

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 337/07
5086509

BETWEEN EVERSON JUDE SILVA
 KARUNANAYAKE
 Applicant

AND AAA PARTS & AUTO
 SERVICES LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: In person
 Arshard Fayyaz, Director of Respondent

Investigation Meeting: 28 June 2007 and 17 October 2007

Determination: 29 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Karunanayake was employed as an auto mechanic in Mr Fayyaz’s business (“AAA”) from 31 July 2006 until 5 March 2007. He seeks payment for all hours worked during his employment, at the agreed rate, and payment of holiday pay.

[2] In the statement of reply, filed on behalf of AAA by Mr Fayyaz, AAA says Mr Karunanayake has received the full entitlement due to him under the employment agreement, that Mr Karunanayake offered to settle his claim for three weeks wages and that his claim is exaggerated and without justification.

[3] The issues for the Authority to determine are what Mr Karunanayake’s hourly rate was and if he was paid for all hours worked during his employment with AAA.

The investigation of this employment relationship problem

[4] Mr Karunanayake lodged his claim for wage arrears in the Authority on 4 May 2007. AAA did not file a statement of reply within the statutory time frame. After the expiry of this time frame the Authority wrote to AAA and made telephone contact with Mr Fayyaz requesting a statement of reply. Nothing was filed.

[5] On 11 June 2007 a notice of investigation meeting for 28 June 2007 was served on Mr Fayyaz.

[6] The investigation meeting proceeded on 28 June 2007 but was adjourned part heard because the Authority required the assistance of a translator in order to take Mr Karunanayake's evidence and Mr Fayyaz would not desist from using unacceptable language.

[7] In a minute dated 28 June 2007 I recorded the reasons for the adjournment and directed AAA to provide copies of Mr Karunanayake's wage, time and holiday records by 5 July 2007. AAA filed some material on 29 June 2007 but did not comply with the direction to provide the wage, time and holiday records. On 12 July 2007 I wrote a further minute requesting the Labour Inspectorate uplift those documents. The Labour Inspectorate's attempts to do so were unsuccessful. The investigation meeting was rescheduled to 9 August 2007. On 25 July 2007 AAA provided the Authority with copies of time records. On 7 August 2007 AAA lodged a statement of reply with the Authority. The 9 August 2007 investigation meeting was rescheduled to 23 August 2007 because translation services were unable to be secured. On 22 August 2007 Mr Fayyaz wrote to the Authority seeking an adjournment of the next day's investigation meeting due to the ill health of a close family member. The adjournment was granted on 23 August 2007 and the investigation meeting rescheduled to 17 October 2007. Notices of the new investigation meeting were sent to the parties. On 15 October 2007 the Labour Inspectorate provided a calculation of Mr Karunanayake's gross earnings and holiday pay, calculated at minimum wage rate.

[8] AAA did not attend at the scheduled start time of the investigation meeting. At 10.05am the support officer assigned this application telephoned the number

provided on the statement of reply, advised an investigation meeting was scheduled for that day and asked to speak with Mr Fayyaz. She was advised Mr Fayyaz was not in and would be in tomorrow. Her request for a mobile telephone number on which to contact him was declined.

[9] At 10.20am I proceeded with the investigation meeting in the absence of AAA satisfied that AAA had been properly notified of the investigation meeting scheduled for that day and that the Authority had taken reasonable steps to contact AAA and Mr Fayyaz to ascertain their whereabouts.

[10] On the afternoon of 17 October 2007, after the conclusion of the investigation meeting, Mr Fayyaz contacted the support officer to explain his non-attendance. Later, that same day, he faxed a letter to the Authority apologising for his absence, explaining that he was under considerable personal stress due to the continued ill health of a close family member, that he thought the investigation meeting was on 18 October 2007 and asking that the Authority not issue any determination until he had had an opportunity to respond to the evidence. In a minute dated 18 October 2007 this request was declined. The investigation is concluded. It is now time to determine the issues before the Authority.

Hourly rate

[11] The parties entered a written employment agreement dated 13 July 2006. The key terms of the agreement are that Mr Karunanayake will work 40 hours per week and receive \$15 per hour. These key terms are repeated in a letter of offer from Mr Fayyaz to Mr Karunanayake dated 13 July 2006 and a "to whom it may concern" letter under Mr Fayyaz's name dated 9 November 2006.

[12] Due to Mr Karunanayake's immigration status his employment with AAA was subject to his having a valid work permit. This condition was satisfied from 28 July 2006, the date his work permit was issued, and he says he commenced employment following that issuing date on 31 July 2006. I accept this was the case.

[13] At the first investigation meeting Mr Fayyaz said Mr Karunanayake agreed to work for \$11 per hour. He was unable to provide any details of when this alleged

variation to the terms of the written agreement was entered or documentation recording the variation. Mr Karunanayake denied that he had agreed to vary the hourly rate.

[14] I do not accept that Mr Karunanayake and Mr Fayyaz agreed to a rate of pay of \$11 per hour. Mr Karunanayake's rate of pay is \$15 per hour as stated in the written employment agreement entered by the parties.

Hours worked

[15] Mr Karunanayake referred the calculation of his wage arrears to the Labour Inspectorate. The calculation provided shows Mr Karunanayake worked 1345 hours during his employment and that 5 statutory holidays fell within that period. The calculation is made using Mr Karunanayake's own records of his working hours. These records include overtime hours and hours worked on Saturdays. Mr Karunanayake said all hours worked were at Mr Fayyaz's request.

[16] During his employment with AAA Mr Karunanayake says he received 18 payments totalling \$7,045.00. The first 8 were cash payments. The remaining 10 were deposited into Mr Karunanayake's bank account. He has provided his bank records which show these deposits. Mr Karunanayake received no pay slips. The sums vary from \$20 to \$960.

[17] AAA provided a spreadsheet which purports to show a break down of Mr Karunanayake's wages. This spreadsheet shows Mr Karunanayake was paid in cash and bank deposits during his employment and that these payments total \$13157.00.

[18] AAA has also provided a letter from its accountant, M.T. Khan, of Business Accounts & Tax Limited, detailing wage and PAYE payments for Mr K for the period of his employment. These payments total \$11,960 (gross).

[19] Further AAA's record of hours worked by Mr Karunanayake would entitle him to net total wages of \$8859.53. The differences between AAA's documents are not readily explicable. I am not satisfied that I am not able to rely on AAA's records.

Determination

[20] Mr Karunanayake struck me as a sincere and careful witness. I am satisfied that he has kept an accurate record of the hours he worked for AAA and that he is entitled to be paid for the hours that he worked at the hourly rate for which he agreed to work. The following orders are made:

(i) Hourly rate differential in wages paid

Mr Karunanayake has received wages totalling \$7045.00 (net) (gross figure of \$8,750.50), payment for 795.5 hours at \$11/hr.

The payments should be grossed up to \$15/hr, totalling outstanding wages of \$3182.00 (gross), being the difference between net payment received and gross payment entitled to under the agreed terms for 795.5 hours worked.

AAA PARTS & AUTO SERVICES LIMITED is ordered to pay EVERSON JUDE SILVA KARUNANAYAKE wage arrears of \$3182.00 (gross).

(ii) Unpaid Wages

Mr Karunanayake seeks payment for unpaid hours worked totalling 592 at the rate of \$15/hour = \$8,880.00 (gross)

AAA PARTS & AUTO SERVICES LIMITED is ordered to pay EVERSON JUDE SILVA KARUNANAYAKE wage arrears of \$8,880.00 (gross).

(iii) Holiday Pay

6% of gross earnings (gross earnings total \$20,812.50) = \$1248.75 (gross)

AAA PARTS & AUTO SERVICES LIMITED is ordered to pay EVERSON JUDE SILVA KARUNANAYAKE holiday pay of \$1248.75 (gross).

(iv) Interest

AAA PARTS & AUTO SERVICES LIMITED is ordered to pay EVERSON JUDE SILVA KARUNANAYAKE interest on the total wage arrears and outstanding holiday pay from date of determination until date of payment calculated at the rate of 9% per annum.

(v) **Costs**

AAA PARTS & AUTO SERVICES LIMITED is ordered to pay EVERSON JUDE SILVA KARUNANAYAKE \$70, by way of reimbursement of the filing fee incurred in brining this application.

Marija Urlich

Member of the Employment Relations Authority