**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2013] NZERA Auckland 59
5369316

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| | BETWEEN | DARRYL ROOTS<br>Applicant |
| | A N D | POINT OF PAY PTY LIMITED<br>First Respondent |
| | A N D | HECTOR DANIEL ELBAUM<br>Second Respondent |

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| Member of Authority: | James Crichton |
| Representatives: | Simon Dench, Counsel for Applicant<br>Rick Hargreaves, Counsel for Respondents |
| Investigation Meeting: | 27 September 2012 at Auckland |
| Date of Determination: | 19 February 2013 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Roots) alleges that he was underpaid salary, holiday pay and redundancy compensation to the tune of AUD$203,241 and is owed a sum of NZ$3,132 ( since reduced )in respect of unpaid expenses.

[2] Initially, the respondents (Point of Pay and Mr Elbaum) alleged that Mr Roots could not proceed in the Authority because the Authority lacked jurisdiction to deal with the particular nature of his claim which was more in the nature of a commercial dispute than an employment dispute. The Authority asserted its jurisdiction to deal with the matter on the footing that Mr Roots was an employee working in New Zealand and was therefore entitled to proceed in the Authority. The employment agreement between the parties identifies New Zealand as the applicable jurisdiction.

[3] Notwithstanding that, there are other proceedings in the Victorian Supreme Court which concern both these parties and that other proceeding will be referred to later in this determination.

[4] Mr Roots commenced employment with Point of Pay on 1 March 2010 in a role styled *Head of Business Development and International Markets*. At all times, Mr Roots was resident in New Zealand and for the purposes of the business, working out of New Zealand although with a strong international focus.

[5] For the sake of clarity, the Authority notes that Mr Elbaum is the sole director of Point of Pay and a major shareholder.

[6] There is no substantial dispute about the factual matrix. Both parties accept that there was an employment agreement between Point of Pay and Mr Roots, the essence of which was that Mr Roots was to receive a salary of AUD$200,000 per annum together with superannuation and reasonable out of pocket expenses. Those reasonable out of pocket expenses were deemed to include the use of certain private facilities provided by Mr Roots for the company's use, because he was working remotely from the company's Australian head office.

[7] Point of Pay is a technology development company which has developed a unique secure online payment system using the internet.

[8] Point of Pay sought to move into the New Zealand market from its Australian base. Very early in Mr Roots' employment there was agreement in principle to incorporate a New Zealand registered company, Point of Pay New Zealand Limited. That company was intended to make use of the parent Point of Pay company's unique technology within the New Zealand market. Critically for our purposes, Point of Pay New Zealand Limited (the New Zealand company) was to pay half of Mr Roots' salary.

[9] There was an email exchange between the parties concerning these arrangements which for the sake of brevity the Authority will refer to as *"the commercial arrangement"*.

[10] The New Zealand company was incorporated and in accordance with the agreement between the parties, 33% of the shares in that company were assigned to Mr Roots and he was appointed as one of the New Zealand company's directors.

[11] Point of Pay commenced paying Mr Roots at the rate of AU$100,000 per annum and this continued throughout the employment without comment or objection from Mr Roots.

[12] There were various exchanges between the parties during the employment relationship which are relevant to the matter in dispute. Throughout those exchanges though, it is fair for the Authority to observe that Point of Pay consistently proceeded on the footing that its understanding of the arrangement was that Mr Roots was to be paid just 50% of the salary agreed in his employment contract. For instance, in an email from David Walker, Point of Pay's commercial lawyer, he comments on the structure of the New Zealand company and amongst other things he says:

> *... your 33 1/3% (share of the New Zealand company) was issued as consideration for you agreeing to reduce your annual salary in Point of Pay from 200k to 100k*

[13] Mr Roots' response to that the following day was to agree that: *"I did reduce my salary"*, but he then goes on to say:

> *... but for the first year we agreed that Point of Pay would make up the shortfall between (the New Zealand company) and my Point of Pay salary.*

[14] Despite the efforts of both parties, the investment in the New Zealand market was not successful and by November 2011 this was clear. Point of Pay says that Mr Roots then *"signalled that he was reneging on the ... commercial arrangement"*. Conversely, Mr Roots says the *"commercial arrangement"* never:

> *... reached the point of a binding agreement and never superseded my employment agreement*

[15] In the result, according to Mr Roots, Point of Pay was still liable for the full effect of his employment agreement and in particular was responsible for paying his full salary.

[16] A formal request for payment of the unpaid salary was made by Mr Roots on 9 November 2011. That was responded to by Point of Pay on 18 November 2011 with the employer rejecting the request for payment and relying on the commercial arrangement.

[17] There were various meetings and engagements between the parties with a view to trying to resolve the two heads of claim but they were not successful. Mr Roots'

position was subsequently disestablished after a restructure and the present proceedings were subsequently filed in the Authority.

**Issues**

[18] The main issue is whether Mr Roots is entitled to the balance of his salary, which he maintains is unpaid and to which he says he is entitled.

[19] A subsidiary issue is whether the unpaid expenses claimed by Mr Roots, now reduced from the amount claimed in the statement of problem, ought also to be awarded to him.

[20] Next, the Authority must consider the claims for a penalty against both respondents.

[21] Finally, the Authority must consider the impact, if any, of the Australian proceedings.

**Does Mr Roots have a wage arrears claim?**

[22] Before considering the relevant law, it will be useful to sketch the factual matrix. In the Authority's opinion, critical to understanding the Authority's conclusion in this matter, is the issue of timing. Mr Elbaum's evidence is that prior to commencing employment with Point of Pay, Mr Roots entered into the commercial arrangement, the effect of which was that he would acquire an interest in the New Zealand company and take a reduction in his salary as a consequence. Mr Elbaum also told the Authority that the reason the employment agreement provided for a salary of AUD$200,000 was because Mr Roots had indicated that that was the minimum that he could *"sell"* to his wife. Mr Roots confirmed as much in his oral evidence at the Authority's investigation meeting when he said:

> *My wife did have some views. We agreed that AUD$200,000 was the bottom line (for my salary).*

[23] It is the essence of Point of Pay's evidence then that the agreement to accept only a 50% payment of salary in exchange for a stake in the New Zealand company predated the execution of the employment agreement and indeed the commencement of the employment. Mr Elbaum was adamant that that was the position and the Authority believed him.

[24] When pushed in the Authority's investigation meeting as to why Mr Elbaum would have allowed himself to enter into a commitment to pay AUD$200,000 in salary, when there was already an agreement in place, on his evidence, that the actual salary that Point of Pay was liable for was only going to be AUD$100,000, Mr Elbaum said that Mr Roots had made it absolutely clear that he needed the greater figure in the employment agreement in order to satisfy his wife, and that Mr Elbaum " trusted " Mr Roots.

[25] To put the first of those observations in context, Mr Roots had come to Point of Pay from another role where he was earning a like amount to the salary in the disputed employment agreement. In his evidence to the Authority, Mr Roots indicated that he did not wish to leave his previous role:

> *... for less than I was already being paid. ... I was paid NZD$250,000 at the time and we agreed I would get AUD$200,000 which was roughly equivalent.*

[26] But Mr Elbaum says that the contention that he simply agreed to this figure without the previous understandings about the New Zealand company and Mr Roots' shareholding in it is simply not accurate. Indeed, Mr Elbaum made clear to the Authority in his evidence that nobody in Point of Pay was earning AUD$250,000 and that salaries of other managerial roles were roughly half that.

[27] Mr Elbaum told the Authority that *"the commercial agreement and the employment relationship operated side by side"* and his evidence is plain that were it not for the commercial arrangement, he would not have entered into the employment agreement at the figure in dispute.

[28] Mr Elbaum made the point that Mr Roots' strategy, at the commencement of the relationship, was one that he personally agreed with. In simple terms, Mr Roots expected that, by foregoing half his salary as a kind of de facto set off for the acquisition of a third of the New Zealand company, Mr Roots would make a great deal of money.

[29] And of course, it is common ground that Mr Roots was and remains a shareholder in the New Zealand company as to one third of the shares and that he paid nothing at all *"in hard cash"* for that one third interest. In effect, he acquired the third interest by agreeing to forego half of his salary entitlement.

[30] Point of Pay maintains that if the New Zealand company had been commercially successful, as both parties hoped and expected, then this dispute would never have arisen because Mr Roots would have been significantly enriched by the profits from the New Zealand company. Point of Pay says that because the New Zealand company was financially unsuccessful, Mr Roots is bringing his claim in order to *"unravel the commercial agreement and claim back his investment in* [the New Zealand company]*"*.

[31] Mr Elbaum's evidence is that the commercial agreement evolved out of contacts between himself and Mr Roots which began in earnest in the middle of 2009. Mr Elbaum says that Mr Roots was keen to join Point of Pay as he was impressed with the technology but that Mr Elbaum indicated that there was no way that Point of Pay could match Mr Roots' then salary.

[32] The parties agree, it was Mr Roots who came up with the idea that he not put any money into the New Zealand business but would take a stake in the business and would forego half his salary in recompense.

[33] While the commercial agreement referred to throughout this determination was never reduced to writing in one document, it is Point of Pay's position that it was nonetheless a binding commitment on both parties.

[34] Mr Elbaum told the Authority that the details of the commercial agreement had been negotiated by early February 2010 and the elements of that agreement were:

(a) The New Zealand company would service Point of Pay technology in the New Zealand market;

(b) Mr Roots would have a third of the shares;

(c) The balance of the shares would be held by Point of Pay;

(d) Mr Roots would be a director;

(e) Mr Roots would waive half his salary in consideration of the shares;

(f) Mr Roots was not required to provide any other finance.

[35] The documents before the Authority disclose that in the period prior to the employment commencing and especially in the month of February 2010, Mr Roots

was actively involved in marketing activities for the New Zealand company. Amongst other things, Mr Roots is proposing various parties to buy into the equity of the New Zealand company and there is extensive email traffic about exactly how the New Zealand company would generate revenue. Point of Pay says that the reason Mr Roots was as active as he was, was because of the parties' understanding that he would be taking a shareholding in the New Zealand company. Although these emails do not neatly set out the understanding between the parties, they do foreshadow at least one of the central elements. In an email from Mr Roots to Mr Elbaum on 19 February 2010, Mr Roots says:

> *If we let someone like Card Link buy your 66.5% share and I split my 33.5% share with you (so we have some say about what goes on around here) …*

[36] The Authority is entitled to ask what that can possibly refer to if not the existing agreement Mr Elbaum is talking about.

[37] Further, Mr Elbaum makes the point, correctly in the Authority's view, that it is difficult to understand why Mr Roots would be spending so much time and energy working on this project when he is not even employed by Point of Pay. The only tangible explanation is that Mr Roots had something to gain from marketing the New Zealand company in advance of its incorporation.

[38] When Mr Roots commenced his employment on 1 March 2010, it is common ground that throughout the 22 months of the employment, Mr Roots was paid 50% of the face value of the salary recorded in his employment agreement. There was never a protest about that from Mr Roots until the point at which the commercial failure of the New Zealand company made restructure inevitable and the decision by Point of Pay to dispense with the position that Mr Roots occupied.

[39] In his evidence to the Authority, Mr Roots is somewhat disingenuous about the creation of the New Zealand company. He claims that there were only two conversations about this and that both took place during the first week of his employment. That is completely inconsistent with Point of Pay's evidence, with the email traffic the Authority has just referred to and, for the avoidance of doubt, the Authority makes clear that it prefers Point of Pay's recollection of these events.

[40] Nor is Mr Roots especially credible when he indicates that the formation of the New Zealand company was driven by the need to *"do things like opening a bank*

*account and getting a mobile phone account"*. If that is so, why was he so actively involved in the previous six weeks in promoting and marketing the New Zealand company with potential investors and customers?

[41] However, Mr Roots does acknowledge that it was his idea to create the New Zealand company and what he says in his brief is that the New Zealand company was to:

> *... pay half my existing salary out of profits ... but if it could not afford this, Point of Pay would make up the shortfall at the end of each year.*

[42] Mr Roots says that Mr Elbaum proposed that Point of Pay make up the shortfall but Mr Elbaum implacably rejects that suggestion as being completely untruthful.

[43] Mr Roots maintains that in effect the New Zealand company never became operational and further to that proposition, he also maintains in his evidence that there were legal steps that needed to be taken in order to make it operational. In the Authority's opinion, neither of those propositions can be given any credence. First, the legal position is clear; the entity was incorporated and the various requirements of the Companies Act were fulfilled. There was nothing more that needed to be done from a legal perspective.

[44] Operationally, it is apparent to the Authority that the entity was effectively up and running prior to incorporation (the pre-employment emails) and after the employment commenced and incorporation had been attended to, the documentation before the Authority confirms that a bank account was opened and that Mr Roots was proposing that account be funded by $2,000 from Point of Pay and $1,000 from him to *"get us going"*.

[45] Within a matter of days of that email (dated 23 March 2010), there is a letter issuing from Point of Pay to a potential client which explains what the New Zealand company is about.

[46] There is a world of difference between a trading entity operating in a normal commercial fashion but being financially unsuccessful, and an entity that never operates at all. The Authority is satisfied on the evidence that the New Zealand company was in the former category, that is, that it was developed as a concept from a

suggestion originally made by Mr Roots, that the concept was actively marketed by Mr Roots before he even joined the entity, because he was to be an equity shareholder in it, that both parties saw real prospect for financial gain from the new entity, if it were successful, that the entity was subsequently incorporated on a "joint venture" basis and that it commenced its legal operations, but that it was never commercially successful such that the hopes of its proposers were never realised.

[47] As the Authority has already observed, the so-called commercial arrangement between Point of Pay and Mr Roots is not reduced to writing in a single document but the Authority is satisfied it is reduced to writing nonetheless. The first such writing is an email from Mr Roots to the Financial Accountant at Point of Pay in which he endeavours to set out the nature of the understanding between himself and Mr Elbaum. This is the first part of the record of the commercial agreement between the parties.

[48] Mr Roots' email of 21 May 2010 addressed to Point of Pay's Financial Accountant, amongst other things, says:

> *... Daniel* [Mr Elbaum] *and I agreed that I should take some risk if I was going to get added reward. This is not documented formally but it goes like this ...*

[49] Mr Roots then goes on to refer to an attached document (which he had generated earlier and which he had forwarded to Mr Elbaum separately), but in the 21 May 2010 email, he summarises the position for the Financial Accountant's benefit. In the continuing email he says:

> *... my overall salary remains the same on an annual basis but the monthly amount is now 50%.*

[50] He then goes on to claim that it has been agreed that the balance will be made up *"at year's end either from* [the New Zealand company] *or as a top up from Point of Pay"*. Insofar as this refers to a top up from Point of Pay, it is not agreed by Point of Pay itself. Mr Elbaum's position is that the extent of Point of Pay's commitment is as to 50% of the salary and the balance, if any, comes from the New Zealand company.

[51] The attached document entitled *"POP New Zealand* [the New Zealand company] – *structure – May 2010"* does not add to the understanding of the parties' commitment, save to confirm the shareholding arrangements, the directorate and the

registered number of the company. The purpose of the paper is primarily to outline the purpose of the New Zealand company and the sources of its revenue.

