IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 195
5298835

	BETWEEN	DAVID NEWICK, Applicant
	AND	WORKING IN LTD, First Respondent
	AND	WORKING IN VISAS LTD (IN LIQUIDATION), Second Respondent
	AND	SCOTT MATHIESON, Third Respondent
	AND	HAYLEY ROBERTS, Fourth Respondent
Member of Authority:	James Wilson	
Representatives:	Erin Davies/David Neutze for the applicant Michael O'Brien for the respondents	
Investigation Meeting:	7, 8 and 9 December 2010 at Auckland	
Submissions received:	23 December 2010 & 25 February 2011 from the applicant 11 February 2011 from the respondent	
Determination:	11 May 2011	

DETERMINATION OF THE AUTHORITY

David Newick's employment relationship problems

[1] David Newick ("Mr Newick") says that he was employed by the first respondent, Working In Ltd ("WIL") from June 2009 until he was unjustifiably dismissed in February 2010. Mr Newick is seeking:

- Reimbursement of the equivalent of the 25% shareholding in WIL at its "current market value" or in the alternative payment of unpaid salary for the period 15 June 2009 to 15 December 2009.

(**Note**: It is not clear whether this reference to WIL is an error and should be WIVL, or whether Mr Newick is seeking the equivalent of 25% of the shares of WIL. I have assumed that the reference should be to WIVL as it is clear from the

evidence that Mr Newick was never offered or expected a shareholding in WIL. In any event the outcome of my investigation makes the issue irrelevant.)

- Reimbursement of monies deducted, unlawfully Mr Newick says, from his salary at the time of his dismissal;
- Payment of unpaid notice;
- Reimbursement of future salary and benefits;
- $40,000.00 for humiliation, loss of dignity and injury to his feelings;
- Costs;
- Interest and any other relief the Authority determines to be fair;
- That a penalty be imposed against the respondent for failing to provide a written employment agreement;
- That a penalty be imposed on the third and forth respondents for breach of their good faith obligations;
- That penalties be imposed on the third and forth respondents for breaches of Mr Newick's employment agreement

[2] The respondents say that Mr Newick was never an employee of WIL. Rather, they say that he was an investor in an entrepreneurial endeavour which he acknowledged may have no return. The third and fourth respondents (Mr Scott Mathieson and Ms Haley Roberts) say that in May/June 2009 they entered into an agreement with Mr Newick where by

a. Mr Scott Mathieson and Ms Roberts, through WIL, would provide funds and infrastructure to establish a new business and Mr Newick although not contributing any equity would invest in the new company in the form of "sweat equity" and would provide his time and skills in business management.

b. In exchange for his contribution Mr Newick would be given a 15% shareholding (later increased to 25%) in the new company, the second respondent, Working in Visas Limited ("WIVL")

c. In the initial six months Mr Newick would manage the company as (effectively) CEO without formal remuneration.

d. After the initial six-month period the parties would conduct a review and Mr Newick would become CEO of WIVL on terms to be agreed.

[3] In December 2009, the respondents say, Mr Newick became an employee of WIVL. In February 2010, the respondents say, that due to precarious financial situation both WIL and WIVL were in, it became necessary, to avoid foreclosure by the Bank, for the companies to secure private investment. It also became apparent that in order to secure that private investment there would need to be some structural changes. After exploring and discussing options Mr Newick was made redundant. The respondents say that the genuineness of that redundancy is borne out by the continued poor performance of WIL and the subsequent voluntary liquidation (in November 2010) of WIVL.

Issues for determination

[4] There are a number of issues for determination:

a. Was Mr Newick an employee from June 2009 to 15 December 2009 and if so who was his employer?

b. Who was Mr Newick's employer from 15 December to the termination of his employment in February 2010?

c. Did the 25% shareholding in WIV form part of Mr Newick's terms and conditions of employment at the date of his dismissal?

d. Was Mr Newick's dismissal justified and, if it was not, what remedies should he be awarded?

e. Should Mr Newick have received greater notice of the termination of his employment?

f. Should Mr Newick's final pay have been reduced as a result of the annual leave for which he was paid during his employment?

g. What penalties, if any should be imposed on all or any of the respondents for the various breaches Mr Newick alleges occurred?

A brief history

[5] After a series of discussions between the various parties, i.e. Mr Scott Mathieson and Ms Roberts on behalf of WIL and Mr Newick, in May/June 2009 they came to an agreement, the relevant points of which were:

- They (WIL and Mr Newick) would *create immediately* a "Newco" (later called WIVL) owned initially 15% by Mr Newick and 85% by WIL. [The % was later changed to 25% and 75%]

- There was to an initial period of co-operation of 6 months during which *Mr Newick would manage the company as (effectively CEO, initially without formal remuneration.*
- Six months after Mr Newick commenced his role WIL and Mr Newick would *review how to proceed* with the *clear intention* that they would document Mr Newick as CEO of (WIVL) *on terms to be agreed including an appropriate salary package.*

[6] Mr Newick commenced his involvement with WIL and WIVL on 15 June 2009. Over the next few months discussions took place about how the parties' agreement in principle could be formalised in a shareholders agreement. I have been shown a draft agreement which, under the heading **CEO** says:

> *The Board shall appoint David Newick to act as the initial CEO of the Company, …On 15 December 2009, the Company and David Newick will engage in discussions with a view to engaging David Newick as either an employee of, or a contracted consultant to, the Company.*

Mr Newick has inserted the comment *This should read "David Newick will be employed or engaged as at the 15th December" not "enter into discussions"*.

[7] For various reasons WIVL was not incorporated until 15 December 2009 and then with Mr Scott Mathieson as the sole shareholder. Mr Mathieson says that, rather than deliberately delaying the incorporation as alleged by Mr Newick, there were good reasons why the incorporation was delayed. These included the need to work through what the appropriate relationship should be between WIL, WIVL and a holding company, Working in Holdings Ltd. He says that Mr Newick was aware of the issues involved. He also says that while he was the sole shareholder of WIVL at incorporation it was always the intention to issues shares to Mr Newick. He points to an email attached to the incorporation documents dated 14 December 2009 saying….*we will issue shares to WIHL (75%) and David Newick (25%) as a second step.*

[8] The parties agree that from 15 December 2009 Mr Newick was an employee - of either WIVL (according to the respondents) or of WIL according to Mr Newick.

[9] Over the Christmas period 2009/10 Mr Newick was paid for 11 days annual leave. In order to accommodate this "anticipation" of his leave entitlement, the payroll was adjusted to indicate that Mr Newick had commenced employment in June 2009. Mr Newick says that this confirms that he was an employee from June 2009 whereas the respondents say that it was simply because the payroll system would not otherwise have accommodated the advance payment.

[10] The respondents say that they were advised in October 2009 that their bank was looking to foreclose WIL. Mr Scott Mathieson says that he entered into discussions with his uncle, Mr Ross Mathieson, regarding potential investment in WIL. Mr Ross Mathieson *proposed to invest a significant amount of money and effectively prevent foreclosure of the businesses.* However, in February 2010 it became clear that this investment was provisional on a number of conditions, including the disestablishment of WIVL and its operations being performed by WIL.

[11] Mr Scott Mathieson says that Mr Newick was aware of the precarious financial state of the businesses and, at the beginning of 2010 attended a meeting with the Companies bank. On 17 February 2010 Mr Newick was offered a new position of Chief Operating Officer(COO) with WIL. Although some discussions took place about this position (as an alternative to Mr Newick being made redundant) no agreement was reached. On 23 February 2010 Mr Newick was informed that WIVL was to be wound up with immediate effect and the offer of a position as COO of WIL reiterated. At this point the respondents offered, as an alternative, to pay what they later described as an extremely generous settlement.

[12] Despite further discussions and formal exchanges, on 26 February Mr Scott Mathieson wrote to Mr Newick advising him that because of the deteriorating financial situation, the offer of the position of COO was withdrawn, that Mr Newick's employment as CEO with WIVL was terminated with immediate effect and making a final settlement offer. Mr Newick chose not to accept the settlement offer

The content of this determination

[13] Due to my imminent departure from the Authority, and in order to ensure that this determination is issued before I leave, it has been necessary to somewhat truncate

its content. I can assure the parties however that I have carefully considered all of the extensive evidence and their respective submissions in formulating my decision.

Discussion

Was Mr Newick an employee from June 2009 to 15 December 2009?

[14] The intention of the parties in May/June 2009 when they entered into their business relationship was clear. They would work together to set up a new business (WIVL). Mr Ross Mathieson and Ms Roberts, through their existing company, WIL, would contribute cash equity of $150.000 and administrative and operating support. Mr Newick would contribute his time and expertise *without formal remuneration.* Mr Ross Mathieson and Ms Roberts, as Directors of WIL set out their expectations in a letter to Mr M Newick dated 29 May 2009. Mr Newick responded in an email in which he said:

> *I will contribute my 15% …..… by way of sweat equity and/or loan/debt guarantee and you provide yours by way of funds….*

In that same email Mr Newick said:

> *This offers a solution of what we could do at the six month mark.*
>
> - *I understand your reasoning of no recompense should the business not progress, so to reiterate; If the business fails and/or WIL decide not to progress with (WIVL) we all walk away with no recompense for our % based input.*

It is clear from this correspondence that Mr Newick's return on his investment was to be a 15% shareholding (this was subsequently changed by agreement to 25%) in the new company, WIVL, and employment as CEO of that company at the end *of an initial period of co-operation of 6 months.*

[15] **During the period from 15 June to 15 December 2009 Mr Newick was not an employee.** I do not accept his assertion that he was an employee of either WIL or WIVL during this period. Certainly he worked closely with WIL but he was never offered, never accepted and it is clear from the correspondence exchanged at the commencement of the arrangement, never expected to be employed during that period. It was only after the rosy expectations of the new business did not materialise that he looked for some alternative way of being recompensed for the time, energy and expertise he had invested into the new business.

[16] It may be that Mr Newick has a cause of action against one or more of the respondents. However, as I have found that Mr Newick was not an employee during this period, such cause of action, if there is one, is not within the Authority's jurisdiction.

Who was Mr Newick's employer from 15 December to the termination of his employment in February 2010?

[17] I have no hesitation in finding that, from **15 December 2009 until the termination of his employment in February 2010 Mr Newick was employed by WIVL.** Mr Newick asserts that the fact that his payslips were in WIL's name and he was paid from WIL's bank account and through their payroll system indicates that he was employed by WIL I disagree. It is common practice for a parent company to use its payroll system to pay the salaries of employees of subsidiary companies. Mr Scott Mathieson points out that it would have been extremely costly to establish a completely different system for 3 staff. The respondents produced financial statements that indicate that the financial records of WIVL were kept separate from those of WIL.

[18] I have no doubt that it was Mr Newick's understanding at the time that he was an employee of WIVL. This was the company he had invested 6 months "sweat equity" into setting up and had agreed 6 months previously that he would be employed by. He cannot now, with the benefit of hindsight, "elect" to have been employed by WIL.

Did the 25% shareholding in WIVL form part of Mr Newick's terms and conditions of employment at the date of his dismissal?

[19] Mr Newick argues that the 25% shareholding in WIVL to which he was entitled formed part of his terms and conditions of employment. I do not agree. Both the 25 % shareholding and Mr Newick's employment were the intended outcome of the agreement between the parties in May 2009. Mr Newick was to receive a shareholding in WIVL and be employed as its CEO. These terms were to be incorporated into a shareholders agreement. Mr Newick's employment was one of the returns on his sweat equity investment rather than the shares being a consequence of his employment. **A 25% shareholding in WIVL did not form part of Mr Newick's terms and conditions of employment at the date of his dismissal.**

[20] Again it may well be that Mr Newick has a cause of action against the respondents in respect to his shareholding in WIVL. The agreement he entered into promised him a 25% shareholding which he never received. However, as I have found that this shareholding did not form part of Mr Newick's terms and conditions this is not a matter that is within the Authority's jurisdiction.

Was Mr Newick's dismissal justified and, if it was not, what remedies should he be awarded?

[21] As with any other dismissal, the test of justification is that set out at section 103A of the Employment Relations Act (the Act). In the words of section 103A, were the respondents' actions, and how the respondents acted, in dismissing Mr Newick, *what a fair and reasonable employer would have done in all the circumstances at the time….* It is well established that this test requires 3 somewhat interwoven considerations. Firstly, when considering whether to terminate an employee's employment for reasons of redundancy as in this case did the employer carry out a full and open consultation with the employee as to the circumstances with which it was confronted and consider any suggestions the employee might have as to how that situation might be addressed. Secondly, was the redundancy, if that was the employer's decision following consultation with the employee, genuine i.e based on genuine business reasons. Thirdly, did the employer discuss with the employee alternative ways of managing the situation so as to avoid the employee's dismissal.

[22] Mr Newick's employer was, I have found, WIVL. The directors of WIVL at the time of Mr Newick's dismissal were Mr Scott Mathieson and Ms Roberts. It is their actions that must therefore be considered and for them to justify their decision to dismiss Mr Newick.

[23] This is of course a somewhat unusual situation. Mr M Newick was CEO of WIVL and, although not formally a shareholder or director of the company at very least a fellow investor with Mr Scott Mathieson and Ms Roberts. It is clear from the evidence that he knew from well before he took up the role of CEO (in December 2009) that the WIL/WIVL group was in severe financial difficulties. He had discussions with Mr Ross Mathieson (whose investment could potentially save the

business) and he met on at least one occasion with the companies' bankers regarding the possibility of foreclosure.

[24] By early February 2010 it became clear that, as a condition of gaining the investment capital needed to save the business Mr Ross Mathieson required a restructuring of the business. The correspondence suggest that Mr Newick was aware of this requirement. On 15 February Mr Scott Mathieson and Ms Roberts wrote to Mr Newick saying:

> *You know what he is suggesting. One consolidated Working In company and one group of shareholders*
>
> *We appreciate that this has an effect on you and on the foundations we laid together last year. Scott and I believe that between us we have enough reasoning ability and mutual respect to work out a solution that you are comfortable with.*
>
> *For our part we would still want you to be part of this rare opportunity*
>
> *We've an initial proposal for you. It's initial because it doesn't include any bonuses. They will be part of your package but Ross is very clear that we can't offer you something that we don't have visibility of yet.*

[25] On 17 February 2010 Mr Newick was presented with a formal offer of appointment for the position of chief operating officer with WIL. On 19 February Mr Newick responded raising a series of questions regarding his employment but did not accept the offer of COO. On 23 February 2010 Mr Newark was advised that WIVL would be wound up effective immediately as would his role as CEO of that company. The letter also reiterated the offer of the position of COO of WIL. On that same day Mr Newick e-mailed Mr Scott Matheson a document detailing the amount of money he believed he was owed by WIL and on 24 February Mr Newick e-mailed Mr Scott Matheson and Ms Roberts suggesting that perhaps he could work on a short term consultancy agreement to cover the period from the end of his employment until details of the position of COO could be clarified.

[26] Late on the afternoon of 26 February 2010 Ms Roberts and Mr Scott Matheson met with Mr Newick and advised him that his position had been disestablished. Mr Scott Matheson subsequently wrote to Mr Newick advising him that the role of CEO of WIVL was now disestablished, that his last day of employment was 26 February

2010 and went on to offer a series of payments by way of compensation. Mr Newick did not accept the compensation offered.

[27] Were the actions of Ms Roberts and Mr Scott Mathieson those of a fair and reasonable employer under all circumstances? As I have already said the circumstances in this case are somewhat unusual. On balance I believe that Mr Scott Mathieson and Ms Roberts did everything they could to ensure that Mr Newick was treated fairly. It could have been no surprise to Mr Newick that the company he had worked so hard to establish was to be wound up. The respondents tried to negotiate a solution which would have kept Mr Newick involved in the business albeit in a different capacity than he, or they, had envisaged. In the end the financial reality meant that they had little option but to accept the changes required by Mr Ross Matheson or face economic ruin. Mr Newick's redundancy was certainly genuine. Given all the circumstances it was a reasonable, and possibly inevitable, decision on the part of Mr Scott Matheson and Ms Roberts. Even then they made a financial offer to Mr Newick which was well beyond what his employment agreement required. I make no comment, as it is outside my jurisdiction as to what if anything is owed to Mr Newick as a party to the unexecuted shareholder agreement.

