

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 319
5624188

BETWEEN	TATIANE MICHAEL Applicant
A N D	IOANE THOMPSON-MITA First Respondent
A N D	BMEVENTS NZ LIMITED Second Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
No appearance for First or Second Respondents

Investigation Meeting: 20 September 2016 at Auckland

Written Record of Oral Determination: 20 September 2016

**WRITTEN RECORD OF ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

No mediation

[1] The First Respondent Mr Ioane Thompson-Mita is the registered address for service for the Second Respondent BMEvents NZ Limited (BMEvents). Although the parties have been served with the Authority's directions to mediation, notwithstanding that mediation has not occurred.

[2] Mr Michael initially applied for voluntary mediation but the Respondents refused to attend. The parties were then directed to attend mediation. Mediation Services subsequently informed the Authority that the Respondents would not agree to a mediation date.

[3] The Respondents were then informed that they were required to attend mediation, whether they wished to or not, because they had been directed to do so by the Authority.

[4] The Respondents still failed to accept any of the mediation dates they were offered. This meant the Respondents in effect have declined to attend mediation, in breach of the Authority's directions.

No Statement in Reply filed by Respondents

[5] The Authority served Mr Michael's Statement of Problem on both Respondents at the address for service recorded in the Companies Office on 08 August 2016. Neither Respondent filed a Statement in Reply. Neither Respondent applied for leave to file a Statement in Reply out of time.

No Appearance by Respondents

[6] The Notice of Hearing was served by email on the Respondents on 25 August 2016 and again by track and trace courier post at the Second Respondent's registered address for service on 06 September 2016. I am therefore satisfied that the Respondents were both aware of the investigation meeting today but have chosen not to attend.

Failure to provide relevant documents

[7] On 09 September 2016 the Authority directed the Respondents (whether they intended to defend Mr Michaels' claims or not) to provide relevant information about his employment.¹ Neither Respondent provided any of this information, in breach of the Authority's directions.

Employment relationship problem

[8] Mr Michael says he worked for Mr Thompson-Mita from 08 – 24 March 2015. Mr Michael claims Mr Thompson-Mita owes him wage arrears because he was not paid for any of the 168 hours he worked, he did not receive any holiday pay upon termination and Mr Thompson-Mita failed to make the required compulsory KiwiSaver contributions to Inland Revenue Department (IRD).

¹ This included Mr Michael's wage and time records, his employment agreement, holiday and leave records and his pay details.

[9] Mr Michael also claims he was unjustifiably dismissed by text message on 28 March 2015 after he told Mr Thompson-Mita that he (Mr Michael) wanted to be paid for the work he had done and he did not want to do any more work until after he had received the employment agreement he had been promised when he accepted the offer of employment.

[10] Mr Michael produced an email to the Authority from Mr Thompson-Mita which says:

“We never had any type of legal contract which was signed by the parties. [...]

[...] I am confident Michael made his own decision not to return to work.”

Credibility

[11] Mr Michael impressed me as an honest witness. In addition to the evidence he filed with the Authority and gave at the investigation meeting today he has also provided copies of text messages with Mr Thompson-Mita and photos of the work at the Diner that he (Mr Michael) says he and the two other workers² did. Mr Michael's evidence was uncontested so I accept his account of events.

[12] Mr Michael says that he undertook the work he was employed to do but did not receive any payment for doing so and did not receive an employment agreement. Mr Michael provided a detailed list of all of the work that he did for Mr Thompson-Mita which was corroborated by supporting evidence.

The issues

[13] The following issues are to be determined:

- (a) Who was Mr Michael's employer?
- (b) Is Mr Michael owed wage arrears?
- (c) Was Mr Michael dismissed?

² Mr Michael says the other two workers had their employment ended by the text to him and that neither of these two workers have been paid for any of the work they did.

- (d) If so, was dismissal justified?
- (e) If so, what if any remedies should be awarded?
- (f) What if any costs should be awarded?

Who was Mr Michael's employer?

[14] On 08 March 2016 Mr Ioane Thompson-Mita offered Mr Michael employment as the Store Manager for the BM Diner located in Manurewa. Mr Michael accepted Mr Thompson-Mita's offer of employment. Mr Thompson-Mita told Mr Michael he would be given an employment agreement to sign within two weeks.

[15] Mr Thompson-Mita asked Mr Michael to start work the next day (09 March) because there was only two weeks before the Diner opened to the public. Mr Thompson-Mita told Mr Michael (and two other workers he was employed to manage and oversee) they would need to work long hours to help finish off the building work so the Diner could open as scheduled.

[16] Mr Thompson-Mita told Mr Michael that he would receive his first pay in two weeks after the building work was complete and that he would be given a full employment agreement to sign before the Diner opened for trading to the public.

[17] Mr Michael says he did not know anything about BMEvents until Mr Thompson-Mita explained how he had become involved in that company along with other partners. This conversation did not occur until after Mr Michael had already been working for Mr Thompson-Mita for approximately two weeks.

[18] Mr Michael says he thought Mr Thompson-Mita was his employer because all of his dealings were with him.

[19] I am satisfied that the usual contract formation necessities of offer, acceptance, mutual intention to create legal relations, certainty of terms, consideration and he like all existed in terms of the offer of employment Mr Thompson-Mita made to Mr Michael.

[20] I find Mr Michael accepted Mr Thompson-Mita's offer of employment and that they then entered into an employment relationship as defined by s.6 of the

Employment Relations Act 2000 (the Act). The fact the parties did not sign an employment agreement does not mean there was no employment relationship. The employment relationship between Mr Michael and Mr Thompson-Mita involved oral agreed terms.

[21] I am satisfied on the balance of probabilities that Mr Thompson-Mita employed Mr Michael in his personal capacity. Although Mr Thompson-Mita may have been acting as an agent for BMEvents and/or may have intended for BMEvents to be Mr Michael's employer, I find Mr Thompson-Mita did not disclose that he was acting as an agent for BMEvents to Mr Michael.

[22] Mr Michael therefore had no way of knowing about BMEvents involvement with his employment (if there was any such involvement). This fact scenario means that the doctrine of the undisclosed principal applies.

[23] I find that even if Mr Thompson-Mita was acting as a principal of BMEvents (and there was no evidence to suggest that he was), I am satisfied that he failed to disclose that association or agency when he was contracting with Mr Michael.

[24] That omission allows Mr Michael to exercise his rights under the doctrine of the undisclosed principle to elect to pursue Mr Thompson-Mita or BMEvents as his employer.

[25] Mr Michael advised the Authority he elects to pursue Mr Thompson-Mita in these proceedings as he (Mr Michael) believed Mr Thompson-Mita had personally employed him. Mr Michael did not know anything about being employed by a company so did not wish to pursue BMEvents as his employer.

[26] I find that Mr Thompson-Mita was Mr Michael's employer so Mr Thompson-Mita is personally liable for any breaches of employment legislation and/or breaches of contract that occurred.

Is Mr Michael owed wage arrears?

Wages for hours worked

[27] Mr Michael says he and Mr Thompson-Mita agreed that he would be paid \$45,000 salary for a 40 hour week worked from Monday to Friday. This worked out to be an hourly rate of \$21.63.

[28] Mr Michael says Mr Thompson-Mita asked him (and two other workers who also were never paid) to work as many hours as necessary to get the Diner opened. At that point the opening was said to be two weeks away. The three workers worked very long hours on 16 consecutive days to get through the required building work so the Diner could be opened to the public.

[29] I accept Mr Michael's unchallenged evidence that he worked at least 168 hours (on average at least 10.5 hours a day) over 16 days (over period 08-24 March 2015) for Mr Thompson-Mita without being paid anything. I accept Mr Michael claim that he is owed wage arrears for these hours he worked but was not paid.

[30] Mr Thompson-Mita is ordered to pay Mr Michael \$3,633.84 unpaid wages for hours worked but not paid.

KiwiSaver contribution

[31] Mr Michael is a member of KiwiSaver. This means that Mr Thompson-Mita was required to deducted 3% of Mr Michael's remuneration and remit that to IRD as the compulsory Employee KiwiSaver contribution.

[32] Mr Thompson-Mita (as Mr Michael's employer) was required to deduct and remit to IRD 3% of Mr Michael's remuneration as the compulsory Employer KiwiSaver contribution.

[33] No KiwiSaver contributions were made so I find that Mr Thompson owes Mr Michael unpaid Employer KiwiSaver contributions of \$109 on his unpaid wages for hours worked but not paid.

[34] Mr Thompson-Mita is also ordered to deduct and remit to IRD \$109 from Mr Michael's award of wage arrears before Mr Thompson-Mita pays this to Mr Michael (being 3% of his wage arrears) as the compulsory Employee KiwiSaver contribution.

Holiday pay

[35] Mr Michael did not take any paid holiday while employed so he was entitled to be paid 8% of his total gross earnings upon termination as holiday pay. That did not occur so Mr Thompson-Mita is ordered to pay Mr Michael \$299.43 (being amount earned while employed of \$3,742.84 x 8%).

Summary of wage arrears claim

[36] Mr Thompson-Mita is ordered to pay Mr Michael \$4,042.27 wage arrears consisting of:

- a. \$3,633.84 unpaid wages for hours worked;
- b. \$109 unpaid compulsory Employer KiwiSaver contribution;
- c. \$299.43 unpaid holiday pay.

Was Mr Michael dismissed?

[37] Mr Michael bears the onus of establishing on the balance of probabilities that he was dismissed. A dismissal is a sending away that occurs at the employer's initiative.

[38] I find that Mr Michael was dismissed. He did not freely or voluntarily resign. I find that he was dismissed by Mr Thompson-Mita after Mr Michael raised concerns about not being paid for the work he had done and about the fact that the employment agreement he had been promised when he accepted Mr Thompson-Mita's offer of employment had not been provided.

[39] Mr Michael presented copies of text messages to the Authority which show that he had been asking Mr Thompson-Mita for a written employment agreement on numerous occasions.

[40] Mr Michael says that after working for two weeks he asked for his pay but was told by Mr Thompson-Mita that he (Mr Michael) had to work for another four weeks without pay (making a total of six weeks' work without pay) before he would be paid his wages.

[41] Mr Michael says that when Mr Thompson-Mita told him that, Mr Michael replied that he wanted to receive his signed employment agreement before he would continue working.

[42] Mr Thompson-Mita's response was to tell Mr Michael (and the two other unpaid workers) that he would receive his employment agreement on 29 March 2016. That did not occur.

[43] Instead on 28 March 2015 Mr Thompson-Mita sent Mr Michael two text messages (which also applied to the two other workers) saying:

- a. “[...] We have decided that I will assume the role of Manager for BM Diner and we have dissolved all other positions.”
- b. “We have made a salaried offer to 3 full time employees on a 90 day trial and we have also taken on 2 school students on part time roles.

The Directors have all agreed the staffing mix we have now are the right levels for the store at this time. We will not be offering any other positions until we have traded a full 4 weeks then we will review after every week.”

[44] I find these texts from Mr Thompson-Mita actually dismissed Mr Michael. Even if I am wrong about that, I find that Mr Thompson-Mita had effectively also constructively dismissed Mr Michael by fundamentally breaching his terms and conditions of employment.

[45] Mr Thompson-Mita failed to provide Mr Michael with a written employment agreement contrary to s.63A of the Employment Relations Act 2000 (the Act). He had also failed to pay Mr Michael as agreed.

[46] An employee is entitled to be paid for the work they do. Failure to pay an employee their wages as agreed is a serious and fundamental breach of an employer’s obligations and of a key element of the employment relationship.

[47] I find that the failure by Mr Thompson-Mita to pay Mr Michael the agreed wages for the work that Mr Michael did was a fundamental breach which made it reasonably foreseeable that Mr Michael would not continue working under such circumstances.

[48] I am therefore satisfied that Mr Thompson-Mita dismissed Mr Michael.

Was dismissal justified?

[49] Justification is to be objectively assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act).

[50] A fair and reasonable employer is expected to comply with its statutory obligations which include the s.4(1A) good faith requirement to provide an employee with relevant information and an opportunity to comment on it before a final decision is made which adversely impacts an employee's ongoing employment. It also includes the four procedural fairness tests in s.103A(3) of the Act.

