

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 192
5300546

BETWEEN JAIME MELGAREJO AMIAN¹
Applicant

AND KARL-HEINZ REIPEN
Respondent

Member of Authority: P R Stapp

Representatives: Kate Hay, Counsel for the Applicant
William J Wright, Counsel for the Respondent

Investigation Meeting: 11 October 2011 at New Plymouth

Determination: 28 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem centres on two meetings involving the applicant, Mr Jaime Melgarejo Amian (Mr Melgarejo) and the respondent, Mr Karl-Heinz Reipen (Mr Reipen). The first meeting was where Mr Melgarejo says Mr Reipen revoked the applicant's earlier resignation. At the second meeting Mr Melgarejo says Mr Reipen dismissed him. Mr Melgarejo says that on the following day Mr Reipen was abusive.

[2] Also, the employment relationship problem revolves around the applicant's turbulent and troubled personal relationship with his wife. He says her emotional state about being in Awakino led him to resign his employment. Their turbulent personal relationship involved a number of allegations and Mr Reipen's involvement. Mr Melgarejo claimed that Mr Reipen became too involved in his and his partner's marital problems.

¹ This is the spelling used in the Statement of Problem and written statement of evidence. There are other references to Mr Melgarejo Amian being spelt as Amien.

[3] Mr Reipen denied all Mr Melgarejo's claims. Mr Reipen says Mr Melgarejo left voluntarily during working out his notice.

The issues

[4] The issues in this matter are:

(a) Did Mr Melgarejo and Mr Reipen agree to revoke Mr Melgarejo's resignation?

(b) Did Mr Reipen behave abusively as Mr Melgarejo has claimed (letter 23 February 2010 refer to paras.10, 11 and 14)?

The facts

[5] Mr Melgarejo was employed by Mr Reipen, personally, as a dressage rider and trainer at an Awakino property.

[6] Prior to an employment agreement being signed off both parties signed a letter of the terms to apply in the employment. The letter was dated 20 July 2009. Although it includes a reference to Awakino Fortune Limited as the employer, Mr Reipen has accepted he was the employer personally because he was named in the final agreement signed off. The letter reads verbatim as follows:

Herr Melgarejo started his position on 20.07.2009 as rider and trainer up to Grand Prix Level in Awakino.

A salary of NZ\$55,000 per year was agreed.

Further there will be the following premiums for horses trained and schooled by him:

NZ\$150 per win at normal competitions.

NZ\$1,500 per win at the Nationals and Horse of the Year Show.

Another premium of NZ\$10,000 will be appearing for horses which compete at Olympia or the World Games if they are trained by him.

Mr Melgarejo will be provided with a house and a car during the time he is working for Awakino Fortune Limited.

Per year he is entitled to four weeks holidays.

It is planned that Mr Melgarejo will train and ride our horses for three years.

[7] This written signed document was superseded by an employment agreement dated 20 August 2009 and signed by Mr Melgarejo and Mr Reipen. Although there appears to be a conflict on the name of the employer at the time, it is clear that Mr Reipen has accepted that he was the employer, personally.

[8] The following terms applied:

3.1: Fixed term Individual Employment Agreement

This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The parties agree that this is a fixed term employment agreement. This agreement will commence on 20.08.2009, and will end on 20.08.2012. The Employer has genuine reasons based on reasonable grounds for specifying that the employment agreement is to end at this time, namely reach the Olympic Games. The parties also confirm that the Employee has been advised by the Employer when discussing this agreement, the reasons for the employment ending in this way.

7.1: Annual Salary

The Employee's salary shall be \$55,000 per annum, which shall be paid monthly on [insert day on which payment will be made by cheque].

[9] It is common ground that Mr Melgarejo was paid monthly by cheque by Mr Reipen. Mr Reipen relied upon his accountant for the details. In a document produced by Mr Reipen that was prepared by his accountants the following details in regard to payments has been provided:

AWAKINO FORTUNE LIMITED

Jaime Melgarejo

Date	Gross Wage	PAYE deducted
August 2009	\$ 1,672.22	\$387.00
September 2009	\$ 5,016.66	\$1,161.00
October 2009	\$10,033.32	\$ 2,322.00
November 2009	\$5,016.00	\$ 1,161.00
December 2009	\$5,416.66	\$ 1,299.80
January 2010	\$10,033.32	\$ 2,322.00
February 2010	\$500.00	\$ 173.50
Total	\$ 37,688.18	\$ 8,826.30

[10] The payments have been made by Awakino Fortune Limited for Mr Reipen. Mr Melgarejo did not recall the two payments on October 2009 and January 2010, which Mr Reipen claimed would have involved bonuses. There was nothing

produced to contradict this claim. It is otherwise common ground that bonuses had been paid.

[11] In addition, the employment agreement provided for the following terms in regard to bonuses:

7.2: *Payments Recognising Qualifications or Skills Acquired on the job*

The Employee shall be entitled to receive the following payments, upon achievement of the following qualifications/skills:

\$150 per competition win.

\$1,500 per national competition.

\$1,500 per win at Horse of the Year Show.

\$10,000 per horse and rider by reaching the Olympic Games.

[12] Another clause in the employment agreement provided for termination of employment (at clause 12) as follows:

12.1: *General Termination*

*The Employer may terminate this agreement for cause, by providing **three months** notice in writing to the employee. Likewise the Employee is required to give **three months** notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.*

[13] The turbulent and troubled personal relationship between Mr Melgarejo and his wife was underpinned by her wish to return to Germany, because she was unhappy in New Zealand. Consequently, Mr Melgarejo decided to resign, and he did so, on notice to Mr Reipen. Mr Melgarejo advised Mr Reipen that he would work out the three months notice period as he was aware at that time of some important Shows taking place in February and March 2010.

[14] Mr Melgarejo says that Mr Reipen later visited him and his wife, in their cottage, and during that meeting, Mr Reipen offered a variation to the terms of the employment agreement. Mr Melgarejo claimed that Mr Reipen offered to pay for return airfares for Mr Melgarejo's wife and child to return to visit Germany as often as they wanted. Mr Melgarejo says that he (and his partner) accepted Mr Reipen's offer, and decided to stay and thus Mr Reipen agreed to "revoke" the resignation. He says this deal was sealed with a handshake, a hug and drink, and he and his wife

confirmed that they were staying in New Zealand and cancelled leaving arrangements. He continued working for Mr Reipen. Mr Reipen denied the claim.

[15] Because of the turbulent and troubled marital problems between Mr Melgarejo and his wife, Mr Melgarejo's wife obtained a restraining order that prevented Mr Melgarejo residing in the cottage. Mr Melgarejo then made arrangements with Mr Reipen for accommodation. They are in dispute, as to whether or not Mr Melgarejo was living in the stables or at Mr Reipen's house. I am satisfied that for at least some of the time Mr Melgarejo lived with Mr Reipen (not challenged).

[16] On the morning of 10 February 2010 Mr Melgarejo had been working in the stables. He had arranged an appointment with a lawyer, for later that day, in relation to his personal matters in respect of his marriage. He needed to drive into New Plymouth for the appointment and planned to return to work after the appointment. He was allowed to use Mr Reipen's car as part of his terms of employment. This was provided for in the agreement. When he told Mr Reipen of his intention to keep that appointment, he claims that Mr Reipen said to him:

Do you think you are King of the world? You're a piece of shit. You can only ride horses, all the rest you are a total disaster. You're a bastard. If you go to a lawyer you're not coming back.

[17] Mr Melgarejo says that Mr Reipen told him that he was to leave the workplace immediately and that he could not use Mr Reipen's car. He says that Mr Reipen said:

You're not taking the car. You can start walking and take all your things with you because you're not coming back to the stable.

[18] Mr Melgarejo gathered his belongings and walked down the road until he met a friend who drove him to his house.

[19] Mr Melgarejo says that Mr Reipen had not raised any issues with him during the course of his employment, prior to 10 February 2010, although it is clear that underlying the employment relationship Mr Reipen had become involved and knew about matters arising from Mr Melgarejo's and his wife's personal problems.

[20] The next day, 11 February 2010, Mr Melgarejo returned to Awakino to recover his remaining belongings. In his statement of evidence Mr Melgarejo stated that these events involved Mr Reipen seeing him and going over to him. It is alleged

that Mr Reipen then started shouting at Mr Melgarejo and abusing him. Mr Melgarejo says that Mr Reipen said:

You're a fucking bastard (two or three times)

I could shoot you.

[21] Mr Reipen denied that he called Mr Melgarejo a *fucking bastard*. He accepted that he could have used the words *I could shoot you*. Further, Mr Reipen explained that his comments to Mr Melgarejo that he was *King of the world and could only ride horses* needed to be considered in context of the whole factual background. Mr Reipen denied that he dismissed Mr Melgarejo.

[22] Mr Melgarejo visited his lawyer, and through her later raised a personal grievance (on 23 February 2010) in writing. The personal grievance was an allegation that Mr Melgarejo had been unjustifiably dismissed and sought remedies of reinstatement, lost wages, compensation and costs.

[23] On 4 March Mr Reipen's lawyer replied with an email. Mr Reipen made it clear in this reply that Mr Melgarejo had resigned and was working out his notice period and that he never accepted Mr Melgarejo back as a full-time employee. Further, Mr Reipen made a number of allegations about Mr Melgarejo personally, Mr Melgarejo's relationship with his wife and accused Mr Melgarejo of copying keys belonging to Mr Reipen for access to the premises without authority to do so and *had generally expressed an intention to cause damage to the employer's property or livestock*.

[24] Mr Reipen further alleged that Mr Melgarejo's resignation brought an end to the employment and the employer had accepted that resignation, but required Mr Melgarejo to work out his notice period. Later in a draft statement in reply a loss of trust and confidence was added as a reason for not wanting Mr Melgarejo back.

[25] On 17 March 2010 Mr Melgarejo's lawyer requested a copy of Mr Melgarejo's wage and time records under s.130 of the Employment Relations Act (the Act). The email also pointed out that Mr Melgarejo had not received his final pay. The wage and time records were not immediately, or in a reasonable time, provided.

[26] The wage and time records were not provided until 26 August 2011 in a form of the document that has been previously quoted, provided through Mr Reipen's

accountants. These are the figures above and have been used by the respondent to calculate the holiday payment entitlement (calculated at 8% of gross earnings) being \$3,015.05.

[27] The parties attended mediation on 1 June 2010. The applicant filed his statement of problem in the Authority on 27 June 2011. A draft statement in reply was filed by Mr Reipen's lawyers on 26 August 2011, because of difficulties in being able to contact Mr Reipen for instructions. This has been a continuing feature of this employment relationship problem and involving Mr Reipen. Mr Reipen's lawyers have had difficulties getting instructions and despite a memorandum from the Authority for the parties to provide written statements, Mr Reipen attended the investigation meeting without having provided a written statement of evidence. I will return to his behaviour shortly.

[28] Also, both parties have referred to various people who may have assisted in this matter. Mr Melgarejo has submitted an affidavit from one person to assist him. That affidavit has been produced subject to the appropriate weight being given to it. Mr Reipen has relied on three people and their written statements, two of whom he has not been able to contact to appear, and a third who has signed a statement, but was not available to appear.

[29] The applicant's letter raising the personal grievance covered the matters in sufficient detail to have put the respondent on reasonable notice of the claims. In particular, the statement of problem also dealt with Mr Melgarejo's claims in regard to losses: that involved unpaid wages and holiday pay, compensation for earnings from 10 February 2010 to 1 January 2011, bonuses, and compensation for hurt and humiliation, and legal costs.

[30] During the investigation meeting I raised with Mr Reipen that the risk of not paying the final wages and holiday pay would involve me considering interest as Mr Melgarejo had been deprived of the use of the money he was entitled to receive. The issue of interest was confirmed during final submissions as a claim in the original statement of problem. I am satisfied that Mr Reipen was on reasonable notice of the extent of the claims that would be applied for and the outstanding claims from the omissions in the statement of problem should have been foreseeable as remedies. This is because Mr Reipen has been represented at various times throughout the

proceedings. His representatives have done their best to represent him despite the difficulties with his availability and providing documents.

[31] The matter has remained unresolved, and thus, it now falls on the Authority to make a determination.

Determination

Holiday pay claim

[32] Holiday pay is owed by Mr Reipen to Mr Melgarejo. The amount owed is \$3,015.05 as amended during the Authority's investigation and confirmed in submissions.

Personal grievance

[33] I am satisfied that there was an arrangement made between Mr Reipen and Mr Melgarejo and Mr Melgarejo's wife for work and for her to return to Germany paid for by Mr Reipen. It makes it more than likely, given such an arrangement, that Mr Reipen had agreed to also allow Mr Melgarejo to continue working. Even if I am wrong Mr Reipen required Mr Melgarejo to work out his notice. No arrangements had been agreed to shorten the three months required. Mr Reipen sent Mr Melgarejo away and refused him the use of the car the next day. This was tantamount to a dismissal during notice because Mr Melgarejo reasonably believed that he had been dismissed and he did not return to work and neither did Mr Reipen do anything to address that as a problem at the time. Afterwards he raised a number of issues to defend the dismissal.

[34] Furthermore, I am supported in my conclusion by the following. Mr Reipen conceded that he did make an offer to Mr Melgarejo's wife when Mr Melgarejo stated during the Authority's investigation meeting that he could produce an email on that matter. While he and his representative did not have the email at hand at the time of the Authority's investigation meeting, Mr Reipen accepted its existence, and conceded that the offer was made. In addition there was no resignation put in writing, and the arrangements agreed to were not put in writing either, unlike the terms of the parties' employment relationship. Mr Reipen also contradicted his lawyer's draft statement in reply, which he must take responsibility for. Also, I conclude that the very matters Mr Reipen put in defence for not wanting Mr Melgarejo back at work

have been raised after the event and are more consistent with a dismissal. Another point is that during cross examination Mr Reipen also made various concessions over his evidence relating to Mr Melgarejo's claims and what he said to Mr Melgarejo. Except for Mr Reipen denying that he used the word *fucking* Mr Reipen conceded that he could have said *bastard* and some of the other comments alleged by Mr Melgarejo. These were significant concessions and make it more likely Mr Melgarejo reliably has remembered correctly what happened. To support this finding Mr Melgarejo committed to writing through his lawyers what he remembered early and during these events. This contrasts with Mr Reipen not complying with the deadline for a written statement of evidence and relying on his memory only.

[35] I hold that the comments allegedly involving Mr Reipen's conduct and behaviour toward Mr Melgarejo would have led Mr Melgarejo to understand he had been dismissed on 10 February 2010. This included being refused the use of Mr Reipen's car, because he was no longer employed.

[36] Next I hold that Mr Reipen failed to follow a proper procedure and failed to investigate the issues he subsequently has raised against Mr Melgarejo. Indeed the issues were only ever raised after the event. This was not the process that a fair and reasonable employer would have followed, I hold. Mr Reipen was relying only on accusations and hearsay to reach his conclusions, and Mr Melgarejo had no proper opportunity for any input, comment and mitigation before reasonably believing that he had been dismissed being told by Mr Reipen not to come back. Mr Melgarejo had no opportunity to get advice and representation that a fair and reasonable employer would have allowed for, I hold.

[37] I hold in essence that Mr Reipen took exception to being told by Mr Melgarejo that he was going to see a lawyer. This was the real reason for Mr Reipen's reaction, I hold.

[38] Mr Reipen's action was unjustified. Thus Mr Melgarejo has a personal grievance.

Arrears of wages for January and February 2010

[39] Mr Melgarejo has claimed 10 ten days pay to February 2010 that was not paid. The accountant's record shows that \$500 was paid for that period, but without the details I accept it was a component of a bonus. Therefore I accept Mr Melgarejo's

claim for \$2,568.68 arrears. There is interest to be paid on this sum and the holiday pay from the date they were due (10 February 2010 until the date of the investigation meeting, 11 October 2011).

Remedies for personal grievance

[40] Turning to remedies Mr Melgarejo is entitled to lost wages and compensation to resolve the employment relationship problem with a personal grievance. He got another job in January 2011. Until then he says he lived off his savings and tried to get the same type of work, but was unsuccessful. He did not look for anything else. Thus he limited his availability by choice and narrowed his selection for alternative employment. That impacted on his attempt to mitigate his losses during the period of his claim, I hold. Therefore I reduce his claim to 3 months lost wages from the date of dismissal. The calculation will follow shortly.

[41] There was no contribution on Mr Melgarejo's part I hold. Any performance matters and behavioural issues were only raised after the event and had not been raised in a disciplinary sense beforehand. Thus, there is to be no reduction for contribution on the lost wages for the personal grievance from 10 February 2010, I hold. The amount owed is based on his base weekly rate of \$1,057.69 gross. For 13 weeks he is owed \$13,749.97 gross lost wages due to the dismissal.

[42] In addition Mr Melgarejo has satisfied me that he is entitled to compensation for hurt and humiliation, but not to the extent of \$20,000 that he has claimed. I assess \$10,000 compensation is appropriate to cover for hurt feelings and humiliation and the impact of the dismissal on Mr Melgarejo.

[43] I am not prepared to order payment of bonuses during the relevant period. While Mr Melgarejo would have been entitled to them, if he had been at work, they were conditional on results that had not happened. Thus, it is not in order to speculate on what those bonuses might have been. That claim is dismissed.

[44] Whilst proper wage and time records have not been kept Mr Reipen was able to produce a record of earnings from his accountant. Although these were not produced in a timely fashion I accept that they have later been produced. Considering all the issues in this matter I hold that the applicant has not been prejudiced. This is not a matter for a penalty because the claim was only raised during the investigation meeting and Mr Reipen at least provided some records. However, I conclude that this

is a workplace and employer that the Department of Labour could scrutinise and look at the work place records for some improvement, because the wage and time records shown to me are inadequate and not in accordance with legal requirements.

Orders of the Authority

[45] I order Karl-Heinz Reipen to pay Jamie Melgarejo Amian/Amien:

- a. \$2,068.68 unpaid wages; and
- b. \$3,015.05 holiday pay; and
- c. \$172.57 interest at 5.0% per annum for the arrears ((Judicature Prescribed Rate of Interest) Order 2011) (10 February 2010 to 11 October 2011);and
- d. \$251.53 interest at 5.0% for the holiday pay ((Judicature Prescribed Rate of Interest) Order 2011);and
- e. \$13,749.97 lost wages due to the dismissal; and
- f. \$10,000 compensation under s 123 (1) (c) (i) of the Act.

[46] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority