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## Whangarei District Council v Jenkins AA370/10 (Auckland) [2010] NZERA 678 (19 August 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 370/10 5285092

BETWEEN WHANGAREI DISTRICT

COUNCIL Applicant

AND JOHN DAVID JENKINS

Respondent

Member of Authority: Representatives:

Investigation Meeting:

Further information received

Submissions received

Yvonne Oldfield

Andrew Golightly for Applicant No appearance for Respondent

28. June 2010

29. June 2010

13 July 2010 from Respondent 2 August 2010 from Applicant

Determination:

19 August 2010

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] This employment relationship problem concerns a claim for recovery of relocation expenses. There is no dispute that the Respondent (the Council) met certain costs incurred by Mr Jenkins and his family when he moved from Northern Ireland to New Zealand to take up employment in June 2008. There is also no dispute that in February 2009 Mr Jenkins left without giving notice and returned to live in Northern Ireland. The Council relies on clause 10 of the employment agreement between the parties which provides:

*"6 SALARY (b) The employer shall pay to the employee a one-off payment of NZ \$12,000.00 on the first Friday following commencement date. This payment is made within the provisions of Clause 10 of this agreement..."*

#### 10. RELOCATION EXPENSES

*If for any reason, other than redundancy the employee ceases to be employed by the employer within two years of the date that the employee commences the employment the employee shall, on or before the date of cessation of employment, make a full*

*refund of the foregoing relocation expenses. Where such a refund is payable the employer may deduct the amount of the refund, or any part of such amount from any salary, holiday pay, or other emoluments which are payable on the date of cessation of employment."*

[2] Specifically the applicant claims:

- i. Reimbursement of payment of a lump sum relocation payment of \$12,000.00 made directly to Mr Jenkins;
- ii. Reimbursement of car hire expenses of \$459.00 paid to Mr Jenkins, and
- iii. Reimbursement of accommodation expenses of \$4,025.00 paid directly to Cherry Court Motor Lodge.

[3] However the applicant acknowledges that holiday pay of \$1,265.36 is owed to Mr Jenkins and therefore seeks payment of the net total being \$15,218.64.

### **Service out of the jurisdiction**

[4] The Council asserts that when Mr Jenkins advised (by email from Northern Ireland) that he was not coming back it requested repayment of the relocation expenses set out above. It says that in the exchange of communications which followed Mr Jenkins conceded the lumps sum part of the claim. However, the matter was not resolved and the employment relationship problem was lodged in the Authority in October 2009.

[5] Leave was then sought, and granted, to serve outside the jurisdiction in accordance with Schedule 2, clause 4A of the [Employment Relations Act 2000](#). (Attached to the application was correspondence from Mr Jenkins to the Council dated July 2009 which indicated that he was residing at the same address that he had before emigrating. It appeared therefore that there was a reliable address for service on Mr Jenkins.) The service copy of the application was accompanied by a notice in form 8.

[6] On 17 February the applicant's solicitors forwarded a 'track and trace' courier receipt confirming that the application had been delivered (and signed for by "K. Jenkins") on 6 November 2009.

[7] By March 2010 there had been no communication from Mr Jenkins to the Authority and the applicant had advised, through its solicitors, that it had not heard from him either. I therefore proceeded to progress the matter as set out in my Minute

dated 15 March 2010 (attached.)

[8] The Authority subsequently received the following by way of confirmation that Mr Jenkins has been properly served with the documents relevant to this matter:

- i. Affidavit of Katharina Barbara Friedl, solicitor for the applicant, attesting to the information previously provided about service of the application, and to the fact that she had arranged for the Notice of Investigation Meeting and Minute of 15 March to be served by International Economy Courier and had received confirmation of their delivery (signed for by "J. Jenkins") on 31 March 2010. Relevant 'track and trace' documentation was attached;
- ii. Affidavit of Richelle Stacey Millar, secretary, attesting that she had arranged for the witness statement of Jennifer Louise Antunovich to be served by International Economy Courier and had received confirmation of delivery (signed for by "E. Reid")

on 17 May 2010.

iii. A call to the Authority from a caller identifying himself as Mr Jenkins on the morning of 28 June. This was recorded by the Support Officer who took the call in a file note as follows:

*"The respondent telephoned from Ireland to ask if we had received the information that he had posted. I advised we had not. He is going to scan and email it to me tomorrow. If received it will be taken into consideration."*

[9] Being satisfied that Mr Jenkins was on notice of the proceedings and in receipt of all relevant information I proceeded with the investigation meeting on 28 June and took evidence from Ms Antunovich, the sole witness for the respondent. At my request Ms Antunovich provided further documentary evidence to the Authority on 29 June.

[10] Mr Jenkins finally lodged his response (in the form of an unsworn statement which contained argument and information) on 13 July. The applicant responded with a closing submission which was lodged on 2 August and immediately sent in hardcopy to Mr Jenkins. Nothing more has been heard from Mr Jenkins since then and I now proceed to determine the matter on the material I have.

### **Issues**

[11] The Council provided me with a "payment voucher" on its letterhead expressed to be for payee "John (Davey) Jenkins" in the sum of \$12,000.00. I was also provided with a "General expenses claim" in the name "Davey Jenkins" which was expressed

to be for "car rental- relocation" in the sum of \$459.00 and which had attached to it a copy of the agreement to hire a rental vehicle from Tourist Rentals (NZ) Ltd. Each of these documents bore the signature of the same authorising manager. Ms Antunovich told me that the signature was hers.