[51] I find that Mr Thompson-Mita's dismissal of Mr Michael was unjustified because it was not what a fair and reasonable employer could have done in all the circumstances.

[52] I find that Mr Thompson-Mita breached his good faith obligations and all of the four procedural fairness tests in the Act. These breaches of minimum statutory obligations have fundamentally undermined Mr Thompson-Mita's ability to justify his actions and how he acted towards Mr Michael.

What if any remedies should be awarded?

Mitigation

[53] I find that Mr Michael has taken adequate steps to mitigate his loss because he has been constantly searching for new employment. Mr Michael is registered with employment agencies and has been actively applying for jobs. Although he has had interviews he has not yet been successful in securing new employment.

Lost remuneration

[54] I am satisfied that Mr Michael has lost remuneration as a result of his unjustified dismissal and that he is entitled to be compensated for that.

[55] Mr Thompson-Mita is ordered to pay Mr Michael \$11,250 (\$3,750 per month x 3 months) being three months' lost remuneration under s.128(2) of the Act to reimburse him for the actual remuneration he has lost as a result of his dismissal grievance.

KiwiSaver

[56] Mr Thompson-Mita is also required to pay the compulsory KiwiSaver contributions on the lost remuneration Mr Michael has been awarded in paragraph [55] above.

[57] Mr Thompson-Mita is therefore ordered to remit \$337.50 (being 3% of Mr Michael's lost remuneration) to IRD as his compulsory Employee KiwiSaver contribution. This amount is included within the \$11,250 Mr Michael has been awarded.

[58] Mr Thompson-Mita is also ordered to pay \$337.50 to IRD (being 3% of the \$11,250 lost remuneration Mr Michael was awarded) as the compulsory Employer KiwiSaver contribution. This amount is in addition to the \$11,250 lost remuneration Mr Michael has been awarded.

Distress compensation

[59] I accept Mr Michael's evidence that he has suffered distress, stress, humiliation and injury to feelings as a result of his unjustified dismissal. Mr Michael described how the other workers who were also not paid for the work they did have been demanding their wages from Mr Michael, because he was the Store Manager.

[60] Mr Michael says the other workers have been contacting him asking for their money because Mr Thompson-Mita cut off all contact with them so the other workers turned to him. Mr Michael described being in "*constant stress*" trying to support himself and his daughter.

[61] Mr Thompson-Mita is ordered to pay Mr Michael \$6,000 under s.123(1)(c)(i) of the Act to compensate him for the distress he has suffered.

Contribution

[62] I find that Mr Michael has not engaged in any blameworthy conduct that warrants a reduction being made under s.124 of the Act to the remedies he has been awarded.

Costs

[63] Mr Michael represented himself and so there is no issue as to legal costs. He is, however, entitled to be reimbursed for his filing fee. Accordingly, Mr Thompson-Mita is ordered to pay Mr Michael \$71.56 to reimburse the filing fee.

Outcome

[64] I find that:

- a. Mr Thompson personally employed Mr Michael.
- b. Mr Thompson unjustifiably dismissed Mr Michael.

[65] Mr Thompson-Mita is ordered to pay Mr Michael \$21,701.58 being:

- a. \$4,042.27 wage arrears inclusive of Employer KiwiSaver contribution and holiday pay;
- b. \$11,587.75 lost remuneration inclusive of the compulsory Employer KiwiSaver contribution;
- c. \$6,000 distress compensation to be paid without deduction;
- d. \$71.56 to reimburse the filing fee.

[66] Within 28 days of the date of this determination Mr Thompson-Mita is ordered to remit to IRD for the benefit of Mr Michael's KiwiSaver account \$893 of the total he has been awarded in paragraph [65] above being the unpaid compulsory KiwiSaver contributions (being \$446.50 compulsory Employee contribution and \$446.50 compulsory Employer contribution).³

[67] That leaves a balance for Mr Thompson-Mita to pay directly to Mr Michael of \$20,808.58 within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority

³ See paragraphs [33] & [34] for KiwiSaver contributions on the wage arrears claim and paragraphs [57] and [58] for KiwiSaver contributions on the lost remuneration awarded under s.128(2) of the Act.