

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 240  
5334770

BETWEEN                      HUB LAL  
   Applicant

AND                              MUDLIAR MOTORS  
   LIMITED  
   Respondent

Member of Authority:      R A Monaghan

Representatives:            P Lal, advocate for applicant  
   K Mudliar, advocate for respondent

Investigation Meeting:      14 May 2012

Additional information  
provided:                      29 June 2012

Determination:                16 July 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Hub Lal says his former employer, Mudliar Motors Limited (MML) dismissed him unjustifiably and owes him wages and holiday pay.

[2]      MML says it did not enter into an employment relationship with Mr Lal.

**Background**

[3]      At the relevant time Mr Lal was not a New Zealand citizen and did not have permanent residence. He had a series of work visas under which he was permitted to work as a panelbeater/spraypainter for the company named in the permit. One visa was to expire in January 2011, but when the company's business closed in early 2010 Mr Lal sought alternative employment. To work lawfully for a new employer he would also need a variation to the permit, naming the new employer.

[4] Kamlesh Mudliar said he had been in employment until February 2010, when his employment ended by reason of redundancy. He planned to open his own business which was to operate through MML. MML was registered in the companies office on 11 March 2010. Mr Mudliar was registered as the sole director and one of two shareholders.

[5] A friend of Mr Lal's, K, knew Mr Mudliar. In February 2010 K introduced Mr Lal to Mr Mudliar with a view to facilitating Mr Lal's employment by Mr Mudliar. K told Mr Mudliar that Mr Lal had no job, and that if Mr Lal could not obtain a variation to his work permit he would be obliged to return to Fiji.

[6] Mr Mudliar's evidence was that he replied he was just setting up in business and was not yet ready to employ anyone. Matters were left there. Mr Lal's evidence was that Mr Mudliar indicated he had a vacancy for a panelbeater, and agreed to provide Mr Lal with an offer of work to allow him to obtain a variation to his work permit. Although no company had yet been registered, on Mr Lal's observation the business was already operating, and was doing so successfully as Mr Mudliar had contacts with several car dealerships.

[7] Mr Mudliar's further evidence was that he sought assistance with the administrative aspects of setting up his business. A relative of Mr Lal's, Peter Lal, worked in an enterprise which provided basic accounting and company registration services to small businesses. It was common ground that Peter Lal assisted Mr Mudliar to register MML. Mr Mudliar said Peter Lal, too, asked him to provide work for Hub Lal to assist Hub Lal to remain in New Zealand. Mr Mudliar said he explained again that he was not yet ready to employ anyone.

[8] Peter Lal said Mr Mudliar asked him about employment procedures. Peter Lal advised Mr Mudliar that, if he sought to employ a person who was not a citizen or resident of New Zealand he would first have to advertise the position in question. Mr Mudliar asked Peter Lal to place the advertisement, which Peter Lal did.

[9] Mr Mudliar denied that such a conversation occurred and said he had no knowledge of the advertisement until after it had been placed. When the advertisement came to his attention on or about 12 February he asked Peter Lal why it

had been placed. Peter Lal replied he had placed it for Hub Lal. If there was no vacancy Mr Mudliar should have taken steps to have the advertisement withdrawn.

[10] Peter Lal also prepared other documents necessary to support Hub Lal's application for a work permit naming MML as the employer.

[11] One was an Employer Supplementary Form – Work Permit/Visa Application. Peter Lal wrote in response to a question on the form about businesses operated by MML: *'Previously I [Mr Mudliar] was self employed trading as Mudliar Motors and since my business has grown I have now registered the business as Mudliar Motors Limited'*. Mr Mudliar signed that document on or about 9 April 2010. A second document was a written employment agreement citing MML and Hub Lal as the parties, providing for a position of panelbeater/spraypainter at a rate of \$18 per hour with overtime at T1.5, and expressed to come into force when Hub Lal had obtained the necessary work permit. Both parties signed the agreement, with Mr Mudliar again doing so on or about 9 April 2010. A third document was a letter of offer of employment on MML's letterhead and dated 22 March 2010, saying that MML offered Hub Lal the position of panelbeater/spraypainter subject to legal requirements being met.

[12] Peter Lal said he made all of these preparations because Mr Mudliar asked him to. Even if Mr Mudliar had asked in a general way for assistance with employment procedures, I consider it likely the primary purpose of the documents was to support the application for a variation to the work visa since all of the documents Mr Lal prepared were required for that purpose. I view Mr Mudliar's denial that Mr Lal was acting at his request in that light. He said Mr Lal prepared documents which he brought to Mr Mudliar for signature, and Mr Mudliar signed them. Mr Mudliar said further that, when he signed the documents, he repeated there was no work available but he would advise when work became available.

[13] Hub Lal's new work visa, containing a permit to work for MML, was issued on 30 April 2010. Hub Lal said that, when he received the permit, he advised Mr Mudliar who then agreed he could start work.

[14] Mr Mudliar denied this. He said Hub Lal came into his workshop frequently, and was allowed to use the workshop to do his own jobs. Mr Mudliar passed some work to Mr Lal to do on his own account when MML's quoted price was too high.

### **Was there an employment relationship**

[15] The documents Mr Mudliar signed are significant. For present purposes the written employment agreement in particular is either a legally binding document, or it is a sham and raises serious questions under immigration legislation.

[16] During the investigation meeting I required Mr Mudliar to provide a number of documents to support his assertions that he had been in employment until about February 2010, that the business of MML was just commencing at that time and could not support an employee, and other records which might support his assertions. A written direction to provide that material followed after the meeting had concluded. There was no response and none of the material was provided. If Mr Mudliar had provided the documents I could have investigated more closely the conflicts in the evidence concerning the entry into the employment agreement and whether in reality such an agreement was entered into. Instead I have only Mr Mudliar's assertions on the one hand, and the evidence of the Messrs Lal and the employment-related documents which Mr Mudliar signed on the other.

[17] Further to those documents, Mr Mudliar knew what he was signing when he signed the Employer Supplementary Form, the letter of offer of employment and the employment agreement. If the documents did not reflect MML's intentions, if insufficient work was available to offer a full time employed position to Hub Lal, and if Mr Mudliar did not appreciate the legal significance of the documents, he should not have signed them.

[18] I conclude on the basis of the signed documents that there was an employment relationship in that Mr Lal was at least a person intending to work. In the circumstances to which I now turn I conclude in addition that work commenced under the agreement.

## **The wage claim**

[19] Peter Lal prepared a spreadsheet in support of Hub Lal's claim. Payment was sought for:

- 42 hours per week in respect of the week ending 7 May 2010 to the week ending 6 August 2010, less payments received;
- 42 hours per week, plus overtime hours as listed, for the period commencing on 31 August 2010 and ending with Mr Lal's dismissal at the end of the first week in October, less payments received.

[20] The total (nett) amount sought was \$8,260.74. Holiday pay was sought in the sum of \$1,026.25 (nett), calculated as 8% x total gross earnings of \$16,407, less tax.

[21] It was common ground that Hub Lal was absent in Fiji between 6 and 31 August 2010.

[22] Peter Lal said he based the spreadsheet on written material which Hub Lal had provided to him, and which set out the hours Hub Lal recorded as having been worked. Both Peter and Hub Lal said the written material comprised the contents of a notebook Hub Lal kept. Hub Lal said his practice was to go home and record the hours he worked.

[23] Hub Lal's notebook recorded hours worked for an unnamed employer in February and March 2010. It recorded that the hours worked were not paid in full, although it noted that some cash payments were made. Peter Lal's spreadsheet did not include these hours.

[24] The notebook contained no entries for the period early March to the end of August 2010. Peter Lal's spreadsheet commenced with the week ending 7 May 2010. It specified that 42 hours were worked per week from that date until the week ending 6 August 2010. Payment was calculated at \$18 per hour (gross), being the rate set out in the employment agreement, less payments received at a further \$200 net per week.

[25] Notebook entries resumed on 31 August 2010 and were made on a daily basis until 5 October 2010. With minor exceptions in respect of the week 31 August – 4 September 2010 the spreadsheet entries correspond with the notebook entries. Both documents also record the receipt of cash payments, which were deducted from the amount sought. Overtime was sought at the rate set out in the employment agreement.

[26] Because of the emphasis on the notebook entries as Hub Lal's record of hours worked, I directed that Hub Lal provide a written account of the differences between the spreadsheet and the contents of the notebook in respect of the May – early August period in particular. No written explanation for the differences was provided, but subject to the dispute about whether there was an employment relationship there was a generalised consensus that Hub Lal carried out work at MML's premises during that period.

[27] I determine the wage claim with reference to s 132 of the Employment Relations Act, 2000. The section applies when an employer has failed to keep or produce a wage and time record as required by the Act, and the employee's ability to bring an accurate claim has been prejudiced as a result. That was the case here. In those circumstances s 132(2) applies. It provides:

*(2) ... the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of –*  
*(a) the wages actually paid to the employee;*  
*(b) the hours, days and time worked by the employee.*

[28] MML has not proved that Mr Lal's claims are incorrect, so I consider the claims proved.

[29] MML is therefore ordered to pay to Hub Lal the sum of \$8,260.74 (nett). I have used the nett figure because it takes into account the cash payments Mr Lal received.

[30] MML is further ordered to pay holiday pay calculated as 8% x total gross earnings, or \$16,407 x 8% = \$1,312.56 (gross). The nett equivalent was said to be \$1,026.25. For consistency, payment is ordered in the nett amount.

## **The personal grievance**

### 1. The facts

[31] Although the notebook indicates Hub Lal did not work for MML after 6 October 2010, and there was no evidence Mr Lal complained about that, Mr Lal said Mr Mudliar told him on 3 November 2010 that his services were no longer required. Mr Lal's evidence was that he was working on a car when Mr Mudliar approached him, told him there was no more work, and told him to report the following Monday to collect his pay.

[32] Mr Mudliar said Mr Lal was already working for the new employer as at 3 November. Indeed the new employer, On-Site Machine Painters Limited (OSMPL), offered employment to Mr Lal by letter dated 5 November 2010. Mr Mudliar said he was aware of this because OSMPL was based in the same area as MML, however he was unable to be any more precise about Mr Lal's association with OSMPL. Mr Mudliar told Mr Lal he could not work for that employer while MML was named on Mr Lal's visa as the employer for whom he was permitted to work.

[33] MML's association with Mr Lal ceased and Mr Lal pursued his employment with OSMPL.

### 2. Was there a dismissal

[34] MML's first argument that there could be no dismissal because there was no employment relationship fails because there was an employment relationship.

[35] MML's second argument was, in effect, that it was Mr Lal's decision to end any association with it and he had already commenced work for another employer. There is a conflict in the evidence on that matter in that Mr Lal said he was still working at MML when Mr Mudliar told him there was no more work.

[36] My difficulty in respect of the absence of any record of hours of work or any wage claim for October 2010, together with the almost immediate offer of employment from OSMPL, means I am at least prepared to accept that Mr Lal had

commenced discussions with OSMPL before 3 November. The vagueness of Mr Mudliar's evidence means I find it probable that Mr Lal continued to report from time to time to MML's workshop. Overall, in that I find it was Mr Mudliar who formally called a halt to the relationship, I find there was a dismissal.

### 3. Was the dismissal justified

[37] Because: there was no evidence about MML's financial position; I have accepted Mr Lal's evidence about his hours of work, with the reservation regarding the extent of the parties' association in October 2010; and MML did not enter into any consultation or discussion in respect of the termination of Mr Lal's employment, I find the dismissal was unjustified.

### 4. Remedies

[38] Payment in lieu of two weeks' notice has been sought, but no other payment was sought in respect of the reimbursement of remuneration lost as a result of the personal grievance.

[39] The employment agreement provided for a notice period of two weeks. MML is therefore ordered to make payment in lieu of notice calculated as  $\$18/\text{hour} \times 42\text{hr}/\text{week} \times 2 \text{ weeks} = \$1,512$  (gross).

[40] Compensation for injury to feelings as a result of the unjustified dismissal was also sought. Although the letter raising the personal grievance asserted there was injury to Mr Lal's feelings, I find the content of the assertions inconsistent with the fact that Mr Lal already had a written offer of employment dated 5 November. I am not satisfied there was evidence of such injury and make no order.

### **Summary of orders**

[41] MML is ordered to pay to Hub Lal:

- (a) \$8,260.74 (nett) as unpaid wages;
- (b) \$1,026.25 (nett) as holiday pay; and

(c) Payment in lieu of notice in the sum of \$1,512 (gross).

[42] Interest is to be paid on these amounts at the rate of 5% pa from 6 October 2010 to the date of payment.

### **Costs**

[43] An ‘accountant’s fee for preparation of documents,’ which was cited in the summary of claim and quantified as \$1,500, reflects Peter Lal’s input. That input took the form of the preparation of the claim and of the associated advocacy. It is claimable as costs.

[44] This is not a case in which the full reimbursement of costs is appropriate. As the successful party Hub Lal is entitled to the reimbursement of the Authority’s filing fee of \$71.56, and to a contribution to his costs of representation. The investigation meeting took less than half a day so with reference to the principles in *PBO Limited v da Cruz*<sup>1</sup> MML is ordered to contribute to Hub Lal’s costs in the sum of \$750, as well as the filing fee of \$71.56.

R A Monaghan

Member of the Employment Relations Authority

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<sup>1</sup> [2005] NZELC 808