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MacPherson v Travers (Auckland) [2007] NZERA 69 (9 March 2007)

Determination Number: AA 65/07 File Number: 5042824

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Neil MacPherson (Applicant)
AND Kelvin Travers
REPRESENTATIVES Applicant in person

Respondent in person

MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 6 March 2007
DATE OF DETERMINATION 9 March 2007

DETERMINATION OF THE AUTHORITY

- [1] This matter concerns an unusual scenario where the applicant seeks lost wages and compensation for unjustified dismissal but the respondent denies the applicant was ever employed or did any work for him or his business.
- [2] A statement of problem was lodged with the Authority on 22 June 2006. No statement of reply was received but after the applicant provided further details of his case and a telephone conference was held with him and respondent's counsel at that time, an investigation meeting was scheduled for October 2006. This was postponed due to availability of the applicant and rescheduled for March 2007. The file was subsequently transferred to me for investigation.
- [3] No statement in reply or witness statements were provided by the respondent, despite opportunities to do so. No mediation was scheduled as stark contrasts in the parties' views of events - on the issues of whether there was an employment relationship at all, and if so, who was the employer - suggested there was little prospect that mediation would contribute constructively to resolving the matter.
- [4] At the investigation meeting I heard sworn evidence from the applicant, the respondent, and Mr Toa Fua-Tuaali'i, an employee of part of the boat building business in which the respondent is involved.
- [5] The parties agree that the applicant attended a job interview at the premises of the boat building business in Henderson on Friday, 12 May 2006. He filled out an employee questionnaire, which included the names and contact details of two referees, and was shown around the factory. The interview was conducted by Ernie Travers, the father of Kelvin Travers and the director of the company which employs staff working in the business. Mr Fua-Tuaali'i remembers Mr Travers Snr introducing the applicant as he walked around the factory with him that day.
- [6] From this point, the witnesses' account of events diverges markedly.
- The applicant's case**
- [7] The applicant says he was looking for a new job in the boat building industry and contacted Mr Travers Snr through an entry in the Yellow Pages for "Silver Tiger Catamarans". At the job interview the applicant proposed a trial period of one week at a pay rate of \$16 an hour and that this pay rate be reviewed after one week. He says that Mr Travers Snr agreed but said he would "really need" to contact referees. The applicant says he was then told to start work on Monday, 15 May and that Mr Travers Snr would check the references that week.
- [8] The applicant says that he started work at the premises at 8am on 15 May and was given instructions by a man whom he called "Tuua". He confirmed at the investigation meeting that this referred to Mr Fua-Tuaali'i.

[9] He provided a statement setting out over two typed pages of what he says was work done on the Monday, Tuesday and Thursday of that week. He says that on Tuesday, 16 May he asked Mr Travers Snr for a cash advance. He also asked and was told by Mr Travers Snr that he had not had an opportunity to check his references. Mr Travers Snr would not give him any cash but he says that Mr Travers Jnr gave him a \$100 note later that day.

[10] He also says he was absent on the Wednesday and Friday due to a bout of flu which turned into bronchitis. He produced a doctor's certificate that stated he had suffered flu and bronchitis for a three week period to 8 June.

[11] He says he left phone messages for Mr Travers Snr during the following week explaining his absence for sickness and asking for wages for 21 hours worked and advice as to whether he had an ongoing job with the business. He also produced three emails to the same effect dated 26 May 2006 and addressed to Mr Travers Jnr's email address.

[12] On 29 May 2006 an advocate engaged by the applicant sent a letter addressed to "The Manager, Silver Tiger Catamarans" at the business address raising a personal grievance for unjustified dismissal.

[13] The applicant later became dissatisfied with his advocate's efforts and lodged a statement of problem himself in the Authority. In the space on the form for the name of the respondent he wrote the name of Mr Travers Snr but crossed this out and wrote the name of Mr Travers Jnr. He told me that was because he understood that Mr Travers Jnr was the manager responsible for dealing with such matters.

The respondent's case

[14] The respondent says that the applicant's references were checked but were unsatisfactory and Mr Travers Snr did not want to employ him. He says that he and others could "recall him hanging around the factory the next week seeing if we would employ him". However he says the applicant was not employed and was not asked to start work on 15 May or given instructions to do any work on the premises on 15, 16 and 18 May 2006. Neither was he given any cash as alleged.

[15] Mr Travers Jnr says he simply ignored the applicant emails of 26 May and the 29 May personal grievance letter was "thrown into the hands of our solicitor".

[16] The evidence of Mr Fua-Tuaali'i was that he saw the applicant outside one of the business' two factories in the week of 15 May but did not recall speaking to him or asking him to do any work.

[17] The respondent also relies on a technical or legal argument that he was not, as an individual, the employer of the applicant in any sense. If the applicant were employed, it was not by him but would have been by a registered company which was not named as the respondent.

Credibility

[18] The Authority's investigative process seeks to find the facts of particular events or situations. Assessment of these facts is on the civil standard of the balance of probability, that is what is most likely to have happened.

[19] Relying on people's memories of past events, and checking for corroboration with any relevant documentary evidence and the accounts of others, the Authority determines, as best it can, what is likely to have occurred, not what certainly happened.

[20] In this case there is very little to corroborate the evidence given. While giving his evidence the applicant accepted that he did not have any other witnesses or documentary evidence which might support his key contentions that he was asked to start work on 15 May and had been given work to do for 21 hours over three days that week.

[21] However the evidence of the respondent was similarly slight - and his intemperate responses and disdain for the applicant in responding to my questions during the investigation often made it difficult to discern the substance, if any, of his answers. As with the applicant, there was little of the respondent's assertions as to what did or did not happen that could corroborated - either through the account of others or contemporary documentary evidence.

[22] I have no reason to doubt the integrity of Mr Fua-Tuaali'i who gave straightforward answers to questions asked but I take account of the fact that he was giving evidence on behalf of his employer and was not likely to contradict the respondent.

[23] Any determination must, in this case, be based on the few facts that are agreed and my assessment of what is more likely than not in respect of disputed areas.

Issues

[24] Against this background, the issues for resolution in this matter are:

- • Who was the alleged employer?

- • Was employment agreed and acted on?
- • Who terminated the employment agreement, if there was one?

The alleged employer

[25] The Authority is charged under the [Employment Relations Act 2000](#) ("the [Act](#)") to investigate and determine employment relationship problems according to their substantial merits and without regard to technicalities. It may direct a party to be joined to a proceeding in order to best deal with a case according to its substantial merits and equities.

[26] For the following reasons, I have little hesitation in joining Imation Holdings Limited ("Imation") as a party.

[27] That is the company which Mr Travers junior told me employs staff engaged to work in the businesses run by him and his father. He showed me a wage record for the disputed period where the employer was identified as TDL Industrial Coatings Limited, a former name of Imation. Its annual return filed on 1 March 2007 shows Mr Travers Snr and Mr Travers Jnr as equal shareholders.

[28] Mr Travers senior is the director of Imation. I consider it more likely than not that it was in this capacity that Mr Travers senior met with the applicant on Friday, 12 May 2006.

[29] From my own review of Companies Office records, it is clear that this boat building business operates through a number of companies in which Kelvin Travers and Ernie Travers are variously involved as directors and shareholders, either directly or through the agency of family trusts.

[30] From the evidence of Mr Travers Jnr at the investigation meeting I understand that "Silver Tiger" is the brand name used by the business. He attended the investigation meeting wearing a shirt and baseball-style cap embroidered with a "Silver Tiger" logo. He told me that the business premises have a sign outside with the words "Silver Tiger Boats".

[31] The applicant's personal grievance letter of 29 May 2006 was addressed to "The Manager, Silver Tiger Catamarans". That is the name of the business given in its Yellow Pages entry.

[32] The Authority's file shows that a copy of the statement of problem was delivered on 24 June 2006 to an address given in Companies Office records for Mr Travers Snr and was signed for by "Travers".

[33] I am satisfied that he and Mr Travers Jnr have been well aware of the applicant's claim from the time it was raised. Mr Travers Jnr confirmed in the investigation meeting that he had seen the applicant's emails of 26 May 2006 and the personal grievance letter of 29 May 2006.

[34] In the light of this, I am satisfied that the applicant has not correctly identified the relevant respondent by referring only to "Silver Tiger Catamarans" on the personal grievance letter and to Mr Travers Jnr by name on the statement of problem. The naming of Mr Travers Jnr as respondent was most likely a misunderstanding by the applicant of what was required -that is he named who he saw as the appropriate contact person at the business but not the formal legal entity of his alleged employer. That is a common misunderstanding. For example, when I asked Mr Fua-Tuaali'i, employed for more than five years, who he worked for, his initial answer was that he worked for Ernie Travers, rather than naming the limited liability company recorded on his wage slip.

[35] However I am also satisfied that the principals of the relevant company - that is Imation Holdings Limited, identified by Mr Travers Jnr as the company that *"employs all the staff, has creditors and pays the bills"* - were aware of these proceedings and are properly liable if any remedies are required. For that purpose I join Imation Holdings Limited as second respondent.

Was there an employment agreement?

[36] For the Authority to make a determination on an alleged employment relationship problem under the [Act](#) there must first be an employment relationship. This requires the offer from the employer of work which is accepted by the employee. This process results in an employment agreement, often verbal at the point of acceptance with the terms soon thereafter fleshed out and finalised in a written agreement, the written agreement being a requirement of the law.

[37] Determining whether employment has been offered and accepted and on what terms the agreement was made has been described as "a question of what construction to put on the whole course of dealing": *Baker v Armourguard* [1997] NZEmpC 323; 1998] 1 ERNZ 424, 432 (EC).

[38] The applicant alleges that the employment offer was made and accepted on 12 May 2006. Not all the terms were finalised but the essential terms were agreed - he says a week's trial at an agreed rate to be reviewed after that and once references were confirmed, with a starting date of the following Monday.

[39] The respondent denies any such agreement was made.

[40] Subsequent conduct is often examined to determine whether there was an agreement reached and acted on.

[41] Here the applicant says he did work over three days which demonstrates that he was employed and accepted as such by the employer.

[42] The respondent does not deny that the applicant came to the work site on those three days but says it was only to see whether his references had been checked and whether he had a job to start, not to do any work at the employer's request.

Determination

[43] While the applicant has provided some considerable detail on the work he alleges that he carried out on 15, 16 and 18 May, I do not find it persuasive. It is possible that he was there and did such work at the instruction of Mr Fua-Tuaali'i without either Mr Travers Snr or Jnr being aware of that. However that is only a possibility and I do not find it to have been likely. Firstly there is an outright denial by Mr Fua-Tuaali'i that this happened. Secondly it is unlikely that the applicant would not have been seen working there by some other person - and the applicant was not able to suggest anyone else who could have corroborated his version of events.

[44] Thirdly, I accept that it is unlikely that a confirmed job offer would have been made to the applicant, who had literally walked in off the street, without his references being checked. He had, quite properly, told Mr Travers Snr that he had been in prison for three months in relation to drink driving offences and wrote this detail on the employee questionnaire. While this is not directly related to his employability, it is more likely that an employer aware of this would want to "check him out" with referees before confirming the job offer.

[45] Weighing those factors I find that the applicant has failed to establish the necessary first step to found his grievance - that there was an employment relationship. The [Act](#) may provide relief for a person actually employed on settled terms and conditions but does not contemplate grievances about unsuccessful job applications: *Hayden v Wellington Free Ambulance Service* [2002] NZEmpC 48; [2002] 1 ERNZ 399, 406

[46] Accordingly this application must be dismissed. **Costs**

[47] The respondent applied for costs at the conclusion of the investigation meeting. He represented himself at that meeting but earlier in the Authority's investigation engaged a barrister. That barrister attended two telephone conferences convened by the Authority member previously dealing with this matter and had some correspondence with the Authority about the case but advised by fax the day before the investigation meeting that he no longer had instructions.

[48] The respondent did not reply to the applicant's emails of Friday, 26 May 2006, nor, as far as I am aware, the personal grievance letter of 29 May 2006. He did not provide a statement in reply, neither in June 2006 as required by the [Act](#) nor in February 2007 when again given the opportunity to file some reply - either on the required form or as a brief witness statement. All were opportunities to dissuade the applicant from continuing his claim while also informing the Authority of the merits of that claim. He did not take the chance to do so and the Authority had to go through its full investigative process.

[49] While costs normally follow the event, the power to award costs is discretionary. I consider this matter is an appropriate one in which to order that costs lie where they fall, that is to make no order as to costs.

Robin Arthur

Member of Employment Relations Authority