

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 118
5346933

BETWEEN	DENNIS KEITH MURRAY Applicant
AND	INTUTO LIMITED First Respondent
AND	RICHARD WARREN Second Respondent
AND	ALASTAIR MACCORMICK Third Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Richard Warren for the Respondents
Investigation Meeting:	On the papers
Determination:	10 April 2012

DETERMINATION OF THE AUTHORITY

- A. Obligations of Intuto Limited to Dennis Murray as its former employee were subject to a full and final settlement under the terms of an agreement made with him in December 2007. The Authority has no jurisdiction now to consider the personal grievance he sought to raise against Intuto Limited in April 2011.**
- B. The Authority has no jurisdiction regarding other terms of the December 2007 agreement about arrangements between Intuto Limited and the Murray-Stewart Family Trust and Intuto China.**

Employment relationship problem

[1] This determination concerns the jurisdictional issue of whether matters of dispute between Dennis Murray and Intuto Limited could properly be raised and resolved as a personal grievance with one, some or all of the respondent parties Mr Murray identified. Mr Murray included Intuto Limited chief executive officer Richard Warren and Intuto Limited chairman Alastair MacCormick as parties to his claim because he said they had authority to ensure that undertakings given in an agreement he signed in December 2007 were honoured but they had failed to do so.

[2] Mr Murray said he had agreed to take “*voluntary redundancy*” at that time but this was subject to those undertakings being honoured. He said the on-going non-resolution of the undertakings in the December 2007 Agreement was the basis of his personal grievance.

[3] By agreement with the parties the Authority determined this preliminary jurisdictional matter ‘on the papers’. Those papers comprised Mr Murray’s statement of problem, the respondents’ statement in reply, an affidavit from Mr Murray, and written submissions lodged by Mr Murray and the respondents. I have also taken account of relevant background documents attached to Mr Murray’s statement of problem and affidavit including the December 2007 agreement, Mr Murray’s employment agreement and variations, and correspondence between Mr Murray and Mr Warren.

What happened?

[4] Mr Murray and Mr Warren founded Intuto Limited in 2000. The company is in the business of providing on-line training in computing, health and safety and English language in New Zealand and some other countries. In 2007 Mr Murray held the position of executive director. On 18 December 2007 he signed an agreement headed: “*Agreement between the Stewart-Murray Family Trust, Richard Warren, Intuto Ltd*”. The agreement noted that Mr Murray signed on his own behalf and on behalf of the trust. Mr Warren signed on his own behalf. Mr MacCormick signed on behalf of Intuto Limited.

[5] The terms of the December 2007 agreement were set out over two-and-a-half pages. They were stated to be “*in principle’ terms, subject to resolution of outstanding items as mentioned’*”. They included:

- (i) The trust acquiring 67 per cent of the shares of Intuto China for \$80,000 with the purchase price to be set off against a current trust shareholder loan. Intuto Limited was to retain 33 per cent of the shares.
- (ii) Intuto China and Intuto Limited were to enter into a shareholder agreement granting Intuto China exclusive rights to China (excluding Hong Kong and some named existing clients of Intuto Limited operating in China).
- (iii) Arrangements with a related business referred to as “*Vital English*”, concerning operation of Intuto China and allowing access to “*content*” for adaption to local use. (Two New Zealand-registered companies using the Vital English name are owned by Intuto Limited or related companies and are in the business of developing language programmes for international students).
- (iv) Rights for Intuto China to negotiate new investors and licenses for partnerships in Vietnam, Cambodia, Thailand and Indonesia.
- (v) The trust to pay \$50,000 to Mr Warren in consideration for release of Mr Murray and Jillian Stewart (Mr Murray’s wife and a former director of Intuto Limited) from personal guarantees for a bank facility owned by Mr Warren.
- (vi) Mr Murray to remain as a non-executive director of Intuto Limited with an annual director fee of \$24,000 from the end of January 2008 and to be given the title of Founder Director.
- (vii) The parties “*to work in good faith to complete all documents and other steps necessary to give effect to the [terms of the agreement]’*”.
- (viii) The following terms which are set out in full:

(1) [Mr Murray] to take voluntary redundancy from Intuto Limited effective 31 December 2007, but paid through to 31 January (being one month’s salary in lieu of notice). \$72,000 in unpaid remuneration, accrued leave (amount to be defined), and 8 weeks redundancy to be paid over 8 months commencing from that date. Intuto Ltd to endeavour to pay this amount within 6 months from 31 January. This will be in full and final settlement of any employment-related grievances, subject to the agreed payment schedule being met (except that a single late payment of no more than 30 days will not give rise to a right to reopen employment-related grievances). Late payments will also be subject to interest at 12%.

(m) [Mr Murray]'s restraint of trade in the shareholder agreement to be amended to extend to NZ only, provided that [Mr Murray]/SMFT/Intuto China will be permitted to deal with customers of the NZ company where Intuto Ltd refers these customers to Intuto China for the purposes of discussing opportunities outside NZ.

[6] Mr Murray summarised the agreement and his outstanding concerns in the following way in his statement of problem:

In return for my taking voluntary redundancy, the respondents agreed, among other things to transfer shares in Intuto China Ltd (sic) to my family trust and to grant Intuto China exclusive rights to China. They also agreed that Intuto China would have access to content (including 800 hours of IELTS material) and to amend for local use.

