IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 378/08
5089238

	BETWEEN	RODNEY SLINGSBY Applicant
	AND	MALCOLM EDEN Respondent

Member of Authority:	Vicki Campbell
Representatives:	Daniel Erikson for Applicant Trudy Paterson for Respondent
Investigation Meeting:	26 June 2008 at Tauranga
Submissions Received:	14 and 24 July from Applicant 21 July from Respondent
Determination:	5 November 2008

DETERMINATION OF THE AUTHORITY

Preliminary matter

[1] In a statement of problem lodged in the Authority on 1 June 2007 Mr Slingsby claimed he had been unjustifiably constructively dismissed from his employment with Highrise Realty Limited (Highrise).

[2] Highrise denied it had an employment relationship with Mr Slingsby, rather Highrise claimed the employment relationship was between Mr Slingsby and Mr Malcolm Eden. In order to deal with the issue of who was Mr Slingsby's employer I convened a preliminary investigation meeting and interviewed Mr Eden.

[3] After interviewing Mr Eden, a confirmed transcript of Mr Eden's answers to my questions was provided to both Highrise and Mr Singsby. Having had the benefit of that document, Mr Slingsby lodged an amended statement of problem in the Authority on 13 August 2007 removing Highrise as the respondent and citing instead, Mr Malcolm Eden.

Employment relationship problem

[4] Mr Slingsby commenced employment with Mr Eden in August 2004 and remained in that employment until 15 November 2006. Mr Slingsby was employed as Mr Eden's personal assistant.

[5] Mr Slingsby claims he was unjustifiably constructively dismissed by Mr Eden as a result of:

- Mr Eden's failure to commit the terms and conditions of his employment to writing; extreme work pressure and stress associated with the uncertainty of the terms and conditions of his employment;
- Mr Eden reneging on the verbally agreed terms and conditions of Mr Slingsby's employment (14 November 2006);
- Mr Eden's unreasonable actions on 15 November 2006.

[6] Mr Slingsby also claims he was unjustifiably disadvantaged through the failure of Mr Eden to provide a written employment agreement, causing Mr Slingsby considerable stress, and which he alleged deprived him of the opportunity to conclude in writing the agreement for payment of commissions, resulting in a loss of potential income; and Mr Eden's conduct on 15 November 2006.

[7] Mr Slingsby also claims arrears of wages and a penalty for a breach of section 63A of the Employment Relations Act 2000.

[8] Mr Eden denies the claims and says Mr Slingsby is outside the 90 days in which to raise a personal grievance against him, and does not consent to the grievance being raised out of time.

[9] Mr Eden counter-claims against Mr Slingsby for breaching his duty of good faith when he removed computers containing commercial information belonging to Mr Eden and to Highrise including all information relating to the Eleven project. Mr Eden seeks payment of damages of $5,713.68 and a penalty for a breach of good faith. Mr Slingsby denies the counter-claim.

[10] The key issue for this determination will be whether or not Mr Slingsby is able to raise his personal grievance outside the 90 day period. If the answer to that issue is affirmative I will then determine whether or not Mr Slingsby was constructively or otherwise dismissed and/or whether he was disadvantaged in his employment. The next issue for determination will be the arrears of wages claim, and the claim for a penalty against Mr Eden. Finally I will deal with the counter-claim from Mr Eden that Mr Slingsby breached his obligations of good faith.

Credibility findings

[11] Before embarking on a discussion and determination of the issues, I need to say something about the credibility of the parties. During the course of the investigation meeting when answering questions from both the Authority and the parties representatives Mr Slingsby's evidence was equivocal, self serving and at times exaggerated.

[12] For example, in his written evidence Mr Slingsby says he had been proactive in attempting to clarify his terms and conditions of employment. In his written evidence he drew my attention to the document dated 8 November 2006. Mr Slingsby's written evidence states that this document set out his understanding of the agreed terms of employment between him and Mr Eden. However, in his oral evidence, and on more than one occasion, Mr Slingsby told me that the 8 November document was not his current terms of employment, but rather, was a negotiating tool to be used to negotiate higher income for himself.

[13] Also in his written evidence Mr Slingsby says he and Mr Eden agreed on the payment of a quarterly bonus but he never received any bonuses. At the investigation meeting Mr Slingsby accepted that he had received a bonus payment in April 2005 and that this was the only bonus he was entitled to.

[14] Mr Slingsby told me that he had created a 3D model for the apartment design. However, in answer to questions at the investigation meeting Mr Slingsby acknowledged that the 3D model for the apartment design had been emailed to Mr Slingsby by the architect of the development. As the evidence transpired it became

clear that Mr Slingsby had received the emailed 3D model and had made a modification to it.

[15] Further, Mr Slingsby says in his written evidence that in 2005 he and Mr Eden agreed that Mr Slingsby would be paid a commission on the basis of $500 a list and $500 a sale and that this agreement was reduced to writing in the form of an employment agreement. A document was lodged with the authority to support his contention.

[16] I am satisfied that at no time during Mr Slingsby's employment with Mr Eden was it ever agreed that Mr Slingsby would be paid a commission on the basis he contends. The employment agreement he lodged in the Authority to was written by Mr Slingsby in late 2005 and signed by him. However, he dated the document to give the impression that it had been signed on 2 August 2004. Mr Eden never signed the agreement as he did not agree to the terms expressed in it.

[17] By contrast Mr Eden's evidence was unequivocal and was supported by documentation. Where the evidence of the parties is in dispute, it is the evidence of Mr Eden that I have preferred.

90 day issue

[18] The personal grievance against Mr Eden was raised on 9 August 2007 when Mr Slingsby lodged his amended statement of problem in the Authority substituting Mr Eden for Highrise as the respondent. Mr Eden says Mr Slingsby is outside the 90 day period in which to raise his personal grievance.

[19] If Mr Slingsby is to be allowed to raise his grievance outside 90 days the issues to be decided are threefold. First I must be satisfied exceptional circumstances exist. If exceptional circumstances exist then I must consider whether Mr Slingsby's delay in raising his personal grievance against Mr Eden was caused by those exceptional circumstances. I then must give consideration as to whether it would be just to allow Mr Slingsby's grievances outside the 90 day period.

Do exceptional circumstances exist?

[20] The Employment Relations Act allows for personal grievances to be raised outside 90 days where exceptional circumstances have caused the delay in raising the personal grievance. The Act has defined exceptional circumstances to include situations were an employee's agreement does not contain an explanation concerning the resolution of employment relationship problems.

[21] The parties did not have a written employment agreement between them. Therefore there was no employment agreement containing an explanation concerning the resolution of employment relationship problems. Exceptional circumstances exist.

Was the delay in Mr Slingsby raising his grievance with Mr Eden occasioned by the exceptional circumstances?

[22] Mr Slingsby's employment ended on 15 November 2006. He raised a personal grievance, through his solicitor, against Highrise on 9 February 2007. Clearly the lack of an explanation in a written employment agreement was no barrier to Mr Slingsby raising a personal grievance within the requisite 90 day period, as the raising of his grievance against Highrise was within 90 days.

[23] In submissions lodged on behalf of Mr Slingsby, Counsel has argued Mr Slingsby did not raise his personal grievance with Mr Eden within the 90 day period because he did not have a written employment agreement, therefore the identity of the employer was not clear.

[24] I do not accept that submission for the following reasons:

- Mr Slingsby, in his written evidence told me he was "…paid by Mr Eden … and not by Highrise.". In 2005 Mr Slingsby drafted an employment agreement where he identifies the employer as being Mr Eden.

- In a letter dated 26 May 2005 Mr Slingsby provided to Mr Eden a letter purporting to resign from his employment. The letter states: "Please accept this letter as the formal resignation of Rodney J. SLINGSBY from employment with Malcolm E. EDEN…"

- On 8 November 2006 a document drafted and signed by Mr Slingsby, and titled "Continued service for Rodney Slingsby to Malcolm Eden" was, according to Mr Slingsby's oral evidence, a negotiating tool to negotiate a higher salary package with Mr Eden.

- Further, on 15 November, the day Mr Slingsby's employment ended, Mr Eden, through his solicitor wrote to Mr Slingsby. In the first paragraph of that letter Mr Eden states clearly that Mr Slingsby had been employed by Mr Eden.

- Communications and negotiations between Mr Slingsby's then solicitor and Mr Eden's solicitor with regard to an inspection of Mr Slingby's laptop, which had been used by Mr Slingsby in his work for Mr Eden continued throughout November and into December 2007.

- In a personal undertaking signed by Mr Slingsby on 29 November 2006 Mr Slingsby states:

  > At all times during the course of my employment with Malcolm Eden I have endeavoured to keep this data safe in all respects."

- The fact that Mr Eden was Mr Slingsby's employer was reiterated in a letter dated 21 December 2006 (within the 90 day period) from Mr Eden's lawyer which formed part of the communications relating to the computer investigations.

- Finally, in his oral evidence at the investigation meeting Mr Slingsby told me that he prepared a template pay slip which had been used by Mr Eden to pay him thoughout his employment. That template names Mr Eden as the employer.

