New Zealand Employment Relations Authority Decisions

Original Stone Company Limited v Adams AA352/10 (Auckland) [2010] NZERA 660 (9 August 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 352/10 5158627

BETWEEN

AND

ORIGINAL STONE COMPANY LIMITED Applicant/Respondent

JARED ADAMS Respondent/Applicant

Member of Authority: Representatives:

Investigation Meeting: Submissions Received Determination:

Alastair Dumbleton

Shelley Lomas, counsel for Original Stone Company Limited
Karen Jones, counsel for Jared Adams

1 December 2009
9 and 16 December 2009
9 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Original Stone Company Limited (Original Stone), has applied to the Authority for enforcement of an express provision of the employment agreement entered into by the company with Mr Jared Adams.

[2] Original Stone seeks from the Authority an order requiring Mr Adams to pay it back $10,000. That amount had been given to Mr Adams immediately upon his signing acceptance of an offer of employment on terms and conditions set out in a written agreement and covering letter. Both were signed by Mr Adams and Mr David Salenius the Manager of Original Stone.

[3] With reference to the $10,000, described as "one off payment," the agreement provided:

This will be reflected in your Gross income as approximately $15,000 pre tax and needs to be paid back if you leave Original Stone in the next 12 months.

[4] The period of "the next 12 months" ran from 26 March 2008, the date on which Mr Adams signed his acceptance of all the written terms and conditions of his employment.

[5] About 11 months after Mr Adams had executed the employment agreement which included the pay-back term, on 27 February 2009 he gave two weeks' notice of resignation in writing to Mr Salenius. Although the contractual period of notice had been four weeks, Mr Salenius accepted the shorter period and elected to pay Mr Adams for it rather than have him work out his notice. Accordingly the employment relationship terminated and Mr Adams left Original Stone on 13 March 2009, a

date two weeks short of the first anniversary of his employment.

[6] Mr Adams accepts that he agreed to the pay-back term as a condition of employment and that he left Original Stone inside the "next 12 months" from 26 March 2008, but he argues for several reasons that he should not have to comply with the pay-back term. He contends that it imposed a penalty on him as a party to a contract and is therefore unenforceable in principle. He also contends that he was discharged from his obligations under it by the exercise of a right to cancel the contract of employment for misrepresentation and as a response to repudiation of the agreement by Original Stone.

[7] I am satisfied that in its nature and purpose the pay-back term did not amount to a penalty. It may be given various labels or described in different ways, but I find it was simply an advance of a sum intended to attract Mr Adams into entering an employment relationship with Original Stone. The pay-back term is expressed quite clearly and plainly, and when he signed his acceptance Mr Adams was unconcerned about the implications of it because he simply thought the employment would last longer than 12 months.

[8] Like all payments, except those to reimburse expenses, the $10,000 was received as income and was subject to income tax. That did not mean the payment was remuneration paid in return for present or future service or work performed. All Mr Adams had to do to get the payment was sign his acceptance of the terms of employment that had been offered by Mr Salenius.

[9] The payment was, as it has been described, an incentive or a "sweetener" offered to entice Mr Adams into accepting employment with Original Stone. Mr Adams had the use of $10,000 in one payment he received at the very beginning of his employment. There was nothing coercive about the pay-back term and Mr Adams remained free to leave the company before 12 months if he wished, provided he gave proper notice. He would not have breached the agreement if he had chosen to resign on notice at any time after commencement of the agreement.

[10] In the event, Mr Salenius accepted less than the contractual period of notice and allowed Mr Adams to depart on two weeks' notice instead of four.

[11] It seems there was nothing to prevent Mr Adams from giving four weeks' notice, which would have taken him past the qualifying period for keeping the $10,000. Had he given sufficient notice under the agreement an Authority investigation is unlikely to have been needed. It appears that without checking the terms of the written agreement Mr Adams had mistakenly thought it was a two week period of notice instead of four.

[12] Leaving aside the claims of Mr Adams that he cancelled the employment agreement and that, as a result, the pay-back provision became unenforceable, I conclude that while the employment agreement remained binding between Mr Adams and Original Stone, the pay-back provision was enforceable against him.

Application for compliance

[13] The Authority has assumed that to enforce the pay-back term Original Stone has applied for a compliance order under s 137 of the Employment Relations Act

2000.

[14] This assumption is made in the absence of reference in the statement of problem to any particular remedy available under the Act. The statement of problem simply says that Original Stone would like the problem to be resolved by having Mr Adams pay the company $10,000. (It may be noted that the form of application as prescribed in the Employment Relations Authority Regulations 2000 expressly directs that reference be made to any specific remedy under any enactment or rule of law that is being sought.) [15] In this case compliance is available in principle as the stated purpose of that remedy is to prevent further non-observance or non-compliance with any provision of an employment agreement. If Mr Adams remained bound by the pay-back provision upon termination of the employment, then he has not complied with that term and continues not to comply with it for as long as he does not pay $10,000 to Original Stone.

[16] Compliance under s 137 is however a discretionary remedy. I consider that there are several factors going to the exercise of that discretion in this case. First, although of lesser significance, is the factor that when Mr Adams left Original Stone he had substantially performed the requirement to stay with the company for 12 months. He had completed 50/52nds of the stipulated period. There is no issue that during that time he fully and properly performed his obligations so far as carrying out the work under the agreement was required. He left because he found that the level of earnings from commissions was not as high as he had hoped or expected or, as he claims, had been promised to him by Mr Salenius.

[17] Another factor of significance is that Mr Salenius had it readily within his hands to avoid the situation where Mr Adams left the company before 12 months. Mr Salenius could have insisted on receiving the agreed period of notice of four weeks and not released Mr Adams on two weeks' notice. Mr Salenius waived the requirement as to four weeks' notice but did not offer to lower the minimum service period of 12 months by a corresponding two weeks. Original Stone and Mr Adams were entitled to vary any of the terms and conditions of their employment agreement, but I take it into account as a discretionary

factor that there was no bargaining or negotiation over varying the minimum service provision of the pay-back term.

[18] Once Mr Adams lost trust and confidence in his employer and gave his resignation, whether the day before or the day after serving for 12 months, there was no point in his employer requiring him to keep working. Mr Salenius acknowledged this reality by paying Mr Adams out the shortened notice period. The company then faced the expense of recruiting his replacement, a cost it had hoped to avoid, but the $10,000 payment to Mr Adams had not been able to buy his continuing trust and confidence.

Opportunity to seek advice

[19] A discretionary factor of much greater significance than those above is the degree to which Original Stone complied with obligations under s 63A of the Employment Relations Act. They applied to the company as an employer when it was bargaining or negotiating with Mr Adams to enter into the individual employment agreement.

[20] Section 63A(2) requires that in bargaining or negotiating an employer must do several things, including:

> *(a) Provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and*
> *(b) Advise the employee that he or she is entitled to seek independent advice about the intended agreement, or any part of the intended agreement; and*
> *(c) Give the employee a reasonable opportunity to seek that advice; and*
> *(d) Consider any issues that the employee raises and respond to them.*

[21] The importance of these provisions to the framework of the Employment Relations Act can be measured from s 63A(3), under which any employer who fails to comply with the section becomes liable to a penalty imposed by the Authority.

[22] Section 63A(4) is also relevant. It provides that any failure to comply with the provision does not affect the validity of the employment agreement between the employee and the employer. Cancellation of the agreement is not a remedy available under s 63A of the Act.

[23] In a counterclaim against Original Stone, Mr Adams has alleged that he did not receive a proper opportunity to seek legal advice before entering into the employment agreement. He alleged that Original Stone had breached s 63A(2)(c) of the Act, for which he seeks a penalty.

[24] The major inducement to Mr Adam entering into the employment agreement was the offer made to him on 26 March of an additional term to the agreement. This was that Mr Adams would be paid $10,000 immediately upon accepting the agreement. Expressed as part of the term was the catch that he would have to repay the $10,000 if he left the company within 12 months. I find that Mr Salenius was well aware Mr Adams would find it hard to resist the prospect of receiving immediately $10,000 before even commencing employment. Mr Salenius wrote out the cheque as soon as Mr Adams had signed the agreement on 26 March.

[25] Mr Adams' evidence about the negotiation of this term was that on 26 March 2008 he went to see Mr Salenius, and that:

... David had the cheque for $10,000 ready for me but he said that I had to sign a letter before he would give it to me. I read the letter quickly and recall that it said I would stay for 12 months. I had no intention of leaving any earlier so I didn't really ask too much else about it. I signed the letter and he gave me the cheque. He also got me to sign the employment agreement.

I didn't have an opportunity to seek legal advice, I felt I had to sign the Agreement right then.

[26] Mr Salenius's evidence was that on 26 March 2008 when Mr Adams met with him and signed the amended employment agreement:

He had not seen the letter I had drafted, which confirmed that the terms of his employment were contained in the agreement and which confirmed that he would be paid $10,000 as an incentive for him to stay for a year.

[27] Mr Salenius went on to say that he read the letter out loud to Mr Adams so that Mr Adams could be sure he knew that the $10,000 was being paid as an incentive and that "he would have to pay it back if he left before 12 months."

[28] I find the contentious pay-back term was presented to Mr Adams in writing, as required under the Act, for the first time on 26 March. He was given only the rest of that day, or the duration of their discussions that day, to accept it, otherwise the offer was to be automatically withdrawn on 26 March as stated in the covering letter.

[29] The Act could not require Mr Adam's would-be employer to force him to take advice but it did require Original Stone to "give" - not just offer - him a reasonable opportunity to do so.

[30] I find that the pay-back term of employment was offered on a take-it-or-leave-it basis and that Mr Adams was given no opportunity to take advice, let alone a reasonable opportunity. The failure to give that opportunity was not a matter without

consequence, as the nature of this unusual term was such that there were risks involved in accepting it, especially if there was any possibility of an employee such as

Mr Adams finding himself in a position of resigning within 12 months and then having to repay the substantial sum of $10,000.

[31] Most employees at or even well above the level of remuneration under this employment agreement including the relatively large one-off payment being offered, are likely to have spent or used the money almost straightaway after receiving it and are unlikely to have kept themselves in a position of being able to repay it in the event they left at any time before 12 months of the employment had elapsed.

[32] By accepting the term with its repayment catch or proviso, Mr Adams was restricting his ability to freely resign in the first 12 months of his employment. The term potentially placed a real constraint on the exercise of a right he had under the agreement. Had he been given and taken an opportunity to seek advice Mr Adams might well have hesitated in accepting the employment agreement, or might have tried to bargain for a less onerous term, or at least have been able to give informed acceptance to it.

[33] The employment agreement at the end of it contains a declaration signed by Mr Adams that he had been advised of the right to seek independent advice in relation to the agreement and had been allowed reasonable time to do so. Merely signing a statement to that effect does not necessarily mean that the statement was an accurate or correct one. Despite his declaration to the contrary, I consider on an objective view that Mr Adams was not given a reasonable time to seek independent advice in relation to the agreement.

[34] I find that the pay-back term of the employment agreement Original Stone now seeks to enforce by compliance, was entered into by the employer in breach of an important statutory provision, s 63A of the Employment relations Act. For that reason I consider it would be unjust and inequitable for orders to be made in favour of the company against Mr Adams and therefore, in the exercise of the discretion under s 137 of the Act, I decline to order compliance.

Penalty claim for breach of s 63A

[35] Although a penalty has been sought by Mr Adams against Original Stone for its breach of s 63A(2)(c), that remedy was not applied for until November 2009 which was several months outside the 12 month period specified at s 135(5) of the Act. The time limit expired in March 2009, one year after the breach had occurred on 26 March 2008. A penalty cannot be ordered.

[36] Mr Adams has admitted he owes $42 in relation to a parking fine incurred while he was performing work for Original Stone. He is ordered pay that sum to the company.

[37] A claim to recover text-parking expenses from Mr Adams was made by the company. I have found no evidence that those payments for parking made to the employers cell phone account of $42.64 in total, related to the period in December 2008 of the business shut down during which Mr Adams was not working. I accept Mr Adams' evidence that the charges were in relation to parking he was seeking in the course of performing his work. Therefore I make no order for repayment of that sum.

Remedies claimed for misrepresentation and breach of employment agreement

[38] Mr Adams' claims that he was induced to enter into the employment agreement by material misrepresentations made by Mr Salenius, in particular about the tools and resources he would be provided with to meet his sales and target levels. He claims that Original Stone breached implied terms of the employment agreement that those tools and resources would be provided to enable him to perform the employment agreement in the way intended by the parties. Damages, recovery of lost earnings and a penalty under s 134 of the Employment Relations Act are sought as remedies.

[39] Damages for misrepresentation are provided for by s 6 of the Contractual Remedies Act 1979. Section 10 of that Act allows damages in cases of misrepresentation, repudiation or breach of contract.

[40] Cancellation of contract, as Mr Adams claims occurred in this case, is dealt with at s 7 of the Contractual Remedies Act. On this point, I am satisfied that Mr Adams did not cancel the employment agreement. Therefore he did not become discharged from the term of it requiring him to pay back the $10,000, although for the reasons given above I have found it should not be enforced against him by compliance.

