

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Matthew Levy (First Applicant)
AND Jordan Pierce (Second Applicant)
AND Kim Larson (Third Applicant)
AND Matthew Eke (Fourth Applicant)
AND Jim Rooney (Fifth Applicant)

AND Phoenix Flight Limited (Respondent)

REPRESENTATIVES Kim Larson in person
Matthew Eke in person
Matthew Levy by telephone
Jordan Pierce by telephone
No appearance for Respondent

MEMBER OF AUTHORITY Helen Doyle

INVESTIGATION MEETING 21 March 2006

DATE OF DETERMINATION 27 March 2006

DETERMINATION OF THE AUTHORITY

[1] The five applicants, Matthew Levy, Jordan Pierce, Kim Larson, Matthew Eke and James Rooney were all employed by the respondent company, Phoenix Flight Limited (“Phoenix Flight”) between 1 October and 9 December 2005.

[2] Messrs Levy, Pierce, Eke and Ms Larson were employed as ground crew and shop assistants. Mr Rooney was employed as a hang glider tandem pilot and tow pilot.

[3] All the applicants are in New Zealand on work permits and were, at the time of lodging their application, scheduled to travel overseas.

[4] The applicants described the respondent in their statement of problem as Danna Burton who is a director of Phoenix Flight.

[5] The statement of problem, which was recorded as lodged with the Authority on 15 February 2006, was served on Ms Burton on that same day by courier post at 5.11pm. The problem concerned unpaid wages and holiday pay.

[6] The matter was assigned some urgency given the applicants imminent travel overseas.

[7] A telephone conference was scheduled to be held on 3 February 2006. Ms Burton was written to by a support officer on 21 February 2006 advising of the date, time and purpose of the telephone

call. Ms Burton was advised that a call would be made to her cell phone. The support officer also indicated in the letter to Ms Burton that it was likely that an investigation meeting would be scheduled in Queenstown at the same time and place as another matter against Phoenix Flight Limited CEA 8/06.

[8] On 3 February 2006 there was an unsuccessful attempt to call Ms Burton on both her cell phone number and a landline number. The telephone call then proceeded with Mr Levy as representative for all the applicants.

[9] The matter was set down for an investigation meeting in Queenstown on 21 March 2006. Mr Levy indicated that he and Mr Pierce would not be able to attend the investigation meeting in person as they would be in Auckland and then departing overseas. It was agreed that I would telephone Mr Levy and Mr Pierce during the investigation meeting.

[10] I set out in my notice of direction the exact amount Mr Levy and Mr Pierce claimed for unpaid wages so that Ms Burton would be able to advise the Authority in her statement in reply or at the investigation meeting if she disagreed with the amounts claimed.

[11] The amount of unpaid wages was based on hours each applicant recorded in a book probably known as the *hours book* each day when they were employed. A photocopy of the pages as they pertained to Mr Levy, Mr Eke, Mr Pierce and Ms Larson were attached to the statement of problem. I also set out in my notice that Ms Burton would have an opportunity to question Mr Levy and Mr Pierce if she wished during the investigation meeting.

[12] Ms Burton did not attend the investigation meeting. I am satisfied that Ms Burton was served with a notice of the direction of the Authority and notice of the investigation meeting. On the Authority file is a sworn affidavit of service from a process server confirming that Ms Burton was served on 9 March 2006 with those documents. The registered office of Phoenix Flight is the same address that Ms Burton was served at.

[13] Ms Burton sent a text message to the applicants shortly before the investigation meeting to the effect that they would be paid but no payments had been made to them as at the date of the investigation meeting.

[14] One of the applicants, Mr Rooney, did not attend at the investigation meeting. I was advised that he was in Dunedin Hospital. I telephoned Mr Rooney in hospital on the day of the investigation meeting and advised him that I did not have details of the amount he was claiming for unpaid wages and would need to be provided with that information. Mr Rooney advised that he would have someone attend to obtaining that detail and providing that to the Authority. Mr Rooney confirmed that he would be remaining in hospital for some weeks.

[15] There is a good reason for Mr Rooney's non-attendance at the investigation meeting. I therefore adjourn my investigation of Mr Rooney's application until I have received details of his claim. Once I have those details I will forward them to Ms Burton as director of Phoenix Flight and give her an opportunity to comment on Mr Rooney's claim for unpaid wages before going on to determining Mr Rooney's employment relationship problem. Mr Rooney is also on a work permit and intends to leave New Zealand when he is well enough.

Contract of Guarantee

[16] It became apparent to the applicants in early December 2005 that they may not be paid their wages. They met with Ms Burton on the evening of 7 December 2005 following which some of the

applicants prepared a document which Ms Burton signed as did Mr Levy, Mr Pierce, Ms Larson and Mr Eke. The document is dated 8 December 2005. None of the applicants continued working for Phoenix Flight or Ms Burton after 8 December 2005.

[17] The applicants seek to rely on that document as a contract of guarantee. They say that Ms Burton agreed to answer to them personally for the default of Phoenix Flight in meeting their wages.

[18] Before I turn to consider the document I need to be satisfied that the Employment Relations Authority has jurisdiction to make a determination in terms of the guarantee. Obviously I did not hear any submissions about this matter.

[19] The Employment Relations Authority has jurisdiction under section 161(r) of the Employment Relations Act 2000 to make determinations about any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort).

[20] The issue about whether there is an enforceable contract of guarantee or not is about a secondary contract to that of employment and there is not, in my view, a sufficiently direct connection between the enforceability of the guarantee and the employment relationship – *Pain Management Systems (NZ) Ltd v McCallum* 14/9/01 Panckhurst J, HC Christchurch CP72/01.

[21] I find that the Employment Relations Authority does not have the jurisdiction to make a determination about the contract of guarantee.

[22] Given the finding, the respondent in this case should be the applicants' employer Phoenix Flight Limited.

[23] I do record that Mr Levy, Mr Eke, Mr Pierce and Ms Larson consider that they have an enforceable contract of guarantee with Ms Burton in the event that the respondent does not make payments to them. The applicants are still able to pursue any issue about the guarantee in another forum such as the Disputes Tribunal if they are not paid the amounts I find they are owed by Phoenix Flight.

DETERMINATION

Matthew Levy

[24] Mr Levy worked for Phoenix Flight from 8 November 2005 until 7 December 2005.

[25] He was party to a written employment agreement with Phoenix Flight and was to be paid \$15.00 per hour.

[26] Mr Levy provided Ms Burton with his IRD number when he commenced his employment and in my view did everything he could to enable his employer to properly account for him as an employee and for PAYE.

[27] Mr Levy was not paid for work performed during the time of his employment. A cheque drawn by Phoenix Flight and deposited into his bank account in the sum of \$652.12 was subsequently dishonoured. I accept that Mr Levy was promised payment on many occasions by Ms Burton and that she never indicated there was any dispute about the hours he worked.

[28] Mr Levy worked 157.50 hours when employed by Phoenix Flight as confirmed by his written record of hours. At the rate of pay Mr Levy was to be paid of \$15.00 per hour he is owed the sum of \$2362.50 gross.

[29] Mr Levy is also entitled to 6% holiday pay on the sum of \$2362.50 in the sum of \$141.75.

[30] In my view it is appropriate for there to be an order for interest to be paid on the unpaid wages and holiday pay from 8 December 2005 in accordance with clause 11 of schedule 2 of the Employment Relations Act 2000.

[31] Mr Levy is also entitled to a contribution toward the filing fee of \$70.00.

[32] I order Phoenix Flight Limited to pay to Matthew Levy the sum of \$2362.50 gross being unpaid wages.

[33] I order Phoenix Flight Limited to pay to Matthew Levy the sum of \$141.75 gross holiday pay.

[34] I order Phoenix Flight Limited to pay to Matthew Levy interest on the sum of \$2504.25 at the rate of 9% from 8 December 2005 until the date of payment.

[35] I order Phoenix Flight Limited to pay to Matthew Levy a one fifth contribution toward the filing fee for lodging the statement of problem with the Employment Relations Authority of \$14.00.

Jordan Pierce

[36] Mr Pierce worked for Phoenix Flight from 8 November 2005 until 8 December 2005.

[37] He was party to a written employment agreement with Phoenix Flight and was to be paid \$15.00 per hour.

[38] Mr Pierce provided Ms Burton with his IRD number when he commenced employment and in my view did everything he could to enable his employer to properly account for him as an employee and for PAYE.

[39] Mr Pierce was not paid for work performed during the period of his employment. I accept that Mr Pierce was never told by Ms Burton that she disputed the amount he claimed for unpaid wages and was promised payment of his wages on many occasions.

[40] Mr Pierce worked 170.25 hours according to the written record of hours provided. Mr Pierce is owed the sum of \$2553.75 gross calculated at the rate of \$15.00 per hour.

[41] Mr Pierce is also entitled to 6% holiday pay on the sum of \$2553.75 in the sum of \$153.23.

[42] In my view it is appropriate for there to be an order for interest to be paid on unpaid wages and holiday pay from 9 December 2005 in accordance with clause 11 of schedule 2 of the Employment Relations Act 2000.

[43] Mr Pierce is also entitled to a contribution toward the filing fee of \$70.00.

[44] I order Phoenix Flight Limited to pay to Jordan Pierce the sum of \$2553.75 gross being unpaid wages.

[45] I order Phoenix Flight Limited to pay to Jordan Pierce the sum of \$153.23 gross holiday pay.

[46] I order Phoenix Flight Limited to pay to Jordan Pierce interest on the sum of \$2707.00 at the rate of 9% from 9 December 2005 until the date of payment.

[47] I order Phoenix Flight Limited to pay to Jordan Pierce a one fifth contribution toward the filing fee for lodging the statement of problem with the Employment Relations Authority of \$14.00.

Kim Larson

[48] Ms Larson commenced her employment in October 2005 and her last day of employment was 8 December 2005.

[49] Ms Larson said that although her written agreement with Phoenix Flight provided she was to be paid \$15.00 per hour she verbally agreed with Ms Burton that her hourly rate would go up to \$17.00 per hour from November 2005 to account for some of her managerial responsibilities. Ms Larson was paid her wages up to 3 November 2005. From 3 November 2005 until the termination of her employment Ms Larson was not paid for the hours she worked.

[50] I am satisfied that Ms Larson provided Ms Burton with her IRD number when she commenced her employment to enable her employer to properly account for her as an employee and for PAYE.

[51] There is no reason for me not to accept Ms Larson's evidence that her hourly rate was varied by agreement to \$17.00 per hour from 3 November 2005. Ms Larson said that Ms Burton was aware that that the amount of wages owed to her was based on the higher hourly rate and did not dispute this at any time.

[52] Ms Larson was also promised payment many times.

[53] Ms Larson worked, on my calculations based on the written record recording her hours, 147.25 hours. Ms Larson was not paid for these hours and at an hourly rate of \$17.00 is owed the sum of \$2503.25 gross.

[54] Ms Larson is also entitled to 6% holiday pay on the sum of \$2503.25 in the sum of \$150.20.

[55] In my view it is appropriate for there to be an order for interest to be paid on unpaid wages and holiday pay from 9 December 2005 in accordance with clause 11 of schedule 2 of the Employment Relations Act 2000.

[56] Ms Larson is also entitled to a contribution toward the filing fee of \$70.00.

[57] I order Phoenix Flight Limited to pay to Kim Larson the sum of \$2503.25 gross being unpaid wages.

[58] I order Phoenix Flight Limited to pay to Kim Larson the sum of \$150.20 gross holiday pay.

[59] I order Phoenix Flight Limited to pay to Kim Larson interest on the sum of \$2,653.45 at the rate of 9% from 9 December 2005 until the date of payment.

[60] I order Phoenix Flight Limited to pay to Kim Larson a one fifth contribution toward the filing fee for lodging the statement of problem with the Employment Relations Authority of \$14.00.

Matthew Eke

[61] Mr Eke worked for Phoenix Flight from 7 November 2005 until 7 December 2005.

[62] He was party to a written agreement with Phoenix Flight and was to be paid \$15.00 per hour.

[63] Mr Eke provided Ms Burton with his IRD number when he commenced employment and in my view did everything he could to enable his employer to properly account for him as an employee and for PAYE.

[64] Mr Eke was not, I accept, advised by Ms Burton that she disputed the amount of his wage claim and that there were many promises made to him of payment. A cheque drawn by Phoenix Flight Limited and deposited into his bank account in the sum of \$833.10 was subsequently dishonoured. Mr Eke was however at some stage late in his employment given cash by Ms Burton in the sum of \$500.00.

[65] Mr Eke worked 175 hours which is confirmed by a written record of his hours. Mr Eke should have been paid a gross amount of \$2625.00. He was paid a cash amount of \$500.00 in or about early December 2005. I have calculated as best I can in the circumstances and using tax code M, that on a gross income of \$2625.00 Mr Eke would have had \$534.47 deducted as PAYE leaving a net sum owing to him of \$2090.53.

[66] Taking \$500.00 from the net amount therefore on the basis that Mr Eke is not responsible for the payment of tax on the cash amount he received there is a net amount owing to him of \$1590.53 for unpaid wages or as I have calculated \$2028.35 gross.

[67] Mr Eke is also entitled to 6% holiday pay on the sum of \$2625.00 which is \$157.50 gross.

[68] In my view it is appropriate for there to be an order for interest to be paid on the unpaid wages and holiday pay from 8 December 2005 in accordance with clause 11 of the Employment Relations Act 2000.

[69] Mr Eke is also entitled to a contribution toward the filing fee of \$70.00.

[70] I order Phoenix Flight Limited to pay to Matthew Eke the sum of \$1590.53 net or \$2028.35 gross being unpaid wages.

[71] I order Phoenix Flight Limited to pay to Matthew Eke the sum of \$157.50 gross holiday pay.

[72] I order Phoenix Flight Limited to pay to Matthew Eke interest on \$2185.85 gross at the rate of 9% from 8 December 2005 until the date of payment.

[73] I order Phoenix Flight Limited to pay to Matthew Eke one fifth contribution toward the filing fee for lodging the statement of problem with the Employment Relations Authority of \$14.00.

James Rooney

[74] The investigation of Mr Rooney's claim for unpaid wages and holiday pay is adjourned. He was, for what I am satisfied were good reasons, unable to attend the investigation meeting on

21 March 2006. Mr Rooney is to provide details of the amounts he says he is owed to the Authority and the Authority will forward these to Phoenix Flight care of Ms Burton for its view before there is a determination.

Helen Doyle
Member of Employment Relations Authority