

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 731
5647029

BETWEEN	MICHAEL KELLEC Applicant
AND	JEFFREY PATERSON First Respondent
AND	IMAGES HAIR CLINIC 2011 LIMITED Second Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person
Craig O'Connell, advocate for the First and Second
Respondents

Investigation Meeting: 16 July 2018 at Wellington

Date of Determination: 20 December 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a statement of problem received by the Authority on 28 October 2016, Mr Michael Kellec said he was owed arrears of wages by Mr Jeffrey Paterson, the then sole director of the Images Hair Clinics 2011 Ltd (the Clinic). In an amended statement of problem, lodged 14 months later, he further claims he was unjustifiably dismissed.

[2] Mr Paterson denies monies are owed to Mr Kellec or that he was unjustifiably dismissed. He accepts there was an initial intention to employ Mr Kellec but says no offer of employment was ever made. He further says a personal grievance alleging an unjustified

dismissal was not raised within 90 days of the date on which Mr Kellec alleges he was dismissed, and says the Authority has no jurisdiction to determine that matter.

[3] As is permitted by s 174 of the Employment Relations Act 2000 (“the Act”) I have not referred to all the information provided to the Authority over the course of the investigation. Rather, this determination has made findings of fact and law necessary to dispose of Mr Kellec’s claims.

The Authority’s investigation

[4] The investigation of Mr Kellec’s claims has proved to be challenging, and the dispute between the parties has been marked by heightened animosity where the parties had previously enjoyed a close friendship.

[5] Mr Kellec was self-represented but supported by his house-mate, Mr Stephen McTague, throughout the Authority’s investigation.

[6] Mr Paterson initially refused to accept service of any documents related to Mr Kellec’s claims. When he finally engaged in a case management conference he resisted having any contact with Mr Kellec citing concerns about his health and safety if he did so. During this discussion the Authority directed the Clinic be joined as a second respondent where it was unclear who was the correct identity to answer Mr Kellec’s claims.

[7] As matters progressed Mr Paterson obtained representation and the parties were directed to mediation, although I understand Mr Paterson did not personally attend. The claims were not resolved and a date on which the Authority would investigate the claims was agreed.

[8] Unfortunately Mr Paterson became significantly unwell (supported by medical evidence) and the investigation into Mr Kellec’s claims was adjourned to allow for Mr Paterson’s recovery.

[9] An investigation meeting was held on 16 July 2018. Towards the end of the meeting the parties agreed further mediation might be useful. The parties were then directed to mediation to allow them an opportunity to settle their differences and the Authority’s granted an adjournment.

[10] For reasons that remain unknown, the parties did not attend mediation until early 2019. Unfortunately it was not clear that the matter remained unresolved until after 3 months had passed following that event.

[11] This determination has been issued outside the timeframe set out at s 174C(3)(b) of the Act in circumstances where the Chief of the Authority has decided exceptional circumstances provided cause for the delay.¹

Background

[12] Prior to the events leading to Mr Kellec's claims, he had occasionally visited the Clinic for services, and both he and Mr McTague knew Mr Paterson socially.

[13] On 26 May 2016 the threesome met by chance. Mr Kellec had earlier that day applied for assistance from Work and Income having recently left his job. He indicated however that he was in need of new employment so as to continue his apprenticeship as a hairdresser.

[14] The conversation progressed to a discussion about whether Mr Kellec should join Mr Paterson at the Clinic. Mr Paterson says he offered to have Mr Kellec "*hang out*" and "*assist*" at the Clinic "*to see if there was a future*".² The arrangement was not recorded in writing, but there appears to be no dispute that the parties agreed to a trial period albeit Mr Paterson described the arrangement as an assessment period. The duration of the trial/assessment was not defined by the parties. I accept it likely that there was a discussion about a suitable rate of pay for Mr Kellec but I am equally satisfied no firm agreement was made on at the issue at the time.

[15] Mr Kellec first attended the Clinic on 7 June 2016. He estimates that between this date and 5 August 2016 he worked Monday to Saturday (inclusive) starting at 9 or 10 am until 7-8 pm each evening.

[16] Mr Kellec says he undertook reception and cleaning duties, and provided chair assistance to a hairdresser who worked under a contract for services (an independent contractor) to the Clinic.

