

[5] On or about 27 June 2008 Mr Eslamy called into Kiwifones' retail store to discuss a vacancy for the store manager's position. He spoke to Mr El-Boutty, who advised that position was taken but a 'Vodafone Business Consultant' ("VBC") position may be available. The position was a sales position, with an emphasis on obtaining corporate customers.

[6] The two men discussed a salary and commission arrangement, as well as training requirements. Training was significant because in terms of the licensing arrangement Kiwifones' VBCs were obliged to obtain a form of accreditation known as a 'Vodafone ID' before they were able to sell Vodafone connections to customers. The 'Vodafone ID' could be obtained after completing an on-line training module, and a course in product knowledge which required attendance at Vodafone's offices.

[7] There was a discussion about whether the initial training period would be paid or unpaid, but no conclusion was reached. Mr El-Boutty told Mr Eslamy that a standard employment agreement would be issued by First Mobile's 'head office' and the matter could be resolved with reference to the contents of the agreement.

[8] Although that matter was not finalised, and the written employment agreement was not available, Mr Eslamy began work within a day or two of these conversations. His understanding was that he would spend the first two weeks in training. No-one was able to identify the precise start date, and with one exception both parties' evidence overall was vague about the dates and timing of events.

[9] Some days later the employment agreement was discussed again. Mr El-Boutty told Mr Eslamy First Mobile would release it once it had carried out background checks on Mr Eslamy. On an undetermined date in late June or early July Mr El-Boutty advised Mr Eslamy there would be a delay in obtaining the agreement while he resolved another employment matter with First Mobile.

[10] An unsigned written employment agreement dated 16 July 2007¹ was provided to Mr Eslamy on a further undetermined date, but which was probably during the second week in July 2008. It included a provision requiring payment of wages for time spent attending courses during working hours, where attendance was required by

¹ This was the date on the document.

the employer. Mr Eslamy's completion of the Vodafone training courses was so required.

[11] Mr El-Boutty and Mr Eslamy were to discuss the agreement once it was received and Mr Eslamy had considered his response to it. Mr Eslamy said in evidence that he believed the employment relationship began with his receipt of the agreement. That is not the case, and the belief does not assist with the claim for unpaid wages. However Mr Eslamy's view of the status and significance of the written agreement is relevant to the confusion about the course of the parties' relationship and how it came to an end.

[12] Mrs El-Boutty gave birth on 9 July 2008, being a date on or a few days before Mr Eslamy received the written agreement. Mr Eslamy was aware that there were difficulties with the birth. However he was not aware that a week later the baby was re-admitted to hospital. Mr El-Boutty was focussing his attention on his family's needs at the time.

[13] Meanwhile Mr Eslamy sought to discuss the employment agreement. When he had not heard from Mr El-Boutty by 16 July 2008, he sent an email message of that date which read:

'What are you up to, not answering calls and not replying, what is that about?

If you want a VBC you've got to say it. If you don't want a VBC, you've got to say it. And if you don't want to do anything, you've got to say it.'

[14] Mr El-Boutty said he does not usually communicate by email and did not see or reply to this message. In the absence of a response, Mr Eslamy decided to leave. He did not report for work again from about that date.

[15] There was no further contact until Mr Eslamy raised a personal grievance in a letter dated 8 October 2008. According to the latter, the basis of the grievance was:

'... It took more than a week to get the contract and after sending me the contract he promised we would sit down the next day and sign it.'

I didn't see Mr El-Boutty after that. I kept on going to work for another 3 or 4 days because he told me he had a baby. After the 4th day I stopped going to work because after two and a half weeks I still didn't have a contract signed. He stopped answering my calls, stopped replying to my text messages and emails. I was promised \$40k plus commission paid fortnightly and never received any payments. I was never given a reason why I was dismissed or why he didn't return any of my calls...."

Determination – the personal grievance

[16] Mr Eslamy was not dismissed.

[17] An employment relationship had commenced, although full details of its terms were to be further discussed and finalised once the written agreement was available. In general the lack of a written agreement does not mean there is no employment relationship - particularly if work begins - rather it can cause difficulties including uncertainty about the existence and content of some of the terms and conditions.

[18] When, after some two weeks, the written agreement had not been discussed and signed, Mr Eslamy left his employment for the reason set out in his letter of grievance. Matters were not helped by the failure to pay wages in respect of the initial training period, but the failure was not given as the reason for leaving.

Determination - wages

[19] Mr Eslamy was entitled to be paid for the period of his employment. The vagueness of the dates provided leads me to assess the appropriate period as 2 weeks.

[20] Mr El-Boutty sought to dispute the time spent at work and on training, but again this information was too vague to allow any finding. In any event, Mr Eslamy was entitled to be paid whether he was attending training away from the retail premises, or working or studying on the premises.

[21] There was no dispute that the salary was to be \$40,000 per annum. Mr Eslamy is entitled to payment calculated as $\$40,000/52 \times 2 = \$1,538.46$ (gross). Payment is ordered accordingly.

[22] Interest is to be paid on that amount calculated at 3% per annum from 16 July 2008 to the date of payment.

Costs

[23] Costs are reserved. Any party seeking an order from the Authority shall have 28 days from the date of this determination in which to file and copy to the other party a statement detailing what is sought and why. The other party shall have 14 days from the date of receipt of the statement in which to file and copy any reply.

R A Monaghan

Member of the Employment Relations Authority