

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 307/07
5076309

BETWEEN

FIONA LEAH BOOTH
First Applicant

MICHAEL CRAIG GOSNELL
Second Applicant

AND

MEDIC ONE SERVICES
AMBULANCE TRUST
First Respondent

MEDIC ONE SERVICES
LIMITED (IN LIQUIDATION)
Second Respondent

Member of Authority: Dzintra King
Representatives: Applicants In Person
No Appearance for Respondent
Investigation Meeting: 10 May 2007, 10 August 2007
Determination: 4 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The applicants claim that the first respondent owes them remuneration.
- [2] The applicants filed the Statement of Problem on 8 January 2007. They had previously filed in the Disputes Tribunal. The Disputes Tribunal determined that the matter was within the jurisdiction of the Employment Relations Authority as it concerned an employment relationship and not a contract for services.
- [3] On 26 March 2007 liquidators were appointed for the first respondent.

[4] A direction to mediate in Hamilton was issued on 28 March 2007. Despite that direction the respondents did not mediate.

[5] Notice of an Investigation Meeting for 10 May 2007 was given on 5 April 2007. On 8 May the respondents sent a fax to the Authority. This was not received until 9 May, having been sent after business hours. The respondents asked whether a decision could be made “according to paperwork” as Ms Baker, the director, had a young daughter and could not travel. Ms Baker was informed that evidence would have to be sworn and that she needed to make herself available on the phone.

[6] I contacted Ms Baker on 10 May and as a result of the phone call she agreed to provide certain documents. These were finally supplied on 6 June and were sent to the applicants to enable them to comment on the documents which they did on 8 June.

The Issues

[7] The respondents say that the applicants were employed by the second respondent and their records show that no monies owe. The identity of the employer is in question.

[8] The second respondent, Medic One Services Limited (“MOSL” or “the company”), was incorporated on 3 March 2004 and the first respondent, Medic One Services Ambulance Trust (“MOSAT” or “the Trust”) was incorporated on 9 December 2005.

[9] Ms Booth commenced employment in November 2005 and Mr Gosnell in 2004. The initial employment, therefore, was with the company.

[10] Mr Gosnell sold first aid kits, trained staff and organised first aid courses. He and Ms Booth also provided paramedical and ambulance services. Their employment was as volunteers.

The Email of 12 December 2005

[11] On 12 December 2005 Mr Baker sent an email to staff headed “Trust Active”. The email stated:

Hello Team

Just to let everyone know that we have formed a trust Medic One Services Ambulance Trust.

This is so we can apply for funding for the event work we do.

Medic One Services Limited

- [1] *Training*
- [2] *First Aid Kits/supplies*
- [3] *Medical Equipment*
- [4] *Shaker Torches*

Medic One Services Ambulance Trust

- [1] *All Ambulance Services*
- [2] *Event Coverage*
- [3] *Community Education*
- [4] *Any other charitable work*

Hopefully this makes sense. Operationally you will notice no difference apart from us being able to access funding for essential equipment etc.

[12] The applicants say this email shows that their employment changed at this date per virtue of this email.

Resignation

[13] On 15 June 2006 the applicants sent a letter stating “Fiona and Myself have now decided to resign from Medic One Services Ltd, and from Medic One Services Ambulance Trust”.

[14] Also on 15 June 2006 Ms Baker and Mr Baker, signing themselves as “Trustee/Financial Controller, Medic One Services Ambulance Trust” and “CEO, Medic One Services Ambulance Trust” respectively, replied regarding “Termination of your involvement with Medic One Services” saying “You are here by terminated as a member of Medic One Services Ambulance Trust”. A number of reasons were given including failure to follow a direction from a company director. The letter is on Medic One Services’ letterhead without specifying the company or the trust.

[15] When I asked Ms Baker why the letter was signed in that way and there was a reference to termination of employment by the Trust, she told me it was a mistake.

[16] The correspondence I have seen indicates a confusion on the part of Ms Baker and Mr Baker and of Ms Booth and Mr Gosnell regarding the identity of the employer. There are emails that are signed by the Bakers in both their capacities as officers of the trust and the company. Sometimes these are on the same email and sometimes on different emails at similar times. Sometimes neither the company nor the trust are identified – there is just a generic “Medic One Services”.

