

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 26  
3018954

BETWEEN                      FEDERICO KURT SIMON  
Applicant

A N D                              ENVIRONMENTAL  
EDUCATION LIMITED  
Respondent

Member of Authority:        T G Tetitaha

Representatives:              B Edwards, Counsel for Applicant  
M Morris for Respondent

Investigation Meeting:        23 January 2018 at Tauranga

Submissions Received:        23 January 2018 from both parties

Date of Oral  
Determination:                  23 January 2018

Date of Written  
Determination:                  25 January 2018

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**ORAL DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. The application for personal grievance of unjustified dismissal is dismissed.**
- B. I order EEL to pay Mr Simon the sum of \$3,000 gross remuneration for the period 14 December 2015 to 23 January 2016.**
- C. I order EEL to pay Mr Simon \$71.56 being his filing fee as a contribution to his legal costs.**

## **Employment relationship problem**

[1] Federico Simon alleges he was unjustifiably dismissed by his employer Environmental Education Limited (EEL). EEL alleges its director was coerced into signing a sham employment agreement that was never approved by both directors and Mr Simon never fulfilled the terms of his employment. Further, EEL alleges the employment was really intended to assist Mr Simon to obtain residency in New Zealand.

## **Relevant Facts**

[2] Federico Simon is a Chilean national. He travelled to New Zealand in 2012 on a visitor's permit. He stayed and obtained a working holiday visa. Mr Simon holds a law degree. He found work in the tourism and hospitality industry in Tauranga.

[3] It was in 2015 while working in Tauranga that he met John Sadler. Mr Sadler was a director of EEL. The other director is Dr Michael Morris. EEL is a company whose business is the development of educational environmental programmes. These programmes are based in Tauranga, New Zealand.

[4] EEL were seeking sales consultants to promote attendances by students at their courses. They had employed one sales consultant who subsequently left. In August 2015 EEL contracted with Mr Simon to undertake work for which he invoiced them and was paid.

[5] In or around November 2015 Mr Simon sought residence in New Zealand. He needed to meet the requirements for a skilled migrant. This required full time employment and a certain category of job. With that in mind he approached the EEL directors, Mr Sadler and Dr Morris, about possible employment.

[6] On 4 November 2015 Mr Simon set out his requirements in a letter that stated amongst other things:

I need a job offer in order to be allowed to stay in New Zealand. To this end, I would be happy to discuss with you a possible contract, of perhaps six months.

I'm aware you don't have sufficient funds to pay me, but as you have intimated to me, I'm happy to discuss the alternative of share and also a percentage of every enrolment. However, and I'm sure you understand, for immigration purposes the contract, if you agree, needs to be set in monetary terms; immigration will not accept remuneration

by way of shares as a legitimate mode of payment to me. The shares would be an agreement between us.

[7] Mr Sadler sent a draft agreement to Mr Simon on 27 November 2015. This draft did not contain any remuneration. Some emails were exchanged between the two directors and Mr Simon between 27 and 29 November 2015. The emails on their face appear to agree to pay Mr Simon the sum of \$20 per hour for 30 hours work per week on the basis that he could enrol a minimum number of 6 students in level 1 courses.

[8] On or about 11 December 2015 Mr Sadler, on behalf of EEL, and Mr Simon signed the last page of an employment agreement that contained a salary of \$50,000 for 30 hours work per week. It also required Mr Simon to keep an accurate weekly record of time worked and to submit a timesheet to EEL that outlines the times and duties performed. It is accepted Mr Simon did not provide a timesheet specifying his hours of work.

[9] Mr Simon applied for a work visa which was granted in January 2016. A condition of the visa tied his employment to EEL and that he work in Tauranga, New Zealand.

[10] It is accepted that Mr Simon never received any wages from EEL after he signed the employment agreement on 11 December 2015.

[11] However personal matters changed for Mr Simon in January 2016. He obtained a scholarship to attend a university in Spain. He also wished to study towards his bar exam. He wanted to do this study in Chile where his family would pay his living expenses. He departed New Zealand for Chile on or about 23 January 2016. He did not return to New Zealand until 9 May 2017.

[12] Upon his return Mr Simon sought payment of his wages. He instructed a solicitor who wrote to EEL on 12 June 2017, demanding payment of his salary. Mr Simon then spoke to Dr Morris. At this stage Dr Morris was the sole director of EEL. Dr Morris indicated he was not interested in meeting with Mr Simon to discuss employment issues.

[13] However, by 17 June 2017 Dr Morris became more strident. He denied the existence of an employment agreement with Mr Simon and called him “delusional”. Mr Simon now alleges that that conduct resulted in his unjustifiable dismissal.

## Issues

[14] As indicated to the parties there are four issues for determination:

- (a) Was Mr Simon employed by EEL?
- (b) If he was employed by EEL was he employed up and until 17 June 2017 or did his employment terminated earlier?
- (c) Was he unjustifiably dismissed on or about 17 June 2017?
- (d) What remedies, including wage arrears, should be awarded?

### **Was Mr Simon employed by EEL?**

[15] I directed Immigration New Zealand to provide copies of any employment agreements and relevant correspondence between these parties. INZ responded promptly and have provided me with an Employer Supplementary Form and a copy of the signed employment agreement. Both documents were confirmed at hearing to have been signed by the former EEL director, John Sadler, who appeared to give evidence. Mr Sadler ceased being a director on 27 July 2016.

[16] The respondent alleges this employment agreement is a sham because it was never intended to pay Mr Simon, only support his residency application.

### ***Law of sham transactions***

[17] The test for an allegedly sham transaction has been authoratively determined by the Court of Appeal in a decision known as *Clayton v Clayton*.<sup>1</sup> To determine whether a particular transaction constitutes a sham, the Authority will focus on the actual intentions of the parties to the transaction and compare them with the acts done or documents created. The Authority will not be restricted to the legal form of the transaction, but will need to examine its substance in light of all the relevant evidence relating to the parties' intentions. As the issue will be whether the transaction was intended to be genuine, the focus will be on the actions and words of the parties, both contemporarily and subsequent.<sup>2</sup>

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<sup>1</sup> [2015] NZCA 30, [2015] 3 NZLR 293.

<sup>2</sup> See above at [61].

[18] The consequence of finding that a purported contract is a sham is that the contract will be inoperative to the extent that the parties did not intend to create a genuine legal relationship.<sup>3</sup>

***Is this a sham contract?***

[19] In my view this was not a sham contract. Prior to the agreement signed on 11 December 2015 there was correspondence between the parties that indicated clear intent to create a legal employment relationship. There only issue of difference between that correspondence and the agreement signed was the remuneration term. I accept Dr Morris and Mr Sadler's evidence that the figure of \$50,000 per annum was for immigration purposes only. From the emails between the directors and Mr Simon on 27-29 November 2015 there was an agreement for payment of 30 hours per week at \$20 per hour on the basis that Mr Simon could enrol at least a minimum number of six students in level 1 courses. Even if he was unable to do so, that did not indicate that this was a sham employment agreement. He may have been subjected to performance review measures, but Federico Simon was employed by EEL from 14 December 2015.

**Was Mr Simon employed by EEL up and until 17 June 2017 or did his employment terminate earlier?**

[20] Mr Simon's employment ended when he went to Chile. There was an agreed term of his employment and his work visa that he was based in Tauranga, New Zealand. He was required to enrol 6 students in level courses. He enrolled none. There was evidence from Dr Morris, which I accept, that courses were principally enrolled students from Tauranga. Once Mr Simon went to Chile, he could and did not fulfil the terms of his contract.

[21] Mr Simon submitted that this employment agreement had been somehow varied to allow him to work from Chile, undertaking the same or similar work to what he was doing, or should have been doing, under the agreement. I do not accept that.

[22] The employment agreement expressly required any variations to the agreement to be in writing. From the evidence that I saw at hearing there was no written agreement allowing Mr Simon to work for EEL in Chile. At best there seems to be

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<sup>3</sup> *Nisha v LSG Sky Chefs Limited* [2016] NZCA 21.

various discussions about what he could do in Chile for EEL but nothing that manifests with any certainty into an agreement.

[23] At best there was a discussion in November 2016 about the possibility of Mr Simon obtaining shares in the company as a form of remuneration. That was not an employment agreement. It was a share agreement. In my view there was no clear agreement about a variation to allow Mr Simon to work in Chile doing completely different work than that set out in his agreement that he signed in December.

[24] There is no conduct by EEL that suggests they have agreed to any variation or new employment agreement. EEL never paid Mr Simon for any work he did whilst in Chile or New Zealand. There is evidence Mr Simon was aware EEL had no money and that it was dependant upon him enrolling students in its courses to be able to pay him. He did not, and never could, secure such enrolments because he had located to Chile. I am not satisfied there was any certainty about the contractual arrangements between the parties thereafter. There was no evidence that satisfied me about a continued or new employment agreement.

#### **Was Mr Simon unjustifiably dismissed on or about 17 June 2017?**

[25] In my view this contract was frustrated by the actions of both parties. The contract terminated on or about 23 January 2016 when Mr Simon left for Chile, did not secure any enrolments and remained unpaid for his work. Mr Simon was not unjustifiably dismissed by EEL. His contract ended on 23 January 2016. The application for personal grievance of unjustified dismissal is dismissed.

#### *What remedies, including wage arrears, should be awarded?*

[26] However, there remains an issue of wages, and this is for the period Mr Simon was in Tauranga from 14 December 2015 to 23 January 2016. This comprises approximately five weeks. There is no evidence to suggest he wasn't working even though this period comprises four statutory holidays.

[27] There was an agreement for payment of 30 hours at \$20 per hour. Therefore Mr Simon is owed \$3,000 gross wages. I order EEL to pay Mr Simon the sum of \$3,000 gross remuneration for the period 14 December 2015 to 23 January 2016.

## **Costs**

[28] I have asked both parties to address me about the issue of costs. Given Mr Simon was successful on two matters (employment and wage arrears) he is entitled to costs.

[29] He has (luckily) secured representation by a counsel who is representing him pro bono. Therefore there are no legal fees to be met. However, he seeks a contribution to the payment of his filing fee and the costs of him serving the company.

[30] I decline, as earlier indicated, to reimburse the costs of service upon EEL as it appears it was undertaken at an incorrect address for service. I do, however, order a contribution towards his costs by payment of his filing fee. I order EEL to pay Mr Simon \$71.56 being his filing fee as a contribution to his legal costs.

**T G Tetitaha**  
**Member of the Employment Relations Authority**