

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 417/08
5131623

BETWEEN DAMIEN BATSON
 Applicant

AND GENERATION 2000 FITNESS
 EQUIPMENT LTD
 Respondent

Member of Authority: James Wilson

Representatives: Damien Batson in person
 No appearance for the respondent

Investigation Meeting: 16 October 2008

Submissions received: 16 October 2008 from the respondent

Determination: 9 December 2008

DETERMINATION OF THE AUTHORITY

Mr Batson's claims

[1] Damien Batson says that he was approached by Mr Chris Kenny of Generation 2000 Fitness Equipment Ltd (Generation 2000) in December 2007 to provide casual services at Club St Heliers (a gym operated by Generation 2000). These services were to include opening and closing the gym and providing advice to gym members from time to time, at a rate of \$15.00 per hour. Mr Batson says that between December 2007 and March 2008 he worked a total of 176.50 hours. Mr Batson says that, with the exception of two cash payments totalling \$770.00, he was not paid for these hours and is owed a balance of \$1877.50.

[2] A complicating factor appears to be that Mr Batson, through a company he operates called Omni Media, also provided some computer services to Generation 2000. There is a dispute between Generation 2000 and Omni Media regarding the correct payment for these services. This separate dispute may have caused some confusion in the mind of the Director of Generation 2000 (Mr Chris Kenny) as to what monies are owing to Mr Batson as an employee and the amounts which may or may not be owing to Omni Media. This Determination deals only with Mr Batson's claim that he was employed, and is owed wages, by Generation 2000.

The Authority's investigation

[3] Mr Batson's statement of problem was received by the Authority on 29 July 2008. Although this statement named the respondent as Mr Chris Kenny, c/o Club St Helier's, Mr Batson subsequently accepted that, assuming he was in an employment relationship, his employer was Generation 2000 Fitness Equipment Ltd, and amended his statement of problem accordingly. In his statement Mr Batson alleged that Generation 2000 owed him the sum of \$1877.50 in outstanding wages.

[4] A statement in reply was not received by the Authority within the 14 day period allowed by the regulations. However, after a reminder, a statement was received from Generation 2000, signed by Mr Kenny, on or about 20 August 2008. In this statement in reply Generation 2000 said that Mr Batson had not been an employee but that Generation 2000 had been invoiced by Omni Media Ltd, that these invoices were incorrect and that he (Mr Kenny) had advised Mr Batson that he would receive payments on receipt of correct invoices.

[5] As there seemed to be some confusion regarding Mr Batson's employment status I advised the parties that I would hold an investigation meeting on 25 September 2008 and requested that they bring *any documents such as payslips or bank statements* to enable me to understand the relationship's between the parties and, if necessary decide what further enquiries needed to be made.

[6] On Monday 22 September 2008 Mr Kenny phoned the Authority support officer and advised that he would be unable to attend the meeting on the 25 September as he was unwell. Several days later Mr Kenny provided a medical certificate from his GP advising that he was *unable to attend work from 16 September to 27 September 2008*. I was advised subsequently that Mr Batson's father had phoned Mr Kenny's place of work and had been advised that Mr Kenny was at work. Mr Damien Batson also advised me that he and his mother had seen Mr Kenny driving his car on the day of the cancelled meeting. Unfortunately, as outlined below, Mr Kenny did not attend a subsequent meeting of the Authority to explain the nature of his illness or his inability to attend the meeting of 25 September 2008. In the absence in any other evidence I am compelled to accept on face value the medical certificate he has produced.

[7] Following the cancelled meeting an Authority support officer contacted Mr Kenny and explicitly advised him that the meeting was rescheduled for 16 October 2008. A formal notice of this meeting was sent to Generation 2000. Courier records show that this notice of the meeting was delivered on 6 October at 9:27 a.m.. While the signature on the receipt is illegible the letters CHRI. K printed on the receipt suggest that it was received by Mr Kenny.

[8] On the morning of 16 October 2008 neither Mr Kenny, nor any other representative of Generation 2000 attended the investigation meeting. On my instructions the support officer attempted to contact Mr Kenny to find out whether or not he intended to attend the meeting. As Mr Kenny did not answer his phone the support officer left a message on his answer phone.

[9] In Mr Kenny's absence I interviewed Mr Batson, under oath, regarding his relationship with Generation 2000 and the amounts he alleged were owing to him. Both of Mr Batson's parents attended the meeting and were able to support parts of Mr Batson's evidence. Regrettably other than a summary of hours worked and payments received prepared by Mr Batson, Mr Batson was unable to produce other documentary evidence of his employment relationship with Generation 2000 such as an employment agreement or timesheets.

[10] At approximately 11.30 am on 16 October Mr Kenny contacted the support officer and advised that he had incorrectly diarised the time and place of the meeting. The support officer advised him that he should write to the Authority explaining why he had not attended and setting out any other information he thought the Authority should take into account.

[11] On the afternoon of 16 October 2008 the Authority received a fax from Mr Kenny advising:

It was definitely my intention to attend a meeting. As you are aware I have been sick and still, even though at work, still not 100% right. I had diarised meeting for 10.30 on 20 October. I am not sure who the lady was who I spoke to. My mother has also been sick with pneumonia and has only just been given the okay by her doctor. So I may have made a mistake in diarising.

Mr Kenny's letter went on to repeat his suggestion that any money owing was to Omni Media and that there was no employment relationship between Generation 2000 and Mr Batson.

[12] Generation 2000 has been given ample opportunity to respond properly and in person to Mr Batson's claims. While I am prepared to give Mr Kenny the benefit of the doubt over his non attendance at the first scheduled investigation meeting I am not prepared to do so for the second. I do not accept that Mr Kenny mistakenly diarised the rescheduled meeting for the wrong date. Not only was he told in person when the new meeting was to be held but this was confirmed in writing and it seems probable that he personally signed for that written confirmation. The notice of meeting explicitly advised Generation 2000 that:

If the respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant.

It is my intention therefore to determine this matter based on Mr Batson's evidence.

Determination

[13] I am satisfied on the evidence I have received, that Mr Batson was employed on a casual basis by Generation 2000 Fitness Equipment Ltd, that he worked a total of 176.50 hours for that company and that he is owed \$1877.50 in unpaid wages. Mr Batson has been deprived of the use of these monies and is entitled to receive interest on the outstanding amount.

Orders

[14] **Generation 2000 Fitness Equipment Ltd is ordered to pay Mr Batson \$1877.50 gross, being wages owed, within 28 days of the date of this determination, together with interest at 7.00% on that amount, from 1 April 2008 until the outstanding amount is paid in full.**

Costs

[15] Mr Batson was not legally represented and therefore incurred no legal costs for which he is entitled to be reimbursed. However he was required to make an application to the Authority in order to obtain payment of the outstanding amount and is entitled to be reimbursed the \$70.00 filing fee. **In addition to the payments outlined above, Generation 2000 is ordered to pay Mr Batson \$70.00 in reimbursement of the Authority filing fee.**

James Wilson

Member of the Employment Relations Authority