I, and my family trust, carried out all our obligations under the agreement early in 2008.

The respondents have still not carried out their undertakings despite numerous requests from 2008 to now. Namely, the respondents have not –

- *Transferred the shares in Intuto China*
- *Granted exclusive rights to China*
- *Provided access to content to amend for local use.*

[7] Mr Murray said he lost income as a result of having to cancel an agreement to sell an exclusive sub-licence for some materials covered by the December 2007 agreement and because the respondents sold some materials subject to that agreement to a third party.

[8] He said he had made “*numerous requests*” for the respondents to carry out their undertakings and on 2 April 2011 had raised a personal grievance with Intuto in writing. If the grievance were found to have been raised outside the 90-day statutory period, he sought leave to proceed with it under the exceptional circumstances provisions of s114(4) of the Employment Relations Act 2000 (the Act).

[9] Mr Murray argued he was “*technically*” still an employee of Intuto Limited because he worked for several years for Intuto China Limited, a company that remained a 100 per cent subsidiary of Intuto Limited, and because the respondents were said not to have kept their agreement to transfer shares in Intuto China to his family trust. He sought compliance orders requiring the respondents to transfer shares in Intuto China to the trust, to provide an exclusive license to Intuto China for use of

certain materials in China and to pay the trust a share of the revenue Intuto Limited gained from a third party to which those materials had been sold. He said these were employment matters as his voluntary redundancy was subject to the undertakings given by the respondents. He believed “*that the respondents should be made to do what they undertook to do in order to secure my voluntary redundancy*”.

[10] As well as compliance orders on those matters, he also sought lost wages, compensation for humiliation and loss of reputation, and penalties.

[11] Intuto Limited’s statement in reply claimed it had “*absolutely met the obligations of the December 2007 agreement*” but questioned whether the Authority was the proper place to address what may be outstanding matters of commercial and company law rather than “*of an employment nature*”. However if there were employment matters to be determined Intuto Limited submitted that only it – the registered company and former employer of Mr Murray – was the correct respondent, not Mr Warren or Mr MacCormick.

Whose rights are whose?

[12] The December 2007 agreement – assuming that what are referred to as “*in principle*” terms are sufficiently certain to be enforceable – records certain rights and benefits to at least three different parties who are each different legal entities. Those parties are firstly, Mr Murray personally; secondly, the Murray-Stewart Family Trust; and, thirdly, Intuto China (which is not a registered New Zealand company but appears to be, on the basis of information in the respondent’s statement in reply, a Chinese firm).

[13] The obligations that Mr Murray asserts have not been honoured by Intuto were expressly those owed to a party other than him personally. The trust was to acquire shares in Intuto China. Intuto China (in which the trust, not Mr Murray personally, was to hold 67 per cent of the shares) was to have exclusive rights in China and access to the content of certain educational materials prepared by Vital English.

[14] The obligations personal to Mr Murray were those in the term regarding voluntary redundancy. At no stage in his statement of problem, his affidavit or his

written submissions did he suggest that Intuto Limited had not kept those obligations – which involved payment of notice, accrued leave and redundancy compensation. Intuto’s written submissions stated all those payments were made “*in accordance with the agreed timetable*”.

[15] Consequently Mr Murray is, I find, bound by the wording of that particular term to accept that those payments, having been made in time, were “*in full and final settlement of any employment-related grievances*”. Whatever other obligations Intuto had with the other legal entities – the trust and Intuto China – are plainly outside the scope of that term. There is no doubt, I find, that on 31 December 2007 Mr Murray’s employment with Intuto Limited ended and, on the payment of the amounts due to him as a former employee (that occurred within the timetable contemplated by the agreement), he had no further claims that he could bring in his personal capacity before the Authority for adjudication. There are no sustainable grounds for him to raise a personal grievance out-of-time under s114 of the Act.

[16] I find no viable construction of the terms of the agreement, read as a whole, that made the termination of his employment (and payments agreed as a result of it) conditional on Intuto Limited meeting whatever obligations it entered into with the trust and Intuto China. The reference in the opening words of the agreement to its terms being subject to resolution of “*outstanding items*” cannot now be taken to refer to the clause on the termination of his employment because the required payments were made by the required time and cannot be said to have been outstanding since then.

[17] Furthermore, what Mr Murray says outstanding obligations (share transfers to the trust and exclusive rights and content use by Intuto China) are not enforceable by him in his personal capacity and as a former employee. Those rights to fulfilment of obligations (if they have truly not been done) are held by the trust and Intuto China. Neither entity is an employee (even if Mr Murray was a beneficiary or agent of the trust and has subsequently worked for Intuto China). Neither the trust nor Intuto China can be said to have an employment relationship problem that is amendable to investigation and determination by the Authority. In short, if there are any outstanding legal issues between those parties and Intuto Limited, they are

commercial ones and not employment matters. The jurisdiction to resolve them lies in the civil courts, not this Authority.

[18] Accordingly the Authority cannot investigate and determine Mr Murray's application. It is dismissed.

[19] Intuto Limited did not seek costs in its statement in reply or its written submissions. No order for costs is made.

Robin Arthur
Member of the Employment Relations Authority