

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 46  
3111053

BETWEEN                      DOUGLAS ANTHONY MENDE  
Applicant

AND                              MENDE BIOTECH LIMITED  
Respondent

Member of Authority:        Michael Loftus

Representatives:             Jon Parker, counsel for the Applicant  
Matt Young, advocate for the Respondent

Investigation Meeting:       10 and 18 February 2022 at Wellington

Submissions Received:      At the investigation meeting

Date of Determination:      21 February 2022

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1]     The applicant, Douglas Mende, seeks the payment of outstanding wages and holiday pay.

[2]     The respondent, Mende Biotech Limited (the Company), accepts the claimed amounts have not been paid but disputes they are rightfully due.

[3]     In its Statement in Reply the Company indicated a counterclaim would follow and that subsequently occurred. The counterclaim raised a number of issues which appeared to largely relate to commercial disputes between the Company and Mr Mende in his capacity as a director/shareholder and included accusations of criminal wrongdoing. That led to some

discussion about jurisdiction and then, at the commencement of the investigation, advice the counterclaim was being withdrawn and the issues pursued elsewhere.

## **Background**

[4] The Company was incorporated on 4 February 1999 with Mr Mende stating he was then its Managing Director. It is based in the Wairarapa and has continued since, notwithstanding various changes in both directorships and shareholdings. At present Mr Mende remains one of three Directors and holds just over 40 percent of the shares.

[5] Mr Mende says that with effect 1 April 2016 he became an employee though this is arguably inconsistent with his earlier claim he had long been a Managing Director as most commercial dictionaries would say the incumbent of such a role is also an employee. It is also inconsistent with the Company's view, enunciated by David McConnell (a fellow director), that nothing formally changed in April 2016 though ultimately this debate is irrelevant to the issues before me. That is because the Company does not dispute Mr Mende was an employee and his claim goes back no further than April 2016 which is also the date payslips both parties offer in evidence record as his start date. There is no written employment agreement.

[6] In early 2017 the current directorship was put in place with Mr McConnell's arrival. Mr McConnell represents interests holding 19% of the shares with longstanding director, Reinhard Hueber, holding the balance.

[7] Mr Mende says later that year, December 2017, the Company invested in another, Totara Bioscience Limited (TBL), and from that various financial difficulties arose with TBL requiring financial support which drained the Company's resources. Mr McConnell disagrees, saying the troubles emanated from Mr Mende overspending and improperly siphoning funds for various non business related activities.

[8] Again this difference need not be resolved in order to decide the claim before me but it highlights one crucial issue upon which the parties agree. Things were not going well and the Company faced significant financial challenges. This then led to discord between the directors with Mr Mende being at odds with the other two.

[9] According to Mr McConnell he and Mr Hueber met with Mr Mende in early December 2019 in order to discuss the fact they considered the Company could not continue

operating as it was. He says they had to make a brutal decision – wind up or stop making undue and/or unrequired payments. In Mr McConnell’s view such payments included those to directors, including the Managing Director’s wages. He says they all had a fiduciary duty to not draw money until all other bills had been addressed.

[10] A further justification for ceasing to pay Mr Mende was that the other directors had invested heavily in the Company while Mr Mende put little money in. Mr Mende’s response is his contribution was the intellectual property upon which the Company relied.

[11] Mr McConnell makes various statements about how the message Mr Mende would no longer be paid was imparted. These range from Mr Mende was *simply told*, through *he had no choice*, to *he agreed*.

[12] Mr Mende vehemently denies he agreed to forego pay, to which Mr McConnell says Ms Mende has a habit of saying something and then either reneging or changing his mind.

[13] The Company says Mr Mende then walked out though exactly when is unclear with the Company’s estimates ranging from the meeting in December to early/mid January 2020.

[14] It is here the issue with holidays arose. It would not be unfair to consider the relevant record keeping poor, as were attendant processes which could only be labelled shambolic. Mr Mende concedes he never completed any formal leave application or a record of leave. He says the Company’s clerical assistant was well aware of what he was doing and where he was. She would therefore complete leave entries accordingly.

[15] The Company say no. The clerical assistant only worked 3 to 5 hours a fortnight (though originally Mr McConnell stated this to be a week) so questioned how she could have any idea of where Mr Mende was or what he was doing.

[16] It is Mr McConnell’s evidence that the ability to address concerns about Mr Mende’s leave usage only arose after he left as he then threw his diaries in a rubbish bin. Mr McConnell was then in a position to compare their content with various invoices paid by the Company and, with the assistance of the clerical assistant, he composed a list of dates on which he believed the records indicated leave had been taken given various bills, particularly accommodation, the Company paid on Mr Mend’s behalf yet work had not been performed.

Underpinning this exercise was belief Mr Mende spent Thursdays and Fridays travelling to indulge his passion for rifle shooting

[17] That information was then forwarded to Stephen Underwood, a consultant used by the Company for analysis. He apparently rejected the idea leave was taken on 14 of the days alleged as a result of possible duplication and concluded Mr Mende had taken a total of 54 unrecorded days. Once leave recorded as being taken was added and Mr Mende's entitlement then subtracted the conclusion was he owed the Company for 6.37 days taken in advance.

[18] Mr Mende and Mr Underwood met to discuss a number of issues on 3 March 2020. Included therein were the leave and outstanding pay issues though there had been some earlier e-mail correspondence between the two over this issue.<sup>1</sup> It is Mr Underwood's evidence Mr Mende agreed with his analysis regarding the holidays but that is not reflected in notes of the meeting Mr Mende prepared and sent to Mr Underwood shortly thereafter. With respect to wages they record:

I have one payment in wage arrears from December propping up TBL. Next pay on the 12<sup>th</sup> should be normal and arrears payment. Last and final payment on the 26<sup>th</sup> with two weeks holiday pay and we are done!

[19] As already said the Company considers Mr Mende was using its resources to fund his passion for shooting and it says a lot of the alleged leave was taken so he could go to Palmerston North for that purpose. He says that is incorrect, and he can prove it by referring to his shooting logs. He says he was often in Palmerston North as that was his *meeting place* and he preferred Palmerston North airport over Wellington for frequently required travel to Auckland. His notes of 3 March 2020 reflect that, before recording *As I said it can go on and on so let's look at an acceptable settlement so we can all move on.*

[20] When giving oral evidence Mr Mende added another reason for being in Palmerston North which was to communicate with Massey University over work related issues. The Company rubbished that claim, stating that role was performed by an employee of a related company who only ever went over from Masterton on day trips. The Company is of the view the suggestion they come to an agreement over the leave issue is indicative the records are wrong and says the notes confirm Mr Mende's predisposition to agreeing to something and later reneging ([12] above).

---

<sup>1</sup> See for example e-mail Underwood to Mende dated 26 February 2020

[21] Mr Mende disagrees he ceased working in either December 2019 or January 2020 and says he remained at work until March 2020 when, on 16 March, he wrote to his fellow directors. In the letter he advises *At the request of my fellow Directors ... I am officially resigning as Managing Director of Mende Biotech Limited effective 27<sup>th</sup> March 2020.* Mr Mende goes on to say he was also willing to resign as a director provided his son was appointed as a replacement in order to represent family interests.

[22] The reply came on 20 March 2020. The letter states:

We cannot accept your resignation as both a shareholding director of Mende Biotech and the position of Managing Director of Mende Biotech due to a number of outstanding company-related issues that need to be resolved before you officially step down.

[23] That said the Company's letter goes on advise Mr Mende's son could act as his representative at the next directors meeting before saying *We have actioned a report* and as a result a proposal would be presented to Mr Mende. The letter states that should the proposal be accepted the others would agree to appoint Mr Mende's son as a director. The letter closes by stating:

We understand this resignation is a difficult decision for you and we appreciate you taking the steps to make this happen for the greater good of the company.

[24] That raises another dispute which is the Company's belief Mr Mende remains in both capacities – employee and director. Here I consider it is failing to understand the two roles are not necessarily the same. While he remains a director it is fair to say he is no longer an employee if only because he elected to walk out, notwithstanding the debate as to when. Again, and even if that is incorrect, the matter need not be considered as there is no claim for the period after 27 March 2020 and Mr Mende accepts that whether the resignation was accepted or not he ceased performing employed roles at that time. Indeed he says he also ceased acting as a director as the others barred his access to the information he would need to do so.

## **Discussion**

[25] As already said Mr Mende seeks to be paid for what he says is both outstanding wages and unpaid holidays.

[26] With respect to the wages Mr Mende contends that he was not paid for three fortnightly pay periods. They are those ending 5 December 2019, 12 March 2020 and 27 March 2020.

[27] The claim Mr Mende was not paid for those fortnights is supported by his bank statements but in any event the claim is not disputed. As already said the Company is of the view the money is not owing given Mr Mende's agreement he should forfeit his salary in order to address a dire financial situation.

[28] Neither does the Company dispute Mr Mende was an employee though there is the irrelevant dispute as to when he commenced as such. There is, however, a question over what his salary was with Mr Mende saying he thought it was around \$93,000 per annum. That is not, however, what the payslips show and the Company could offer no evidence on the issue.

[29] As I said earlier record keeping was somewhat shambolic but both Mr Underwood, who appeared as a witness for the Company, and Mr Mende attached payslips to their evidence. They must be considered a credible contemporaneous record of what was actually happening and record a per-diem rate which equates to a salary of \$110,000 per annum. It is that figure I shall accept.

[30] Having established the payments were not made, it falls to the Company to justify the failure to pay and here it must fail if only for one key reason. If the Company is correct and Mr Mende agreed he not be paid then that must be construed as a deduction. Section 5(1) of the Wages Protection Act 1983 stipulates that no deduction may be made without the written consent or written request of the employee. There is no evidence of either and the Company concedes the agreement Mr Mended no be paid was not confirmed in writing.

[31] Even if that were not the case the Company would have some difficulty for two reasons. The first is notwithstanding the Company's inadequately substantiated claim Mr Mende is prone to changing his mind and renegeing on undertakings, the only contemporaneous documentary evidence is Mr Mende's notes of the meeting of 3 March 2020. They say the opposite and evidence Mr Mende's clear expectation he would be paid.

[32] The second problem is the Company's assertion it never accepted Mr Mende's resignation. That undermines the argument nothing is due as the Company's position

Mr Mende remained employed means wages would remain payable absent any written agreement to the contrary. Finally I note the argument is further undermined by the fact wages continued to be paid for the period 6 December 2019 to 27 February 2020 which again indicates Mr Mende remained employed. It also appears to undermine the claim Mr Mende agreed to forfeit his wages – if that was the case why was payment immediately resurrected.

[33] For these reasons I conclude the six weeks is owed as claimed.

[34] Turning now to the holiday pay. Essentially the Company offers two arguments in support of its contention Mr Mende is owed nothing.

[35] The first is he took considerably more leave than he admits. Indeed the Company says he has taken more leave than he accrued an entitlement to.

[36] The second is he was responsible for the business's administration and he should not therefore benefit as a result of his failure to ensure adequate and robust systems were in place to record leave. Bear in mind this is an equitable jurisdiction and here reference was made to a previous decision of mine where I refused to grant a manager's minimum wage claim on similar grounds.<sup>2</sup>

[37] The simple fact is notwithstanding my agreement with the parties view the pay records are shambolic, they exist to the extent there are comprehensive payslips which purport to record leave taken and outstanding. The parties produced one each. Mr Mende's was dated 22 January 2020 and records an outstanding leave balance of 57.63 days. The Companies was one pay period later (5 February) and says Mr Mende was due 50.63 days. The difference is attributable to the Company having deducted 8 days leave after Mr Mende allegedly walked out.

[38] Here the Company faces an insurmountable problem. While poor, these are records which must be considered capable of establishing an entitlement. Indeed Mr Underwood's e-mail of 26 February<sup>3</sup> appears to accept that and uses the outstanding leave balance recorded therein as his starting point. Given the debate about the 8 days in January 2020 it is Mr Mende's record I shall use as my starting point.

---

<sup>2</sup> *Barron V Stephen and Sarah Jones Limited* [2014] NZERA Christchurch 7

<sup>3</sup> Above n 1

[39] The fact there are records which the Company uses means Mr Mende has established an entitlement. The Company must therefore show the claim to be wrong. For three reasons it fails.

[40] The first is I have some qualms about the Company's mathematics. The claim covers the period 1 April 2016 to 27 March 2020. That is 4 years which means Mr Mende was, according to the Holidays Act 2003, due 16 weeks (80 days) leave. Given the leave balance of 57.63 days the payslip of 22 January 2020 suggests he had used 17.37 days leave. Add the 54 days the Company says he failed to record along with the 8 in dispute in January 2020 the total is 79.37 day used. That is marginally less than the 80 he was due and inconsistent with the Company's conclusion he owed leave in advance.

[41] To that I add the fact there is nothing to support the deduction of the 8 days in January 2020. The Company claims Mr Mende walked out. He claims he tried to work but was frozen out as his fellow directors barred access to records which would allow him to work. The evidence, and the way it was presented, leads me to side with Mr Mende on this. I do not consider this leave taken and will not deduct those days from my final reconciliation.

[42] There is then the fact Mr Mende expressed a willingness to allow a perusal of his shooting records which might provide a means of resolving the dispute about what leave might or might not have been taken for private purposes. It was the Company that failed to avail itself of this offer which means it also failed to take advantage of an opportunity to prove its contentions correct.

[43] That said it is accepted there are errors, with Mr Mende conceding he took leave which was not recorded. He agrees 11 of the days<sup>4</sup> stated in Mr Underwood's reconciliation with some questions about a couple more. Those in question concern a trip to Stewart Island. The Company says he took 7 days leave, he says 4 as the balance involved work on route. Again I side with Mr Mende as it is for the Company to disprove the claim and they failed.

[44] The above leads me to conclude I should deduct 15 days from the amount claimed for holiday pay which leaves a residue of 42.63 days. That is approximately 8.5 weeks or \$18,035.77 gross.

---

<sup>4</sup> 5 days in Fiji in June 2019 and another 6 in Noumea in October that year

[45] It is here I must make a final comment about the defence raised and that concerns the argument it was Mr Mende who, as a director, was responsible for the record keeping which we are discussing. Yes, he had some responsibility but the evidence also makes it clear other directors, particularly Mr McConnell, performed day to day functions within the Company for which he was remunerated, albeit as a consultant. I know of nothing in the Companies Act 1993 that suggests a directors duties and responsibilities are confined to a specific aspect of the operation. In other words all directors are liable for what are clearly deficiencies in the Company's record keeping.

[46] The equity defence therefore fails though I have to accept the argument about wrongdoing may, or may not, have some validity but by virtue of the counterclaims having been withdrawn that is for deliberation in another jurisdiction.

### **Conclusion and orders**

[47] For the above reasons I conclude Mr Mende has made out the claim he is owed unpaid wages and, while not in its entirety, that holiday pay is also due.

[48] As a result I order the respondent, Mende Biotech Limited, pay Douglas Mende the sum of \$30,728.11 (thirty thousand, seven hundred and twenty eight dollars and eleven cents gross) being \$12,692.34 unpaid wages and \$18,035.77 outstanding holiday pay.

[49] Payment is to be made within 28 days of this determination.

[50] Costs are reserved.

**Michael Loftus**  
**Member of the Employment Relations Authority**