¹ Above, s 174C(4)
² Statement in Reply

[17] Mr Kellec says his requests for a written employment agreement and to fix his hourly rate of pay were routinely met by Mr Paterson's agreement that these matters "*needed to be sorted*". He says Mr Patterson would then fail to appear at the time scheduled to finalise those matters.

[18] Mr Paterson's evidence is that he offered to have Mr Kellec at the Clinic to provide him with a collegial environment at a time when Mr Kellec was in need of support. He states his initial plan was to open the Clinic on Saturdays and have Mr Kellec operate as sole charge which would provide him with a supplementary income.

[19] Mr Paterson says Mr Kellec was assessed by the contractor within a day (or so) after starting at the Clinic and she formed a view that Mr Kellec had overstated his experience.³ Mr Paterson says he needed more time to see if Mr Kellec would develop the skills needed, but accepts he did not discuss that matter with him.

[20] According to Mr Paterson, Mr Kellec was still under assessment when he travelled to Auckland on Friday 5 August 2016 for a brief excursion.

[21] Mr Kellec says prior to his departure Mr Paterson agreed to place monies into his bank account the following day (Saturday). He furnished a copy of a text message he had sent to Mr Paterson setting out his bank account details to demonstrate the agreement.

[22] Mr Kellec did not return to the Clinic.

[23] Over August and September he sent a number of text messages to Mr Paterson which reflect his growing dissatisfaction that he had not received the monies he says were promised. The messages appear to have gone unanswered until the afternoon of 28 September 2016 when Mr Paterson sent him a text message and, amongst other things, asked Mr Kellec to make contact.

[24] Arrangements to meet did not eventuate and an argument between the parties ensued over the phone the following day. I shall return to detail the material portion of their exchange later in this determination, but the issue concerning wages was not resolved. The discussion ended with each party making various threats to take legal action against the other.

[25] Mr Kellec lodged a statement of problem with the Authority shortly thereafter.

³ Witness Statement, paragraph [8]

The issues

[26] The Authority is required to determine:

- (a) whether Mr Kellec was an employee and if so was he employed by Mr Paterson and/or the Clinic;
- (b) whether Mr Kellec is owed wages;
- (c) whether Mr Kellec raised a personal grievance.

Was Mr Kellec an employee?

[27] As noted, the crux to Mr Paterson's defence against Mr Kellec's claims is that Mr Kellec's skills did not reach a standard by which he was willing to offer him a position of employment. He says no offer of employment was made and Mr Kellec was never an employee.

[28] It is necessary to examine whether Mr Kellec became an employee. Section 6 of the Employment Relations Act 2000 (the Act) defines an employee in the following way:

6 Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee**—
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes—
 - ...
 - (ii) a person intending to work; ...

[29] At section 6(1)(c) the Act then states that the meaning of employee excludes-

- (i) a volunteer who does not expect to be rewarded for work to be performed as a volunteer; and
- (ii) receives no reward for work performed as a volunteer.

[30] In *Brook v Macown*⁴ the Court referred to the meaning of employee under s 6 of the Act and noted at [18]:

If the requirement of section 6(1)(c)(i) and (ii) are met it follows that they are not an employee. However it does not follow that they are an employee if these requirements are not met. That is because subsections (2) and (3) require a more expansive analysis.

[31] Section 6(2) states, to the effect, that when deciding whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them. The essence of s 6(3) requires that the court or Authority must consider “all relevant matters”.

Unpaid assessment or work?

[32] I am unwilling to accept that the absence of a signed written employment agreement demonstrates a contract of service was never established between the parties. Nothing in s 6 requires a contract of service to be writing before a person may be regarded as an employee. Nor do I accept that an agreement between parties that the prospective employee undertake a trial or assessment period precludes the formation of an employment relationship.

[33] In the Court’s judgment of *Salad Bowl Ltd v Howe-Thornley*⁵ Chief Judge Colgan (as he was then) applied s 6(1) to circumstances where the applicant undertook a purported pre-employment trial, for three hours split over two days, said by the respondent to assess the applicant’s suitability for a potential job.

