

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 235/08
511 3815

BETWEEN	Eli Salant Applicant/Respondent to Counterclaim
AND	Hospitality Services Ltd Respondent/Applicant in Counterclaim

Member of Authority: Yvonne Oldfield

Representatives: No appearance for Mr Salant
Christine Meechan for Respondent

Investigation Meeting: 24 June 2008

Determination: 07 July 2008

DETERMINATION OF THE AUTHORITY AS TO COUNTERCLAIM

Employment Relationship Problem

[1] Mr Salant, the original applicant in these proceedings, applied for an order for compliance with mediated terms of settlement agreed and signed by the parties shortly after a mediation conference in respect of an alleged personal grievance of unjustified constructive dismissal. Before the mediator had added his signature the respondent advised him that it had come to believe that certain representations by Mr Salant (upon which it said the agreement was based) were false. At the respondent's request, the mediator desisted from signing the terms. The respondent declined to make payment of the agreed settlement and purported to cancel the agreement pursuant to the Contractual Remedies Act, after which Mr Salant lodged the problem in the Authority.

[2] The respondent continues to assert that the settlement has been cancelled on the basis of misrepresentation. The alleged misrepresentation was Mr Salant's

statement that he had returned all company property in his possession. Mr Salant denies any misrepresentation and says that the agreement remains enforceable.

[3] In addition the respondent lodged a counterclaim for damages against Mr Salant. The respondent says that in his capacity as the respondent's IT manager, Mr Salant had been supplied with a Maxon data card to trial for suitability for the respondent's use. Pursuant to the respondent's service agreement with Telecom, Telecom was to bill the respondent for any charges associated with trialling the card.

[4] Unbeknown to the respondent at the time, Mr Salant remained in possession of this data card after his employment ended and after the terms of settlement were signed on 20 November 2007. Out of this arises the allegation of misrepresentation. On 28 November 2007 the card was activated. The respondent found this out when, in December 2007, it was billed for use of the card. At the respondent's request Telecom blocked the card however in the intervening period (28 November 2007 to 17 December 2007) charges of \$22,457.79 were incurred. Hospitality Services Ltd now claims damages in this amount.

[5] Mr Salant says that the respondent is precluded from counterclaiming for damages because the agreed settlement contained the following term:

"3. This is full and final settlement of all matters that are or may be outstanding between the parties arising out of the employment relationship between the applicant and the respondent."

Scope of this determination

[6] Minutes dated 29 April 2008 and 12 June 2008 (attached) set out the history of proceedings in the Authority. In summary, Mr Salant (who now lives in Perth) did not wish to return for an investigation meeting and asked that both claim and counterclaim be investigated and determined by other means. The respondent did not agree with this proposal. It anticipated that there would be differences in the evidence of the parties and wished to be heard in relation to the assertions of misrepresentation and cancellation and on the matters that gave rise to the counterclaim.

[7] I advised that in these circumstances I did not consider myself able to determine the claim or the counterclaim on papers, and advised the parties that the investigation of both would have to proceed by investigation meeting. At the respondent's request, I set a date for a meeting. Although he did confirm that his claim was not withdrawn, Mr Salant could not confirm that he would attend. In such circumstances I did not consider it appropriate to embark on an investigation of his claim at that meeting and advised the parties accordingly.

[8] **Mr Salant's application for compliance therefore remains at large and its investigation is suspended until further notice from him.**

[9] In the event, Mr Salant did not attend the investigation meeting of 24 June, although he did provide me with a written statement in response to the counterclaim, which I have taken into consideration because (contrary to the respondent's expectations) material parts of it were not in dispute.

Issues for determination

[10] The first issue for determination is whether the counterclaim can be investigated and determined at all. If it can be, then the second issue for determination is whether the evidence establishes that the applicant has caused the alleged loss to the respondent.

Is the respondent precluded from bringing a counterclaim?

[11] It was the respondent's submission that because the terms of settlement were cancelled there was no bar to the Authority proceeding to determine any employment relationship problem that the parties might have. I was unable to accept this argument as the issue of cancellation had not been investigated and determined. However this still left the question whether the terms of settlement would in fact preclude the respondent from bringing a counterclaim.

[12] Even a phrase as broad as "*all matters that are or may be outstanding*" can only extend to matters of a type in contemplation at the time the agreement was entered into. In determining whether the respondent may pursue its claim I have relied

on *Marlow v Yorkshire New Zealand Ltd*, [2000] 1 ERNZ 206, a decision of Chief Judge Goddard in which the first issue for consideration (as here) was whether a common law action had been settled along with the potential personal grievance relating to termination of employment. Judge Goddard noted there at page 214 that:

“There is ...a principle that, unless an actual or potential dispute can be discerned as existing before an agreement between the parties is made, that agreement will not be taken to have compromised the issue.”