[17] There are a number of examples of this mutual confusion. There are two emails sent on 8 June 2006 by Mr Gosnell to MOSL itemising stock. On 20 June 2006 an email from Medic One Services regarding medications stated “As originally stated all we wanted was the Trusts property back”. It is signed by the Trustees for Medic One Ambulance Services Trust. Some of the emails from the respondents are in the names of both organisations, e.g., an email dated 21 March 2006 is from Todd Baker the Chief Executive Officer of both the Trust and the company.

[18] On 8 June Mr Gosnell has emailed the company regarding a stock take. An email dated 21 March 2006 was sent from the company to Mr Gosnell. This referred to double crewing of vehicles. Mr Gosnell had sent an email to the company’s email address that same day.

[19] The applicants contacted a solicitor who, on their behalf, corresponded with MOSL on 26 June 2006. The letter refers to their having “left the employment of your firm”.

[20] On 23 July Mr Baker writing as CEO of the company and Ms Baker as Managing Director of the company replied to the applicants using the company's letterhead regarding the lawyer's letter. An invoice in the name of MOSL was attached.

[21] On 17 July 2006 a statutory demand was served on the registered office of MOSL by the applicants.

[22] Mr Gosnell ran a company, Total Entertainment Services. It was this account into which MOSL was instructed to make payments for Mr Gosnell. Subsequently, Mr Gosnell and Ms Booth opened Kiwibank accounts in their own names and that there a \$50 payment into those accounts on 23 May 2006 from the Trust. Ms Baker told me that that had been an error and the money should have been paid from the company's account.

[23] The respondents say that the applicants both signed copies of Medic One Services Ltd's Employee House Rules on 31 January 2006. The applicants say that their signatures have been forged on these documents and that the documents were only produced by the second respondent when the employment status of the applicants was raised in the Disputes Tribunal.

[24] Both applicants made complaints to the police. When I spoke to Ms Baker she said that she had been notified that the police did not intend to take the matter further. When the Authority contacted the police Detective Mike Thorne of the New Plymouth Police stated that the applicants and the Booths had been told some months ago that the matter would be taken no further because the originals were not available for inspection.

[25] At the second hearing on 10 August Mr Ricky Tipene said he had signed a copy of the house rules. He said a number of people, including Ms Booth and Mr Gosnell, were present when the forms were handed out on 31 January 2006. He said he had not actually seen either Ms Booth or Mr Gosnell sign the forms but they had been given to all the people present at the meeting to be signed.

[26] Mr Tipene had not taken the email relied upon by the applicants as indicating a de facto change of employer. Neither had an employee named Ivan Lammas. An email from Mr Ivan Lammas states that he was an employee of the company from December 2003 until June 2006. The email was sent from Mr Lammas on 9 November 2006. Clearly Mr Lammas did not read the email as an indication of change of employer.

[27] On 31 January 2006 Mr Gosnell signed a vehicle usage agreement with the company which states: "All drivers of vehicles belonging to Medic One Services Ltd or being used by must agree to the following:". At the top of the page is a logo that says "Medic One Services". Mr Gosnell says this was the logo for both the company and the trust.

[28] Whether or not Mr Gosnell and Ms Booth signed the contested documents it is clear from Mr Tipene's evidence that staff were given the documents to sign. That is an indication that the MOSL was continuing to function as an employer at that stage.

Trust Deed

[29] Further evidence that this was the case derives from the Constitution and Trust Deed.

[30] The constitution envisages the company providing services to the trust. At that stage it cannot be that employment with the company had been discontinued and somehow, without express agreement, transferred to the trust.

[31] The MOSAT Constitution of 9 December 2005 states that Medic One Services Ltd and all staff will offer their services to the trust. It goes to say:

The trust will then intern[sic] cover the running cost and the day to day cost for this service to operate. All funds Medic One Services Ambulance Trust generated from the cliental [sic] will be passed to Medic One Services Ambulance Trust.

[32] The Constitution also provides for the employment of Mr Todd Baker as the Trust's CEO and allows the Trust to contract and employ casual staff. It also states that vehicles and equipment of Medic One Services Ltd and Todd and Margaret Baker shall remain their property.

[33] The Trust Deed was amended on 20 July 2006. The amended Deed states that Medic One Services Ltd will, through its first aid training courses, assist in providing funding for the Trust.

[34] The evidence is that both the trust and the company were operating over the same time period. That would have ceased with the liquidation of the company in 2007 or earlier for those staff such as Mr Tipene who were offered and signed new employment agreements with the trust. His was signed in July 2006.

[35] The drawing up of new employment agreements and offering them to staff to sign is an indication that employment with the company continued until such time as a new offer of employment was made and accepted.

[36] The Liquidator's First Report dated 1 April 2007 states that the business of the company is "First Aid Courses". In the background the liquidator says that the company "provided first aid courses and also sold various medical supplies to organisations in the New Plymouth region". A significant down turn in demand for first aid courses impacted adversely on cash flow". The applicants say that this bears out their assertions that the type of work they did – events – was work carried out under the aegis of the Trust.

Decision

[37] The 12 December email says that the Trust has been formed for the purposes of applying for funding for event work. There are two references to funding in the email. There are no references to change of employment.

[38] In *Service Workers Union v Chan* [1991] 3 ERNZ 15 the Labour Court adopted the approach the Court of Appeal had earlier taken in *Petherick v Wellfit Ltd* unreported, 1 October 1986, CA84/84, by considering the extent, if any, to which it

was a material consideration from the point of view of either party that the contract they entered into was with any particular person or entity. The identity of the employer was not a material consideration for the applicants until they attempted to recover monies they believed they were owed and found they could not recover from the company which had gone into liquidation.

[39] The payment of salary is not conclusive as to the identity of the employer, see, for example, *McManus v University of Otago* [1985] ACJ 219.

[40] A change in employer and in the contract of employment cannot be assumed. In *Mersey Docks & Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 at 15 Lord Porter stated that “a change of employer must always be [proved in some way, not presumed”. In *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 the House of Lords stated that the right to employ under a contract of services is not assignable.

[41] In *Smith v Blandford Gee Cementation Co Ltd* [1970] 3 All ER 154 Lord Parker CJ stated at p 163:

I do not think myself that it became a question of considering the matter from that angle at all. The contract of service cannot be assigned unilaterally; there must be a discharge of the old agreement of service and a novation, a new contract formed.

[42] To like effect is *Wellington etc Local Bodies' Officers' IUOW v Feilding Borough Council* [1983] ACJ 629 at 631 where Horn CJ stated:

It is not possible to transfer the services of an employee from one employer to another in this way unless there be some contractual arrangement which authorises such transfer.

[43] In *Southern Distribution Workers Union v Tourist Souvenirs Ltd* [1989] 1 NZILR 952 where the Court stated, at p 956:

There is no such thing in New Zealand law as a right by either party to a contract of employment to assign it to another party. A new contract may be

made with the purchaser of the business, but, in the absence of such a new contract or novation, there can be no transfer by either employer or employee to a stranger of their respective obligations to each other.

[44] In *Kruesi v Hamua Holdings Ltd* [1992] 3 ERNZ 135 Travis J said that a transfer of the contract, if such occurred, had, according to established legal principle, itself have been the subject of agreement between each of the affected parties. In that case Mr Kruesi must have agreed with Forever Living to transfer or assign his employment and Hamua Holdings must also have agreed to take over or assume the responsibilities as employer of Mr Kruesi.

[45] There was no payment of outstanding entitlements at the purported change of employer. There was no discussion regarding terms and conditions. There was nothing signifying that Mr Gosnell and Ms Booth had relinquished their employment with the company and accepted new employment with the trust. There had been no request for them to do so; there was no offer and no acceptance. Mutuality of intent is the essence of contract and employment agreement. It cannot be said that such existed here.

[46] The employer was and continued to be the second respondent, a limited liability company which is in liquidation. The applicants are unable to recover any remuneration that may be owed to them from the second respondent.

Dzintra King

Member of the Employment Relations Authority