

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 555
5435401

BETWEEN ONDREJ KAFKA
Applicant

A N D NEIL GOWER
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
No appearance for Respondent

Investigation Meeting: 15 November 2013 at Auckland

Date of Determination: 4 December 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Kafka) alleges that he is owed wages and holiday pay together with reimbursement of petrol costs and repayment of a small loan.

[2] Until the eleventh hour, there was limited engagement in the Authority's investigation from the respondent employer (Mr Gower). No statement in reply was filed and despite efforts by the Authority's support officer to get Mr Gower to engage in the process of the Authority, Mr Gower simply made excuses. The Authority member was prepared to attend on Mr Gower at his workplace and that offer was specifically made by the support officer. Eventually, that suggestion bore fruit and the Authority interviewed Mr Gower at his work site.

[3] Mr Gower is a house painter. Mr Kafka commenced work with Mr Gower as Mr Gower's employee on 26 June 2013 and ceased paid employment with Mr Gower on 2 September 2013. There was no written employment agreement but according to

Mr Kafka, it was agreed that the hourly rate would be \$15 per hour for each hour worked. Conversely, Mr Gower said that that may have been the start figure but once he assessed Mr Kafka's skills as a painter, the rate was reduced to \$13.75, the minimum rate of pay for an adult worker.

[4] There is dispute about the incidence of tax on either sum. Neither party seemed entirely clear whether the hourly rate was gross or not. Having reflected on the evidence it heard, the Authority is satisfied that the parties did not reduce the hourly rate from \$15 to \$13.75 and that the hourly rate was net of tax, not gross. The Authority prefers the higher wage rate because it is the basis of the calculation on which the parties seem to have agreed in a document dated 16 September 2013 (about which more later), and for the same reason adopts the net of tax position because that is how the parties' agreement was expressed.

[5] Mr Kafka was not a tradesman painter but he had had some practical experience in painting and enjoyed working with his hands.

[6] When he commenced the employment, Mr Gower had a number of jobs around Auckland city but no transport to move around and Mr Kafka willingly agreed to effectively provide his vehicle for the purposes of the business.

[7] There was an initial difficulty with a job at 885 New North Road where Mr Gower had left Mr Kafka in sole charge and there were subsequent complaints from the property owner which led to the contract with Mr Gower being cancelled. As a sign of good faith, Mr Kafka says he accepted he was partly to blame and gave Mr Gower \$200 for the lost job but then lent him a further \$300. That is not all accepted by Mr Gower but what is beyond doubt is that the loss of the job cost Mr Gower significant lost income and he blames Mr Kafka for that loss. Mr Kafka accepts some of the blame but retorts that he was never a tradesman painter, never held himself out to be a tradesman painter, and even at one point offered to make over to Mr Gower his tax refund which he estimated would be around \$1,000 to partly compensate Mr Gower for the lost work.

[8] However, the short point is that Mr Gower ought to have either not left Mr Kafka in sole charge of the job, if he had any doubts about Mr Kafka's ability or, in the alternative, stayed himself to supervise. He did neither of those things and in the result suffered a loss for which the Authority is satisfied he is solely responsible.

It is not fair or just for an employer to allocate work to an employee for which the employee has insufficient skill and the complain when the job goes wrong.

[9] The parties agreed on the use of Mr Kafka's vehicle and the effect of that agreement was that the vehicle could be used by Mr Gower for business purposes provided he paid the fuel costs.

[10] Mr Kafka's evidence is that after the initial difficulty which the Authority referred to at 885 New North Road, Mr Kafka became a competent painter although he acknowledged that he was not fast. He told the Authority (and the Authority accepts) that whenever Mr Gower had to take any remedial action as a consequence of Mr Kafka's work, Mr Kafka did not count the hours that he had spent on that job.

[11] Mr Kafka described how various wage payments were made by Mr Gower to him on account but wage payments were always behind. Mr Kafka said that after about two and a half weeks on the job Mr Gower paid him \$300, a further \$700 was paid after six weeks on the job, and then two weeks later another \$600 was paid. In addition, Mr Gower would buy small amounts of petrol for Mr Kafka's car (usually \$10-\$20 worth of fuel) but Mr Kafka's evidence (which again the Authority accepts) is that the amount of fuel used was much more.

[12] Six weeks into the employment, Mr Kafka sought to leave, essentially because he was not being paid, but Mr Kafka says Mr Gower threatened him that if he left, Mr Gower would deduct from what was owed to Mr Kafka all of the costs lost on the 885 New North Road job. Mr Gower denies the threat but does concede he was displeased by the loss of that job. Mr Kafka described to the Authority the anxiety that that threat caused him and as a consequence, he decided to remain in the employment in the hope that he would eventually be paid what was owed to him.

[13] Eventually, Mr Kafka decided to terminate the employment and he had difficulty then getting his car back from Mr Gower particularly as he discovered that Mr Gower had removed the spare tyre.

[14] There were numerous discussions about payment of the outstanding monies and in an effort to get some commitment, Mr Kafka even proposed to send Mr Gower his tax refund as part additional compensation for any contribution Mr Kafka had made to the unsatisfactory job at 885 New North Road.

[15] Then on 16 September 2013, Mr Kafka got Mr Gower to sign a document in the following terms:

I NEIL GOWER WILL PUT EVERY WEEK MINIMUM OF NZ\$700 ON ACCOUNT OF JANA RAJCOKOVA ANZ 01-0194-0410138-00 UNTIL THE AMOUNT NZ\$3,700 IS FULLY PAID. PAY WILL BE DONE EVERY WEEK UNTIL FRIDAY 5PM.

*SIGNED: NEIL GOWER
16/09/13*

[16] Despite that statement, no payment was made and in the absence of any effort by Mr Gower to meet his obligations, Mr Kafka filed proceedings in the Authority.

[17] Mr Kafka made clear to the Authority in his oral evidence that he was satisfied that Mr Gower had never accounted to the Inland Revenue Department for the income tax on the money already paid and he imagined that even if Mr Gower were to pay the balance of the money owed as wages, he would not attend to the payment of the income tax on that amount either.

Determination

[18] Mr Kafka has supplied the Authority with a comprehensive set of documents including in particular a schedule of hours worked and the payments to be derived from those hours.

[19] In the absence of any records from Mr Gower, the Authority is entitled to treat the records provided by Mr Kafka as an accurate representation of the hours that he worked and the wages that had derived from those hours, and the Authority chooses to adopt that approach in reliance on s.132 of the Employment Relations Act 2000.

[20] Moreover, the amount claimed by Mr Kafka as a consequence of the records just referred to is accepted by Mr Gower because that is the same amount which is incorporated in the undertaking signed by Mr Gower on 16 September 2013 wherein he commits to pay \$700 per week to clear the total indebtedness to Mr Kafka of \$3,700. On that basis alone, the parties are at one on what Mr Gower owes Mr Kafka.

[21] It is true that Mr Gower says he was “threatened” by Mr Kafka and “forced” to sign the agreement. The Authority has difficulty accepting that claim. First, Mr Gower is a man of some physical substance while Mr Kafka is of slight stature. It seems unlikely to the Authority, given that physical disparity, that a threat could have

so overborne the will of Mr Gower that he signed the document under duress. Second, Mr Gower is a New Zealander established in the New Zealand community while Mr Kafka is an overseas national. It seems more likely than not that a New Zealand national would have more opportunity and ability to “force” an agreement, than the other way around. Third, given Mr Gower’s failure to make any payments on account and his failure to engage with the Authority’s investigation until the Authority went to the extent of visiting him on a work site, the Authority feels entitled to prefer Mr Kafka’s evidence on the point.

[22] However, what the Authority does accept from the evidence taken from Mr Gower is that the proposal he pay \$700 a week was always quite unrealistic. The Authority accepts he simply does not have that amount of uncommitted weekly income. That said, Mr Gower did confirm he agreed he owed Mr Kafka \$3,700 net and would pay that sum to Mr Kafka over time. That is notwithstanding Mr Gower’s contention that he did not receive loans from Mr Kafka or owed Mr Kafka money for petrol. The Authority prefers Mr Kafka’s evidence of these items; if Mr Gower did not owe these sums, it is difficult to understand why he would accept and sign the agreement, with the breakdown of what was owed, attached. The Authority has already rejected Mr Gower’s contention that he was forced to sign the agreement.

[23] As just noted, that sum of \$3,700 is not just wages. When Mr Kafka got Mr Gower to sign his undertaking to pay that amount off by instalments, he provided Mr Gower with a comprehensive written statement of what was owed and how that sum was broken down. The wages totalled \$4,110 net, there was an amount of \$983 for fuel, and an amount of \$462 for loans made by Mr Kafka to Mr Gower. From the subtotal aggregate of those three items, Mr Kafka has deducted the total amount that Mr Gower paid him (\$1,945) which achieves the outstanding balance of \$3,610 which has been rounded up by the parties to \$3,700 in the undertaking that Mr Gower signed.

[24] In the normal course of events, there might be a difficulty in Mr Kafka claiming repayment of the loans that he made to his employer because it might be contended that the loan monies were not an incident of the employment relationship at all and therefore could not be said to be “*a cause of action, the essential character of which is to be found entirely within the employment relationship itself*”: *BDO Grange Limited v Parker* (High Court, Auckland, CIV-2005-404-993, 19 July 2005) applied.

Indeed, all that can be said is that the parties to the loan were known to each other because of the pre-existing employment relationship.

[25] But while there might be a difficulty of enforcement in the normal course, in the present case there is an additional factor; it is of course that Mr Gower has accepted the repayment of the debt as part of the obligation to repay the total sum of \$3,700, a breakdown of which he was supplied with prior to executing the undertaking. On that basis then, the Authority is satisfied that it can find that the parties are at one on the repayment of all of the sums incorporated within the undertaking signed by Mr Gower.

[26] That also applies to the reimbursement of fuel used by Mr Gower for the purposes of his business in the operation of Mr Kafka's car. Of course, even in terms of the test in *BDO Grange*, there is an argument for the view that fuel for a vehicle used for business purposes by the employer is in truth a cause of action entirely within the employment relationship.

[27] What is excluded from the undertaking signed by Mr Gower is first of all his obligation to account to the revenue for income tax on the wages paid to Mr Kafka, and secondly, the payment of holiday pay which was not included in the undertaking Mr Gower signed on 16 September 2013. The reason that holiday pay was not included is simply that Mr Kafka was not aware at the time that he got Mr Gower to sign the document that he was entitled to holiday pay being a foreign national and not being as cognisant of the law in this country as a New Zealand resident might have been. Mr Kafka told the Authority that he had decided to ask the Authority to award holiday pay although Mr Gower had not committed to paying that sum, because Mr Gower had failed to honour his obligations to make any payment at all under the undertaking that he signed.

[28] On that basis then, according to the wage records which the Authority has accepted, the total wages earned by Mr Kafka during the employment amounted to \$5,137.50 gross. Calculation of holiday pay for an uncompleted year of service at the time the employment comes to an end is at the rate of 8% of the employee's gross earnings. Holiday pay is accordingly \$411 gross for the period in question.

[29] The Authority now directs that Mr Gower is to pay to Mr Kafka the following sums:

- a. \$3,700 net in respect to wages and reimbursement of other sums in accordance with the undertaking made by Mr Gower and dated 16 September 2013;
- b. Holiday pay in the sum of \$378.80 net;
- c. The Authority's filing fee in the sum of \$71.56 net.

[30] It follows that the total amount owed by Mr Gower to Mr Kafka is \$4,150.36 net.

[31] In addition, Mr Gower is to account to the Inland Revenue Department for the tax on the sums paid to Mr Kafka and to assist the Commissioner in that regard, a copy of this determination is to be supplied by the support officer to the Inland Revenue Department at Auckland. Because the wage payments to Mr Kafka are expressed as net payments, Mr Gower is responsible for payment of the income tax.

[32] For the avoidance of doubt, the payments to Mr Kafka are to be made by Mr Gower to the bank account he undertook to make payments to (but failed so to do) being 01-0194-0410138-00 and payment of the full amount set out in this determination is to be made at the rate of \$100 per week, starting immediately.

James Crichton
Member of the Employment Relations Authority