IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 87/09
5134818

	BETWEEN	"M" Applicant
	AND	"C NZ LTD" Respondent

Member of Authority:	James Wilson
Representatives:	The applicant in person with assistance from Roger Poole No appearance by the respondent
Investigation Meeting:	18 December 2008 at Auckland
Submissions received:	5 January 2009 from the applicant
Determination:	25 March 2009

DETERMINATION OF THE AUTHORITY

"M"'S EMPLOYMENT RELATIONS PROBLEM

[1] "M" says that he was employed as Country Manager - Australia and New Zealand, by "C NZ Limited" ("C") from February 2004 until he was advised, in June 2008, by the Company Owners in the USA that his employment had been terminated. "M" says that the termination of his employment was both unlawful and unjustified and has caused him serious humiliation and emotional distress. In his statement of problem "M" requested either

- that the Authority order that he be reinstated to his employment, be paid outstanding wages and salary owed and $25,000 in compensation for humiliation and distress, or if the company elected not to reinstate him,

- outstanding wages and salary, accrued holiday pay, interest and costs together with $250,000 in compensation for humiliation and distress.

In either case “M” seeks a written apology from the American Directors of “C” Inc.

THE AUTHORITY’S INVESTIGATION

[2] “M”’s circumstances and his application to the Authority are somewhat unusual and have created particular difficulties in investigating his problem. There is absolutely no doubt that “M” was employed, as he states, by “C NZ Limited”. He is also the sole director of this company. “C NZ Limited” is fully owned by “C” Inc. a company based in the USA. “M” is the sole representative of “C NZ Limited” in New Zealand. “M”’s original statement of problem sought interim reinstatement in addition to the remedies listed above. This statement, in addition to listing “C NZ Limited” as the first respondent, also cited 4 of the directors of “C” Inc as respondents. When “M”'s original statement of the problem was filed it was immediately forwarded to the “C” New Zealand company address. “M” received this correspondence as the sole director in New Zealand. Fortunately “M” was able to provide e-mail addresses for the American directors of “C” Inc (the American directors) and copies of the statement of problem were forwarded to them. Subsequently the Authority was contacted by Mr Stuart Dalzell of Chapman Trip in Auckland, advising that he had received a copy of the statement of problem. In September 2008 Mr Dalzell advised that he had e-mailed the American directors but had not received any instructions.

[3] On 30 September 2008 “M” advised that he was withdrawing his application for interim reinstatement (because he had found an alternative position) but wished to continue to pursue his other claims. On 1 October 2008 Mr Dalzell confirmed that he acted for the American directors but not “C NZ Limited”. “M” subsequently filed an amended statement of problem citing “C NZ Limited” as the sole respondent.

[4] “M”'s new statement of problem was again served on the company address in New Zealand. On my instruction a copy of this statement was also forwarded to Mr Dalzell for his information and e-mailed to the American directors. No response was received from either Mr Dalzell or from the American directors. In the absence of any

response the matter was set down for investigation meeting on 18 December 2008. Copies of the notice of meeting were forwarded to the address for service of "C NZ Limited", Mr Dalzell and the American directors of "C" Inc.

[5] No representative of the New Zealand company or the American owners attended the investigation meeting. However I am satisfied not only that the various documents had been properly served in terms of the Employment Relations Regulations, but the American directors were aware of "M"'s claims and the Authority's investigation. They have chosen not to appoint a New Zealand representative to represent the interests of "C NZ Limited" and must now accept, subject to any legal challenge, whatever outcome the Authority determines.

"M"'S EMPLOYMENT WITH "C" NEW ZEALAND LTD

[6] From the documents produced by "M" it seems that he was initially employed by "C" Inc. in the role of Country Manager - Australia and New Zealand. The exact nature of this employment prior to 2007 is a little unclear. What is clear is that in September 2007 a new company, "C NZ Limited" was registered with the New Zealand Companies Office. "M" is listed as the sole New Zealand director and all shares are listed as being owned by *"C" Inc, a "N" Corporation*. It is also clear from the correspondence that from at least that date "C NZ Limited" was "M"'s employer.

[7] In May 2008 "M", for the first time, had problems with his entry visa for one of his frequent trips to the USA. It seems that this issue, i.e. his inability to work in the United States, became the catalyst for the termination of his employment. There was a good deal of correspondence exchanged and several telephone conversations between "M" and various of the American directors and managers. During these exchanges various severance arrangements were discussed. On 26 July 2008 "M" received an e-mail from H (one of the American directors) saying:

> *But I will say it again.*
> *1. You were terminated on June 9 because you could not work in the US and you could not provide any benefit to the Corporation in New Zealand or Australia. See the attached e-mail in which you acknowledge this.*

2. We offered to pay you severance through (to 31 August) subject to release. Since the Corporation was paying you $3500 per month, that would be $3500 for June, July and August. You have been paid in June and July. A release has not been signed.

3. We expected you to tie up some loose ends during the severance period -- see attached e-mail.

4. P made a mistake -- he did not understand my directions -- which he later clarified to McL by the e-mail you received.

