



# New Zealand Employment Relations Authority Decisions

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## Fisher v Express Couriers Limited [2011] NZERA 329; [2011] NZERA Christchurch 66 (18 May 2011)

Last Updated: 3 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 66

5327771

BETWEEN

DANIEL USSHER Applicant

A N D

BK  
LIMITED  
Respondent

HORTICULTURE

Member of Authority: Representatives:

Investigation Meeting: Submissions Received: Date of Determination:

M B Loftus

Daniel Ussher, the Applicant in person Ajay Gaur, for the Respondent

18 February 2011 at Blenheim

On the day

17 May 2011

### DETERMINATION OF THE AUTHORITY

#### Employment relationship problem

[1] The applicant, Mr Daniel Ussher, claims that he was unjustifiably dismissed by the respondent, BK Horticulture Limited (BK), on or about 15 August 2010. As remedies he seeks reinstatement and compensation.

[2] Mr Ussher also claims that he was not paid for work performed and claims arrears accordingly.

[3] Finally Mr Ussher lists a number of allegations that he categorises as *violation of employment laws* though no remedies are identified in respect to these alleged wrongs.

[4] BK contends that it never employed Mr Ussher. It claims Mr Ussher refused to complete required documentation and insisted that he first be allowed to trial the work. BK claims any "work" performed by Mr Ussher was a consequence of his self imposed trial.

#### Background

[5] The parties' differ significantly in their recollection of events. There are few significant facts upon which they agree.

[6] Mr Ussher says that he first became aware of BK through both online advertisements and notices placed in a Work & Income office. He says that he was in need of work and responded to the advertisements by phoning BK. The call occurred on 13 August 2010 and Mr Ussher says that he initially inquired whether the company still required employees to which the person who answered the phone advised *as many as possible*. He states he was advised to go to the company's office which was at a backpackers' establishment run by BK's owner, Mr Ajay Gaur.

[7] Mr Ussher says that upon arriving at the office he spoke to a gentleman that he can not now identify. He claims said gentleman repeated the advice that there was work available to which he, Mr Ussher, responded by asking about the pay rate. Mr Ussher says he was told that BK paid on a piece-rate basis, which led to his asking for an indication of the earning level he might expect. The response was that he could expect to earn between \$100 and \$150 per day. Mr Ussher says he then asked whether work would be available seven days a week and was told yes, with the proviso the work was not offered on days upon which it rained.

[8] Mr Ussher says that he was not asked to fill in any forms at that point, nor was he given any. He says he was advised that staff left from the office at 7.30 each morning to go to various sites and that if he wished to work to report at the office the following day.

[9] Mr Ussher says that the next day he came to the office as advised, sought the manager, and asked if he could work that day. He says he was told yes. He says that there was no mention of any documentation and that he simply hopped in the van and proceeded to a work site that day.

[10] Mr Ussher states that later that day the supervisor approached him with a form. He says the form had two names on it, one of which was his. He asked what the form was and was told that he had to sign in for the day. The evidence shows that the form being referred to was a basic timesheet recording each employee's daily start and finish times. Mr Ussher says he once again raised the rate of pay and the supervisor confirmed that a piece-rate system applied but added that there would be a deduction to cover the cost of the transfer to and from the work site(s).

[11] The following day, Sunday 15 August, Mr Ussher again reported for work at 7.30am. He claims that later in the day he was approached by a supervisor who asked if he knew of any acquaintances who may also be seeking work. He responded by asking if there was much available and was told, *plenty - months of it*. He says he then asked what sort of work, to which the Supervisor gave the strange reply that it was a secret.

[12] Mr Ussher states he then asked about the pay and whether the minimum wage was guaranteed. The Supervisor is said to have replied *no*. Mr Ussher says this reply concerned him, so when he returned to the office that day he asked the supervisor for the manager's name. He was told the manager's name was Ajay Gaur, and he was given Mr Gaur's phone number.

[13] Mr Ussher says he phoned Mr Gaur and a brief conversation ensued. He says he told Mr Gaur he was happy with the work but wanted to confirm that he would receive the minimum wage. He claims Mr Gaur confirmed the supervisor's advice that the answer was no, to which he (Ussher) responded *you have to under New Zealand law* or words to that effect. Mr Ussher claims that Mr Gaur responded by stating *you can stuff your law and don't ever come back to work*.