[28] **The respondents' actions in dismissing Mr Newick were those of a fair and reasonable employer in all the circumstances.**

Should Mr Newick have received greater notice of the termination of his employment?

[29] After his dismissal Mr Newick was paid two weeks salary in lieu of notice. Although a draft employment agreement had been drawn up (by Mr Newick) this had never been signed by the parties. In the absence of any agreement it is well established that an employer should pay "reasonable" notice, taking into account the nature of the employment. One month's notice is reasonable given the nature of Mr Newick's position (CEO) and the relatively short duration of his employment (2 months) and the provision in the unsigned agreement of one month's notice. In the absence of any other agreement it is reasonable that Mr Newick be paid the one month's notice set out in the unsigned agreement.

[30] **Mr Newick is entitled to receive a further 2 weeks payment in lieu of notice** from his employer, WIVL.

Should Mr Newick's final pay have been reduced as a result of the annual leave for which he was paid during his employment?

[31] Mr Newick's statutory leave entitlement was correctly calculated, with his final pay, as 8% of the gross a salary he earned while he was employed by WIVL. He received, during that period of employment, payment for 11 days annual leave. His argument that he was entitled to accrue an annual leave entitlement from June 2009 to his dismissal in February 2010, is based on the incorrect premise that he was employed and should have been paid for that period. As set out above I have found Mr Newick was employed, and entitled to salary, only from 15 December 2009. It follows **that the only additional payment due to Mr Newick for leave, is 8% of the additional notice period set out in [30] above.**

What penalties, if any should be imposed on all or any of the respondents for the various breaches Mr Newick alleges occurred?

[32] Mr Newick has asked that I impose penalties on the respondents for failing to provide a written employment agreement and on Ms Roberts and Mr Scott Mathieson for breach of their good faith obligations and for breaches of Mr Newick's employment agreement.

[33] I am satisfied that, while Mr Newick was not provided with an employment agreement, this breach was not a deliberate breach by the respondents. They point out that they had suggested to Mr Newick, as CEO of WIVL that he draft an agreement for discussion. A draft agreement was in fact drawn up and was never finally agreed because events over took the discussion. **I therefore decline to order the payment of a penalty for the non provision of an employment agreement**

[34] There is no evidence that Mr Scott Mathieson or Ms Roberts did not act in good faith nor that they deliberately breached Mr Newick's employment agreement**. I therefore decline to award the payment of a penalty for either of the alleged breaches.**

Costs

[35] **Costs are reserved** and the parties are requested to resolve the issue of costs between themselves. If they are unable to do so the respondents may file and serve a submission in respect to costs within 28 days of the date of this determination. Mr Newick will then have 14 days in which to file and serve a response

Summary of determination

[36] By way of a summary of the findings set out in this determination.

- **During the period from 15 June to 15 December 2009 Mr Newick was not an employee.**
- **From 15 December 2009 until the termination of his employment in February 2010 Mr Newick was employed by WIVL.**
- **A 25% shareholding in WIVL did not form part of Mr Newick's terms and conditions of employment at the date of his dismissal.**
- **The respondents' actions in dismissing Mr Newick were those of a fair and reasonable employer in all the circumstances.**
- **Mr Newick is entitled to receive a further 2 weeks payment in lieu of notice from his employer, WIVL.**
- **The only additional payment due to Mr Newick for leave is 8% of the additional notice period set out in [30] above.**
- **I decline to order the payment of a penalty for the non provision of an employment agreement**
- **I decline to award the payment of a penalty for either a breach of good faith or breaches of Mr Newick's employment agreement.**
- **Costs are reserved**

James Wilson

Member of the Employment Relations Authority