[12] The Council also provided me with 2 invoices from the Cherry Court Motor Lodge totalling \$4,025.00. Each was expressed to be in relation to accommodation for Mr David Jenkins and between them they covered the period 29 May 2008 to 3 July 2008.

[13] I advised Ms Antunovich that I required evidence that the payments in question had been actioned. On the 29 June she provided me with copies of the following:

- i. Remittance advice D332830 dated 5 June 2008, for credit of John (Davey) Jenkins in the sum of \$12,000.00;
- ii. Remittance advice D334538 dated 26 June 2008, for credit of John (Davey) Jenkins in the sum of \$459.00;
- iii. Remittance advice D339389 dated 24 July 2008, for credit of

Cherry Court Motor Lodge, in the sum of \$3,795.00 and

- iv. Remittance advice D341424 dated 20 August 2008, in the sum of \$230.00 for credit of Cherry Court Motor Lodge.

[14] These documents were copied to Mr Jenkins. He has not disputed the amounts paid. The issue for determination is therefore whether Mr Jenkins is obliged to repay any or all of those costs.

### **(i) Mr Jenkins's obligations**

[15] In his submission Mr Jenkins pointed out that he did not receive a signed copy of his employment agreement until after he arrived in Whangarei, and Ms Antunovich conceded that she was not sure exactly when a fully executed copy of the agreement was provided to him. However, there is no dispute that it was eventually executed and that the final form of the document was unchanged from the draft Mr Jenkins saw before he left Northern Ireland. The relevant provisions of the agreement clearly

apply.

[16] Mr Jenkins accepted that clause 10 of the agreement obliges him to repay relocation expenses. This is consistent with a view expressed in a letter he wrote to the respondent on 27 July 2009, in which he stated:

*"As regards relocation expenses I would point out that the contribution made by WDC was in fact \$12,000 as stated in Clause 6, paragraph B, and not \$16,483.13 as you have stated. I enclose a copy of the relevant section for your information. The accommodation and car rental were not part of the relocation expenses and these were offered and paid voluntarily on the part of WDC and therefore are not repayable by myself. Accordingly the sum owed is \$12,000.00 less holiday pay owed, being \$10,733.64."*

[17] In his submissions to the Authority Mr Jenkins suggested:

*"I would also suggest that as the contract of employment is applied for a 2 year term, then the \$12,000.00 relocation expenses should be divided over the 24 months. As Ms Antunovich states I carried out a good job for the 9 months I was there, I would suggest the \$12,000.00 be divided over the 24 months and a 9 month sum be deducted(\$4500), leaving a balance of \$6234.64."*

[18] Mr Jenkins rejected any suggestion that he should repay the motel and car hire expenses. He said in submissions:

*"Upon my arrival in New Zealand I found the Council had booked me into the Cherry Court Motor Lodge. I had not requested this and do not understand why I would have to repay the cost of same. At the time Ms Antunovich informed me Whangarei District Council would be paying the motel fees and I do not accept it is my responsibility to repay same..."*

*In respect of my car hire the Council again paid for same voluntarily... when I was offered the job with the Council it was a condition of my employment that a company car was to be provided to me full-time. However it was 5 weeks before a car was made available to me. Therefore I am at a loss to understand why I am being held liable for the car hire."*

### **Determination**

#### *Relocation payment*

[19] The express words of clause 10 are clear and unequivocal. In the event that employment ceases within two years of the date of commencement, the employee is to make a full refund of the relocation expenses described in clause 6 (b). There is no dispute that this refund was not made. Mr Jenkins must refund the \$12,000.00 relocation payment, with deduction only for outstanding holiday pay.

#### *Car hire and accommodation*

[20] Although the applicant views the payments made in respect of car hire and accommodation as relocation payments, they are not "*the foregoing relocation expenses*" described in clause 10. Clause 10 clearly refers to the lump sum payment set out in clause 6. The applicant cannot rely on the express provision in clause 10 as a basis for a claim for reimbursement of those payments.

[21] It is within the Authority's jurisdiction, in the alternative, to consider the applicant's claims as claims for damages pursuant to [section 162](#) of the [Employment Relations Act 2000](#). There is no dispute that Mr Jenkins breached clause 15 of the employment agreement, which provides that an employee must give one month's notice in the event of a resignation, and it is very likely that the Council has incurred significant expense as a result of this breach. However the cost of accommodation and car hire incurred upon Mr Jenkins's arrival cannot be said to flow from that breach.

[22] Mr Jenkins had the use of a company car throughout his employment at the Council (as part of his ongoing terms and conditions of employment.) There is no dispute that the rental car was supplied to cover the interval before the company car was ready. There is no basis for treating the provision of a rental car any differently to the provision of a company car during the rest of the employment.

[23] The provision of accommodation was not part of the ongoing terms and conditions of employment but again, it cannot be said that this cost arose as a result of any breach by Mr Jenkins.

[24] I am not persuaded that Mr Jenkins can be ordered to repay the car hire or accommodation costs.

### Orders

[25] **The respondent, Mr John David Jenkins, is ordered to pay to the applicant, Whangarei District Council, the sum of \$10,733.64 in reimbursement of relocation expenses.**

[26] I note that in submissions Mr Jenkins has advised that he is not in a position to reimburse anything to the Council at present. He suggests payment by instalments. The purpose of this written determination is to dispose of the merits of the claim before the Authority and for this reason it makes no provision as to how and when payment is to be made. I leave it to the parties to discuss the best way to do that.

### Costs

[27] **The issue of costs is reserved. Any application for costs must be made within 28 days of the date of this determination.**

Yvonne Oldfield

Member of the Employment Relations Authority