[41] I find that the contract ended by the action of one party to it, Mr Adams, giving notice to terminate, as contemplated and permitted by a provision of the contract. The inadequacy of the notice given did not change that fact. I find Mr Adams did not make known to Original Stone at any time that he was cancelling the contract. Neither did he evince by some overt means his intention to cancel the contract. Mr Adams freely resigned, I find.

[42] I do not consider that a party in the position of Mr Salenius could or should reasonably have realised from Mr Adam's

conduct that he was cancelling the contract. It is relevant that in his letter of resignation to Mr Salenius he requested "a release from my contract to you and Original Stone." Mr Salenius responded by releasing him from the requirement to give four weeks' notice but not from the pay- back term of employment.

[43] As to whether Mr Adams' resignation was a direct response to any repudiation by Original Stone and therefore amounted to a constructive dismissal, I find that it was not. Whether within 90 days as required or outside that period, Mr Adams has never raised a grievance claim that he was dismissed, constructively or otherwise, from his employment. He resigned.

[44] There is also a limitation placed on the ability of a party to cancel a contract where that party, with full knowledge of a repudiation or misrepresentation or breach, has affirmed the contract; s.7(5) of the Contractual Remedies Act. I find that by continuing to work for as long as 11 months with knowledge of what Mr Salenius had or had not provided in relation to sales tools and resources, Mr Adams lost his entitlement to cancel the employment agreement.

[45] Mr Adams alleges that on behalf of Original Stone, Mr Salenius made representations including:

- Commissions earned by him as part of his remuneration would be paid on or before the 10th of each month;
- He would be promoted to Sales Team Leader in the near future;
    - He company would engage a full time Administration and Support Team to enable Mr Adams to concentrate on his sales role;
- The company would acquire What's On, a computer search engine tool;
- The company would provide Architects and Specifications literature;
    - The company would ensure that key line stock was kept available at its warehouse for Mr Adams to sell;
    - Mr Adams would have reasonable personal use of the phone, laptop and car provided to him by Original Stone fro work use.

[46] I do not consider the discussions that took place between Mr Salenius, Mr Andrew Kelliher and Mr Adams about any of the above matters included any actionable misrepresentations or led to agreement being reached about terms of employment that although not expressed in the written agreement became were terms of that agreement.

[47] If there were any misrepresentations I consider they did not to any significant degree induce Mr Adams to enter into the employment agreement. The substantial inducement or "sweetener" as Mr Salenius described it, was an immediate payment of

$10,000.

[48] Had the discussions with Mr Salenius and Mr Kelliher by Mr Adams led to representations the truth of which was essential to Mr Adams, in my view they are likely to have become contractual promises expressed in the employment agreement as terms of it. The payment of $10,000 was referred to in that way and also the date for monthly payment of commissions, but apart from that there are no clear undertakings given by Original Stone as to what was to be provided by way of sales tools and resources. There is only a passing reference to Technical Support and the existence of a quantity surveyor (QS) in the team. There was no guarantee expressly given that the position would not be made redundant if economic or other circumstances made that a decision open for an employer to take.

[49] It is also significant that Mr Adams had worked for Original Stone before and had left because of dissatisfaction over sales tools and resources provided by Mr Salenius. With that previous bad experience, before returning to the company it could be expected he would have required Mr Salenius to put into the employment agreement terms reflecting any promises that had been made about the provision of tools and resources for sale.

[50] In his statement in reply, Mr Adams referred to "ideas presented to me" by Mr Salenius which had led him to decide to go back and work again for Original Stone. These ideas were listed by him as including:

> *(a) Five sales reps;*
> *(b) One quantity surveyor;*
> *(c) Architects folders;*
> *(d) New sales tool initiatives.*

[51] There was no express mention of What's On in the way there was to Architects Folders. Later though, in an amended statement in reply, the claim was made that a representation had been made by Original Stone that it would acquire

What's On.

[52] As the Authority's investigation advanced from the lodging of the original statement in reply by Mr Adams to giving evidence about the representations made during discussions, what had been said about What's On took greater prominence.

[53] I am not satisfied that there were express or even implied terms of the employment agreement arising out of such

discussions as took place about the provision of sales tools, such as What's On, the architects manual and the provision of adequate stock.

[54] Although I find that these matters were discussed or canvassed before entry into the employment agreement, they did not become the subject of any term or stipulation of it.

[55] Mr Kelliher, a former sales manager of Original Stone and a witness presented by Mr Adams in support of his claims, in answering questions backed off some of his written evidence. Mr Kelliher had been present during the initial discussions Mr Adams had with Mr Salenius.

[56] In relation to What's On, Mr Kelliher's evidence was that Mr Salenius had said he would "look into" getting that tool but had not said that he would get it. No details were given by Mr Salenius about how or when he would look into it. Mr Kelliher noted that Mr Salenius had also said that What's On could not be afforded by the company. Mr Kelliher was equivocal about whether What's On had been part of the proposal or was just mentioned in discussion as being something that

Mr Salenius would think about. Mr Kelliher accepted that Mr Salenius had been "non-committal" with regard to providing What's On and the architects folder.

[57] Mr Kelliher's evidence was that he and Mr Salenius created a package "designed to address and remove the issues that had come up in the past." He said that the package addressed concerns that had caused Mr Adams to leave Original Stone in 2006. If so it seems likely the package would have been given express contractual effect, not just left as the subject of pre-contractual discussions.

[58] From the evidence, I am unable to find that Mr Salenius made any definite promises as to the tools to be provided and when that would be. Mr Adams said he thought the tools would not be provided immediately but as the year went on. At the most, Mr Salenius encouraged Mr Adams to think that he was amenable to looking at providing this assistance requested by Mr Adams. But to the extent that Mr Salenius made representations, they were as to future intention. Actionable misrepresentation about future intention occurs only when the person making the representation does not have the intention that person says they have. I do not consider that Mr Salenius was making promises he had no intention of keeping, just to get Mr Adams to put his signature on the employment agreement. Mr Salenius' can be taken as knowing that false promises made by him, particularly as a former employer of Mr Adams, would soon be exposed and would have disastrous consequences for the employment relationship. Mr Adams remained in the employment relationship for over 11 months, and in that time it must have been obvious to him the way Mr Salenius was running the company and what he was providing by way of sales tools and resources.

[59] Mr Salenius presented himself to Mr Adams as a go-forward manager ready to respond to new ideas and keen to make changes to the business as recommended by a salesperson experienced in it, but he was careful what he committed to.

[60] As with many businesses at this time, the effects of the recession were beginning to be felt more and more and Mr Salenius also had to consider what cost savings could be made by restructuring, including redundancy where necessary. I find that the quantity surveyor position which did exist was disestablished for that reason. It would have been most unusual if a term of the agreement had guaranteed the continued existence of a position of employment.

[61] I agree with the submissions of counsel for Original Stone (para 3.5) that the evidence falls well short of establishing that Mr Salenius when negotiating the employment agreement represented to Mr Adams;

A full time administration and support team would be engaged.

Whats On would be purchased.

The Architects Specifications Manual would be provide.

$80,000 per year would be his earnings.

[62] As submitted, at the most there was informal discussion about sales tools and support. Mr Salenius said he would "look into it" but had remained "noncommittal."

[63] I also agree that it would not have been logical for Mr Salenius to represent that he would buy Whats On, as he had recently cancelled that programme which had not been used in the past, and the information from it was obtainable elsewhere. The Architects Manual was available although it required updating, and there was an administration and support team to begin with, although later some positions were made redundant.

[64] I do not accept that from their discussions Mr Adams believed Mr Salenius had promised him he would earn $80,000 per year. Mr Adams was an experienced commission salesman who would have known that a promise like that was not one an employer could keep, since it was Mr Adams who had to make the sales. Only the base salary of $35,000 could contractually be guaranteed.

[65] The Authority concludes that there is no basis for awarding damages or lost wages against Original Stone. I find that there was no material misrepresentation inducing Mr Adams to enter into the employment agreement and there was also no breach during the course of performance of that agreement of any express or implied term. The late payment of commissions on three occasions while technically a minor breach either caused no loss to Mr Adams or he has not been able to quantify any loss.

[66] There is no basis for a penalty, as sought by Mr Adams, to be imposed under s 134 of the Act for breach of an employment agreement.

Determination

[67] In respect of the applicant's claim to recover payments including the $10,000 "one off payment," Mr Adams is ordered to pay $42 to Original Stone as reimbursement of a parking fine. He has always accepted his obligation in that regard.

[68] In relation to Mr Adams's claims against Original Stone, there is no basis as alleged for making orders against the company, whether for damages or reimbursement of wages or penalties, or anything else.

Costs

[69] Costs are reserved.

[70] To avoid further costs being incurred by both parties they are urged to settle any issue of costs themselves, perhaps by agreeing that costs should lie where they fall. If they are unable to agree an application can be made to the Authority by either party. Any application is to be made within 21 days of the date of this determination and the opposing party, upon service of it, may apply in writing within 14 days after the 21 day period has elapsed.

A Dumbleton

Member of the Employment Relations Authority