[25] When Mr Slingsby raised his initial grievance with Highrise, Highrise made it clear on more than one occasion that Mr Slingsby had not been employed by Highrise, but by Mr Eden. It was therefore, open to Mr Slingsby, who was legally represented, to have erred on the side of caution and added Mr Eden to the

correspondence and raise his grievance with citing Mr Eden as a co-respondent. This could have been achieved within the requisite 90 day period.

[26] I find that the failure to provide Mr Slingsby with an employment agreement containing an explanation concerning the resolution of employment relationship problems did not occasion the delay in Mr Slingsby raising his personal grievance against Mr Eden.

Is it just to allow the case to be brought outside the 90 day period?

[27] The final question is whether it is just to allow the case to be brought outside the 90 day period. Mr Slingsby was legally represented immediately following the ending of his employment relationship with Mr Eden, and he was on notice prior to the 90 day period expiring that the correct respondent was Mr Eden and not Highrise.

[28] Mr Slingsby claims he was unjustifiably, constructively dismissed and that he was disadvantaged in his employment. To be successful in his claim for constructive dismissal I need to be satisfied there was a breach of duty on the part of Mr Eden towards Mr Slingsby and that it was reasonably foreseeable that Mr Slingsby would resign as a result of that breach.

[29] Mr Slingsby says Mr Eden breached his duty to him when he continually failed to commit the terms and conditions of his employment to writing; required Mr Slingsby to work in an extremely stressful environment and with a stressful workload; reneging on agreed terms by way of a "final offer"; and through Mr Eden's conduct on 15 November 2006.

[30] Having had the benefit of hearing the evidence with regard to his claims, I find the evidence does not establish the claims made by Mr Slingsby. For all the forgoing reasons I find it would not be just to allow Mr Slingsby's grievances to be raised outside the 90 day period.

Arrears of wages

[31] Mr Slingsby claims payment of commission on a quantum meruit basis for his work on the 11 Project. Quantum meruit applies when the parties to an

employment relationship have entered into an agreement and have not agreed on the remuneration to be paid. In this situation the common law requires an employer to pay to the employee reasonable remuneration for his or her services, provided it was not intended that the work would be done gratuitously (see *Lamont v Power Beat International Ltd* [1998] 2 ERNZ 20).

[32] The 11 Project was a development project located at 11 Maunganui Road (thus the name of the project). The 11 Project entailed the acquisition of 17 parcels of land in private ownership, the demolition of existing buildings, the construction of new apartments, and the sell down of the apartments.

[33] The acquisition of the 17 parcels of land was concluded in March 2007 four and a half months after Mr Slingsby had left his employment. While construction has commenced, the building will not be completed until some time in 2009. The sale of the Apartments commenced in late October 2006 and continues today with over half the Apartments sold.

[34] I am satisfied the project was initiated and managed by Mr Eden. Mr Slingsby was employed as Mr Eden's personal assistant and in that role had some responsibility for the marketing and sales of Mr Eden's real estate portfolio, including the 11 Project.

[35] Mr Slingsby says Mr Eden promised to reward him over and above his salary of $40,000 for work he undertook, which he says was outside the scope of his job as personal assistant. Mr Slingsby's written evidence was that he undertook significant work outside his role as personal assistant with regard to the 11 Project. He says he drafted the vast majority of all marketing materials, graphic design, publishing, contracts and authorities used for the land acquisition, and sell down of the project. I have not accepted that evidence as being entirely accurate.

[36] It became clear during the investigation meeting that while Mr Slingsby undertook some marketing duties including some drafting of marketing material, Wave Marketing and Design was engaged in early September 2006 to undertake the bulk of the development of the marketing material including the teaser flyer for apartment sales, core logo design, website design, brochure pack (including

developing the creative concept, introduction pages, floor plan pages, layout etc). Mr Slingsby did attend meetings with Wave to discuss the development of the material, however Mr Eden was also present at those meetings.

[37] Mr Slingsby also told me through his written evidence that he was heavily involved with the developer and financiers. However, again as the evidence unfolded at the investigation meeting, it became obvious that Mr Slingsby was involved in meetings with Mr Eden present and he never attended any meetings with either the developer or the financiers on his own.

[38] I am satisfied Mr Slingsby was employed as a personal assistant and undertook duties consistent with that role. He entered into an oral agreement with Mr Slingsby that he would be paid $40,000 per annum for undertaking his duties. That agreement was adhered to. In those circumstances quantum meruit does not apply.

[39] In submissions lodged on behalf of Mr Slingsby, Mr Erikson makes an alternative claim for additional remuneration payable to Mr Slingsby over and above his salary pursuant to ss.7 & 9 of the Contractual Remedies Act (CRA). This claim was never made in the amended statement of problem lodged in the Authority on 13 August 2007. Submissions are not the place for parties to raise new claims which have not previously been before the Authority.

[40] For the avoidance of doubt, even if I had entertained the claim pursuant to the CRA it did not have a high chance of success. Sections 7 and 9 of the CRA provide a foundation relating to constructive dismissal, which in effect, allows an employee to cancel an employment agreement by resigning, where there has been repudiatory conduct by the employer to justify the cancellation.

[41] Mr Slingsby has failed to show that there was any repudiatory conduct on the part of Mr Eden. I am satisfied, having seen and heard the evidence of the parties, that Mr Slingsby's resignation on 15 November was initiated by him after he became dissatisfied with his level of remuneration and attempts to increase his remuneration in discussions with Mr Eden had not been successful.

[42] Further, Mr Slingsby has failed to show that it was a contractual provision that he be paid commission over and above his salary. During his employment with Mr Eden, Mr Slingsby provided two copies of an employment agreement to Mr Eden for Mr Eden's consideration. The first was the agreement Mr Slingsby had been employed under prior to commencing work for Mr Eden. Both Mr Eden and Mr Slingsby sat down with that document and discussed the terms and conditions of employment applicable to the relationship Mr Slingsby now had with Mr Eden.

[43] The document produced to the Authority has two sets of handwriting on it. This is consistent with Mr Eden's evidence that as he discussed the terms and conditions of employment with Mr Slingsby they made notes on the contract.

[44] The document has a reference to the payment of a bonus, and the % symbol is written in but no figure is attributed to it. At the time of their discussions relating to this document Mr Eden was working from the Professional's office where he was paid a quarterly bonus. I find Mr Eden and Mr Slingsby agreed that Mr Slingsby would receive 50% of the quarterly bonus Mr Eden received from the Professionals. I am supported in my conclusions by a document which shows that on 22 April 2005, Mr Slingsby was paid $1,112.06 by way of a bonus payment. This was the only bonus paid to Mr Slingsby.

[45] In 2005 Mr Eden moved to Colliers (Highrise) and was no longer in receipt of a salary or bonus. Instead he was paid on a commission only basis. After Mr Eden moved to Colliers, Mr Slingsby provided a second document to Mr Eden where the reference to a bonus was replaced with a provision to pay Mr Slingsby a commission of $500 per list and $500 per sale made by Mr Eden. Mr Slingsby signed the document before giving it to Mr Eden, and backdated it to read 2 August 2004.

[46] Mr Eden refused to sign the document as he did not agree with the commission clause set out in it. I find there was no contractual basis on which to grant relief under section 9 of the CRA.

Penalty for breach of the Employment Relations Act

[47] Mr Slingsby claims a penalty be awarded against Mr Eden for the failure to provide a written employment agreement.

[48] The obligation to provide a written employment agreement, is contained in s.63A(2) of the Employment Relations Act 2000. The Act requires an employer to provide an employee with a copy of the intended agreement. Section 63A(3) provides for a penalty for failure to comply with s.63A.

[49] Mr Slingsby and Mr Eden sat down and discussed the contents of an employment agreement in 2004. Those discussions, as set out earlier in this determination, were based on the Individual Employment Agreement Mr Slingsby had signed with his previous employer. Mr Eden did not follow those discussions up, nor did he then provide a written copy of the agreed terms of the discussion.

[50] Mr Eden has clearly failed to meet the requirements of the Act. Had he done so, there is a strong possibility that the employment relationship problems would not have occurred in the way they did. Under the circumstances I am satisfied that a penalty is appropriate. **Mr Eden is ordered to pay a penalty in the sum of $500 to the Crown.**

Counter-claim for breach of good faith

[51] Mr Eden claims that on 15 November Mr Slingsby removed computers containing commercial information belonging to Mr Eden, including all information relating to the 11 Project. Mr Eden claims that Mr Slingsby's action were in breach of his obligations of good faith.

[52] There is no dispute that the computers Mr Slingsby removed from the business on 15 November were his property. Mr Slingsby, in his role as personal assistant, was required to back up all the computer data on a weekly basis.

[53] On 8 November Mr Slingsby presented Mr Eden with a document setting out some terms of employment he wished to negotiate. The terms included a bonus of $50,000 for prior work, an increase in his salary to $75,000 and a future bonus based on 10% of Mr Eden's future earnings.

[54] It was Mr Eden's evidence, which I accept, that he himself, had only received remuneration of $30,412.12 for the period 1 April to 8 November 2006. Mr Eden was not in a financial position to meet Mr Slingsby's new remuneration expectations. However, notwithstanding his own financial situation, Mr Eden met with two directors of Highrise and a consultant working for Highrise (Ms Anne Thrupp), to discuss the possibility of changing Mr Slingsby's role to allow some scope for him to work for Highrise and Ms Thrupp. This would then enable Highrise and Ms Thurpp to contribute to Mr Slingsby's remuneration which would allow for an increase.

[55] On 14 November Mr Eden approached Mr Slingsby and offered him a $10,000 increase which would take his remuneration to $50,000 per annum. Mr Slingsby rejected the offer. He asked for $65,000 and reiterated is request for 10% of Mr Eden's income by way of a bonus. Mr Eden says Mr Slingsby then disabled his computer, which Mr Eden was unable to reset.

[56] In his oral evidence at the investigation meeting Mr Slingsby admitted he became very annoyed because he felt Mr Eden had refused to negotiate. He said he got up and pulled a cable from the computer. Mr Slingsby told Mr Eden that he was in a very strong position. He then left the office.

[57] As a result of Mr Slingsby's actions that day and the vulnerability he felt having all his business information on Mr Slingsby's personal laptop, the following day 15 November Mr Eden arranged for an employee from Millenium Technology Tauranga Limited (Millenium Technology) to retrieve the business data from Mr Slingsby's computers.

[58] When Mr Slingsby arrived at work on 15 November Mr Eden advised him that the offer of $50,000 salary per annum stood. Mr Eden also advised Mr Slingsby that he had arranged for Millenium Technology to take the business data off his computer.

[59] It was at this point that the employment relationship broke down. Mr Slingsby was under the misapprehension that Mr Eden was going to "wipe"

everything off his computers. However, I am satisfied, having heard evidence from Mr Clinton Besseling, the employee from Millenium Technology that this was never the case. Mr Eden was, not surprisingly, concerned about the protection of his business information and it was that information he wished to have taken off Mr Slingsby's computers.

[60] Mr Slingby refused to allow Mr Besseling near his computers and after Mr Slingsby's mother arrived at the office (following a telephone request from Mr Slingsby), Mr Slingsby set about removing his computers from Mr Eden's office.

[61] Without his business information Mr Eden was unable to operate his business. This situation persisted for at least two days, during which time lawyers acting for Mr Eden and Mr Slingsby negotiated and agreed on the retrieval and return of Mr Eden's business information.

[62] Mr Eden says that Mr Slingsby's deliberate and wilful actions in disabling the computers on 14 November followed the next day in removing the computers entirely, which contained all Mr Eden's business information, was a breach of Mr Slingsby's duty of good faith.

[63] Mr Slingsby had an obligation pursuant to s.4 of the Act to behave in good faith toward Mr Eden. Good faith includes conduct by an employee which is likely to damage an employers business (*Tisco v Communication & Energy Workers Union* [1994] 2 ERNZ 799). I am satisfied that when Mr Slingsby disabled the computers on 14 November and then removed them entirely on 15 November, without allowing Mr Eden to remove his business information, Mr Slingsby was well aware his actions would disrupt Mr Eden's business.

[64] Mr Eden had no option but to pursue legal avenues to retrieve his business information. All the expenses incurred by Mr Eden in that retrieval process would have been avoided if Mr Slingsby had allowed Mr Besseling to take the business information of the computers on 15 November 2006. The maximum cost of that process would have been $317.75.

[65] Mr Slingsby was on notice from 15 November 2007 that Mr Eden may choose to take action against him for his breach of good faith. I am satisfied that this is a case which warrants the award of damages for Mr Slingsby's breach toward his employer. I have deducted the costs Mr Eden would have been exposed to, but for Mr Slingsby's actions.

Mr Rodney Slingsby is ordered to pay to Mr Eden damages in the amount of $5395.93 within 28 days of the date of this determination.

[66] Mr Eden also claims a penalty for the breach of good faith by Mr Slingsby. I have declined to order a penalty in this matter, given that Mr Eden will recover his losses through the order of damages.

Costs

[67] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Summary of orders

- Mr Eden is ordered to pay to the Crown, through the Employment Relations Authority, the sum of $500 as a penalty for the failure to provide Mr Slingsby with a written employment agreement pursuant to section 63A, within 28 days of the date of this determination.

- Mr Slingsby is ordered to pay Mr Eden damages in the amount of $5,395.93 within 28 days of the date of this determination.

Vicki Campbell
Member of Employment Relations Authority