

but it allowed him to persevere with the task. Avanti says the payment made to Mr Muthuvel on 7 June 2020 was made without admission of liability and in full and final settlement of this employment relationship problem.

[3] In its statement in reply dated 22 August 2019 Avanti sought to recover by way of counter-claim losses it says were caused by Mr Muthuvel. The counter-claim was withdrawn at the investigation meeting.

Application for non-publication order

[4] Mr Muthuvel applied for non-publication orders on the grounds that having his name on a publically available determination may harm his chances of gaining further employment.

[5] Avanti opposed the application.

[6] The application is declined. The high threshold required to grant a non-publication order has not been met.¹

The Authority's investigation

[7] On 21 May the Authority issued a minute to the parties proposing the investigation meeting for this employment relationship problem be held by telephone. The minute, an earlier minute dated 12 March and notice of hearing were served on the parties by way of email. For completeness the 12 March minute records that Mr Muthuvel did not raise a personal grievance within the 90-day statutory limit and did not seek leave to raise a personal grievance out of time.

[8] On 11 June an investigation meeting was held by telephone.

¹ *XYZ v ABC* [2017] NZEmpC 40

[9] In determining this matter the Authority has considered oral evidence received at the investigation meeting from Mr Muthuvel and Mr Sam Anand, a director of Avanti, submissions and relevant background documents filed prior to the hearing.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[11] The issues requiring investigation and determination are:

- (i) Whether payment of the wages claimed fully and finally settles the application?
- (ii) Whether the applicant was employed by the respondent for 8 hours on 27 July 2018?
- (iii) If so, is holiday pay to be calculated on any arrears?
- (iv) Is an award of interest warranted?
- (v) Whether costs should be awarded?

The relevant law

[12] Section 6 of the Employment Relations Act 2000 sets out the meaning of employee and includes:

- (i) A person employed to work for hire or reward under an contract of service; and
- (ii) Excludes volunteers who do not expect and do not receive reward.

Full and final settlement?

[13] Avanti says Mr Muthuvel's claim cannot proceed because he accepted a payment on 7 June 2020 in full and final settlement thereof.

[14] Avanti unilaterally paid the sum directly into Mr Muthuvel's bank account and emailed him saying the payment was made in full and final settlement. There was no condition on the payment, fulfilment of which would establish acceptance on the terms asserted. A unilateral assertion of an agreement does not establish an agreement has been reached.

[15] Avanti is not entitled to rely on full and final settlement and Mr Muthuvel is entitled to have his claim investigated and determined by the Authority.

Was Mr Muthuvel employed by Avanti?

Background

[16] In late July 2018 Mr Muthuvel saw an AutoCAD design job advertised on the Student Job Search website. He was familiar with AutoCAD and believed he had the skills to undertake the role. Mr Muthuvel is a qualified engineer undertaking post graduate study. This was to be his first job in New Zealand.

[17] The advertisement included a start date of "ASAP", a description of the work involved, the location where the work was to be carried out, that the job was casual with a hourly pay rate of between \$16.50 and \$18 per hour and hours up to 12 per week.

[18] Mr Muthuvel was interested in the job and was duly put in touch with Mr Anand. He and Mr Muthuvel spoke on the telephone. At Mr Anand's request Mr Muthuvel provided his bank account details, IRD number and student identity number and agreed to meet him at 3.15pm the following day.

[19] Mr Muthuvel arrived early for the meeting at 3pm. Mr Anand almost immediately put him on what he described as a live project to assess Mr Muthuvel's capability. Mr Anand emphasised to the Authority this was a capacity assessment and not a work trial. The project involved a lighting plan for an Avanti client which Mr Muthuvel worked on until at least 10.45pm with a 30 minute meal break. There is no dispute that during the course of the day Mr Anand took Mr Muthuvel for a hamburger meal, paid for the meal, drove him back to the place where the work was being performed to continue working and then drove him home.

[20] The following day Mr Muthuvel texted Mr Anand expressing his willingness to take on other projects for Avanti and asking for “provision to pay”. He received no reply to the txt.

[21] On 30 July 2018 Mr Muthuvel telephoned Mr Anand. He recorded that conversation and another with Mr Anand on 30 August. The conversations were conducted in Tamil. A translation of these conversations has been provided to the Authority. Avanti took no issue with the translation but submitted the recordings were made without Mr Anand’s consent and this is a factor that should be weighed against Mr Muthuvel.

[22] The 30 July conversation is significant because it is a near contemporaneous record of the parties’ respective positions in regard to this employment relationship problem.

Was Mr Muthuvel employed to work?

[23] In *Salad Bowl Limited v Howe-Thornley* the Employment Court had to determine whether an individual was an employee when undertaking a work trial². The Court observed that an interview alone between a prospective employee and employer would rarely amount to work in an employment relationship giving rise to employment rights and obligations including the expectation of payment, and that satisfaction with the work performed is not a condition of employment. In finding Ms Howe-Thornley was an employee while undertaking a work trail the Court stated:

Where the reasonableness line is likely to be crossed most commonly and “work” may be engaged in, for which there may well be a requirement for payment as well as where other incidents of an employment relationship arise, is where the employer gains an economic benefit from the employee's activity. In this case, for example, the defendant performed a number of the range of tasks which would have been undertaken by her had she continued to work for the plaintiff. Although the economic or other business or operational benefit to the employer may not have been optimal at that point due to the needs of the defendant to be shown what to do and to develop the necessary skills,

² *Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152

the defendant was nevertheless performing work for the plaintiff and contributing to its business.

[24] Avanti says there was no employment relationship and it merely gave way to Mr Muthuvel's insistence to persevere with the project. It is not accepted that Avanti found itself in a situation it could not control. If, as Mr Anand says, he quickly assessed Mr Muthuvel as not having the skills to complete the work as expected then, he should have ended the capacity assessment. The weight of evidence suggests Avanti needed the job completed urgently and Mr Muthuvel was given the job which he diligently completed, his final tasks at the end of eight hours work including converting the plans to pdf, printing them off and handing them to Mr Anand. Mr Muthuvel performed work for Avanti and was contributing to the business.

[25] In the statement in reply and in the evidence it is suggested Avanti would have paid Mr Muthuvel had it assessed the work as acceptable. This further supports the finding Mr Muthuvel was working and contributing to the business. However, whether the work was to an acceptable level does not need to be determined and I make no finding as to the standard of work performed by Mr Muthuvel. Satisfaction with the work performed is not a condition of employment.³

For hire or reward under a contract of service?

[26] The basis on which the employment was offered was sufficiently clear from the SJS advertisement placed by Avanti and known to Mr Muthuvel – the work was to be casual, AutoCAD design work, to be paid at a rate within a stated range. Mr Muthuvel's performance of the tasks requested of him by Avanti amounted to acceptance of that offer. Mr Muthuvel was employed by Avanti for hire or reward under a contract of service.

Volunteer?

[27] Avanti did not claim in its statement in reply or supporting documents, and Mr Anand did not say, Mr Muthuvel was told prior to commencing the capability assessment that it would be unpaid. Mr Muthuvel could not reasonably have deduced

³ *Salad Bowl*

Avanti intended the capability assessment to be unpaid – Avanti asked him to provide his payment details prior to the meeting and he was given a live project on which to work which Avanti allowed him to complete over eight hours. Mr Muthuvel was not a volunteer within the meaning of section 6 of the Act.

[28] The Authority finds Avanti employed Mr Muthuvel to complete an urgent job on 27 July 2020 on terms clear between the parties.

Holiday Pay

[29] As an employee Mr Muthuvel was entitled to holiday pay upon the termination of his employment calculated at 8% of his gross earnings.⁴

[30] Avanti is ordered to pay Mr Muthuvel \$10.56 in holiday entitlements within 14 days of the date of this determination.

Interest

[31] Mr Muthuvel is entitled to an award of interest on the total wages claimed including the holiday pay component. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[32] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[33] Avanti Private Limited is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:⁵

- (i) Interest on the sum of \$132 from 28 July 2018, being the date the wages were due and owing, until 7 June 2020, when the wages were paid.
- (ii) Interest on the sum of \$10.56 from 28 July 2018 until the date payment is made in full.

⁴ s 27 Holidays Act 2003

⁵ www.justice.govt.nz/fines/civil-debt-interest-calculator

[34] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Filing fee

[35] The filing fee of \$71.56 is an amount Mr Muthuvel can reasonably recover from Avanti Private Limited.

[36] Avanti Private Limited is to pay the sum of \$71.56 to Mr Muthuvel within 14 days of the date of this determination.

Summary of orders

[37] The Authority orders as follows:

- a) Avanti Private Limited employed Mr Muthuvel on a casual basis for 8 hours on 27 June 2018.
- b) Payment of the wages claimed does not amount to full and final settlement of the claim.
- c) Within 14 days of the date of determination Avanti Private Limited is ordered to pay Mr Muthuvel the following sums:
 - (i) holiday pay of \$10.56
 - (ii) filing fee of \$71.56
- d) Within 14 days of the date of determination Avanti Private Limited is to calculate and pay Mr Muthuvel interest on wages paid and holiday pay as awarded in paragraph [33] above.

Marija Urlich
Member of the Employment Relations Authority