5. In the light of recent revelation that you pursued the superfruit juice project with D (without our permission) after the project was terminated, any severance is more than reasonable.

6. I believe we are being more than fair in our offer..

It appears you are trying to play the parties against one another. Let me be clear, I am the only one that can approve anything in this situation. So, please don't think that anyone else can -- and please don't ask anyone else to approve something.

I e-mailed you our final offer on July 11 -- see attached. Since you have been paid another $3500, the amount due to you (if you accept our offer) is $18,000. I have attached a revised agreement with that amount.

[Note: the amounts listed above are expressed in American dollars]

[8] On 7 August 2008 "M" sent a lengthy letter to H setting out his position in some detail and proposing a settlement. Despite some initial indication that the American directors would consider "M"'s proposal, no settlement was agreed and, on 29 August he filed his statement of problem with the Authority.

DETERMINATION

[9] As previously indicated "C NZ Limited" chose not to be represented at the Authority's investigation meeting, despite every effort being made to ensure they were aware of both "M"'s claims and the time and date of the meeting. In these circumstances clause 12 of the second schedule of the Employment Relations Act (the Act) provides:

Power to proceed if any party fails to attend

If, without good cause shown, any party to a matter before the Authority fails to attend or be represented, the Authority may act as fully in the matter before it is if that party had duly attended or been represented.

[10] In the absence of evidence from the respondent (other than correspondence from them made available to me by "M") I am left with "M"'s uncontested evidence. Based on this evidence I find that "M" has a personal grievance against "C" New Zealand Ltd in that he was unjustifiably dismissed. He is entitled to be compensated both for the losses he has incurred and for the humiliation and distress this dismissal has caused him.

Apology

[11] As I explained to "M" at my investigation meeting, it is not within the Authority's power to order one party to apologise to another.

Contribution

[12] In terms of section 124 of the Act I find that "M" did not contribute to the circumstances which gave rise to his personal grievance. It is not therefore appropriate to reduce the remedies to be paid to him.

Recovery of lost wages

[13] According to "M"'s sworn evidence, the last payment of salary from "C" was for July 2008. Prior to that date he had been receiving $NZ5000 per month, i.e. an annual salary of $NZ60,000. On 5 September 2008 "M" commenced work for another employer at an hourly rate of $20. This job was of a temporary nature and lasted two weeks. On 29 September 2008 he commenced work for a new employer on an annual gross salary of $35,000 and on 3 November 2008 commenced another position at an annual salary of $80,000.

[14] "M" is entitled to recover lost salary from the end of July 2008 until he commenced new full-time employment. **"C NZ Limited" is ordered to pay "M" $NZ8400.00 gross** being unpaid salary for August and September 2008 less $1600 he earned for the 2 weeks commencing 5 September 2008.

Holiday pay

[15] According to documents provided by "C" payroll provider, as at 31 July 2008 "M" was entitled to $NZ4000 in unpaid holiday pay. In addition he is entitled to receive holiday pay calculated at the rate of 8% on the unpaid salary set out in paragraph 13 above i.e. 8% of $8400 = $NZ 672.00. **"C NZ Limited" is ordered to pay "M" $NZ4672.00 gross being unpaid holiday pay.**

Interest

[16] Due at least in part to "C" lack of response "M" has already had to wait some months for payment of this outstanding wages. While it is not appropriate to award interest on the compensation for hurt and humiliation, he is entitled to receive interest on the outstanding wages and holiday pay awarded. **"C" is ordered to pay "M" interest at the rate of 5% on a total of $13,072 (unpaid wages plus unpaid holiday pay) for the period from 1 September 2008 until these amounts are paid in full.**

Hurt and humiliation

[17] Both "M" and his partner gave evidence of the level of humiliation and stress that he had suffered as a result of this unjustified dismissal. It appears from the correspondence that the American directors avoided clearly communicating with "M" and gave him conflicting messages regarding their willingness to arrange a dignified exit. I have no doubt at all that "M"'s distress at both his dismissal and the way in which it was handled was genuine and he is entitled to be compensated for that distress. **In terms of section 123(1)(c)(i) of the Act, "C NZ Limited" is ordered to pay "M" $NZ10,000 without deduction.**

COSTS

[18] Throughout much of the investigation process "M" pursued his application himself. However he did receive advice from Mr Poole who also attended the Authority's investigation meeting in a support role. "M" is entitled to receive a contribution towards his costs. **"C NZ Limited" is to pay "M" $470, this amount being inclusive of his $70 filing fee.**

SUMMARY OF ORDERS

[19] By way of summary of the orders outlined above, "C" New Zealand Ltd is ordered to pay "M":

- $NZ8400.00 gross being unpaid salary
- $NZ4672.00 gross being unpaid holiday pay.
- Interest at the rate of 5% on a total of $NZ13,072.00 (unpaid wages plus unpaid holiday pay) for the period from 1 September 2008 until these amounts are paid in full.
- $NZ10,000.00, without deduction, **i**n terms of section 123(1)(c)(i) of the Act
- $NZ470.00, this amount being inclusive of his $70.00 filing fee, as a contribution towards his costs.

James Wilson
Member of the Employment Relations Authority