

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 78A/09
5144170

BETWEEN DAVID PAINTER
 Applicant

AND CANSTAFF LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Peter Macdonald, Advocate for the Applicant
 Robert Thompson, Advocate for the Respondent

Investigation Meeting: 4 August 2009 at Christchurch

Further information: 7 August 2009 from the Applicant
 10 August 2009 from the Respondent

Determination: 13 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Painter was employed by Canstaff Limited until he resigned in September 2008. His claim is for arrears of wages based on his employment agreement. It provided for a minimum of 40 hours per week but Canstaff Limited only paid him for the hours he actually worked.

[2] There are several reasons why Canstaff Limited says it should not have to meet Mr Painter's claim. To resolve this problem, I will first explain the background to Mr Painter's employment before considering the validity of Canstaff Limited's objections.

Mr Painter's employment agreement

[3] Canstaff Limited and Mr Painter signed an employment agreement in May and June 2007 respectively. There are a number of significant provisions.

[4] Clause 3.2 says:

It will come into force on 1 July 2007 and will remain our agreement until it is replaced or either of us terminates the employment.

[5] Clause 4.1 says:

This agreement may be varied during its term when we agree to this. When any variation is agreed we will record the variation and it will form part of the agreement between us.

[6] Clause 7.1 says:

*Your minimum hours of work shall be not less than **40** (forty) hours per week ...*

[7] Matthew Jones is Canstaff Limited's director. As part of that role, he recruits employees from Europe and elsewhere to work in New Zealand. Mr Painter is a tradesman carpenter/builder. He and his wife lived in England and met Mr Jones in London when he was there recruiting employees. Their exchanges eventually resulted in the offer of employment and its acceptance embodied in the written employment agreement mentioned above. At the time both sides expected that Mr Painter would be in New Zealand to commence work on 1 July 2007.

[8] Although not expressed in the employment agreement, it was presumably subject to Mr Painter receiving the appropriate visa allowing him to enter and work in New Zealand. This was obtained by him on about 22 June 2007. Canstaff Limited's client record reports that an email was received on 13 July 2007 from Mrs Painter advising it about the visa. Thereafter, the record shows Canstaff Limited initiating various inquiries about Mr Painter's intended arrival date and his work intentions. Mr Painter's evidence is that he phoned a number of times but those contacts are not recorded in Canstaff Limited's client record. Understandably, Canstaff Limited doubts whether there was any contact from Mr Painter other than what is reported in its record. However, it is not necessary to resolve this dispute for reasons that will be explained later.

[9] Mr Painter eventually arrived in New Zealand in December 2007 and started work with a client of Canstaff Limited (Montechristo) on 27 December 2007. Mr Painter and Canstaff Limited did not enter into any other employment arrangements in respect of this work. Canstaff Limited's evidence is that Mr Painter should have been offered a temporary contract for the work with Montechristo which it says was initially only for six days, but because of an administrative oversight, he was not. Even if it was correct that the assignment with Montechristo was initially only temporary and that an administrative oversight resulted in a failure by Canstaff Limited to provide a replacement employment agreement, I must decide this matter based on what was agreed between Mr Painter and Canstaff Limited, not what they might have agreed.

[10] There is another reason why Canstaff Limited's argument about administrative oversight makes no difference. When Mr Painter started work at Montechristo, he was paid \$18 per hour at first. He complained about that because the signed employment agreement between him and Canstaff specified a rate of \$20 per hour. Mr Jones' evidence is that the underpayment resulted from an administrative error that was corrected as soon as it was brought to his attention. However, there is other evidence to suggest that Mr Jones resisted paying Mr Painter at the contracted rate of \$20 per hour but eventually conceded the point. For present purposes, I will assume that Mr Jones's evidence is correct. Canstaff Limited, by placing Mr Painter at Montechristo and paying him \$20 per hour, must be taken as affirming the signed employment agreement in full knowledge of Mr Painter's late arrival. That is also why a failure by Mr Painter to keep in touch with Canstaff Limited (if that is what happened) makes no difference to the outcome of this case.

[11] Mr Painter's assignment at Montechristo ended in May 2008. By agreement, Mr Painter took annual leave (in advance) from 25 May to 2 June 2008. I understand that Mr Painter was paid for this time. Around the same time, Mr Painter came into Canstaff Limited's office looking for further work since the Montechristo work was ending. Graham Hinds was a Canstaff Limited representative at the time and he spoke to Mr Painter when he came in to his office. Mr Painter said his contract entitled him to a minimum of 40 hours pay each week but Mr Hinds told him that Mr Jones' instructions were that he would only be paid for time actually worked. There is some dispute in the evidence about whether Mr Jones had actually given this instruction to Mr Hinds. It is not necessary to resolve the conflict. There is no doubt

that Mr Hinds, on behalf of Canstaff Limited, at the time told Mr Painter that he would only be paid for time worked.

[12] One of the points taken now by Canstaff Limited is that Mr Painter should have protested about this at the time by taking up the matter directly with Mr Jones. It is said that Mr Painter acted in breach of good faith by failing to do so. I do not accept this argument. Section 131 of the Employment Relations Act 2000 leaves no room for doubt. It says that:

Where ... there has been default in payment to an employee of any wages ... payable by an employer to an employee under an employment agreement ... such wages ... may be recovered by the employee by action commenced in ... the Authority.

[13] Subsection (2) goes on to say that this applies despite the acceptance by the employee of any payment at a lower rate or any express or implied agreement to the contrary. Unless there was a variation to the terms of the employment arising from the exchange between Mr Painter and Mr Hinds, Mr Painter remained entitled to enforce the written employment agreement according to its terms. It was not suggested that Mr Hinds had any authority to bind Canstaff Limited contractually or that he actually purported to do so. Mr Painter's failure to protest to Mr Jones at the time (if that is what happened), makes no difference now to his right to enforce the signed employment agreement.

[14] The next point for Canstaff Limited is that Mr Painter failed to keep in contact and make himself available for work after the end of the Montechristo work and actually refused an offer of work with a company called Pallet Makers. Again, the conflict in evidence is largely between Mr Hinds whose evidence supports Mr Painter's position, and Mr Jones for Canstaff Limited. It was Mr Hinds who had the relevant direct dealings at the time. Putting that dispute to one side, there is no reason to doubt Mr Painter's evidence that he made himself available for work. It is common ground that Mr Painter accepted at least two offers of work that had him answering phones for a few days and building a shed on a dairy farm. He accepted that work because he would not otherwise have been paid by Canstaff Limited. I find it likely that he made himself available for any other work that Canstaff Limited had to offer him.

[15] As noted, all of the relevant exchanges were between Mr Painter and Mr Hinds. I note that Mr Hinds is now pursuing his own litigation against Canstaff

Limited so I should treat his evidence in support of Mr Painter with some caution. Canstaff Limited's evidence is that more work was available at Pallet Makers than Mr Hinds' evidence suggests was the case. However, I am still left with Mr Painter's evidence that Mr Hinds told him that there was the possibility of some work there and then subsequently told him that there was no work there. As noted, I find it more likely than not that Mr Painter would have accepted any work offered to him. I am not persuaded to the contrary by the evidence of what Mr Painter is purported to have said in a meeting on 28 September 2008.

[16] The other difficulty for Canstaff Limited with this argument is that it is common ground that Mr Painter would only have been paid \$13 per hour for work at Pallet Makers. There was no obligation on Mr Painter to accept work on the basis that Canstaff Limited would not comply with its employment agreement.

[17] There is an affidavit from the dairy farmer (Stewart Henderson) who was involved in Mr Painter's work building a shed. Several points are made in the affidavit. First, Mr Henderson is critical of the standard of some of Mr Painter's work. That is irrelevant for present purposes. Secondly, he is critical that the project took seven weeks from start to finish rather than three to four weeks. Again, as a general point, that is immaterial for present purposes. Finally, he says that Mr Painter was not available to work on the shed project at times because he was working on his own recently purchased house to bring it up to a good standard. Mr Painter's evidence is that he moved in to this property on 9 August 2008. After the investigation meeting he provided (at my request) an extract from the sale and purchase agreement that records possession date as 25 July 2008. Mrs Painter nonetheless says that they did not move in until 9 August 2008.

[18] Mr Henderson's affidavit says *[He] started on the 23rd of June. ...On the first day David spoke about his intention to move into a new property and he would require time off. ...David talked a lot about the work he was doing on his property which I had no problems with over the first few weeks ...*Mr Henderson must be wrong to suggest that Mr Painter took time off *over the first few weeks*, given the possession date. Mr Henderson goes on to say *as the project went on David was spending more time off the project as he informed me his new property was not up to standard.* He also says that there were weather delays. However it is not made clear when Mr Painter took time off and whether that was because Mr Painter made himself

unavailable so as to amount to a breach of his obligations to Canstaff. In the circumstances there is not sufficient evidence to affect Mr Painter's claim.

[19] For the foregoing reasons I do not accept that Canstaff can avoid liability for the minimum specified in the written employment agreement.

Mr Painter's claim

[20] Mr Painter produced a schedule of his claim day by day between 2 June and 19 September 2008. It makes allowance for the work done and paid for during that time leaving a balance of 454 hours that should have been paid by reference to the minimum in the employment agreement. I accept the claim is accurate so Canstaff owes Mr Painter \$9,080.00 (gross).

[21] Mr Painter is also entitled to holiday pay calculated on all his gross earnings after allowing for the week's holiday taken in advance by agreement. I will reserve leave in case of any difficulty with the calculation.

Personal grievance

[22] After Mr Painter instructed a representative an amended statement of problem was lodged which purported to refer to the Authority for determination a grievance about the termination of Mr Painter's employment. In an earlier determination I found that no grievance about the termination of the employment was raised within time. However, left open for further consideration was whether Mr Painter's arrears claim should be treated by the Authority as an unjustified disadvantage personal grievance so as to open up the possibility of a distress compensation award.

[23] The Authority is not bound to treat a matter as being a matter of the type described by the parties and may, in investigating a matter, concentrate on resolving the employment relationship, however described: see s.160(3) of the Employment Relations Act 2000.

[24] In this case I find that Mr Painter's initial statement of problem fully and accurately described his problem and how it should be resolved. It reads *Non payment of wages as per contract of employment as signed by Matt Jones (For Canstaff Ltd) and David Painter and I would like payment of the 451 hours plus holiday pay for the hours that are owed to me.* While it was open to Mr Painter to

formulate this as a personal grievance of unjustified disadvantage he did not do so until much later. Apart from adjusting the claim to match the actual number of unpaid hours, there is no reason to do anything other than treat Mr Painter's description of the problem as accurate and award remedies on that basis. It would not be appropriate to now deal with the matter as a grievance and I decline to do so.

Summary

[25] Canstaff Limited is to pay Mr Painter arrears of wages of \$9,080.00.

[26] Canstaff Limited is to pay Mr Painter arrears of holiday pay. Leave is reserved in case of any difficulty with quantum.

[27] Costs are reserved. Any claim for costs must be lodged and served with 21 days and any reply must be lodged and served within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority