

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 32/09  
5118921

BETWEEN                      SCOTT CAMERON  
Applicant

AND                              AXO SHREDDERS LIMITED  
Respondent

Member of Authority:      P R Stapp

Representatives:            John Coyle for Applicant  
Michael Bale for Respondent

Investigation Meeting:      13 November 2008 and 5 February 2009 at Wellington

Determination:                20 March 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      Scott Cameron was employed by Axo to work in the United Kingdom. After entering the UK he worked and was paid, but without a work visa. There is an issue about whose responsibility it was to obtain the required visa to work in the UK. He experienced difficulties in various matters during the time he worked in the UK and returned to New Zealand after being deported. On 4 June 2007 he raised a personal grievance claiming his work with Axo involved an unjustified disadvantage due to health and safety issues at work in the UK, being deported from the UK and events that occurred upon him returning to New Zealand. Subsequently the employment ended. Mr Cameron and Axo have differences over what happened with the way his employment ended on 10 May 2007. On 18 March 2008 Mr Cameron raised a personal grievance about being dismissed, when his representative filed a statement of problem in the Employment Relations Authority.

**Mr Cameron's employment**

[2] Scott Cameron commenced his employment at Axo as an installation engineer on or about 28 February 2006. He was appointed by Neil Callaghan and Greg Corrigan, both Axo directors. It was arranged that he would be orientated and trained in New Zealand and then move to the United Kingdom. The parties had an employment agreement that included provision for a salary to be paid in English pounds, commission and the reimbursement of travel, accommodation and other expenses.

[3] There is a dispute about whose responsibility it was to arrange obtaining a work visa in the United Kingdom. Messrs Callaghan and Corrigan understood that Mr Cameron was going use a paternal grand parent to get access to work in the United Kingdom and they were waiting on him to clarify that. Messrs Callaghan and Corrigan confirmed that they understood Mr Cameron would obtain the evidence of his ancestry and at the investigation meeting told me that they anticipated he would, upon getting his information, return to New Zealand to apply as required for a visa to work in the United Kingdom. However, Mr Cameron says he understood the company would make the necessary arrangements, and its failure to do so was its responsibility, including that it had to take responsibility for difficulties involved with his deportation and arrival back in New Zealand in 2007.

**Mr Cameron's return to New Zealand**

[4] Mr Cameron says on his return to New Zealand he took four days off work to get well, but Messrs Callaghan and Corrigan say that it responded to his request for indefinite leave with absence because he was unwell, agreement was reached to pay out his holiday pay as he had requested, he was to make arrangements for his visa to enable him to return to the United Kingdom, and he was to sort out whether or not he would go to the Unites States for his own reasons and he would disclose how much time this would involve. In the meantime he was requested to provide his outstanding receipts for expense claims. Various anomalies were discovered in the claims and Mr Cameron was requested to provide explanations while he was taking his leave.

[5] Mr Cameron says he was told not to return to work on 10 May 2007, but Axo says he agreed to take leave of absence. He did not return to work. His last pay was 22 April 2007.

### Mr Cameron's claims

[6] Mr Cameron claimed the following:

- Shortfall in wages... £4,000 nett
- Unpaid salary-last pay-17 April 2007 to 18 July 2007 £8,750
- Unpaid leave for 900 hours in lieu:
  - 35 days for work on weekends and public holidays... £23,628
- Unpaid Commission... £5,333
- Health and Safety in the work environment issues:
  - a) Substandard living conditions in England
  - b) Not being provided with a proper workshop.
  - c) The work shop was makeshift.
  - d) The company van was a health problem.
  - e) The long hours required to be worked.
  - f) Not supplied with work clothes and safety equipment and tools:
 

Cost of replacement-estimated	£4,000
Tools	no sum provided
- No arrangement was made for a UK work visa.
- Expense claims not reimbursed... £7,668.44
- Business expenses not reimbursed... £340.29
- Medical expenses incurred... £1,500

[7] Mr Cameron has requested his employment relationship problem be resolved by a determination that Axo's actions were unjustified and disadvantaged him in his employment. He says Axo breached its duty to act in good faith and with trust and fair dealing. He says Axo breached his employment agreement. He says Axo unjustifiably dismissed him.

[8] On 13 November 2008 Mr Cameron withdrew his claim for penalties against Mr Corrigan and Mr Callaghan personally for aiding and abetting in alleged breaches by Axo.