[14] Mr Ussher states he told Mr Gaur that his actions were illegal and that Mr Gaur then emitted an unintelligible high pitched scream which led to his (Ussher's) hanging up.

[15] Mr Ussher states the following day, Monday 16 August, he went to the office and gave the person present (who again he cannot identify) his IRD number and bank details. He says the person helped him fill out the tax form and emphasised the need to use tax code M, and not a casual code. He then departed and that was, effectively, the end of the relationship.

[16] As was said earlier, the respondent's view of what occurred differs markedly from that of Mr Ussher. BK claims, as its starting point, that no one works for the company until s/he has completed an IRD certificate, signed an employment agreement and provided evidence of their ability to work in New Zealand.

[17] BK is also adamant that while it pays on a piecework basis, it will adhere to the requirements of the Minimum Wage Act 1993 and make up any shortfall should an employees' output mean that he or she would have earned less than the required amount. That said, and while BK accepts that an employees output may initially be inadequate, all employees should be able to achieve earnings which exceed the minimum wage after a relatively short training period. To ensure that is the case, and that BK is not subsidising poor performers, the respondent regularly reviews production and should an employees' earnings have to be topped up for any length of time, that employee will cease to receive offers of work.

[18] Returning to Mr Ussher and his situation. BK accepts that Mr Ussher first approached it on 13 August with Mr Gaur stating that it was he that Mr Ussher spoke to on the phone that day. Mr Gaur says that he told Mr Ussher that if he wished to work for BK he must first come to the office and fill out the appropriate paperwork in accordance with BK's normal requirements.

[19] BK accepts that Mr Ussher then came to the office but does not agree that he spoke to a male employee. BK is adamant

that during the week the office is staffed by Mr Gaur's wife, Meenu and it was she Mr Ussher spoke to.

[20] Meenu initially stated *I know I've seen his face but cannot describe the conversation. There are so many.*

[21] That said, she went on to say that she remembered *the legal thing*, which was a reference to a claim that she remembered Mr Ussher discussing his rights under the Minimum Wage Act on the Friday. She is adamant that it is her job to obtain an IRD certificate, a signed employment agreement and evidence of an employee's ability to work in New Zealand before s/he can commence work. She also says that she explains the piecework payment system and the fact that the company will, at least for a limited period, top up earnings so that the minimum wage is paid. The company claims that the discussion between Meenu and Mr Ussher took some 10 to 15 minutes and that the nature of the work (specifically pruning) was discussed.

[22] BK claims that the discussion ended with a request that Mr Ussher fill out the required forms but that he replied that he wanted to take the agreement home with him so that he could read it before he signed. BK allege that Meenu responded to this by advising *we have a desk and computer* and while Mr Ussher could take as long as he liked, he should sit down, read the agreement and sign it before leaving so that she could make a copy for him and be able to start work for the company. BK claims that Mr Ussher refused, so Meenu asked him to leave and not return till he had spoken to the boss, Mr Gaur.

[23] BK accepts that Mr Ussher returned the next morning and states he did so just before the 7.30 reporting time. Neither Mr nor Mrs Gaur was present and Mr Ussher is said to have met Mr Vipreet Bagwa, the supervisor. Mr Bagwa was not present at the investigation meeting.

[24] BK claim that Mr Bagwa asked whether or not the paperwork had been filled out and Mr Ussher replied no, he had come to work for a trial to see if he could make sufficient money or not. Mr Gaur says Mr Bagwa repeated the question and that Mr Ussher then answered yes, he had completed BK's paperwork.

[25] Irrespective of whether or not the paperwork had been completed, and Mr Ussher says it has not and no forms other than the time sheets referred to in 10 above have been proffered by either party, he went with the gang to a work site some 26kms from the office. The time sheets records that Mr Ussher commenced work at 8.30am and finished at 3.30pm that day.

[26] Likewise, and given that neither Mr or Mrs Gaur was present on Sunday morning when they accept Mr Ussher reported for work, the company accepts the timesheet as a record of work performed that day. It records that Mr Ussher again commenced work at 8.30am and finished at midday which, the company contends, is normal practice on a Sunday given that that afternoon is considered the weekly rest.

[27] Mr Gaur states that he was in the office on the Sunday evening. He says whilst there Mr Ussher approached and asked whether he would be guaranteed the minimum wage. Mr Gaur says he replied by advising that the company would top up wages so the minimum was guaranteed.

[28] Mr Gaur says he then went to check Mr Ussher's documents and noted there were none. He says he asked whether the forms had been completed and that Mr Ussher advised that he had not filled them in. Mr Gaur says that he then advised that the paperwork must be completed and that Mr Ussher could not work until he had done so.

[29] Mr Gaur says that Mr Ussher responded to that advice by stating that he wished to trial the work to see if he could make sufficient money. Mr Gaur claims that he responded that this is technical work which you must learn first if you are to earn sufficient income. He says that he again asked Mr Ussher to fill out the required paperwork, namely an employment agreement and IRD form, before handing the papers over. He claims Mr Ussher advised that he wanted to take the documents home and read them. Mr Gaur concedes that he then told Mr Ussher that *this was no good, you have already worked, fill in the forms and I will get a copy.*

[30] Mr Gaur claims that Mr Ussher's reply was an incoherent babble and that Mr Ussher was moving backwards and forwards in a threatening manner. Mr Gaur says that Mr Ussher then put the papers down but immediately reconsidering and saying that maybe the papers were taken - he could not remember. He closed by stating that neither he nor Mrs Gaur had met face to face with Mr Ussher prior to this incident.

[31] The company accepts that the next day, Monday 16 August, Mr Ussher came into the office and gave a supervisor who was present an IRD number and bank account. Neither Mr nor Mrs Gaur claim to have been present.

[32] Mr Ussher was subsequently paid for the hours recorded as worked at an hourly rate of \$12.75. The payment was made by direct credit to the account identified by Mr Ussher (31 above).

### **Determination**

[33] As said in opening, there are few if any points upon which the parties agree. My determination relies on a credibility finding and in this respect I conclude I prefer Mr Ussher's version of events.

[34] Mr Ussher's evidence remained totally consistent and while I can not accept everything he said, I did not feel he was

attempting to mislead. In any event the evidence I doubt relates to the issue of possible tenure and while it may affect remedies, it does not impact on my conclusion that Mr Ussher has a personal grievance.

[35] The same can not be said of BK's evidence, which contained some significant contradictions. These include:

- a. Mrs Gaur's claim that she had no memory of Mr Ussher or the particulars of any conversation they may have had, which was immediately contradicted by a detailed description of what she claims was discussed on Friday 13 August;
- b. The confusion over the validity of Mrs Gaur's evidence of her conversation with Mr Ussher on the 13th (19 to 22 above) is compounded when one considers Mr Gaur's contradictory evidence that the first time either he or his wife had a face to face meeting with Mr Ussher was on the evening of Sunday the 15th (30 above);
- c. The company's oft repeated assertion that no one could commence without completing the required paperwork is at odds with the fact that Mr Ussher clearly did. BK's attempt to address this aberration by alleging that he had misled Mr Bagwa is undermined by Mr Bagwa's absence and, even if true, reflects badly on BK's processes and their adherence there-to. Surely Mr Bagwa should have checked and acted to prevent Mr Ussher working the Sunday;
- d. BK's current oral evidence is, in places, contrary to previously prepared written statements. In particular I note the already contradictory evidence about who spoke to Mr Ussher on the 13th is further contradicted by the written statement alleging it was Mr Gaur and a supervisor;
- e. The allegation that Mr Ussher insisted on a trial is, to be blunt, unbelievable. It is inconsistent with the evidence, which illustrated a man desperate to work and was undermined by the fact that BK did pay Mr Ussher.

[36] In summary, and in respect to the key allegation, I accept Mr Ussher's allegation that he was advised not to return on the Sunday evening. Having observed the parties, and the way they interacted with each other, I conclude that Mr Ussher voiced concerns about the amount he would be paid, that Mr Gaur reacted adversely to what he perceived as criticism (the written statement describes a situation where Mr Ussher *showed me attitude*) and advised Mr Ussher to never return.

[37] In summary I conclude that Mr Ussher was 'sent away'.

[38] That conclusion does, however, raise one of the key issues with this claim. Is this a dismissal as claimed, or do the events of 13 to 16 August 2010 amount to some other form of grievance.

[39] Even accepting, as I do, Mr Ussher's version of events on the evening of 15 August, I have difficulty concluding he was dismissed. As I advised the parties I would, I contacted Work and Income. They told me that the advertisements to which Mr Ussher refers are clear - BK sought casual labourers to perform various tasks on an as and when required basis. Notwithstanding Mr Ussher's evidence that he understood there to be plenty of work (which sits well with what he sought and also fits BK's evidence that work was available through to the end of the pruning season which would continue for another fortnight or so beyond the events canvassed here) there can be no doubt he was a casual employee. He had not been there long enough for a consideration as to whether or not his status may have been altered by virtue of work practices as has occurred in some cases.

[40] For a casual, the employment comes to an end at the end of each engagement and there is no guarantee of further engagements. The fact the discussion which amounted to a sending away occurred after the end of the work day combined with the lack of a guaranteed reengagement means that this can not, in my view, be considered a dismissal.

[41] I do however conclude that Mr Ussher has been unjustifiably disadvantaged and has a grievance pursuant to section 103(1)(b) of the Employment Relations Act. By largely accepting his version of events, I accept that he was spoken to inappropriately and note, in further support of this conclusion, Mr Gaur's aggression toward him during the investigation meeting. What I do not accept, is that Mr Gaur was adamant that BK would not honour its obligations under the Minimum Wage Act. Having observed the two I conclude that their ability to communicate clearly was close to non-existent and that they were talking at cross purposes, but that does not excuse Mr Gaur's losing his temper as I conclude occurred.

[42] The second reason why I conclude that Mr Ussher was disadvantaged was that the sending away deprived him of work that even BK's evidence suggests he would undoubtedly have been able to perform over the following fortnight or so.

[43] The conclusion that Mr Ussher has a grievance leads to consideration of remedies. In this respect he says *I would like to reinstate, I would like the problem resolved by compensation, and for violation for breaching employment laws as stated by the Employment Act.*

[44] Reinstatement is not an option here. As said earlier, this is casual seasonal work. There is, technically, nothing to reinstate Mr Ussher to.

[45] It is unclear whether or not Mr Ussher seeks lost wages but the casual nature of the employment and the lack of any guarantee in respect to ongoing work would preclude an award under this head.

[46] The violations to which Mr Ussher refers are various allegations regarding breaches of the Act such as an alleged failure

to answer requests for time and wage records and a lack of response when asked to explain the termination (s.120 of the Employment Relations Act). Such breaches would normally be dealt with by way of penalty but there is no penalty application - simply a request for compensation covering both the alleged breaches and other aspects of his grievance claim.

[47] It is here that Mr Ussher's claim strikes some impediments. While his demeanour makes it clear he was anguished by both the way he was treated and the loss of opportunity (the possibility of ongoing work) he offered little direct evidence to support his claim for compensation under section 123(1)(i) of the Act.

[48] In the circumstances I consider an award of \$1500 to be appropriate.

### **Arrears of Wages**

[49] Mr Ussher claims he was not paid for hours worked, but was unable to accurately quantify the claim. Both parties accept that Mr Ussher completed the time sheets proffered in evidence and it is clear that Mr Ussher was paid for the hours recorded at what was, at the time, a rate that complied with the requirements of the Minimum Wage Act. Mr Ussher has not established that he has a claim in this respect.

### **Orders**

[50] For the reasons given the following order is made:

The respondent, BK Horticulture Limited, is to pay to the applicant, Mr Daniel Ussher, the sum of \$1,500.00 (fifteen hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

### **Costs**

[51] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Mr Ussher wishes to seek costs, he is required to file his application within 28 days of this determination. A copy shall be served on the respondent who is to file any response within 14 days of the application.

Mike Loftus

Member of the Employment Relations Authority

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