

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Thys van Lingen (Applicant)

AND BBBHL Limited (formerly Hasieman Holdings Ltd) (First Respondent)
AND Denis Fetherston (Second Respondent)

REPRESENTATIVES Dylan Marriott, for Applicant
Denis Fetherston in person
No appearance for first respondent.

MEMBER OF AUTHORITY Y S Oldfield

INVESTIGATION MEETING 8 March 2005, 8 April 2005

SUBMISSIONS 12 May 2005, 20 May 2005, 24 May 2005, 13 June 2005, 24 June 2005, 1 July 2005, 28 July 2005, 8 August 2005, 2 September 2005

DATE OF DETERMINATION 12 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 11 October 2004 I determined that there had been an employment relationship between Mr van Lingen and the first respondent (formerly Hasieman Holdings Ltd) but not whether Mr Fetherston, a director of the first respondent, shared any liability with the second respondent. Mediation followed but the parties were unable to resolve the remaining issues which are:

- i. Whether Mr van Lingen is owed arrears of wages;
- ii. Whether a breach of the employment agreement caused Mr van Lingen to resign and whether this was so serious a breach that the resignation amounted to a constructive dismissal;
- iii. What if any remedies should be awarded in relation to the alleged personal grievance, and
- iv. Whether Mr Fetherston is personally liable as Mr van Lingen's employer or alternatively, whether he is jointly and severally liable with the second respondent.

Arrears of wages

[2] As my earlier determination records, the terms of employment were contained in a written agreement. Mr van Lingen was on a salary of \$7,000.00 per month plus \$1,100.00 expenses. He

worked for four months (May-August 2003) minus a two week period in which he completed a real estate course. He received a total of \$5,000.00, paid to him by Mr Fetherston personally.

- [3] It is clear that Mr van Lingen is owed arrears of wages. I calculate these as follows. The employment was for a period of 17 weeks, less two weeks leave. Mr van Lingen is therefore owed 15 weeks salary less what he received. Weekly salary is \$1,615.38 gross so the total payable was \$24,230.77 gross. Mr van Lingen received \$5,000.00 without deduction. **He is therefore owed the balance of \$19,230.77 gross.** Expenses were \$1,100.00 per month or \$253.85 per week. Multiplying this by 15 gives **\$3,807.69** owed as expenses.

Alleged constructive dismissal

- [4] As we have seen, Mr van Lingen worked for a long period without receiving the salary which had been agreed when he was employed. He told me that he left, in the end, because he was a family man and did not have the resources to cope with such uncertain income.
- [5] A failure to pay wages over an extended period of time does amount to a serious breach of the employment agreement and in this case it was the reason for the resignation. I conclude that the resignation did indeed amount to a constructive dismissal.

Personal grievance remedies

- [6] Mr van Lingen was able to obtain a real estate licence at the beginning of October. He is entitled to lost wages for the month of September. This comes to a further **\$7,000.00 plus expenses of \$1,100.00.**
- [7] In addition I must consider whether to award compensation for distress arising out of the grievance. Mr van Lingen told me that the treatment he received from Mr Fetherston was particularly distressing because he and his family had only recently arrived in the country and this was his first job here. **I accept this evidence and consider that an award of \$10,000.00 compensation is warranted in all the circumstances.**

Liability

- [8] Mr Fetherston attended the investigation meeting on 8 April 2005 but advised that he did so only on his own behalf as he said the first respondent had been struck off the Companies Register for failing to file an annual return. My own search of the Register has confirmed that this happened on 15 March 2005, and that the company has not been reinstated to the Register since then. No orders may therefore be made in relation to the first respondent. It follows that the principal issue for determination now becomes whether Mr Fetherston personally bears any liability.
- [9] In submissions Mr Marriott suggested that the question whether the first respondent was trading during the period Mr van Lingen was employed is relevant to the question whether Mr Fetherston is personally liable as employer. In submissions he suggested that I interview further witnesses to obtain more information about the first respondent's activities during that period. My investigation had already been protracted (principally as a result of Mr Fetherston's ill health.) and I was not convinced that this line of inquiry would add greatly to the information I already had. Because of these factors I did not take this suggestion up.
- [10] Mr van Lingen told me that he understood that he was originally employed by Hasieman Holdings Ltd, being the other party to the written agreement he had signed. However he said

that once he began work Mr Fetherston and Mr Jooste deployed him to work on tasks for several different companies in Mr Fetherston's group. (Documentary evidence confirms this.) He said he felt that he worked for Mr Fetherston personally because he was the common element that is the person who fronted for all the companies. In addition, Mr Fetherston made the \$5,000.00 payment personally and sent Mr van Lingen an email that Mr van Lingen construed as an assurance that he would address the balance owed upon receipt of further investment. (I have seen this email, and consider the construction placed upon it to be reasonable.)

[11] Mr Fetherston denies any personal liability. He says that if the applicant worked for anyone it was BBBHL Ltd as this was the entity invoiced for services. However he says that the first respondent could never have been liable as it was never more than a "shelf" company and was not in a financial position to trade lawfully. He also denies that Mr van Lingen worked for other companies in his group.

[12] In submissions Mr Marriott argued that the payment and the undertaking from Mr Fetherston both indicate that he had assumed the role of employer. As for the assertion that the first respondent was never in a position to trade, Mr Marriott says that if this was the case, and if Mr Fetherston instructed Mr van Lingen to do business on behalf of the first respondent or other companies in the group (as Mr van Lingen asserts) then Mr Fetherston must have been either employer or guarantor. Finally he notes Mr van Lingen's evidence that Mr Fetherston did have him working for several of Mr Fetherston's companies. He says Mr Fetherston alone was the common denominator for those legal entities and should, in his submission, be held jointly and severally liable.

Conclusions

[13] As I noted in my earlier determination, I received a very large body of documentary evidence in relation to this case. This includes evidence that the first respondent was doing business during the time of Mr van Lingen's employment. Mr van Lingen himself was authorised to place advertising and to pursue sales for the first respondent, and Mr Fetherston was kept informed of his activities. However, I have also come to the conclusion that Mr Fetherston's companies worked very much as a group. There is evidence that Mr van Lingen performed work, not just for the first respondent, but for them all. (For example, marketing plans which he helped prepare included references to several companies within the group.) On balance the evidence leads me to the conclusion that Mr van Lingen ended up working for the group as a whole. (I note in saying this that the other member companies were not cited as respondents and were not formally heard, although Mr Fetherston did at times give evidence about their activities.)

[14] I do not consider the evidence to be sufficient for me to say however that Mr van Lingen worked for Mr Fetherston personally. It follows that I am unable to make any orders in Mr van Lingen's favour. Notwithstanding the fact that he has established a personal grievance, I can do nothing more to assist him with his employment relationship problem.