Sales says that *Grey*

Skills Employment did more than was required under the terms of the employment which include the following provisions:

- 1.1 *The Employee is employed by the Employer to work on Assignments for Clients. At any time the period of an Assignment may be extended, reduced or terminated in accordance with the Client's needs.*
- 1.2 *The Employee accepts at all times, while on Assignment, that if the Assignment is terminated or reduced that they are not entitled to receive any payment or compensation for redundancy.*
- 1.3 *The Employee accepts that no guarantee of Assignment duration or continuous employment has been given or implied by this Agreement.*
- 3.3 *Owing to the nature of the Assignments, the Employee accepts that any Assignment may be varied, extended, shortened or terminated by the Employer without notice and/or reasons being given.*

[11] The applicants on the other hand point to another provision in their employment agreement which reads:

- 13.5 *In the event of redundancy, four weeks notice of redundancy will be given. The Employer may pay the Employee up to four weeks in lieu of notice. The parties acknowledge that there will be no redundancy compensation.*

[12] The task for the Authority is to interpret these apparently contradictory provisions and apply that interpretation to the present circumstances.

[13] The employment agreements do not say they are casual or for a fixed term. The employment relationship must be regarded as on-going subject to contractual powers of termination. Clause 13 is headed *TERMINATION OF EMPLOYMENT*. It first empowers the employer to summarily dismiss the employee for gross or serious misconduct. The next sub-clause stipulates the circumstances where the employee is deemed to have abandoned their employment. Next, the employer may terminate the employment *for cause by giving one week's notice in writing or paying one week's in lieu*. Clause 13.4 permits the employer to terminate the employment by giving one

week's notice in writing or forfeiting one week's pay in lieu. Clause 13.5 dealing with redundancy is set out above. The last two sub-clauses provide for the employer to deduct certain debts from wages.

[14] There is no definition of *redundancy* in the agreements. Mr Sales pressed the notion that clause 13.5 is limited to the situation where the business of *Grey Skills Employment* closes. However *redundancy* could only have that narrow meaning if expressly stated in the agreements or by necessary implication: neither applies here. The word must then be given its ordinary meaning of where an employee's employment is terminated by the employer, the termination being attributable to the fact that the position filled by the worker is or will become superfluous to the needs of the employer: see *GN Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079. Adopting that definition, it is clear that the employment of each employee was terminated by *Grey Skills Employment* because their position was superfluous to the needs of the employer. They were each entitled to four week's notice of redundancy and the employer had an election to pay in lieu of notice.

[15] That does not completely resolve the problem. The difficulty for the applicants lies in clause 4 of the agreements headed up *Remuneration* which reads:

4.1 *The Employee agrees that their wages will be based solely on the hours worked on each Assignment. The Employee is not entitled to remuneration when not working on an Assignment provided by the Employer.*

[16] When an employer dismisses an employee in breach of the employment agreement the employer is liable for damages for wrongful dismissal which is assessed as the amount the employee would have earned under the employment agreement for the period until the employer could lawfully have terminated it. In this case that period is a further three weeks but the employees would not have earned any wages during that period because of the operation of clauses 1.1, 1.2 and 4.1 above. *Grey Skills Employment* wrongfully terminated the applicants' employment but the applicants are not entitled to any further payment.

Summary

[17] The applicants paid no commissions to *Grey Skills Employment* so there is nothing for them to recover.

[18] *Grey Skills Employment* wrongfully dismissed the applicants but they suffered no damages.

[19] Costs are reserved. If the question of costs cannot be resolved between the parties any claim must be made in writing to the Authority within 28 days and the other party may lodge a reply within a further 14 days.



Philip Cheyne
Member of the Employment Relations Authority



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