IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 18
5323509

	BETWEEN	Colin Allomes Applicant
	AND	Kevin Freemantle Respondent
Member of Authority:	Denis Asher	
Representatives:	Mr Allomes represented himself, assisted by Tony Perkins Mr Freemantle represented himself, assisted by Mike Barham	
Investigation Meeting	Napier, 1 February 2011	
Submissions Received	1 February 2011	
Determination:	3 February 2011	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was there an employment relationship between the two men? Does Mr Freemantle owe the applicant unpaid wages totalling $2,151.80. Did the respondent unjustifiably disadvantage Mr Allomes such that compensation for hurt and humiliation should be awarded? Are any other unpaid wages owed to Mr Allomes?

The Investigation

[2] During a telephone conference call on 22 November 2010 the parties were urged to undertake mediation. They agreed to an investigation in Napier on 1 February 2011 as well as timelines for filing witness statements and any documentary evidence on which they wished to rely.

[3] The parties undertook mediation but their employment relationship problem remained unresolved. Confusion as to whether the mediation process had finished caused the parties to miss filing all of their witness statements, etc by the agreed deadlines. A longer investigation resulted because of the need to take evidence directly from the witnesses.

Background

[4] The parties agree that Mr Allomes was employed by way of a contract of service with the KCF Trust (the Trust) from 11 or 12 January 2009, until the end of October of the same year. They disagree as to whether Mr Allomes' role was that of a farm manager or farm worker. No written employment agreement in respect of this relationship was produced by the parties; it may be there was no written employment agreement. But, as no claim has been raised by Mr Allomes in respect of the termination of his employment with the Trust and as the employment relationship problem relates to a subsequent period of employment, with differing terms and conditions of employment, that failure and disagreement as to the applicant's role are irrelevant.

[5] Messrs Allomes and Freemantle agree that, at the conclusion of the applicant's employment with the Trust, a fresh, albeit unwritten, arrangement was then entered into whereby, in exchange for working at a much reduced rate, the applicant could continue to occupy the respondent's farm house rent free. While I understand from Mr Freemantle that the farm house is managed as part of the Trust's assets, he has never disputed his status as the respondent, i.e. the fresh employment relationship was between the applicant and himself.

[6] Instead, Mr Freemantle – as set out in his statement of reply filed on 1 November 2010 – took the view that the matter between the parties was, *"Not an employment issue"* (par 3)

[7] Mr Freemantle has not taken issue with my summary of his position as set out in the record of preliminary conference dated 22 November 2010. It was:

Mr Freemantle says he never employed Mr Allomes and this is not an employment issue.

(par [2])

[8] Notwithstanding his view that the matter was not an employment issue, Mr Freemantle has consistently referred to Mr Allomes working in exchange for free accommodation. For example, he stated that he agreed to the applicant's request he stay in the farm house and work in lieu of rent, for *"a minimum of 14-hours per week"* (oral evidence). In his letter of 26 October 2010 and attached to the statement in reply, Mr Freemantle states unequivocally,

> *… I agreed he could stay in my house for a minimum of 14 hours **work** per week which equated to 2 hours per day doing various farm **duties** which also included shifting stock.*

(emphasis added)

[9] As it happens, in his letter of 22 June 2010 to the respondent (copy attached to his statement of problem), Mr Allomes described the hours as *"10 … a week, in exchange for the rent"*. For reasons that are set out below, I am satisfied it is unnecessary for me to resolve any contest over the amount of agreed hours of work.

[10] By undated letter (which he believes he may have written in May 2010) Mr Freemantle gave Mr Allomes notice to vacate his farm house by early July of that year. During my investigation, Mr Freemantle confirmed his notice to vacate was also, by implication, notice of termination of employment, i.e. that the two men's work for no rent arrangement was coming to an end.

[11] By his letter dated 22 June 2010 Mr Allomes acknowledged that advice, which he described as having *"received today 22 June"*. In his reply, Mr Allomes also raised, for the first time in written evidence before the Authority, a claim for payment for *"extra hours"* (attachment to statement of problem). He described those additional hours as totalling *"106 …from Nov 2009 to May 2010 and that this equates to $2,120 or 10 weeks rent"* (above).

[12] Because he regarded Mr Freemantle as *"a mate"* (above) and did not *"want to quibble"* (above), Mr Allomes offered to round the amount down to $2,000 and to either accept it in cash or stay for the equivalent rental period (10 weeks).

[13] Mr Freemantle did not accept the applicant's proposal.

[14] After vacating the house, and by way of a letter to the respondent dated 15 September 2010, Mr Allomes repeated his claim original claim for unpaid wages, i.e. $2,151.80. His letters of 22 June and 15 September made no other claims. In particular they did not set out a claim for compensation for *"a lot of unnecessary stress and inconvenience"*: this claim was not raised by Mr Allomes until he filed his statement of problem on 21 October 2010.

Discussion and Findings

Was there an employment relationship between the parties?

[15] Section 6 of the Employment Relations Act 2000 (the Act) defines as employee as:

> *(a) … any person of any age employed by an employer to do any work for hire or reward under a contract of service;*

[16] The evidence is abundantly clear: whether on his own account or that of the Trust, Mr Freemantle agreed to Mr Allomes continuing to undertake the same tasks, albeit now by way of much reduced hours of work, for a commensurately reduced remuneration package. He went from wages plus free accommodation to only the latter. The arrangement is clearly that envisaged by s. 6. Mr Allomes was an

employee employed by way of a contract of service. Mr Freemantle was the employer.

[17] Because of the agreement between the two men as to payment, and because it was in lieu of rent and consistent with that part of the proceeding remuneration package, I am satisfied the agreement was not in breach of s. 7 of the Wages Protection Act 1983 which stipulates that an employee shall pay the wages of every worker in money only.

No written employment agreement: penalty?

[18] As s 63A (2) of the Act makes clear, an employer *"must … provide to the employee a copy of the intended agreement … under discussion"*: every employer *"who fails to comply with this section is liable to a penalty imposed by the Authority"* (ss. (3)).

[19] Mr Freemantle is in breach of that statutory obligation. However, no penalty is sought by the applicant. Consistent with the role of the Authority (to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities – ss. 157 (1) of the Act), and in particular the merits of this case, I see no value in imposing a penalty on the respondent on my own initiative.

Unpaid Wages?

[20] On a balance of probabilities basis, I do not accept Mr Allomes' claim for unpaid wages for the following reasons:

a. It is clear that the parties, in the context of settling on reduced hours of work and a different remuneration package, did not ever agree to Mr Allomes receiving wages should he work in excess of the agreed hours for free accommodation;

b. The applicant accepts he did not seek the respondent's agreement prior to undertaking work in excess of the agreed hours;

c. The need or basis for undertaking work in excess of the agreed hours has not been established by Mr Allomes. The two men could not agree on whether the applicant was required to work beyond his agreed hours or not and whether in fact he did. Both accept that Mr Freemantle, during the period of this redefined employment relationship, was himself now active on the farm. He was readily contactable and his authority could have been sought and obtained in respect of the additional tasks claimed by the applicant;

d. Mr Allomes candidly accepts he did not raise this issue with the respondent during his employment other than to confirm that, while he was working excessive hours, he would not be claiming for them; and

e. Mr Allomes acknowledged in part Mr Freemantle's claim that the arrangement was characterised by *"swings and roundabouts"* (oral evidence), whereby the work required of the applicant naturally fluctuated and ultimately balanced out at the agreed rate, and that the latter anyway enjoyed time off (including a week in North America) from normal duties.

[21] Given these factors, I am satisfied that the applicant's claim is not made out.

Compensation for Unjustified Disadvantage?

[22] This claim must fail for two reasons: first, as set out in the applicant's statement of problem for the first time, it is outside of the statutory 90-day period. No leave for application out of time has been made by Mr Allomes (ss 114 (1) & (3) of the Act) and Mr Freemantle has not been asked if he agrees to it being raised out of time. I anticipate he will not.

[23] Second, even if the claim was lodged within time or leave granted, Mr Allomes has provided no evidence of actual hurt and humiliation arising out of an unjustified disadvantage initiated by Mr Freemantle or the Trust. He has not established a causal linkage. I readily accept that the circumstances surrounding his having to move out of the respondent's accommodation were stressful to Mr Allomes, as were the circumstances surrounding his seeking unpaid wages. But that distress,

while disadvantageous, cannot be attributed to any unjustified action by the Trust and/or Mr Allomes.

[24] Mr Allomes' evidence as to hurt and humiliation was vague and lacking in specifics. As a result, even if there were an unjustified disadvantage, it is difficult to see what if any compensation is warranted.

One week's unpaid wages?

[25] During the investigation Mr Allomes claimed for the first time unpaid wages from the Trust in respect of his diary record he started on 12 January 2009 and his first wages payment being recorded as 23 January that year. No objection was raised as to the Trust not being previously identified as a party to the employment relationship problem. Leave was granted Mr Freemantle to look into this matter and respond.

[26] By email dated 2 February 2011 and copied to the applicant, Mr Freemantle advised his records indicated Mr Allomes started on Sunday 11 January 2009, that the farm working week goes from Sunday to Sunday (inclusive), and that wages payments are made on the following Thursday which means money was in the applicant's bank account the following Friday, i.e. 23 January, as recorded in the wages record provided to the investigation.

[27] Mr Allomes' delay in bringing this claim is, I find, evidence in favour of the credibility of Mr Freemantle's explanation, on behalf of the Trust.

Determination

[28] Mr Allomes does not succeed with any of his claims against Mr Freemantle or the Trust.

[29] As requested, costs are reserved. I note here that, subject to submissions, as neither party was represented but were assisted instead, no costs appear claimable and they are therefore likely to lie where they fall.

Denis Asher
Member of the Employment Relations Authority