

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Shane Rolton (Applicant)
AND Ocean Fresh Harvest Limited (First Respondent)
AND Delking Distributors Limited (Second Respondent)

REPRESENTATIVES Melanie O'Neill, Counsel for Applicant
Gregory Denholm, Counsel for First and Second Respondents

MEMBER OF AUTHORITY Leon Robinson

INVESTIGATION MEETING 12 May 2005

DATE OF DETERMINATION 13 May 2005

DETERMINATION OF THE AUTHORITY

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- A. Ocean Fresh Harvest Limited is ordered to forthwith pay to Michael Shane Rolton the sum of \$6,819.95 as arrears of wages and the sum of \$16,800.00 as arrears of car allowances.**
- B. Ocean Fresh Harvest Limited is ordered to forthwith pay to Michael Shane Rolton interest on the judgment sum of \$23,619.95 at the rate of 9% per annum from 30 November 2004 until the date of payment.**
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Employment Relationship Problem

[1] The problem between these parties is Mr Michael Rolton's ("Mr Rolton") claim that he is owed salary and car allowances. He additionally seeks the return of a BMW motor vehicle to him. The respondents deny that Mr Rolton was an employee and say he is not owed any money. The respondents further say the matters relating to the BMW motor vehicle are civil matters in which the Authority has no jurisdiction.

The issues

[2] A number of issues arise:-

- (i) Whether Mr Rolton was an employee;
- (ii) If he was an employee, which of the respondents employed him?;
- (iii) Whether Mr Rolton is owed remuneration;
- (v) Whether Mr Rolton is entitled to have a BMW motor vehicle returned to him.

These issues are discussed in turn.

Was Mr Rolton an employee?

[3] Mr Rolton relies on an undated document entitled *Employment Contract for Michael Rolton* ("the Agreement") and signed by him on 15 January 2003 as evidencing his employment relationship. That document is executed by a Director Mr Michael Delmont ("Mr Delmont") on behalf of Ocean Fresh Harvest Limited the first respondent ("Ocean Fresh"). Mr Rolton says that he was employed as from 1 January 2003.

[4] The Agreement confirms employment as Chief Executive Officer commencing as from 1 January 2003 with a basic salary of \$68,000.00 and an on target annual bonus of a further \$40,000.00. That base salary is said to be payable in equal monthly instalments.

[5] The Agreement is supplemented by a letter dated 19 February 2003 signed by another director of Ocean Fresh one Mr Flemming Rasmussen ("Mr Rasmussen") confirming Mr Rolton's entitlement as from 1 January 2003 to a *monthly all-in gross car allowance of \$2,500.00 exclusive of GST*. In fact, Mr Rolton was paid \$2,800.00 per month.

[6] Those documents and the terms of employment evidenced by them are sufficiently corroborative of an employment relationship to my satisfaction. The bargain between these parties is decisively set out in the contractual documentation and the parties are to be held to the bargain they voluntarily entered into. There is no necessity nor is it appropriate to have regard to extraneous matters or to look behind the contract.

[7] Ocean Fresh suggests Mr Rolton was employed on unwritten terms independent of the Agreement. I don't accept that either on the evidence or as a matter of law. The law requires all employment agreements to be recorded in writing. The Agreement evidences an employment contract and it would be quite wrong in those circumstances to sanction another employment where the terms are not recorded in writing.

[8] The respondents maintain that the Agreement was terminated in September 2003. The termination arose because of a change in Ocean Fresh's company structure occasioned by the withdrawal of shareholders Mr Rasmussen and one Mr Habgood. Mr Delmont says that there was an agreement that the board of Ocean Fresh would be disbanded. He says Mr Rolton's position as CEO no longer existed and all other arrangements ceased.

[9] Mr Delmont's evidence was far from satisfactory. It was vague, imprecise, inconsistent and unconvincing. I do not accept his evidence.

[10] It is also the case that Mr Rolton continued to be paid his regular salary and car allowance after September 2003. Nor was he paid his contractual entitlements for redundancy or extended an opportunity to have input into that decision making process.

[11] I am satisfied that the Agreement was never terminated and consequently, I find that it evidences the fact and terms of Mr Rolton's employment. I find that Mr Rolton was an employee.

[12] Mr Rolton decided to resign because he was not paid regularly. By email dated 23 November 2004, Mr Rolton gave notice of resignation. He nominated 30 November 2004 as his final day of service. The Agreement required notice of termination of six months. Mr Rolton left the employment on 30 November 2004.

Who employed Mr Rolton?

[13] I have heard much evidence relating to transactions between various corporate entities as well as various arrangements for tax purposes. Regardless of which corporate entity paid Mr Rolton's remuneration, it was always his employer Ocean Fresh's liability to pay him.

[14] I am satisfied that the Agreement evidences Ocean Fresh was Mr Rolton's employer. That is beyond doubt by the express terms of the Agreement. There is therefore, no basis to impose any liability on the second respondent Delking Distributors Limited.

Whether Mr Rolton is owed remuneration

[15] For each month of his service, Mr Rolton was entitled to payment of base salary of \$5,023.99 and a car allowance of \$2,800.00. The total monthly remuneration is \$7,823.99.

[16] Mr Rolton claims the sum of six months salary of \$46,943.94 being the notice period under the Agreement. He says that he was willing, ready and able to work out the notice period when he gave notice. I do not accept this claim. While he did give notice of termination, he gave seven days notice of his resignation not the required six months. He has not entitlement to salary in lieu of notice because he did not give the notice he was required to give. **There will be no orders in relation to this claim.**

[17] Ocean Fresh's counsel denied any deficiency in payment to Mr Rolton. It is clear to me that Mr Rolton has not been paid what he was entitled to.

[18] Mr Rolton's calculation is incorrect. The following schedule details the sporadic payments actually made to Mr Rolton, his entitlements and my calculation of a total shortfall:-

Monthly Entitlement	Actual payment made		Monthly Shortfall/Overpayment
	Date	Amount	
\$7,823.99	29/08/03	\$7,823.99	Nil
\$7,823.99	30/09/03	\$2,000.00	-\$5,823.99
\$7,823.99	08/10/03 31/10/03	\$5,823.99 \$7,823.99	+\$5,823.99
\$7,823.99	02/12/03 08/12/03	\$2,800.00 \$5,023.99	Nil
\$7,823.99	05/01/04 30/01/04	\$7,823.99 \$2,800.00	+\$2,800.00
\$7,823.99	10/02/04	\$5,023.99	-\$2,800.00
\$7,823.99	03/03/04 10/03/04	\$2,800.00 \$5,023.99	Nil
\$7,823.99	06/04/04 07/04/04 15/04/04 23/04/04	\$2,800.00 \$1,000.00 \$2,023.99 \$2,000.00	Nil
\$7,823.99	07/05/04 11/05/04 19/05/04 28/05/04	\$2,800.00 \$2,000.00 \$1,000.00 \$2,023.99	Nil
\$7,823.99	14/06/04 25/06/04	\$2,800.00 \$3,000.00	-\$2,023.99
\$7,823.99	09/07/04 28/07/04	\$2,023.99 \$3,000.00	-\$2,800.00
\$7,823.99	23/08/04	\$3,000.00	-\$4,823.99
\$7,823.99	08/09/04 27/09/04	\$1,500.00 \$2,500.00	-\$3,823.99
\$7,823.99	04/10/04	\$2,500.00	-\$5,323.99
\$7,823.99	03/11/04 08/11/04	\$1,000.00 \$2,000.00	-\$4,823.99
Total		\$93,739.90	-23,619.95

[19] Mr Rolton is owed \$23,619.95. For convenience and because it is not possible to distinguish salary from car allowance in what the employer has paid, I determine that Ocean Fresh owes \$6,819.95 and \$16,800.00 in car allowances on the basis that it has paid salary first. **Ocean Fresh Harvest Limited is ordered to forthwith pay Mr Michael Rolton \$6,819.95 as arrears of wages and \$16,800.00 as arrears of car allowance.**

[20] As Mr Rolton has not had the use of the above monies when those funds fell due to him, I think it fit that he should have interest. **Ocean Fresh Harvest Limited is ordered to forthwith pay interest on the judgment sum of \$23,619.95 at the rate of 9% per annum from 30 November 2004 until the date of payment.**

The BMW motor vehicle

[21] Mr Rolton was entitled to an all-in monthly gross car allowance of \$2,500.00 exclusive of GST. He was actually paid \$2,800.00 per month but I am not prepared to find that that amount was an overpayment because it would be inequitable to do so in all the circumstances and because there must be some uncertainty around whether the amount was GST inclusive or exclusive. The contractual entitlement is to be interpreted against the employer drafter.

[22] Mr Rolton and Mr Delmont entered into an arrangement between them for the sale of Mr Delmont's BMW motor vehicle to Mr Rolton but there was no loan agreement drawn up. That arrangement involved the payment of interest. Mr Delmont obtained finance on Mr Rolton's behalf for the purchase. The motor vehicle remained registered in Mr Delmont's name. For tax purposes, Mr Rolton implemented a lease arrangement between himself and a limited liability company he set up for that purpose. Mr Rolton applied his car allowance towards the purchase of the vehicle from Mr Delmont.

[23] Mr Delmont's evidence on the financing of Mr Rolton's purchase of the vehicle was also unsatisfactory. I remain doubtful of his evidence as to whether he received an advance from a finance company in respect of Mr Rolton's purchase.

[24] Mr Rolton did not meet the instalments due to Mr Delmont in late 2004. On 9 December 2004 Mr Delmont and some associates arrived at Mr Rolton's home to repossess the BMW. Mr Rolton's wife had taken the vehicle to her work. The BMW was repossessed from Mrs Rolton's workplace.

[25] Mr Rolton in my view had an equitable interest in the BMW motor vehicle. He seeks an order from the Authority that the vehicle be returned to him or alternatively, damages to compensate him for the loss of that vehicle.

[26] I have decided that the Authority cannot assist Mr Rolton in respect of this claim. The orders in relation to his remuneration will compensate him for the car allowance entitlement owed to him. That is all that his employment agreement entitles him to - a monthly all-in car allowance. He was not entitled to the use of a motor vehicle itself. Consequent upon the Authority's orders, he will have received what he bargained for under the Agreement.

[27] I conclude then that the arrangements Mr Rolton entered into with Mr Delmont in respect of the purchase of the motor vehicle are severable and independent from the employment relationship. Mr Rolton's remedies lie elsewhere in relation to an alleged unlawful repossession, the operation of a credit contract and other tortious remedies. There are also third party and other competing equitable interests involved. For these reasons, I am unable to assist Mr Rolton and **there will be no orders in relation to the BMW.**

Costs

[28] In the event that Mr Rolton seeks costs, the parties are encouraged to resolve that question between them, but failing such agreement, Ms O'Neill is to file and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Denholm is to file a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson

Member of Employment Relations Authority