[52] Mr Elbaum responded to the 21 May 2010 email with the response of even date. It simply says *"excellent summary, totally agreed let's make it a workable agreement now that David has a copy of it too"*.

[53] David is a reference to David Walker, the company's commercial lawyer. It is noteworthy that Mr Elbaum does not comment in his response on Mr Roots' contention that Point of Pay is to *"top up"* his salary, should that be necessary. The issue is important, of course, because Mr Roots says that by sending the responding email that he did, Mr Elbaum accepted the proposal as set out in the earlier email from Mr Roots. Given that the whole point of this litigation is to seek to require Point of Pay to *"top up"* Mr Roots' pay, the issue is important.

[54] Mr Elbaum in his evidence deals with the issue by saying that his response to the 21 May 2010 email was focused on the material in the penultimate paragraph. That referred to a proposal that a third party would be granted worldwide distribution rights for Point of Pay technology and that that fact, of itself, would mean the end of the New Zealand company.

[55] The short point is that the Authority is not satisfied that Mr Elbaum dealt with the issue appropriately at the time and his evidence before the Authority, which the Authority found inherently credible, could not, on an *ex post facto* basis, explain why he failed to deal with it at the time.

[56] The Authority sees this failing in the same context as it sees the responses that Mr Elbaum made to the Authority's questions about why, as an experienced commercial person, he would have agreed to record a $200,000 salary in an employment agreement and not properly document how that salary was to be funded.

[57] The Authority observes that in Mr Roots' submissions, he adopts the device of referring to the $200,000 salary as *"a fiction"*. The Authority does not think that correctly states the position at all. The Authority considers that the evidence discloses that the parties intended that Mr Roots' income would be equivalent to the salary that he previously enjoyed in his former role and their expectation was that it would be funded from not one but two sources. With respect, that is not a fiction at all and the

debate is not about the quantum of the salary but about where the salary is funded from.

[58] There is a further exchange between the parties via email which is relevant to the Authority's investigation. The Point of Pay commercial lawyer, Mr Walker, set out his understanding of the New Zealand company structure in an email dated 3 November 2010 addressed to Mr Roots in which, after confirming the shareholding, Mr Walker then says:

> *Your 33.33% was issued as consideration for you agreeing to reduce your annual salary in Point of Pay from $200k to $100k.*

[59] Mr Roots confirms the accuracy of Mr Walker's summary in an email sent the following day, but with this rider:

> *I did reduce my salary but for the first year we agreed that Point of Pay would make up the shortfall between* [the New Zealand company] *profit and my Point of Pay salary.*

[60] The Authority has been able to find nothing by way of response in the paper trail before it. One explanation for that absence is that the matter was dealt with without the need to further document it.

[61] Matters came to a head a year later when, by letter dated 9 November 2011, Mr Roots sought to claim the *"balance"* of his salary. The operative paragraph is the second one in the letter:

> *My employment agreement stipulates a salary of AUD$200,000 per annum for the period March 2010 to March 2011 and an amount of AUD$250,000 per annum thereafter. In May 2010 we agreed to vary that agreement taking into account my wish to participate as a shareholder in a subsidiary company, Point of Pay New Zealand Limited* [the New Zealand company].

[62] Mr Roots then goes on to contend that because the New Zealand company has effectively not been operational, he now wishes to claim the unpaid balance of his salary. Mr Roots again alleges that there is agreement that that unpaid balance *"would be made up at year's end"*, either from the New Zealand company or from Point of Pay.

[63] The Authority has concluded that Mr Roots does not have a legitimate claim to arrears of salary. Contrary to the view advanced by Mr Roots, that there was only one concluded agreement and that was the employment agreement, the Authority is

satisfied on the evidence it heard that, to the contrary, this is a case where there are two freestanding agreements between these parties.

[64] The Authority accepts the evidence of the activities of the parties prior to the employment relationship commencing as conclusive of the first agreement, the commercial arrangement, being formed prior to the employment relationship commencing.

[65] If that is not the conclusion reached, then it seems to the Authority impossible to understand why Mr Roots, when still in the employ of a third party, would assiduously promote the interests of the New Zealand company, albeit not yet a registered entity, unless he was himself interested financially in the success of the new venture.

[66] That whole email trail suggests a concluded arrangement between the parties and even includes reference to the shareholding the parties would have in the New Zealand company (Mr Roots' email 19 February 2010). Why would Mr Roots talk about that arrangement, as effectively a fait accompli, if there was not already a concluded commercial arrangement between these parties?

[67] So the Authority's conclusion is that there was a commercial arrangement between the parties in place prior to the employment agreement being entered into. The terms of that concluded agreement are not reduced to writing in one document, although there is documentary evidence about what the parties intended. The Authority has already commented extensively on those exchanges.

[68] The Authority's considered view is that the evidence it heard disclosed that the parties agreed to Mr Roots' proposal that in return for a third share in the New Zealand company, he would forego half of his Point of Pay salary. The Authority is not persuaded that there were any further understandings beyond that simple formula. In other words, the Authority does not accept that the parties agreed that there would be any top up from Point of Pay, as Mr Roots contends.

[69] The Authority reaches the conclusions it does because both these parties were experienced commercial parties and it seems inconceivable that a technology development company which plainly has cashflow problems would agree to not only allowing Mr Roots to obtain a third shareholding in the New Zealand company, without putting any cash in, but also undertake to make up any shortfall. That seems

to the Authority to be a very unequal bargain and one which a knowledgeable and experienced commercial operator would not undertake.

[70] Mr Roots makes the point throughout the email traffic that, to use a colloquialism, he has *"skin in the game"*. This is because he had accepted that half of his salary would effectively be treated as his payment for equity in the New Zealand company.

[71] If, as he suggests, not only does he get that equity immediately without having to fund it by way of capital, but he also gets an undertaking that if the New Zealand company is not successful, he will effectively be indemnified against the risk that he, like Point of Pay, is undertaking, then that seems to the Authority an unfair bargain and one that is unlikely that a smart commercial operator would undertake.

[72] After all, Mr Roots still owns a third of the New Zealand company, as he did throughout the employment, and in the Authority's view, the only commercial way in which his view of matters could be acceded to would be on the footing that he sought to surrender his shareholding to Point of Pay in return for its payment of the balance salary. But if that has been suggested between the parties, it certainly was not suggested in the Authority's proceeding and in the absence of that element, the Authority is satisfied that Mr Roots' proposal, that he be indemnified against the failure of the New Zealand company to deliver the balance of his salary, is simply not part of the bargain..

[73] What is more, there was no suggestion whatever from Mr Roots throughout 20 odd months of employment that the payment that he was receiving (50% of the face value of the salary in his employment agreement) was anything other than the salary that he expected and was entitled to. Only when the employment relationship soured and it became clear that the New Zealand company was not going to achieve the objectives that both parties had of it did Mr Roots purport to rely on Point of Pay's alleged commitment to indemnify him for the balance of his salary.

**Is Mr Roots owed expenses?**

[74] As the Authority has already observed, the amount in contention under this head has reduced significantly since the filing of the statement of problem. The claim in the statement of problem is NZ$3,132 but that is now reduced to a figure of NZ$1,861.08.

[75] There are two relevant provisions in the employment agreement. The first requires Point of Pay to meet *"reasonable out of pocket expenses"* and it appears that that aspect has now been settled.