[9] Mr Cameron amended his claims on 31 January 2009 at the Authority's investigation meeting on 5 February 2009. His claim is for lost wages of £8,750 from 17 April 2007. He has claimed compensation of \$20,000 and "damages" of \$25,000. He claimed penalties against Axo in the sum of \$10,000.

[10] He is also seeking interest.

[11] There has been agreement for costs to be reserved.

### **Axo's counter-claim**

[12] Axo denied the above claims. It has not consented to a personal grievance being raised out of time. It counter claimed (SIR) that Mr Cameron owes it the sum of \$4,904.32 for cash withdrawals and spending on Axo's credit card without authority.

### **Agreement to an independent audit**

[13] During the Authority's investigation meeting on 5 February 2009 agreement was reached by both parties to refer (1) the expenses that the company has claimed and (2) Mr Cameron's claim of an alleged underpayment of salary while he was working in the UK, to an accountant for auditing. Both parties agreed on various terms for an independent audit and agreed to be bound by the outcome. As a result Mr Cameron withdrew the claims for:

- |                                       |             |
|---------------------------------------|-------------|
| • Shortfall in wages...               | £4,000 nett |
| • Expense claims not reimbursed...    | £7,668.44   |
| • Business expenses not reimbursed... | £340.29     |

[14] Mr Cameron also withdrew his claim for £1,500 medical expenses incurred because he did not have receipts and the evidence to support the claim.

[15] Axo agreed that its counter claim for \$4,904.32 was to be referred to the independent auditor.

[16] Any recovery and enforcement remains a matter for the Authority.

### **The issues**

[17] What was the arrangement between the parties for Mr Cameron to work in the UK? On what basis was it agreed he would be paid? Was there any deception over the employment arrangements?

[18] Is Mr Cameron owed the sums claimed for unpaid salary for time in lieu, unpaid leave and unpaid commission?

[19] Are there receipts for the sums claimed? Is Mr Cameron owed the cost of the replacement of clothing expense claims and business claims?

[20] Have there been any breaches of two clauses of the employment agreement; namely clauses 4.1 and 10.1 that relate to good faith and trust and fair dealing? Was there any unjustified action disadvantaging Mr Cameron in his employment?

[21] How did the employment relationship end? Did the employer consent by its actions to waive the time for raising a personal grievance for unjustified dismissal?

[22] How should the employment relationship problem be resolved?

### **The employment arrangements**

[23] There was an employment agreement. It made a provision for an annual salary of £27,000 (clause 7 "*Wages/Salary/Allowances*"). It also made provision for the annual salary to compensate Mr Cameron for all hours worked (clause 6 "*Hours of Work*").

[24] The employment agreement did not make any provision for a work visa in the UK. There was no documentation identifying any arrangement and who was responsible for obtaining the work visa.

[25] The employment agreement made provision for the use of the company's credit card, and made provision for commissions. In essence these required Mr Cameron: first to have receipts and provide his receipts for payment. This is now a matter for the audit agreed to by the parties. Second his commissions were based on a term in the employment agreement as follows:

**7.2 Commission**

*The Employee shall be entitled to receive Commission in addition to their base salary of £27,000 on the following basis: 10% on UK Invoiced service fees by the Employee as described in the 'Job Description' attached.*

*The Employee's commission shall be paid monthly into a bank account nominated by the Employee on 20<sup>th</sup> of the month following the receipt of those funds from the customer.*

[26] The employment agreement also made provision for English statutory holidays to apply.

[27] The agreement placed obligations on both parties:

**4.1 Obligations of the relationship**

*The Employer shall:*

- (i) Act as a good employer in all dealings with the employee;*
- (ii) Deal with the Employee and any representative of the Employee in good faith in all aspects of the employment relationship;*
- (iii) Take all practical steps to provide the Employee with a safe and healthy work environment.*

**4.2 Obligations of the Employee**

*The Employee shall:*

- (i) Comply with all reasonable and lawful instructions provided to them by the Employer;*
- (ii) Perform their duties with all reasonable skill and diligence;*
- (iii) Conduct their duties in the best interests of the Employer and the employment relationship;*

- (iv) *Deal with the employer in good faith in all aspects of the employment relationship;*
- (v) *Comply with all policies and procedures (including any codes of conduct) implemented by the Employer from time to time.*
- (vi) *Take all practicable steps to perform the job in a way that is safe and healthy for themselves and their fellow employees.*

### **Pay arrangements and holidays**

[28] It is common ground that Mr Cameron's pay was banked in the UK as pounds from New Zealand. The arrangements for the pay seem to have occurred by consent but there are difficulties over what deductions have been made and the employer's translation from New Zealand dollars to British pounds. It has been agreed that Mr Cameron's claim for an underpayment will be the subject of an agreed audit.

[29] The statutory holidays were agreed to be taken as English statutory holidays (clause 8.2 of the employment agreement). There were no records kept by the employer of time, hours and days of work and holidays because Axo says Mr Cameron's pay related to a salary and he was paid for his statutory holidays and any leave. A summary of payments was produced. Mr Cameron has provided no record to substantiate his hours and holidays not paid and claimed. He could not identify or challenge the amounts referred to by the employer in the summary of wages and holiday pay produced.

### **The United Kingdom visa arrangements**

[30] Mr Cameron worked and was paid in the UK while on a visitor's permit.

[31] Both parties have to take some responsibility for the situation they found themselves in. Mr Cameron entered the UK and accepted his pay and started reporting on his work as he was required to do under the employment agreement. He was aware there was a visa difficulty, but at no time did he take any direct action to get it sorted and to take responsibility to ensure he was protected. On the other hand Axo condoned the situation by paying Mr Cameron and acting as if everything was in order, when clearly it was not. It was not sufficient for Axo to rely on its

interpretation of the employment agreement that made provision for Mr Cameron to fly back to New Zealand to complete the visa application, to mitigate its responsibility in the matter, when it knew visa requirements had not been completed properly. Axo would have known what was happening, but continued to pay him while he was working on a visitor's permit. This makes Axo's explanation implausible. Indeed I am supported in reaching this conclusion because Mr Corrigan only raised this point very late in the Authority's investigation. A good employer would not have exposed an employee to this situation despite any alleged arrangement for Mr Cameron to identify his ancestry. Axo's failure to make any adequate provision for Mr Cameron, as he was its employee, was a breach of good faith and the mutual obligations of the relationship under the terms of the agreement. The dispute between both parties on what they each thought each other was required to do and whose responsibility it was to deal with the visa, was as much Mr Cameron's responsibility given that he decided to work and accepted his pay. In best practice both parties had a responsibility to commit to an agreed process and specify whose responsibility it was over obtaining a visa in their arrangements to meet UK requirements. It follows that Mr Cameron has not established that there was a deliberate misrepresentation by Axo.

[32] There is sufficient evidence from Mr Corrigan and Mr Callaghan that the issue of Mr Cameron having a UK grandparent was a genuine matter. However, it was their omission that they did not deal with Mr Cameron's failure to respond when they condoned him working in the UK because he was getting paid and reporting about the work he was doing. A fair and reasonable employer would have done more to prevent the situation drifting when Mr Cameron did not respond, although I do accept it did try. Mr Cameron is equally culpable by his actions.

### **Commissions**

[33] Mr Cameron's claim for the payment of commissions has not been established because he has not been able to prove what he was owed, if anything, considering that there are no receipts and invoices for service fees under the terms of the employment agreement. I am supported in my conclusion by Mr Cameron making an estimate, yet his employment agreement has a prescriptive requirement that required any claim to be properly quantified. His failure to put in place such a system was as much his

responsibility as the respondent's: Mr Cameron was required to report properly, and did not do so. It is not enough for me to rely on an estimate.

### **Unpaid leave and statutory holidays**

[34] Mr Cameron has claimed unpaid leave on the basis of hours he says he worked in excess of 45 hours per week under his employment agreement. However he agreed under the terms of his employment agreement that all hours were fully compensated by the payment of his salary when he signed the employment agreement. Also his employment agreement made provision for the payment of any work on call or when he attended to service or installations on a public holiday. His entitlement was time in lieu for the time actually worked on a public holiday (clause 8.2 "*Payment for Work on a Public Holiday*"). He has no claim on the extra time he says he worked because there is no itemised detail provided of the hours actually worked or the statutory holidays involved. Therefore his claim is dismissed.

[35] There is a record of payments made for holiday pay. Mr Cameron has not identified how these are incorrect. His claim is dismissed.

### **Health and safety in the workplace**

[36] There are many issues Mr Cameron had with his workplace conditions while he was based in the UK. Mr Cameron had personal responsibility to find his own accommodation. His failure to do so can not fall on the employer, especially where the employer tried to assist him. Mr Cameron has not established that the vehicle and accommodation and work premises were unsafe and unhealthy and that his employer breached the general health and safety obligations (clause 10 of the employment agreement) given their conflicting accounts of their experiences and expectations and responsibilities. There were no complaints made to any independent authority at the time and thus no evidence of any breaches found. This is not surprising given the visa situation. The issues that Mr Cameron raised were taken up by the employer during the time he worked in the UK. This included the employer providing financial assistance, paying for hotels and accommodation and meeting with him. Mr Cameron has not been able to satisfactorily say what the unjustified actions of the employer were to establish a personal grievance. In this situation Mr Cameron was responsible

for the work environment in the UK and had access to Mr Callaghan who was available by telephone, mail and email to sort out any problems. Mr Corrigan personally went to the UK and what he says he found leaves me with the impression that Mr Cameron's claims in part relate to his own failure to deal with matters. Also Mr Corrigan organised another employee, Rob Warrender, who was in the UK at the time, to assist and to prompt Mr Cameron to take appropriate action on accommodation, reporting and the visa. The employment agreement made provision for a place of work and it was provided. Thus, Axo has produced sufficient evidence to meet its obligation of taking all practicable steps to provide Mr Cameron with a safe and healthy work environment.

### **Replacement clothing and tools**

[37] There is no contractual basis upon which Mr Cameron can claim the replacement of clothing and tools. He has relied upon some of his clothing and tools being stolen and tools being left in the UK. The parties had no arrangements for these contingencies under the terms of their employment agreement and the situation is not made any easier by the absence of some agreed reconciliation of what clothing and tools are at issue. Mr Cameron's claim is dismissed.

### **Unjustified action causing disadvantage**

[38] This was a broad claim raised on 4 June 2007 going back to Mr Cameron's arrival in the UK on 28 May 2006. There is no doubt that Mr Cameron's employment circumstances in the UK were difficult, first because of his visa problems, and secondly, his claim that his accommodation, vehicle and work premises were the cause of his problems at work in the UK. He says these combined involved an unjustified action disadvantaging him in his employment. However, the issues during Mr Cameron's employment in the UK were the type of matters associated with an on-going employment relationship and any cause of action linked to this claim of unjustified action and disadvantage is difficult to discern. Indeed any relevant causes of action appear to be outside the 90 day requirement and are only useful in as much as they relate to the background and circumstances of Mr Cameron's employment ending. He has not produced any satisfactory evidence of any breach by the employer of any health and safety requirements, and has not been able to establish that there

was any deliberate misrepresentation, given that the parties had a genuine difference over the responsibility for the work visa and arrangements over the employment ending. Thus, Mr Cameron is not entitled to any remedies for a personal grievance. If he has been underpaid there are alternate procedures for the recovery of any wages.

### **The employment ending**

[39] This is a matter of credibility. I believe that Mr Cameron's employment ended when he took leave of absence and accepted his final pay. There was no actual dismissal or resignation as such. There was no correspondence and written details of any dismissal from either side. The claim of the dismissal was made 8 months after it was alleged to have happened. There was no detail provided before the statement of problem was filed in the Authority. It is more believable that a leave of absence occurred given the circumstances of Mr Cameron's arrival back in New Zealand, the difficulties he had had with being deported, his consideration of making arrangements to go to the United States and the nature of his personal grievance when it was raised on 4 June 2007. I accept that Mr Cameron agreed to be paid out because he was short of funds and accepted the pay out with no conditions attached. A final payout is not necessarily proof of a dismissal initiated by the employer. Furthermore the employment relationship became fractious upon Axo requesting, as it was properly entitled, Mr Cameron to account and provide receipts for his expenses and his use of the company's credit card. The discord between the parties still exists given this claim, another issue to do with a laptop computer and hard drive, and an incidental matter to do with some photographs sent by an ex-girl friend of Mr Cameron's to Axo. Thus, the employment came to an end without any likelihood of it being resumed.

### **Conclusion**

[40] It is my conclusion that Mr Cameron has not established his claims on:

- Pay arrangements for work in lieu and statutory holidays.
- Commissions.
- Health and safety complaints.
- Replacement clothing and tools.
- Unjustified action disadvantage personal grievance.

[41] The above claims are dismissed.

[42] The employer's breach of the obligation to be a good employer and act in good faith does not warrant a penalty because there was no deliberate and wilful misrepresentation made by the employer over the work arrangements despite the difficulties. Mr Cameron's role in the situation makes him equally culpable and he failed to sufficiently quantify damages and distinguish any damages claim from his claim for compensation.

[43] There was no actual dismissal. Mr Cameron's claims are dismissed.

[44] Costs are reserved.

[45] Any recovery action and enforcement action in respect of the matters now the subjects of an independent audit are also reserved.

P R Stapp  
Member of the Employment Relations Authority