And at page 215 he concluded:

“Applying these rules to the language used by the parties as explained by the context, the agreement must be taken to be an agreement for the settlement of all claims under the contract of whatever nature and whether already commenced or only potential or inchoate but it must also be limited to claims of the existence of which both parties were aware and to claims of the nature they were discussing... The settlement cannot reasonably be taken to extend to preclude the plaintiff from making claims coming to light later out of unrelated events during the employment. This would work both ways — if a settlement of this kind were made it would not preclude an employer from pursuing recovery of property not returned by the employee when leaving, such as a company car.”

[13] Like the hypothetical example of an action for recovery of a company car, the counterclaim in this case is not related to the alleged personal grievance. Nor can it be said to have been in contemplation by the parties at the time the terms of settlement were entered into, since it had not yet arisen and was not foreseen.

[14] **I am satisfied that if the agreement is enforceable, it does not encompass settlement of the counterclaim, which may therefore be determined as a stand alone issue.**

Is the counterclaim made out?

[15] Although Mr Salant’s name is shown on the respondent’s Telecom account as the holder of a data card the respondent conceded that this did not necessarily mean that he was personally using it. In his capacity as the respondent’s IT manager Mr

Salant took receipt of all such equipment from suppliers before passing it on to other staff members to trial. Keeping track of who had what was his responsibility and where no one else was recorded as being in possession of an item he was identified by default as its holder. The respondent said that after Mr Salant left everything under his name was accounted for except for the data card and one other item.¹ It believed Mr Salant personally had this card because it was being used in Australia.

[16] Mr Salant does not deny that he remained in possession of what he describes as “*the data card in question*” nor does he deny that he used it, although he does say that it was never the property of the respondent and was provided directly to him by the third party supplier rather than by Telecom itself. Stuart Harrison, vice president of the respondent, told me that the respondent considered the data card to be its property but I consider it more likely that the card remained the property of the supplier. Either way, it is not in dispute that the card was issued to Mr Salant in his capacity as agent of the respondent.

[17] The respondent says that it learnt that the card was in use when it received a bill on or about 7 December whereupon it immediately instructed Telecom to take steps to block the card. Unfortunately, for technical reasons, Telecom did not succeed in doing so until 17 December. On 10 December the respondent’s solicitors notified Mr Salant’s solicitors of the situation, and of the charges which had been billed to that date. Unfortunately, use of the card did not immediately cease.

[18] Mr Salant’s written statement explained his view of the situation as follows:

“Prior to my departure for Australia I instructed Telecom New Zealand (repeatedly) to transfer 2 different services that [the respondent] had been paying for to my personal account...

They informed me that this had been completed...

Why did [the respondent] not cancel the usage of the card with Telecom once they had received an initial account, rather [sic] than let the amount accumulate to where it is now?

¹ The other item was a Sim card said to have been used briefly by Mr Salant’s wife however the respondent told me that charges on this were negligible and are not being pursued.

The account was being sent to [the respondent] and not to myself as requested, so I had no visibility of same...

The Telecom monthly bill clearly showed the card was being used in Australia by myself...

When [the respondent] sighted the Telecom bill, the onus/responsibility was with them to cancel the contract with Telecom, not myself. I cannot be held responsible for an accounting oversight by [the respondent]'s management and account's department.'

[19] Although this information was provided in unsworn statements I note that it is not inconsistent with the respondent's evidence. I also note that there has been no suggestion that Mr Salant was ever billed directly for the use of the card in the period in question (28 November 2007- 17 December 2007.)

[20] I was shown relevant communications between the respondent and Telecom which indicate that the respondent took prompt action to have the card blocked. I note also that the respondent took steps to inform Mr Salant what was happening as early as 10 December through communications between the parties' respective solicitors.

[21] Although it may not have been Mr Salant's intention that the respondent carry the cost of his personal use of the data card after the employment ended that is what happened. The responsibility for meeting that cost clearly falls on Mr Salant. There can be no question that Mr Salant must reimburse the respondent for the costs it incurred through this personal use.

[22] **I therefore order Mr Salant to pay to Hospitality Services Ltd damages in the sum of \$22,457.79.**

Mediation

[23] As indicated earlier in this determination, Mr Salant's original application for compliance remains at large. I have already directed the parties to attend mediation on one occasion however Mr Salant declined to return to New Zealand for that purpose. In the circumstances I make no further direction to mediation but note that I consider

it would be in both parties' interests to mediate their differences and recommend this course of action to them.

[24] Meanwhile I reiterate that if Mr Salant wishes his application for compliance to be progressed he must advise accordingly at which point an investigation meeting will be set down for that purpose.

Costs

[25] Any application for costs in relation to the counterclaim must be made within 28 days from the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority