

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 226
3103592

BETWEEN

MANOJ MISHRA
Applicant

A N D

RYAN INVESTMENTS NZ
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Kevin Murray and David Buckingham, advocates for the Applicant
Yogeesh Kapoor for the Respondent

Investigation Meeting: 24 February 2021

Submissions Received: 24 February 2021 from the Applicant
24 February 2021 from the Respondent

Date of Determination: 25 May 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Manoj Mishra moved to Queenstown in early November 2019 to take up a role with Ryan Investments NZ Limited as a driver. After working only three days, Mr Mishra says Yogeesh Kapoor, the shareholder and director of Ryan Investments, confronted him over his work; this confrontation involved Mr Kapoor abusing him over his work, attempting to assault him and then telling him to leave.

[2] Mr Mishra says this was clearly a dismissal, so he left, not only because he was dismissed but because he was afraid of Mr Kapoor.

[3] Mr Mishra claims he was unjustifiably dismissed by Ryan Investments. He also claims he is owed wages as he was not paid for all of the work he did over the three days. And he claims Ryan Investments breached obligations to him for which it should be penalised.

[4] Ryan Investments disputes Mr Mishra's account of what occurred. It says, in the first instance that Mr Mishra was a contractor not an employee; this is because after it offered Mr Mishra full time employment it became aware that he did not have a full driver's licence so it offered him a temporary contractor role pending him sitting and obtaining his full licence. It says, in any event, the events on the third day of Mr Mishra's work for Ryan Investments included that Mr Mishra became angry at Mr Kapoor and two others who were trying to assist him with his deliveries. Mr Mishra then quit.

Mr Mishra's claim

[5] Mr Mishra's claim, that I have investigated, falls to be assessed in various steps.

[6] First, was Mr Mishra an employee of, or a contractor to, Ryan Investments:

- (a) If Mr Mishra was a contractor then his claim ends there as I do not have jurisdiction to resolve claims arising out of a contractor relationship.
- (b) If Mr Mishra was an employee of Ryan Investments then I can determine the further elements of his claim.

[7] Second, if Mr Mishra was an employee, was he unjustifiably dismissed by Ryan Investments? This includes the following issues:

- (a) Did Mr Kapoor dismiss Mr Mishra or did he resign?
- (b) If Mr Mishra was dismissed were Ryan Investments actions in dismissing him what a fair and reasonable employer could do in all of the circumstances?

[8] Third, if Mr Mishra was an employee was he paid correctly for the hours he worked, including any benefits he was entitled to such as holiday pay?

[9] Fourth, if Mr Mishra was an employee, did Ryan Investments fail to meet the following obligations, and if so should a penalty be imposed against it for any of the failures:

- (a) Comply with the duty of good faith set out in s 4 of the Employment Relations Act 2000 (the Act).
- (b) Provide wage and time records as requested pursuant to s 130(2) of the Act.
- (c) Provide and retain an employment agreement pursuant to s 64 of the Act.

My assessment of the evidence

[10] In the course of my investigation of this employment relationship problem I assessed various documentary, written evidence and oral evidence. In particular I heard from Mr Mishra, Mr Kapoor and two other drivers who were at the Queenstown depot when the alleged confrontation occurred. Based on all of this evidence I record the facts I established, which inform my determination of Mr Mishra's claim.

[11] On 1 November 2019, Mr Mishra responded to an advertisement for a courier driver role in Queenstown. He subsequently spoke to Mr Kapoor in a telephone interview, as he was living in Auckland at the time and Mr Kapoor was in Queenstown, and was offered the role.

[12] The terms of the courier driver role accepted by Mr Mishra included:

- (a) Employed as a courier driver to Ryan Investments to deliver groceries under the contract Ryan Investments had with the Queenstown Countdown store.
- (b) Working five days per week, 9 – 10 hours per day depending on delivery schedule.
- (c) Wage rate of \$17.70 per hour, the applicable minimum wage.
- (d) Ryan Investments to provide the truck and provide daily delivery schedule.
- (e) The driver role included responsibility to load groceries at Countdown depot and unload groceries at customer homes.

[13] Mr Mishra moved to Queenstown on 8 November 2019 and moved into a room at Mr Kapoor's home, which he rented from Mr Kapoor.

[14] On the evening of 8 November 2019, Mr Kapoor and Mr Mishra met to discuss arrangements for work, which was to commence on 9 November 2019. This included Mr Mishra providing relevant information for Mr Kapoor to complete all necessary employment, health and safety and insurance requirements and documentation.

[15] During this meeting Mr Mishra advised Mr Kapoor that he did not hold a full class 1 drivers licence. This created a problem for Mr Kapoor as he was concerned about Mr Mishra's ability to be an employee as the restricted licence might impact his ability to drive as required (for example he may not be able to drive certain hours) and would impact on the ability to have complete insurance cover for him while driving.

[16] After discussing this with Mr Mishra both Mr Kapoor and Mr Mishra agreed that Mr Mishra would start work on 9 November 2019 and work for five days. However this was a limited engagement, in that it would be five days only, whilst Mr Mishra made arrangements to sit his full licence and Mr Kapoor made enquiries about Mr Mishra's capacity to be an employee pending that full licence being obtained. Given the temporary nature of the role and the uncertainty about any future work, Mr Mishra would be retained as a contractor for the five days and paid at the rate of \$180.00 per day.

[17] Mr Mishra commenced work on 9 November 2019 at 8:00 am. Mr Mishra received some assistance and instruction from Mr Kapoor at the start of the day and was sent to deliver the first delivery of groceries to Wanaka. Mr Mishra was slow on his first day, taking many breaks and needing time to work out where he was going and how to efficiently get around the various customer drop offs.

[18] On 10 November 2019 a similar pattern occurred; despite assistance Mr Mishra was slow and appeared to be taking too many breaks and in the end one set of deliveries had to be completed by another driver.

[19] On 11 November 2019, after another morning of delayed deliveries Mr Kapoor confronted Mr Mishra about his slowness and the need for him to be more efficient and

communicate with him about deliveries. Mr Mishra became angry at Mr Kapoor so Mr Kapoor moved away to leave him to his work. Another driver then tried to assist Mr Mishra offering to share the afternoon delivery run with the deliveries he was doing. Mr Mishra became aggressive toward this driver and threw a punch at him. Mr Kapoor then came back to intervene. Mr Mishra calmed down but then told Mr Kapoor that he could keep his work as he was leaving.

[20] After a short period of time, with arrangements having been made for Mr Mishra's deliveries to be done by another driver, Mr Kapoor took Mr Mishra back to his house where he collected his belongings. Mr Kapoor then took Mr Mishra to the airport so he could hire a car and leave Queenstown.

Was Mr Mishra an employee?

[21] I am satisfied that Mr Mishra was an employee of Ryan Investments. The contractor arrangement agreed between Mr Kapoor and Mr Mishra was a temporary arrangement to reflect the need for both to make enquiries before a permanent position could be confirmed. It was however the same role as the employed courier driver role albeit for short duration and paid at a different rate.

[22] The advocate for Mr Mishra described this as being, in many respects, a trial; he rightly pointed out that the temporary nature of the engagement could not change the underlying relationship for what was otherwise an employee role based on all the relevant factors and applying the relevant case law.¹ It was temporary to accommodate the circumstances and to assess what might be able to be put in place long term, but it was still an employment relationship. I accept this as an accurate reflection on the situation.

Was Mr Mishra dismissed by Ryan Investments?

[23] Based on my assessment of the evidence and my conclusions as to the facts outlined above, Mr Mishra resigned and was not dismissed. There is no basis for Mr Mishra's unjustified dismissal personal grievance and this claim is dismissed.

¹ *Mike Leota v Parcel Express Limited and Freightways Limited* [2020] NZEmpC 61.

Was Mr Mishra paid correctly?

[24] Despite being paying a lump sum for each day he worked, rather than an hourly wage, my overall calculation shows that Ryan Investments paid Mr Mishra correctly including his holiday pay.

[25] On my assessment of the evidence I determine that Mr Mishra worked 29 hours over the three days. At minimum wage rate this is \$513.30 plus holiday pay of \$41.06. After tax, Mr Mishra should have been paid \$496.15. However Mr Mishra had agreed to Ryan Investments deducting his weekly rent and board costs leaving an amount of \$361.15 owing. Ryan Investments paid Mr Mishra \$365.00.

[26] There is no money owed to Mr Mishra and his wage arrears claim is dismissed.

Penalties for breaching minimum employment standards and the duty of good faith.

[27] Given my assessment of the evidence and my factual finding I make the following conclusions on the alleged failings by Ryan Investments:

- (a) Ryan Investments met the duty of good faith in its dealings with Mr Mishra.
- (b) There is no evidence that Ryan Investments failed to keep records of the hours worked nor is there sufficient evidence to show that it failed to produce the wage and time records on request. I would add that given the very short nature of the employment relationship, the circumstances of it being started and then finishing and given that Ryan Investments essentially went out of its way to try and give Mr Mishra an opportunity to become a full time employee, I do not consider it would be appropriate to impose a penalty even if a failure to keep and/or provide wage and time records was established.
- (c) Ryan Investments failed to provide and retain an employment agreement pursuant to s 64 of the Act. But given the circumstances of this employment relationship and that Ryan Investments was trying to accommodate Mr Mishra and facilitate his ongoing employment through the temporary arrangement, I do not consider it appropriate to impose a penalty.

[28] Mr Mishra's claim for penalties to be imposed is dismissed.

Costs

[29] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[30] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority