

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 108/10
5123499

BETWEEN JAMIE CARLSON
 Applicant

A N D ROB REDMOND
 Respondent

Member of Authority: James Crichton
Representatives: Both parties in person
Investigation Meeting: 10 March 2010 at Ashburton
Submissions Received: from Applicant
 from Respondent
Determination: 5 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Carlson) is a young man seeking to make a career in the building trade. He had been let go from his building apprenticeship as a consequence of the economic downturn and his father sought to help him find new work by asking around the community. Amongst other people, he asked the respondent (Mr Redmond). Mr Redmond is a carpet layer by trade but, notwithstanding that, his evidence is that he *took Jamie (Mr Carlson) on as a favour*. Mr Redmond's evidence was that Mr Carlson just acted as his helper while he was carpet laying and that Mr Redmond asked all the builders he knew if they had a place for Mr Carlson.

[2] It seems common ground that the employment relationship commenced on 4 May 2009 and ended at Labour Weekend in October 2009. Mr Carlson says that this was real job for which he was to be paid in the usual way and for which he could

expect the usual legal benefits of an employee. Accordingly, Mr Carlson says that when Mr Redmond dismissed him on 27 October 2009, because he had lost his drivers licence and therefore was not as useful to Mr Redmond, he (Mr Carlson) considered that he had been unjustifiably dismissed.

[3] Mr Redmond on the other hand contended that it was not a *proper* employment relationship at all and that he was simply helping the young man out by providing him with a bit of pocket money in effect while he (Mr Carlson) sought permanent employment. As a consequence of Mr Redmond's view of matters, there is no employment agreement, no record of wages paid and indeed no information at all to enable either party or indeed the Authority to assess what was paid, for what, and when. There is anecdotal information about the amounts of money received by Mr Carlson but no equivalent record from Mr Redmond and while there appears to be agreement between the parties as to the hourly rate (\$14.50 per hour) there are no pay slips, no timesheets and no other records of any kind to support the relationship. Neither party paid income tax on the monies paid and that obligation remains whatever the decision of the Authority.

[4] When the matter first came before the Authority, I conducted an initial telephone conference on 16 February 2010. I decided that in all the circumstances, it was better to try to meet with the parties and taken their evidence rather than send the matter to the mediation because there was still some residual tension between the parties which I thought would make mediation more difficult than it would otherwise be. The investigation meeting was held in Ashburton on 10 March 2010 and the parties gave their evidence to me at that time. At the end of the investigation meeting, I indicated frankly to the parties that I thought there would be real difficulty in my making any credible decision because of the absence of evidence as to exactly what was owed and what was paid.

[5] I noted that while there was agreement about the hourly rate, there was no agreement about hours of work, no evidence of hours of work, only anecdotal evidence of what was paid (from Mr Carlson's reconstruction recognising that by his own admission, he was regularly paid in cash) and so on. My provisional conclusion at the time was that the parties would be well advised to undertake mediation and seek to resolve the matter on their own terms as, in relation to the wages claim, I thought it would be virtually impossible to make any credible finding. However, I did note that

if there were a finding that an employment relationship had been constituted by this curious arrangement, then the allegation that Mr Carlson had been unjustifiably dismissed by Mr Redmond might potentially have merit which would sound in compensation.

[6] Accordingly, the parties accepted my recommendation and agreed to attend mediation. I undertook to adjourn my investigation and to close my file completely on the basis that the parties were able to resolve matters in mediation. Regrettably, that approach was not successful and the Authority must now attempt to deal with the matter notwithstanding the challenges already referred to.

Issues

[7] The first issue clearly is whether there was indeed an employment relationship created. Next I need to deal with the question of what wages if any are owed by Mr Redmond to Mr Carlson and finally I need to examine whether Mr Carlson was unjustifiably dismissed by Mr Redmond.

Was an employment relationship created?

[8] I am satisfied on the sketchy evidence before the Authority that there was an employment relationship created despite Mr Redmond's protestations to the contrary. Even on Mr Redmond's evidence, he admits that wages were paid and being a person in business, I cannot imagine how he could consider that the relationship was anything other than one of employment given he was paying this young man and apparently requiring him to turn up to work on a regular basis, be ready willing and able to take direction on matters and to accept being growled at when he was guilty of misconduct.

[9] All of those aspects of the employment relationship seem to have been present in this case, even on Mr Redmond's evidence, and on that basis, I am satisfied that whatever Mr Redmond thought he was entering into, it was in truth an employment relationship.

[10] Mr Redmond protests that he was simply trying to help the young man out and I accept that statement at face value. However, he does not help the young man out by failing to keep proper records of the relationship and trying to make an employment relationship appear like something it is not. Indeed, again, on

Mr Redmond's evidence, it is difficult to see what other kind of relationship this could be.

[11] If, as I have just held, this is an employment relationship then Mr Carlson is entitled to access to the Authority in the event of employment relationship problems and he is entitled to the protection of the law (if needed) in respect to that relationship.

Is Mr Carlson owed wages?

[12] It appears common ground that no holiday pay was ever tendered and so it is easy to conclude that that amount anyway is owed. It is less clear how that holiday pay is to be calculated because of the absence of timesheets, wage records or any other detail which would enable the calculation to be properly attempted. Amongst other things, based on the schedule of monies provided to the Authority by Mr Carlson (which is literally the only evidence of what was paid during the employment) there would seem to be some significant fluctuation in the hours worked. Mr Carlson, in giving his evidence, also indicated that part of the explanation for the varying amounts was that as he was paid in cash some of the amounts would have already been subject to the normal depredations of daily living before he took a note of the amount. The highest weekly amount received seems to be \$552.00 and the lowest \$280.00. Given the fact that Mr Carlson's evidence is that some of these amounts are not in fact the total amount that he received as payment for that particular week's work and some weeks that he worked are not referred to at all, the best the Authority can do is make a reasoned estimate as to the amount of holiday pay that is due and owing.

[13] I consider the figure of \$800 gross is a reasonable assessment of the holiday pay that should have been paid to Mr Carlson on the termination of his employment.

[14] In addition, Mr Carlson, while mercifully not claiming to have been underpaid his daily wages, does allege that he was not paid for Labour Day and claims he is owed a bonus for a particular reflooring job at Countdown, Ashburton. As to the first claim, I direct that Mr Redmond is to be pay to Mr Carlson the sum of \$116.00 gross as payment for Labour Day as I am satisfied that that money is due and owing.

[15] The position is otherwise in respect of the claim for a bonus. I am not persuaded that Mr Carlson has made out his case for a bonus to be paid in respect to this particular job. I heard evidence on this matter from both parties. I prefer the

evidence of Mr Redmond who indicated that the extent of the job was much less significant than had first been expected and that he paid Mr Carlson an additional bonus at the time. I accept that evidence.

[16] Mr Carlson not unnaturally seeks a summary of his earnings during the period of the employment. If there were any basis on which the Authority could direct that information to be provided, I would do so but I am satisfied that there is no basis on which the information can be provided.

[17] One other matter which needs to be addressed by the Authority is the failure to account to the revenue for the income earned by Mr Carlson over the six months that he was employed by Mr Redmond. It is clear from the evidence of both men that neither accounted to the Inland Revenue Department for the income tax that ought to have been paid on those sums. While both employer and employee have obligations in relation to accounting for tax, I think in the present situation, in the absence of proper records and with Mr Carlson's relative youth, the appropriate course of action is for the tax impost to rest with Mr Redmond.

[18] While it is impossible to calculate exactly what he paid Mr Carlson, it appears that the maximum that he would have paid over the period in question might have been something in the order of \$13,000. Using that figure as the roughest guide, I direct that Mr Redmond is to account to the Inland Revenue Department for the notional PAYE that ought to have been taken from Mr Carlson's wages before they were paid over to him, in the sum of \$2,730.

Was Mr Carlson unjustifiably dismissed?

[19] I am satisfied on the evidence before the Authority that Mr Carlson was unjustifiably dismissed. It is clear that he was dismissed by text message at the point at which Mr Redmond discovered that Mr Carlson had lost his drivers licence. The effect of that according to Mr Redmond's evidence was that Mr Carlson was no longer useful to him as an employee and he terminated the employment relationship by text.

[20] Mr Carlson complains that that was a completely unsatisfactory process, that he had no opportunity to engage with Mr Redmond, no opportunity to be heard, and that the substantive basis for the dismissal was itself unfair. I agree.

[21] Mr Redmond says that Mr Carlson ought to have fronted up and talked to him face to face and that is true but Mr Carlson's evidence is that he endeavoured to contact Mr Redmond on a number of occasions but Mr Redmond never returned his calls. Furthermore, I am satisfied that Mr Redmond had previously promised that the holiday pay issue and the statement of income would be provided to Mr Carlson from Mr Redmond's accountant but that never materialised and in the absence of any other contact from Mr Redmond, Mr Carlson resorted to writing to Mr Redmond setting out his grievance. In that letter, which is dated 28 November 2009, Mr Carlson satisfactorily raises a personal grievance, identifies what the personal grievance is about and identifies the compensation that is sought to rectify matters. Mr Carlson is to be commended for putting this document together. For his part, Mr Redmond responded to the letter of personal grievance and while making a number of points in his own defence failed absolutely to deal with the fundamental issue that Mr Carlson claimed he had been unjustifiably dismissed.

[22] I am satisfied on the basis of the evidence I heard that Mr Carlson was unjustifiably dismissed from his employment by Mr Redmond and he is entitled to remedies.

[23] Before considering the quantum of those remedies though, I must consider whether Mr Carlson contributed in any way to the circumstances giving rise to his dismissal. Mr Redmond says that Mr Carlson was not a particularly satisfactory employee and that he regularly turned up the worse for drink, spent a lot of time texting and was regularly late to work. Mr Carlson disputed those allegations and whether they are true or not, I am not satisfied that they have anything to do with the actual dismissal, the fairness of which has to be in question, giving that Mr Carlson was simply dismissed by text, was not given any opportunity to be heard or any opportunity to make any submissions in relation to the matter at all. Indeed, worse than that, Mr Carlson's evidence was that he was never aware that holding a driving licence was so important to the employer that it might result in dismissal were he to lose it. I accept that evidence at face value.

[24] To remedy Mr Carlson's personal grievance for unjustified dismissal, I direct that Mr Redmond is to pay to Mr Carlson the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$2,000;

- (b) A contribution to wages lost in the sum of \$750 gross on which tax must accounted for and paid.

[24] In addition Mr Redmond is to pay to Mr Carlson the following sums I have already referred to:

- (a) holiday pay of \$800.00 gross
- (b) wages for Labour Day of \$116.00 gross
- (c) unpaid income tax on Mr Carson's wages in the sum of \$2730.00

Costs

[25] Costs generally are to lie where they fall, save for the Authority's filing fee of \$70.00 which is to be paid by Mr Redmond to Mr Carlson.

James Crichton
Member of the Employment Relations Authority