

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 195/10
5287306

BETWEEN

MAIKO NATSUME
Applicant

AND

VALLEY OF THE KINGS
LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Mr Brendan Scoble, Advocate for Applicant
No appearance for the Respondent

Investigation Meeting: 7 October 2010 at Christchurch

Submissions received: At the Investigation Meeting

Determination: 14 October 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This a wage arrears claim brought by the applicant, Ms Maiko Natsume, against the respondent, Valley of the Kings Limited. Ms Natsume claims that the respondent underpaid her by \$3,248.77 gross.

Non appearance on behalf of the Respondent

[2] Valley of the Kings was not represented at the investigation meeting. That raised the question of whether or not it was appropriate to proceed in the respondent's absence.

[3] The application was filed on 17 May 2010 and a copy was, in accordance with the Authority's normal processes, forwarded to the respondent along with advice that any statement in reply had to be lodged within 14 days. A statement in reply has never been received.

[4] The Authority's normal procedure sees the scheduling of a telephone conference at which the parties discuss the forthcoming investigation meeting, its timetabling and conduct. That call occurred on 8 July 2010 and amongst the participants was Mr Koura, a Director of and shareholder in the respondent company.

[5] The parties agreed to hold the investigation meeting on 7 October 2010. They also agreed a prior exchange of evidence, with Ms Natsume to forward her briefs on 23 September and the respondent to reply on 30 September 2010. There was a lengthy discussion over these dates as, at the time of the telephone conference, Mr Koura was incarcerated at Rolleston Prison and I wished to ensure he had sufficient time between his release and the agreed date for preparation. He was adamant that he had sufficient time and that the respondent's briefs of evidence would be filed by the set date. They weren't; indeed, they are still to be received.

[6] Before the meeting date Mr Koura did, however, contact the Authority. On 28 September he phoned to advise he was unable to attend due to a medical condition. He was asked to request the adjournment in writing and advised that the request would undoubtedly require supporting evidence such as a medical certificate.

[7] On learning of the request I confirmed the need for supporting evidence. That message was passed to Mr Koura by a Support Officer. The evidence, such as it was, took the form of facsimile received on 1 October. It detailed various hospital appointments and an outline of medication to be administered to Mr Koura between 26 September and 4 October 2010. Whilst there was sufficient information to establish the general nature of his condition, there was nothing about its seriousness or evidence which supported his assertion that it precluded attendance on 7 October.

[8] I asked the Support Officer to advise Mr Koura that I did not consider the facsimile sufficient and that more would be required for an adjournment to be granted.

That message was passed to Mr Koura's son given that by this time Mr Koura had asked that contact be made that way.

[9] Mr Koura's response came on 6 October when he rang the Authority. The Support Officer was not at her desk and Mr Koura left a message. He referred to the fact that he was responding to the message left with his son; expressed dissatisfaction that his call was not answered in person; asked that his call be returned and then stated "I'll not sit on my bum and do nothing. I haven't time for you".

[10] The Support Officer returned the call. She reiterated that the need for more evidence supporting Mr Koura's claim that he could not attend the investigation meeting to which he advised that he had to go to hospital to get a daily injection. Thereafter he pursued a normal daily routine. The Support Officer advised that if that was the case the meetings commencement time could be altered to fit with his appointment. Mr Koura responded by advising that while he wished to assist the investigation, he was a busy man and would attend if he had time. He said he would telephone and advise whether or not he would attend in the morning (being the date of the scheduled investigation meeting).

[11] Mr Koura did not attend the investigation meeting and the promised call was never made.

[12] The above speaks for itself. Mr Koura is clearly aware of the meeting yet is unwilling to commit to participating. Whilst it is accepted that there is a medical issue, there is absolutely no evidence that it precludes his attendance. To the contrary, his comments about being busy and the admission about the only restriction on normal activity is the time taken for the injection would suggest that his condition does not preclude attendance. His comments suggest a cavalier attitude to the claims against him and he has failed to provide a reason, let alone a good one, for adjourning.

[13] In these circumstances, I chose to proceed in the respondent's absence.

Background

[14] As at the time of events being canvassed herein, the respondent operated its business from two locations – a fast food outlet in New Brighton and a restaurant in Kaiapoi.

[15] Ms Natsume was a foreign student seeking, as a secondary interest, a source of income. She let it be known amidst friends that she sought work and one advised that she had heard from another acquaintance that the respondent had a vacancy. Ms Natsume was put in contact with the friend of a friend who advised her to ring the New Brighton shop. She did so and spoke to Mr Koura. He gave a time for an interview which was to be held at the Kaiapoi establishment.

[16] Ms Natsume says that the interview was brief, some ten to fifteen minutes. She says she gave Mr Koura a copy of both her curriculum vitae and a letter from the Inland Revenue advising her tax number. She says Mr Koura acknowledged the later document but neither took it nor appeared to write the tax number down. Ms Natsume says she also asked about the rate of pay but that she did not receive an immediate answer. Ms Natsume says she was told that the vacancy was at the New Brighton establishment and that it was a sole charge role. Given that the incumbent would be working alone there was to be an initial training period of two weeks when the employee would work with Mr Koura. Ms Natsume commenced almost immediately.

[17] The work was organised in half day shifts – the first of some 4 hours from 11am to 3pm and the second from 3pm until closing at 9pm. The pay was to be \$30 per shift (irrespective of length) or \$60 if the full day was worked and Ms Natsume received these amounts as of her first shift.

[18] After the initial two week period Ms Natsume worked most of her shifts alone at New Brighton, though occasionally she assisted at the Kaiapoi restaurant. Payments were made, in cash, for all shifts.

[19] Some three months later Ms Natsume was approached by a colleague who advised that they were being underpaid. The colleague, also a Japanese student, had apparently got a second job and asked a teacher about the significant pay differential. The teacher had suggested she approach Citizens Advice and there she learnt about minimum wages. She passed this information to Ms Natsume.

[20] Ms Natsume says she raised this with Mr Koura. She says his response was delivered angrily and included advice that as she had taken the money and hadn't complained till then she was deemed to have accepted the rate. In response to Ms Natsume's advise that she intended approaching the Department of Labour, Mr Koura told her that she had no proof and was taking a risk as no tax had been paid on her earnings. There was, at that time, no mention of Mr Koura's later defence, namely that Ms Natsume was engaged as a trainee as opposed to an employee.

[21] Notwithstanding that, Ms Natsume approached the Department of Labour. They examined the available records, which largely appear to have consisted of a diary that Ms Natsume kept and which included, amidst other day to day appointments, a record of which shifts she had worked. The Labour Inspector calculated that her earnings fell \$3,248.77 short of minimum statutory requirements (the Minimum Wage Act 1993 and the Holidays Act 2003). Ms Natsume accepts that calculation as an accurate summation of what she is owed.

[22] The Labour Inspector contacted the company and was told by Mr Koura that Ms Natsume was not an employee but a trainee he had allowed to work in his shop so as she could gain experience which might enable her to gain future employment in New Zealand. The Labour Inspector found himself unable to pursue the arrears. He could only do so if Ms Natsume was an employee and determining the nature of the relationship was beyond his jurisdiction.

[23] Ms Natsume therefore brought the matter to the Authority though in the interim she had completed some investigations and found, amongst other things, two advertisements placed by the respondent on a local Japanese language website, www.nzdaisuki.com. They are job advertisements seeking someone to perform the role that Ms Natsume filled and are of a contemporaneous vintage.

Determination

[24] Whilst I have only heard one side of the story I have no qualms in determining that Ms Natsume was an employee. Her evidence was credible and she has pursued the issue with vigour notwithstanding the potential risks that reside in the fact that the respondent has failed to either deduct or forward PAYE on her behalf.

[25] The companies defence; namely that Ms Natsume was a trainee is not, in my view, credible. I reach this conclusion for the following reasons:

- (i) I find it unbelievable that any responsible company would leave a trainee in sole charge of a retail food outlet for complete shifts;
- (ii) I consider the fact that Ms Natsume was paid throughout (albeit at an inadequate and unlawful rate) undermines the credibility of the claim;
- (iii) Likewise the advertisements undermine the assertion that the respondent was seeking and engaged a trainee as opposed to an employee; and
- (iv) I accept Ms Natsume's evidence about Mr Koura's response when she raised the issue. To me, the reported response indicates that at the time he was treating her as an ungrateful employee as opposed to a misguided trainee.

[26] It follows, given my finding that Ms Natsume was an employee and my acceptance of her evidence as credible, that I also conclude that the claimed amount is owed.

[27] The respondent will therefore be ordered to pay to Ms Natsume outstanding wages in the amount of \$3,248.77 gross.

Interest

[28] Ms Natsume asks that she be allowed to amend her claim and seek interest on any amount found to be owing. Interest is to reimburse someone for use, by others, of money that is theirs. In this instance there is no doubt that by failing to make payments properly due the respondent has continued to have use of money rightfully

belonging to Ms Natsume. This is a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[29] When ordering interest the Authority may consider an amount up to the current 90 day bank rate plus 2%. The 90 day rate is currently 3.19% which makes 5.19% the total possible. I consider that to be an appropriate amount given the circumstance of this failure and the lack of an argument to the contrary.

[30] The obligation to pay arose no later than the cessation of Ms Natsume's employment on 22 November 2009 and that is the date from which interest should be paid.

[31] I therefore order that the respondent pay to Ms Natsume interest on the arrears owing at the rate of 5.19% per annum from 22 November 2009. The amount payable as at the date of this decision is \$92.56 and that shall increase by a further 28 cents for each day that passes from today's date until payment is made.

Costs

[32] There are three elements to Ms Natsume's costs claim. She seeks:

- Reimbursement of the \$70 fee incurred for filing this claim in the Authority;
- Reimbursement of costs incurred in travelling to attend the investigation meeting; and
- Reimbursement of costs associated in obtaining an extension to her visa so as to allow her to pursue the claim.

[33] Given Ms Natsume's success the filing fee is, in my view, a given.

[34] Ms Natsume now resides in Blenheim which, according to the Automobile Association, means a round trip of some of 620km. Inland Revenue recognises 70 cents per kilometre as being an appropriate rate for reimbursing the use of a private car as Ms Natsume used here. Applying that rate to the distance travelled gives a travel reimbursement of \$434.00. Ms Natsume was also required, given the early start, to stay in Christchurch the night before the investigation meeting. That cost \$95 dollars and she has produced the requisite receipts.

[35] The travel costs were incurred and she has been totally successful with her claim. In such circumstances, and given the lack of any argument to the contrary, I consider it appropriate the claimed reimbursement occur.

[36] Ms Natsume's also claims the cost of obtaining a visa extension. In the normal course of events this investigation meeting would have occurred earlier than it did. The delay was occasioned by Mr Koura's incarceration and resulted in a date after the expiry of Ms Natsume's visa. To be available to attend the hearing and pursue monies rightfully hers, she required an extension. That involved not only the cost of her application but various medical examinations required by the Immigration Service. The total cost was \$474.25 and the claim is supported with receipts and correspondence from the Immigration Service.

[37] Again, these costs were incurred. They were incurred as a result of Mr Koura's circumstances and necessitated by his assertion that he intended defending the claim. That assertion proved to be misleading, and put Ms Natsume to unnecessary expense. In such circumstances I believe the amount incurred should be reimbursed in full.

[38] I therefore order that the respondent reimburse the costs incurred by Ms Natsume and pay to her the sum of \$1073.25.

Orders

[39] For the reasons given, the following orders are made:

(i) The respondent is to pay to Ms Natsume wage and holiday arrears in the sum of \$3,248.77 (Three thousand two hundred and forty eight dollars and seventy seven cents); and

(ii) The respondent is to pay to Ms Natsume interest at the rate of 5.19% per annum from 22 November 2009. As at the date of this decision, the sum owing amounts to \$92.56 (ninety two dollars and fifty six cents) and that amount shall increase by 28 cents for each further day that passes before payment is made; and

(iii) The respondent is to pay to Ms Natsume a reimbursement of costs incurred in the sum \$1073.25 (One thousand and seventy three dollars and twenty five cents); and

(iv) The respondent is to pay the above sums no later than Thursday 4 November 2010.

Mike Loftus
Member of the Employment Relations Authority