[34] In that case, the Chief Judge found that if the person undertaking the trial expects to be rewarded for it, and they are doing work which is of value to the employer, it is likely an employment relationship exists. He referred to circumstances where a prospective employee may attend a workplace to observe the nature of the work performed there would unlikely amount to work in an employment relationship. He went on to state:⁶

Where the reasonableness line is likely to be crossed most commonly and “work” may be engaged in, for which there may well be a requirement for payment as well as where other incidents of an employment relationship arise, is where the employer gains an economic benefit from the employee’s activity.

[35] Mr Paterson described the work Mr Kellec undertook as “minor fiddling” - the implication being that Mr Kellec did not work in such a way that the business derived a benefit from it.

[36] In *Salad Bowl* the then Chief Judge noted that the work performed by the applicant in that instance may not have greatly advanced the economic and business interests of the

⁵ [2013] NZEmpC 152

⁶ Above at [27]

employer where she needed to be shown what to do, but he found the applicant nevertheless performed work for the employer which contributed to its business.⁷

[37] I find it likely Mr Kellec did not perform the range of functions Mr Paterson envisaged, or that all of his work could be directly charged back to a client. But Mr Paterson agreed Mr Kellec provided chairside assistance for the contractor, including washing and styling hair and wig pieces for clients, and I am satisfied these services were ultimately charged to clients and provided an economic benefit to the Clinic.

Was Mr Kellec a volunteer?

[38] As set out at s 6(1)(c) a person who does not expect to be rewarded for work performed as a volunteer and received no reward for work performed as a volunteer is not an employee.

[39] Mr Paterson says Mr Kellec had made it clear to him he was on a sickness benefit. The inference I understand he wishes the Authority to take from this statement is that Mr Kellec conveyed to him that he had no expectation for payment over the assessment period. The evidence does not support Mr Paterson's position on this point.

[40] There are a range of factors which I find demonstrate both that Mr Kellec had an expectation he would be paid, and his expectation was a reasonable one to hold.

[41] Firstly, there is no evidence that the parties agreed the trial/assessment period would go unpaid. Next, there is a text message dated 12 July 2016 sent by Mr Paterson to Mr Kellec noting "*need to chat about hourly rate etc*". Mr Paterson further accepts he gave Mr Kellec \$300 in cash on or about 21 July 2016.

[42] I do not find it credible that this sum was given as a gift as Mr Paterson reports. Mr Paterson further agreed under questioning that he "*stalled*" finalizing Mr Kellec's requests for an employment agreement and wages but did not communicate the delay was a consequence of growing doubts about Mr Kellec's suitability for a position. Finally, the text message sent by Mr Paterson on 28 September 2016 to Mr Kellec advised "*...need to establish what's owing and get you[r] sorted*".

[43] I am satisfied by the evidence that Mr Kellec was not a volunteer.

⁷

Above at n5

The true nature of the relationship

[44] It is not disputed that on 26 May 2016 Mr Paterson offered to have Mr Kellec work at the Clinic. I have found Mr Kellec's work provided a benefit to the Clinic even if not at the level hoped for by Mr Paterson. Mr Kellec received some reward for his work. It follows from these conclusions Mr Kellec was an employee according to the statutory criteria at s 6(1) of the Act.

[45] Against that finding, Mr Paterson says that there was no requirement for Mr Kellec to work any particular hours of work and he was free to come and go as he pleased. This factor was emphasised at the investigation meeting to demonstrate Mr Kellec cannot have been an employee in circumstances where he was neither controlled by the respondents nor integrated into the operation of the business.

[46] There is evidence that Mr Kellec was away from the work place from time to time. Nor does it appear he was required to provide Mr Paterson advance notice of his absence.

[47] On balance, I find this practice was accepted by Mr Paterson where Mr Kellec was still not entirely well, and was a feature of the casual nature of the relationship. I do not accept Mr Kellec was not controlled or supervised at work given Mr Paterson's evidence that Mr Kellec remained under assessment for the duration of his attendance at the Clinic.

[48] The parties' loose arrangement regarding attendance does not alter my conclusion that Mr Kellec was an employee.

[49] I need to note Mr Paterson's written evidence asserts he would only have ever offered Mr Kellec a contract for services (an independent contractor arrangement as opposed to that of an employee) if he had wished to establish a relationship between them. He did not pursue this position when questioned by the Authority and I do not need to explore this matter further.

Was Mr Kellec employed by Mr Paterson personally, or by the Clinic?

[50] There is some evidence that Mr Kellec undertook occasional activities for another business Mr Paterson owned and for a café Mr Paterson was contemplating investing with.

[51] Having heard the evidence of both parties I am satisfied the claims raised by Mr Kellec are properly against the Clinic as his employer and not Mr Paterson personally.

Are wages owed?

[52] Having found Mr Kellec was an employee he is owed wages for his work. At issue is the quantum of hours for which Mr Kellec should be paid.

[53] Mr Kellec's statement of problem claimed he is owed \$4,880 (gross) at the then minimum wage of \$15.25 per hour. That sum equates to 320 hours of work (or 40 hours per week) over 8 weeks.

[54] In preparation for the Authority's investigation, Mr Kellec provided time sheets which he says reflect the hours he worked albeit he concedes the documents were created after his employment ended.

[55] Mr Paterson says the time sheets should not be relied on where, for example, hours of work have been claimed when the Clinic was not open.

[56] I agree there are several instances where hours of work claimed cannot be correct where text messages sent to from Mr Kellec to Mr Paterson indicate he cannot have been at work at that time.⁸

[57] Under questioning by the Authority Mr McTague estimated Mr Kellec attended the Clinic on average 4 days per week. I consider his response is likely the most reliable evidence on the matter.

[58] I also accept Mr Paterson's testimony that the Clinic's operating hours fluctuated according to client demands and I am not persuaded Mr Kellec's hours of work were as uniformly regular as those set out in his evidence.

[59] Taking the above evidence into account, I find Mr Kellec is owed wages corresponding to 4 days of work per week at 8 hours per day at the rate of \$15.25 per hour over 8 weeks. Minus the sum of \$300 which I find has already been paid I calculate Mr Kellec is owed wages of \$3,604 (gross).

Was a personal grievance for an unjustified dismissal raised in accordance with statutory requirements of the Employment Relations Act at s 114.

⁸ For example: Mr Kellec claimed a total of 18 hours work over 4 and 5 July 2016 but a text message dated 5 July 2015 reflects Mr Kellec did not attend the Clinic over the same timeframe.

[60] Section 114 of the Employment Relations Act 2000 requires every employee who wishes to raise a personal grievance to do so within 90 days beginning with the date the action which is alleged to amount to a personal grievance occurred or came to the notice of the employee.

[61] *Creedy v. Commissions of Police*⁹ is the leading case concerning what is required to raise a grievance. In that case the Court said:

[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance...¹⁰

...

[62] Mr Kellec says he raised a personal grievance regarding his dismissal during the telephone call with Mr Paterson on 28 September 2016. Ms McTague says he was present when Mr Kellec spoke to Mr Paterson, and both Mr Kellec and Mr McTague provided several signed statements setting out the nature of the exchange with Mr Paterson.

[63] I need to comment that there was notable difference to the content of the statements provided to the Authority before Mr Kellec amended his claim to include an unjustified dismissal, and the statements provided after. In the former, both individuals say Mr Kellec informed Mr Paterson he would “*take this legal*” whereas in the latter statements Mr Kellec and Mr McTague each say Mr Kellec said he would “*take a grievance*”.

[64] In *Creedy* the Court found there is no requirement that any particular words are to be used when raising a grievance. It observed “*What is important is that the employer is made aware sufficiently of the grievance to be able to respond ...*”¹¹

[65] At the Authority’s investigation Mr Kellec agreed that the argument with Mr Paterson on 28 September 2016 was about whether Mr Paterson owed him wages.

[66] I am not satisfied a personal grievance was raised concerning the way his employment ended.

⁹ [2006] 1 ERNZ 517

¹⁰ At [37]

¹¹ Above

[67] There is no evidence that a personal grievance for an unjustified dismissal was raised until well over a year after Mr Kellec's employment had ended. Despite an assertion in the amended statement of problem that Mr Kellec had received legal advice regarding the personal grievance claim,¹² no application for leave to raise the personal grievance out of time was made pursuant to s 114(3), and Mr Kellec's personal grievance claim is dismissed.

Orders

[68] Images Hair Clinic 2011 Limited is ordered to pay wages arrears of \$3,604 (gross) to Mr Michael Kellec.

Costs

[69] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

¹² In the Amended Statement of Problem dated 2 December 2017