[76] However, clause 2(e) reflects the fact that Mr Roots was working remotely from Point of Pay's head office and recorded that the company was to provide:

> *... telephone computer communications and other services necessary for you to fulfil your role at its expense. You will be reimbursed for using your private facilities should the need arise from time to time.*

[77] In the documents before the Authority, Mr Roots has provided a careful schedule of the details of the claim. His submission, which the Authority accepts, is that on the evidence the Authority heard there is no basis on which Point of Pay cannot meet the obligation.

[78] Mr Elbaum accepted in his oral evidence to the Authority that Point of Pay had agreed to meet Mr Roots' home office expenses but had simply failed to do so.

[79] It seems to the Authority that a proper construction of the relevant clause is that Point of Pay was to reimburse Mr Roots for the use of his private facilities if the need arose. Mr Elbaum acknowledged in his evidence that the debt was accepted. That seems sufficient evidence to the Authority that Point of Pay had concluded that the need had arisen for Mr Roots to use his home office and accordingly the Authority directs that Point of Pay is to pay to Mr Roots the outstanding sum of NZ$1,861.08.

**Are penalties due?**

[80] Given that the Authority has found for Point of Pay, the question of penalties does not arise. However, the Authority would comment that this was a commercial dispute between two very experienced commercial operators. There was nothing on the evidence that would encourage the Authority to levy a penalty in any event even if the decision were otherwise.

**The Australian claim**

[81] In the period between the present claim being filed in the Authority and being investigated by the Authority, proceedings were filed in the Supreme Court of Victoria which broadly allege various breaches of implied and express terms of Mr Roots' employment agreement and seeks relief for those breaches.

[82] On 4 September 2012, barely a month before the Authority's investigation meeting, the Supreme Court of Victoria ordered a stay of the Victorian proceeding broadly on the footing that whatever the dispute between the parties, that dispute relates to an employment relationship problem which occurred in New Zealand. The Court might have added (although it did not) that the employment agreement between the parties specifically identifies the law of New Zealand as being the operative law for the purposes of the employment agreement.

[83] The Court concluded that a stay ought to be granted because:

> *the proceedings would be vexatious and oppressive to Mr Roots in that the proceedings would be seriously and unfairly burdensome to Mr Roots. He would be obliged to fight substantially the same issues on two fronts. He is a New Zealand resident. His employment duties were to be carried out substantially in New Zealand. He was retrenched in New Zealand and the alleged breaches of the commercial agreement all took place in New Zealand.*
>
> *For similar reasons, in my opinion, the proceedings are prejudicial or vexatious to Mr Roots as they are likely to produce and serious and unjustifiable trouble and harassment. It is not irrelevant when considering these factors to observe that the complaints made against Mr Roots by POP* [Point of Pay] *can probably be thoroughly ventilated in the New Zealand proceeding and that it appears they have been brought in Australia and formulated under the Corporations Act as a means of harassing and vexing Mr Roots.*
>
> *In my view a temporary stay of the Victorian proceedings should be ordered while the New Zealand proceedings proceed. A stay should be granted on the condition that Mr Roots does not object to POP and Mr Elbaum counterclaiming before the Employment Relations Authority for damages against Mr Roots based on the factual allegations made in the Victorian proceedings.*

[84] Mr Roots advised the Authority by memorandum dated 7 September 2012 from counsel that he consented to Point of Pay filing a counterclaim late if they were minded so to do.

[85] No such counterclaim was filed and the matter proceeded before the Authority in the usual way.

[86] Subsequently, the Authority has been advised by counsel for Mr Roots that on 10 December 2012, the Victorian Court of Appeal dismissed an application by Point of Pay for leave to appeal. Further, the time to appeal that decision has now passed without an appeal being lodged. On that footing, the Victorian Supreme Court decision stands as a final decision.

**Determination**

[87] Mr Roots' claim to be indemnified for the outstanding balance of his salary fails but Point of Pay is directed to pay to Mr Roots the sum of NZ$1,861.08 as reimbursement for the use of his home office during the employment.

**Costs**

[88] Costs are reserved.

James Crichton
Member of the Employment Relations Authority