

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

AA 271/09  
5136979

BETWEEN            AFZAL HASSAN  
                                 Applicant

AND                    SOUTH CITY AUTO TOWING  
                                 LIMITED  
                                 Respondent

Member of Authority:    Marija Urlich

Representatives:        Anne-Marie McInally, Counsel for Applicant  
                                 Douglas Cowan, Counsel for Respondent

Investigation Meeting:    7, 16 October 2008

Further Information and    20, 21 October 2008  
Submissions received:

Determination:            11 August 2009

---

**DETERMINATION OF THE AUTHORITY**

---

[1]     Mr Hassan says he worked as a tow truck driver for South City Auto from 27 March 2008 until either 9 or 20 August 2008. He says he has not been paid for this period and that he was unjustifiably dismissed. He seeks orders in relation to unpaid wages and holiday pay, remedies consequent to the claim of unjustified dismissal and an award of a penalty against the South City Auto for breaches of the duty of good faith.

[2]     South City Auto say Mr Hassan could not and did not work as a tow truck driver because he did not have the required license classification, that in relation to this the parties agreed to an unpaid training period during which Mr Hassan would prepare for and obtain the necessary classification, with South City Auto's support, that this occurred but Mr Hassan ended the relationship before he could commence tow truck driving duties.

[3] There are two elements to this employment relationship problem which create a filter through which all the evidence must be seen - the first is that Mr Hassan and the owners of South City Auto have a very close family relationship and the second that South City Auto sponsored Mr Hassan's immigration to New Zealand from Fiji for the purposes of working in their business.

[4] To determine this employment relationship problem the following issues must be resolved:

- (i) Was a New Zealand tow truck license a precondition of employment?
- (ii) Did South City Auto have an obligation to pay Mr Hassan before he gained such a license?
- (iii) Did Mr Hassan perform any work for South City Auto for which payment is due and owing?
- (iv) if these questions are answered in Mr Hassan's favour, was he dismissed and if so, was that dismissal unjustified?

**Was a New Zealand tow truck license a precondition of employment?**

[5] South City Auto is owned by Zain Khan and Nafeesa Latif, a business they purchased in 2005. Ms Latif's father, Abdul Latif is a shareholder in the business. Mr Hassan is Mr Latif's brother-in-law – their wives are sisters. Mr Khan and Ms Latif address Mr Hassan as “uncle”.

[6] The process leading up to Mr Hassan's entry to New Zealand took a considerable time, formally commencing in early 2007 when South City Auto instructed an immigration consultant to apply for approval in principal to recruit an overseas worker. Prior to that the family had discussed Mr Hassan coming to New Zealand and an unsuccessful application for a visitor's visa had been made by Mr Latif, on Mr Hassan's behalf, in 2006.

[7] In July 2007 Immigration New Zealand granted South City Auto provisional approval to recruit two tow truck drivers. The conditions of this approval are set out in a letter dated 19 July which directed that the person wishing to be considered for recruitment should apply for a work visa at their local New Zealand immigration service office and, along with that application, supply the following:

- (i) evidence of a heavy transport/vehicle driver's license equivalent to a Class 2 "V endorsed" (specific to tow truck driving) New Zealand driver's license with a minimum of three years relevant work experience;
- (ii) an offer of employment listing duties and remuneration;
- (iii) a copy of Immigration New Zealand's 19 July letter.

[8] On 14 August 2007 the Fiji Land Transport Authority issued a "to whom it may concern" letter confirming Mr Hassan held a current Fiji driving license entitling him to drive specified class and vehicle types. This document was adequate for immigration purposes but did not adequately state the weight requirements for LTSA New Zealand. This meant Mr Hassan was required to go through an exemption process when he came to apply for a New Zealand driving license.

[9] On 30 August 2007 Mr Khan wrote to Mr Hassan:

Dear Afzal

I am pleased to offer you a position as a Tow Truck Driver with South City Auto Towing Limited effective from 10<sup>th</sup> October 2007.

This job offer is valid for two years. Please find attached a job description and a copy of the employment contract outlining your employment conditions.

You will be paid \$15/hour, annual salary being \$37440.00. In addition free accommodation will be provided.

I look forward to working with you.

Congratulations and welcome to the team.

Yours sincerely

...

[10] The attached job description provides that a tow truck driver must *possess valid truck or light commercial vehicle license equivalent to NZ class. Preferably, 2 years driving experience but training provided...Comply with all company standards and LTSA requirements for vehicles and Drivers. Records all call information on Tow Authority and maintain a Log Book.*

[11] Mr Hassan signed the employment agreement on 10 September 2007 and returned it to Mr Khan. South City Auto completed the work permit application on Mr Hassan's behalf which he signed and presumably submitted to the Suva office of NZ Immigration. I record that the whole document was unable to be produced to the Authority. The application would have included New Zealand Immigration's 19 July letter to South City Auto granting provisional approval to recruit.

[12] On 28 February 2008 the Suva office of New Zealand Immigration issued Mr Hassan with a temporary permit to enter New Zealand and work here for a period of two years. The only condition placed on Mr Hassan's permit was that he work for the respondent as a tow truck driver. I record Mr Hassan's evidence that the first time he saw the 19 July letter was after the initiation of these proceedings.

[13] There is no dispute that a "V" endorsed drivers license is a necessary license classification to work as a tow truck driver in New Zealand; that is a legal obligation incorporated by necessity into the terms of the parties' employment agreement. Mr Hassan could not work as a tow truck driver until that endorsement had been gained. Mr Hassan did not gain a "V" endorsement on his New Zealand driver's license until 30 June 2008 (with a subsequent period for work experience dispensation).

[14] I therefore find a "V" endorsed driver's license was a necessary precondition

to the employment agreement the parties entered prior to Mr Hassan's arrival in New Zealand. Mr Hassan could not work as a tow truck driver in New Zealand without such a license.

**Did South City Auto have a contractual obligation to pay Mr Hassan in the period before he gained the necessary driver's license?**

[15] Mr Hassan did not gain a "V" endorsed license until three months after his arrival in New Zealand, 30 June 2008. A further period of eight weeks passed before the necessary work experience dispensation was gained. Mr Khan said this process took considerably longer than anticipated. Prior to 30 June Mr Hassan undertook the necessary preparation for this license endorsement; attending training courses, studying the Road Code, sitting tests<sup>1</sup>. As declared in the immigration application Mr Khan and Ms Latif provided Mr Hassan's accommodation. He did not pay board.

[16] The terms of employment between the parties are comprised of the offer of employment, the employment agreement, job description and relevant immigration documents. None of these documents contain a term requiring either a paid or unpaid training period prior to Mr Hassan receiving a "V" endorsement to his license.

[17] In his evidence to the Authority Mr Hassan said Mr Latif told him, before he came to New Zealand, that he would be paid when he started work and that work would commence after he had received training, that he was to bring his International driver's license with him to New Zealand and when he got here he would get a New Zealand driver's license. Mr Hassan says he did not know he would have to undergo training for a "V" endorsed license. Mr Khan says he told Mr Hassan many times before he came to New Zealand that he would be unable to work until he had received the necessary license.

---

<sup>1</sup> Mr Hassan says he worked during this time. This issue is dealt with below.

[18] There is no evidence the parties agreed Mr Hassan would be paid during the training period before he received the “V” endorsement on his license. There is no basis to imply such a term into the employment agreement.

**Did Mr Hassan perform work for South City Auto?**

[19] Mr Hassan says he commenced working for South City Auto as a tow truck driver and domestic from 27 March 2008 until 9 or 20 August 2008 when he says he was unjustifiably dismissed. He says he worked very long hours – 80 per week – for which he received no pay.

[20] With regard to the tow truck work Mr Hassan says he was told to take his international driver’s license when in the truck, taught to use a GPS system and given a log book by Mr Khan which he completed. Mr Hassan says he was directed to do numerous domestic duties which he found humiliating.

[21] South City Autos strenuously deny Mr Hassan commenced work in that business as a tow truck driver or domestic. Mr Khan said it was not possible for Mr Hassan to work as a tow truck driver because he did not have the necessary license and it was more than his business was worth to put an unlicensed driver on the road. He denies a log book was issued to Mr Hassan. No such log book was produced to the Authority.

[22] Other than Mr Hassan’s evidence, there is no evidence that he worked for South City Autos as a tow truck driver or in some related capacity. I do not find it plausible that South City Auto would take the risk Mr Hassan alleges given the highly regulated nature of the tow truck industry. There is insufficient evidence to make a finding that Mr Hassan worked as a tow truck driver for South City Auto.

[23] In relation to Mr Hassan's claim that he worked long hours as a domestic worker in the Khan household, there is no evidence to support his assertion. There is insufficient evidence to make the finding sought.

### **Conclusion**

[24] For the reasons set out above Mr Hassan's employment with South City Auto did not commence. His employment was conditional on his gaining the necessary driver's license and that process was not complete when he alleges he was unjustifiably dismissed. There is insufficient evidence to find he worked as a tow truck driver or domestic. There is no basis to consider the further claim of unjustified dismissal.

### **Counterclaim**

[25] These claims relate to the conditions of Mr Hassan's immigration status in New Zealand; Mr Khan and Ms Latif sponsored Mr Hassan's immigration and have incurred costs associated with that sponsorship. These claims fall outside any employment relationship and cannot be considered for lack of jurisdiction.

### **Costs**

[26] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then leave is granted to request a timetable be set for the filing of such within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority