

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 194/09  
5285652

BETWEEN DONALD IAN SMITH  
Applicant  
  
AND DTZ NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: P R Stapp  
  
Representatives: Peter Chemis and Andrea Pazin for Applicant  
Andrew Schirnack and Andrew Crocker for Respondent  
  
Investigation Meeting: 7 December 2009 at Wellington  
  
Submissions received: 7 December 2009  
  
Determination: 11 December 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Donald Ian Smith was employed by DTZ New Zealand Limited. He had an employment agreement. Prior to his employment he used a cell phone with a 025 personal number. It was agreed that he could use his personal cell phone number to receive business calls. And retain the number after he left. He acquired another cell phone with a 021 and the same personal number under the same arrangements.

[2] Mr Smith signed his employment agreement with DTZ on 12 December 2002 and commenced employment on 20 January 2003. He says he took the two numbers with him to DTZ. He relies on discussions he says he had with the Wellington general manager and DTZ's secretary about using the personal phone numbers for business purposes. He says that agreement was reached to transfer the account for

these numbers into DTZ's name and that when he left the account would transfer back to him.

[3] During his employment the 025 number was changed to 0275 because of a change of service provider.

[4] Mr Smith resigned from his employment with DTZ on 1 October 2009. DTZ placed Mr Smith on garden leave from 5 October 2009 until his employment ended on 29 October 2009, being the duration of the notice period.

[5] On 5 October Mr Smith informed DTZ that the 021 and 0275 numbers were his personal numbers that he had brought to DTZ and referred to his discussion with the general manager resulting in an agreement that when his employment ended with DTZ the numbers would remain his property and he would take them with him. There was no written confirmation of the arrangement and Mr Smith has had to rely on his word and the history of his arrangements.

[6] On 6 October 2009 Mr Smith again advised DTZ that the 021 and 0275 numbers were his personal numbers he had brought to DTZ and advised that DTZ was required to transfer the numbers back to him. There was an exchange of emails around DTZ's intention to disconnect the numbers and Mr Smith clarified his earlier position on the matter. DTZ's acting managing director claimed that the numbers fell within DTZ'S ownership unless Mr Smith could produce contrary information.

[7] The parties have reached an impasse on this matter. I considered mediation on the employment relationship problem, but have accepted that a decision is required to resolve the employment relationship problem.

### **Issues**

[8] Did Mr Smith reach an agreement with DTZ that he would bring his own numbers to DTZ and when he left he could take them with him? Is he entitled to have the two cell phone numbers returned to him?

[9] How is the employment relationship problem to be resolved?

[10] There is one fact in dispute and that is whether or not Mr Smith is entitled to take the two numbers with him as his employment with DTZ has ended.

### **The respondent's position**

[11] DTZ does not know if any agreement was entered into by Mr Smith, but on the balance of probabilities says it is more than likely he did not have such an agreement because:

- There was nothing put in writing at the time or when the number changed to 0275.
- Mr Smith's wife, who worked for DTZ also, had a similar arrangement and her arrangement was put in writing in January 2009.
- That there was no agreement entered into on the 0275 number and Mr Smith never had prior ownership of that number.
- There was never any arrangement referred to take the numbers with him when he left DTZ.
- By way of an example Alan Crocker, the director of finance, says his arrangement was different to that claimed by Mr Smith and he transferred his personal number and did not ask DTZ to return it if he left.
- There is no record of any agreement with Mr Smith and DTZ. Mr Crocker says he made enquiries for example with the human resources advisor. He says there was an expectation such an agreement would have been put in writing.
- DTZ was invoiced and paid the accounts.
- Mr Smith's resignation and conduct leaving DTZ has to put into context for the reasons why DTZ have refused to hand over the telephone numbers and justify its actions.

### **Determination of the Authority**

[12] It is my determination that it is more than likely that Mr Smith had an arrangement that he was able to use his personal telephone numbers and that they

would be transferred to DTZ for invoicing and payment, and when he left they would be returned to him. My reasons for this conclusion are as follows:

- There is a history that Mr Smith has been able to point to. This involves Mr Smith's employers prior to joining DTZ.
- He remembers personally what he says happened.
- The two people who Mr Smith says were directly involved could not recall. For example an affidavit from Royal David Setchfield, the group financial controller, deposed that he had no specific recollection of a discussion with Mr Smith, and he deposed that in any event he adopted a process to document any agreements reached with employees. He had expectations about others completing their responsibilities. Mr Smith says that when he started the company operated on the back of a cigarette packet, but accepted that it changed. Also, I note that Mr Setchfield was employed as company secretary in the period April 2002 and November 2006. He does not explain the difference in the company's procedures and practices at the time Mr Smith was employed and later when Mr Smith says there were changes. Indeed Mr Setchfield has used examples of people and their responsibilities but did not provide any other examples of formal practices followed by the company. DTZ did not call the human resources advisor to give evidence of her direct knowledge of the company's affairs.
- Mr Smith's wife's arrangements, which were put in writing, can be explained as a requirement of the company to have its agreements in writing, but her arrangement was done in 2009, and Mr Smith's arrangement occurred much earlier in 2002-3. This difference in time is not decisive for the respondent.
- Any differences in Mr Smith's recollection of what was agreed and his requests for the return of the numbers in his emails, his lawyer's letters and the statement of problem and attached documents are matters of expression. The intent was clear.
- The change to the 0275 number evolved from changes with service providers and the core of the number remained unchanged.

- The circumstances of Mr Smith's resignation, garden leave and DTZ's views about Mr Smith in 2009 are too far removed from what he says he agreed to in 2002-3.
- In any event the matters raised by DTZ are irrelevant for an enforcement matter in justifying its stance. Even for credibility it has not assisted me. In this regard I consider the events of 2002-3 (where at the commencement of the employment the relationship would have been positive) different people were involved and those that are able to depose their evidence say that they cannot recall any discussion, as opposed to Mr Smith's clear memory of what he says was agreed to.

### **Conclusion**

[13] I find that Mr Smith more than likely reached an agreement to take his numbers when he left DTZ. He therefore has a reasonable expectation for the return of the telephone numbers. DTZ is required to return the numbers to Mr Smith. DTZ has the opportunity now, given this finding, to comply with the agreed term and condition of his employment. As such the request for a compliance order is adjourned for 7 days pending voluntary compliance. Leave is granted for the applicant to return to the Authority for enforcement if it is required.

[14] The final matter is that in the statement of problem a personal grievance for unjustified action was pleaded. I accept that a personal grievance was raised on the basis of the employer's failure to return the numbers and compensation sought. However, this is clearly a matter of enforcement. As such a finding needed to be made on a genuine dispute about the terms and conditions agreed between Mr Smith and DTZ at the time the employment arrangements were entered into. As such this employment relationship problem is primarily an enforcement matter and not a personal grievance. Indeed Mr Smith has been more interested in the matter of principle relating to the enforcement of his rights rather than the personal grievance. To settle the matter DTZ has the opportunity to comply before any further action can be taken.

[15] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority