

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 100/10
5285598

BETWEEN

GAVIN BIRD
Applicant

AND

UNITED CONSTRUCTION
SERVICES LIMITED (IN
LIQUIDATION)
First Respondent

WILLIAM STANTON
Second Respondent

Member of Authority: Alastair Dumbleton

Representatives: Paul Chambers, counsel for Applicant
Second respondent in person

Investigation Meeting: 1 March 2010

Determination: 4 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated a claim brought by the applicant Mr Gavin Bird against the two respondents, United Construction Services Ltd and Mr William Stanton.

[2] The claim is partly a personal grievance of constructive and/or unjustified dismissal and partly a recovery action for unpaid salary, holiday pay and expenses.

[3] Compensation of \$5,000 is sought for hurt feelings and humiliation and the recovery action is for \$11,539.

[4] United Construction Services Ltd was incorporated in July 2008. Mr William Stanton was a director and Ms Jenny Stanton its sole shareholder. On 13 November, 2009 just a few days after Mr Bird had lodged his statement of problem in the Authority, the company went into liquidation.

[5] As a legal consequence Mr Bird's claims against it can no longer be investigated and determined.

[6] Mr Bird's claim against Mr Stanton was able to proceed and a date was fixed for an investigation meeting.

[7] As no statement in reply had been lodged by Mr Stanton (or by United Construction Services Ltd before it was placed in liquidation) under the Employment Relations Authority Regulations he was required to obtain the leave of the Authority to reply or respond to Mr Bird's application.

[8] In seeking leave Mr Stanton claimed that he had not been served with a copy of the statement of problem and only became aware of the investigation meeting when the formal written notice of it was served on him just three days before that meeting.

[9] After hearing the oral evidence of Mr Bird and Mr Stanton on the question of leave, I held that the latter had been personally served by Mr Bird with a copy of the statement of problem on 14 December 2009, at his home address.

[10] Earlier the Authority had directed Mr Bird or his agent to serve the statement of problem, a statement in reply form to be filled in and a letter requiring the statement in reply to be lodged within 14 days. Mr Bird swore an affidavit on 18 December 2009 in which he described service of these documents on Mr Stanton four days earlier, on 14 December 2009.

[11] Also, on 18 December 2009 Mr Bird gave a signed statement to the Police complaining that he had been assaulted by Mr Stanton on 14 December after handing to him the papers which he had announced he was there to serve.

[12] Mr Bird confirmed in oral evidence that his affidavit and statement to the Police were both true in their contents. Mr Stanton in his evidence confirmed that Mr Bird had visited him at home on 14 December but denied that any papers had been served by him as claimed.

[13] It seems to me likely that Mr Bird visited Mr Stanton for the purpose of serving on him the statement of problem, which he had lodged only a few weeks earlier and had afterwards been requested by the Authority to serve.

[14] In the email Mr Bird sent to Mr Chambers on 16 December 2009 outlining what had happened when he went to do that on 14 December he states that the papers were left with Mr Stanton. Mr Bird swore an affidavit and signed a statement to the Police about his actions. I think it is likely that Mr Bird, who was taking legal advice, knew that if he gave false evidence and made false statements to the Police he was likely to get into serious trouble.

[15] I therefore rejected Mr Stanton's denial that he had been served.

[16] Mr Stanton was on stronger ground when he pointed to the lack of seven clear days notice given upon service of the notice of investigation meeting on him on the evening of 25 February 2010. The Regulations require seven days notice unless the parties to the proceedings otherwise agree or the Authority otherwise orders.

[17] Although no directions had been given abridging the notice period, Mr Stanton advised that he was ready to proceed with his case before the Authority.

[18] I have considered the question of leave in conjunction with the merits of Mr Bird's claims against Mr Stanton.

[19] Mr Stanton contended that Mr Bird was not an employee of United Construction Services Ltd in liquidation or himself personally but was a contractor to the first respondent company.

[20] I find from the evidence that there was no contractual relationship of any kind between Mr Bird and Mr Stanton personally. On that basis the personal grievance and other claims cannot succeed against Mr Stanton.

[21] I note that there was no issue about the identity of the contracting parties before United Construction Services Ltd was placed in liquidation in November 2009.

[22] On 2 June 2009, Mr Chambers with reference to his instructions from Mr Bird, wrote to Mr Stanton giving his understanding that Mr Bird had commenced "*working for your company.*" He went on to give details of Mr Bird's "*employment with your company.*"

[23] In the letter Mr Stanton was advised that a personal grievance had been brought against “*your company*” and that specified remedies were required to be provided by “*your company.*”

[24] In a reply to that letter from Mr Stanton dated 4 June 2009, before there was any issue about the identity of the contracting parties, it was stated:

Gavin was contracted (labour contract only) ... to manage a short contract for us as Project Manager.

.....

.....at no time was Gavin employed by this company. He was on a contracted hourly rate.

.....Gavin has never been employed by this company or made redundant his contract simply came to an end.

[25] It is clear that the issue then between the parties was the nature of the contractual relationship Mr Bird had rather than the identity of the party he had contracted with.

[26] Even after the company was placed in liquidation Mr Bird signed a statement to the Police which included the following:

I was employed by a company called United Construction as a project manager.

[27] He referred to being made redundant and not being paid for nine weeks of “*my employment with that company.*”

[28] Mr Stanton produced a number of business records, all created before there was any issue about the nature of the contractual relationship or the identity of the contracting parties, which clearly indicate that whatever kind of relationship it was, one of the contracting parties to it was United Construction Services Ltd.

[29] The cell phone Mr Bird was given to use was under an account with the company. There are a number of invoices to the company and orders by the company signed by Mr Bird. His work vehicle was owned by the company.

[30] It also seems improbable that having formed a company of which he was the sole director, Mr Stanton would then expose himself to personal liability by contracting directly with Mr Bird.

[31] I am therefore satisfied from the evidence that if Mr Bird was employed as an employee then that relationship was not with Mr Stanton. Most likely his employer was United Construction Services Ltd, a company now in liquidation.

[32] A consequence of the liquidation is that the Authority has no ability to formally determine any of the rights and obligations the company had under any contract with Mr Bird. I am therefore unable to make any finding as to whether or not Mr Bird was an employee of United Construction Services Ltd.

[33] It may not be too late for Mr Bird to present a claim, whether as a contractor or employee, to the liquidator of that company for it to be considered in the usual way.

Determination

[34] Leave is given to Mr Stanton to respond to Mr Bird's claim. In respect of that claim I must conclude that there is no ability to make orders against Mr Stanton as he personally was not in an employment relationship with Mr Bird.

[35] In the result, there is no basis for any order as to costs.