

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 146/09
5130059

BETWEEN

PETERO DAUNISEKA
Applicant

AND

WAIRARAPA UNITED
FOOTBALL CLUB
INCORPORATED
First Respondent

PHELIM KEINZLEY
Second Respondent

KEINZLEY AGVET LIMITED
Third Respondent

Member of Authority: G J Wood

Representatives: Janet Mason for the Applicant
Jaesen Sumner for the Respondents

Investigation Meeting: 3 September 2009

Submissions Received: 3 September 2009

Determination: 5 October 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Petero Dauniseka, claims that in breach of his employment agreement he was never paid by the first respondent (Wairarapa United/the Club), or Mr Keinzley, or the third respondent (Keinzley Agvet) and that each of the respondents were effectively his employer. He also claims that he was unjustifiably constructively dismissed when forced to leave the Club and transfer to another soccer club because of the way he was treated at Wairarapa United, including its failure to pay him.

[2] All three respondents claim that they never employed Mr Dauniseka. In particular only Wairarapa United claims to have had any relationship with Mr Dauniseka that could even be mistaken for that of an employment relationship. Mr Keinzley considers that he is only being pursued because he is the chairman and coach of Wairarapa United, while Keinzley Agvet believes that it is only being pursued because it is a company which has Mr Keinzley a principal.

[3] The Club's defence is that no employment relationship with Mr Dauniseka ever existed, that Mr Dauniseka was never fit enough to commence employment with Wairarapa United anyway, and that its role was limited to assisting him in finding other work and accommodation.

[4] Because the claims for constructive dismissal are out of time, the investigation meeting focused on whether or not leave should be granted to raise the grievances out of time, and whether or not Mr Dauniseka is owed remuneration over the three seasons that he played for Wairarapa United.

The Facts

[5] Mr Keinzley is not only the chairman, but also the coach of Wairarapa United and its predecessor clubs. During his tenure he has been intimately involved in the engagement of a series of Pacifica players, since 2005 at least, to help boost the Club's performance. For the past few years Keinzley Agvet, the third respondent, of which Mr Keinzley is a director and shareholder, has also been a major sponsor of the Club and at one time employed one of the Pacifica players as a storeperson.

[6] Mr Keinzley, as the Club's coach, informed the New Zealand Immigration Service (NZIS) at one point that three of the Pacifica players (but not including Mr Dauniseka) would be employed 40 hours a week, 52 weeks a year and would be subcontracted out for coaching etc, and that Mr Keinzley would be acting as principal financial sponsor to underpin these contracts.

[7] The fact was that none of the players had been paid on the basis set out above. Instead, Wairarapa United acted in effect as an employment agency for the players, although it did not accept any fees for that service. Essentially it found work for the players in areas unrelated to soccer, such as forestry and vineyard work. One player was actually employed by Keinzley Agvet as a store person, for at least some of his time in New Zealand

[8] Mr Dauniseka is a professional soccer player, who has played soccer at an international level for Fiji. In October 2005 he was approached by Mr Keinzley to come and play for the Club the next season. At that point, as noted above, Mr Keinzley had already previously successfully “imported” a number of other Pacifica players. Mr Keinzley and the Club wished to be promoted to the Central League, while also being able to use the players to assist with coaching in schools etc, if funding could be arranged through lotteries or other grant agencies.

[9] In a letter to NZIS dated 26 October 2005, signed by him as coach, he stated that it was the Club’s wish to employ Mr Dauniseka to play soccer for the Club in the Wellington Premier Division during the 2006 season. He would be paid \$480 per week, provided with free accommodation, free medical insurance and a free return airfare to New Zealand. In that letter he stated:

We currently have just received renewed approval from NZIS, for another year, for three Fijian soccer players already employed on the above basis. The three players have also signed this letter as proof of their being happy with the past year on the above basis.

[10] All the arrangements were approved by NZIS.

[11] As part of the immigration process Mr Keinzley arranged for a written contract to be drawn up between Mr Dauniseka and the Club,. It states *inter alia*:

Individual employment agreement between

The employer Wairarapa United Soccer and

The employee Petero Dauniseka

Schedule of duties: to be available for training and games on time as requested by the coach. The employee agrees to keep himself to a level of fitness no less than 16 on the progressive shuttle test.

Place of work: as specified by the coach on a week to week basis.

Hours of work: 40 hours per week

Training: coach to advise on a week to week basis.

Uniform: as supplied by the employer

Salary: \$480 per week

Term: from arrival in New Zealand until the 30.10.06

Secondary employment: only with written consent of employer.

[12] The agreement also provides for a procedure for the settlement of personal grievances, noting as required that:

The grievance must be submitted within the period of ninety days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the latter, unless the employer consents to the personal grievance being submitted after the expiration of that period.

[13] While Mr Dauniseka had prepared a document for NZIS's purposes that claims that Mr Keinzley was his employer, that was incorrect. The employment agreement clearly states that the employer is Wairarapa United.

[14] The written agreements were not made conditional upon outside funding and such funding had not even been applied for at the time the contracts were entered into. However I accept that Mr Keinzley told Mr Dauniseka that he was required to meet the Club's fitness requirements if the Club was going to be able to get funding to enable him to work for it.

[15] NZIS provided Mr Dauniseka with a work visa and permit. His work visa provided that he may only work as a soccer player for Wairarapa United Soccer in Wairarapa as one of its conditions of issue. The work permit was to the same effect.

[16] There has been a great deal of dispute between Mr Dauniseka and Mr Keinzley about how the contracts were meant to operate. Two other Pacifica players gave evidence, but it was equally as conflicting about the nature of their relationship with the Club. The Authority can not be certain about what happened many years ago when it was not present. It must however make decisions on disputed matters, but can only do so on the balance of probabilities, i.e. what is more likely than not.

[17] I conclude that Mr Dauniseka, who knew at least some of the Pacifica players who had gone to the Wairarapa the year before, well understood that Mr Keinzley's offer was not as it appeared in the written documentation, namely \$480.00 per week for playing for Wairarapa United during the season. Instead I am satisfied, because of the evidence of one of the players and Mr Keinzley, and because Mr Dauniseka came back for three seasons under the same conditions, that he never expected to work for or be paid by Wairarapa United. I note also that at the time the employment agreement was signed Wairarapa United, through Mr Keinzley, had taken few or no

steps to secure any sponsorship that would enable Mr Dauniseka to do coaching and other such duties for Wairarapa United and other associated soccer groups. If Mr Dauniseka had not accepted that he was not going to be paid by Wairarapa United, but would instead be required to work for other employers while playing soccer for Wairarapa United, he would simply not have returned for the next two seasons. This conclusion is also supported by the fact that Mr Dauniseka started work with a vineyard the day after he arrived in New Zealand for his first season and made no complaint about it.

[18] Mr Dauniseka did not suffer under any great language difficulties, as his English is of a high standard due to his level of education in Fiji. While it is possible that Mr Dauniseka did not understand the relationship at its outset, and therefore should be allowed to rely on the employment agreement he signed, on the balance of probabilities I do not consider that was the case.

[19] Therefore I conclude that because of the obvious benefit to someone like Mr Dauniseka of being able to live and work in New Zealand, when it was understood that it was unlikely he would otherwise be eligible, Mr Dauniseka well understood that the conditions for him coming to play soccer for Wairarapa United would involve him not working for Wairarapa United or Mr Keinzley or Keinzley Agvet, but rather that the Club would find him work with other employers, as well as accommodation and airfares, as it had for the others.

[20] Keinzley Agvet gave financial guarantees for another of the Fijian players, but did not however do so for Mr Dauniseka. I concluded that that guarantee was made because that was the player who was employed by Keinzley Agvet as a store person.

[21] While Mr Keinzley states that it was because Mr Dauniseka did not meet the required level of fitness that he was not offered work with Wairarapa United, I conclude that this option was never strongly pursued by the Club, because it had done little or no preparatory work in getting sponsorship that would allow it to employ Mr Dauniseka as a player/coach contractor to other organisations, and because it could meet Mr Dauniseka's income expectations through finding him work in vineyards, timber mills and the like.

[22] How these arrangements were squared away with NZIS is a matter for NZIS, not the Authority. The Authority's role is to look at the real nature of the relationship

between the parties. I note, however, that perhaps one of the reasons the situation has unfolded as it has is that Mr Keinzley believed, as stated in his evidence, that *all the club was required to do was confirm that it wished to offer Petero employment and provide a written copy of such an offer of employment*. He also saw the work done by the players as secondary work under the agreement.

[23] I note that the league is an amateur league. Yet I also note that the fitness level is almost that expected, Mr Keinzley believed, of the New Zealand national soccer team, but was said by witnesses to actually be higher than that. Either way it appeared to be an unrealistic expectation from the outset.

[24] When Mr Dauniseka arrived in New Zealand he was told by Mr Keinzley that had arranged for him in a local vineyard starting the next day. Mr Dauniseka made no complaint.

[25] Mr Dauniseka was concerned that he was not earning \$480 per week at the vineyard. He raised that with Mr Keinzley, who paid him the balance for the first few months. Mr Keinzley claims that this was a loan, whereas Mr Dauniseka believed it was a top-up to his guaranteed earnings. In any event this arrangement did not last for more than three months, yet Mr Dauniseka did not complain about it being stopped.

[26] Throughout his first season Mr Dauniseka in fact worked for a number of employers, all of them through contacts made by Mr Keinzley. I do not accept that Mr Dauniseka raised his concerns about not being paid by the Club, or that Mr Keinzley's response was that he would be thrown out of the country. My reasons for so concluding are essentially because Mr Dauniseka returned under the same conditions in 2007 and 2008, Mr Keinzley denied the claims and I believe he has been genuine, particularly as he has not been concerned about involving NZIS when he has issues with the Pacifica players, and that this is a serious allegation to make without much supporting evidence.

[27] Rather than Mr Keinzley threatening Mr Dauniseka with removal as a stick, and offering him the prospect of permanent residency as a carrot, I conclude that Mr Dauniseka's actions were based on his desire at that time to get permanent residency in New Zealand.

[28] Once the season was over Mr Dauniseka left the country in September, until re-engaged in 2007. This was despite the fact that Mr Dauniseka's work visa was

valid until January 2007. I note that his leaving concluded his relationship with the Club, even if the relationship were held to be that of an employee/employer.

[29] Mr Keinzley did not particularly want Mr Dauniseka back at the Club, because a number of the places where he had arranged work for Mr Dauniseka were not impressed with his work ethic. Mr Dauniseka did however want to play again for the Club, presumably because in that way he would get his visa renewed.

[30] One of the other Fijian players prevailed on Mr Keinzley to take Mr Dauniseka back and accordingly a near-identical agreement was signed for the 2007 season. Again Mr Dauniseka went straight to work for another employer, which he stayed working at for the duration of the season. He then left in August and returned to Fiji to take part in trials for the Fiji national soccer team. Once again his relationship with the Club ended.

[31] The next season no written agreement was entered into. One of the reasons for this was that an agreement was not required for immigration purposes, as Mr Dauniseka's 2007 work visa did not expire until August 2008. Once again Mr Dauniseka started work for another employer, although he started that work well before the season actually commenced, because he had not spent long in Fiji. He continued to play for Wairarapa United at the beginning of the 2008 season.

[32] One of the other players who had previously been playing for Wairarapa United, and who supported Mr Dauniseka's evidence in the Authority, had transferred that season to Island Bay. For the second game of the season Wairarapa United played Island Bay and lost.

[33] Allegations of match fixing subsequently came to Mr Keinzley's attention, with it being claimed that Mr Dauniseka had been involved in throwing the game to Island Bay. By this time Mr Dauniseka had been looking at playing for Island Bay and had planned on attending one of their training sessions. Mr Keinzley was concerned about these allegations and the fact that Mr Dauniseka might leave. Mr Keinzley believed he was required to stay with Wairarapa United, as set out in the work permit.

[34] An informal meeting was then called by Mr Keinzley with the Club's overseas players, the NZIS and the Police. A document signed by all concerned sets out a brief summary of the issues. I accept, on the balance of probabilities, that this document

accurately reflects the issues, because it is signed by three of the people who gave evidence, including Mr Dauniseka himself. It states (with some deletions for confidentiality reasons):

1. *Petero Dauniseka confirming that he had been offered \$200.00 per game for the 2008 season by an Island Bay club member, if he transferred to Island Bay. This offer had been made before the Tawa game on Sunday 14th April (in the presence of A, B and C).*
2. *Petero Dauniseka neither confirming or denying that he had been offered money to throw the Tawa game, by Island Bay, and was to collect the money on the following Tuesday at Island Bays training.*
3. *Petero Dauniseka neither confirming nor denying whether he intended to transfer to Island Bay.*
4. *D and E neither confirmed or denied being offered money to transfer to Island Bay but did confirm they had no intention of transferring.*
5. *On Wednesday the 16th April 2008, Petero Dauniseka confirmed he had been to the Island Bay training the following night. He also confirmed the financial offer with Island Bay was correct. He also confirmed that at this stage he had made no commitment to transfer to Island Bay.*
6. *The same Island Bay club member who had made the financial offers had also lead the above to believe that they could transfer under the present work permit and Visa and Island Bay would look after everything.*
7. *Phil Keinzley invited Petero Dauniseka, D, E, A and F to the above meeting to help clear up any misinformation of which they all confirmed their attendance.*

[35] Given Mr Dauniseka's natural reticence when faced with people in positions of authority, I do not accept, however, that anything in the summary means that Mr Dauniseka admitted any of the allegations made of match fixing.

[36] At the meeting Mr Dauniseka was told that shifting clubs could have an effect on his immigration status. He had an opportunity to raise other issues with NZIS at the time but chose not to do so. I do not accept that this was because Mr Dauniseka was fearful of Mr Keinzley - after all this meeting took place with Immigration and Police officials. I also note that NZIS's files contain a comment on the meeting that no immigration breaches were identified.

[37] Mr Dauniseka subsequently transferred to Island Bay and Mr Keinzley informed the NZIS accordingly.

[38] Mr Dauniseka consequently contacted NZIS to try and sort the situation out. He raised for the first time his concerns about not being paid for playing soccer, being forced to work for other companies and being too scared of Mr Keinzley to do anything about matters.

[39] Mr Dauniseka's concerns over his wages were referred to a Labour Inspector, who determined not to investigate the matter further while NZIS were investigating issues. NZIS subsequently determined that Mr Dauniseka should not be in New Zealand, because he was in breach of the terms of his work permit. He left New Zealand voluntarily in August 2008.

[40] In May Mr Dauniseka had met with the Labour Inspector, who said that she would contact Mr Keinzley on his behalf. This information is not consistent with the decision to park the investigation, nor Mr Keinzley's evidence that he was never contacted by the Labour Inspector during this time. I accept Mr Keinzley's evidence accordingly.

[41] In late July Mr Dauniseka consulted his current representatives. They immediately sought mediation with Mr Keinzley. Mr Keinzley was subsequently contacted by an officer of the Mediation Service of the Department of Labour. Mr Keinzley declined to attend mediation on the basis that Mr Dauniseka had never been an employee of the Club and that he was outside the 90 day time frame in any event.

[42] Mr Dauniseka subsequently raised a grievance was by way of the provision of a statement of problem in the Authority on 19 September 2008. The six week delay was caused by the time it took to answer a request of the NZIS for Mr Dauniseka's employment agreements with Wairarapa United.

[43] The parties attended mediation without prejudice to the respondents' claims that any grievances were out of time, but were unable to resolve their differences. As they have been unable to do so since, the matter now falls to the Authority for a determination.

The Law

[44] The Authority has no jurisdiction to deal with problems between parties in relationships where that relationship is not one of employment. The meaning of the term employee is set out s.6:

6. **Meaning of employee**
- (1) *In this Act, unless the context otherwise requires, **employee** –*
- (a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
 - (b) *includes –*
 - (i) *a homeworker; or*
 - (ii) *a person intending to work; but*
 - (c) *excludes a volunteer who –*
 - (i) *does not expect to be rewarded for work to be performed as a volunteer; and*
 - (ii) *receives no reward for work performed as a volunteer.*
- (2) *In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
- (3) *For the purpose of subsection (2), the court or the Authority –*
- (a) *must consider all relevant matters, including any matters that indicate the intention of the persons; and*
 - (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[45] It is made clear in *Jinkinson v. Oceania Gold (NZ) Ltd* unreported, Couch J, CC9/09, 13 August 2009 that the definition relies on the common law definition of a contract of service. To establish a contract of service, it must be established that in consideration for a wage or other remuneration an employee will provide his own work and skill in performance of some service for his employer; that the employee agrees that in performance of that service he will be subject to the other's control in a sufficient degree to make that other his employer; and the other provisions of the contract are consistent with it being a contract of service.

[46] One important relevant matter is of course any written agreement between the parties. However, that need not be determinative of the situation, as s.6 makes clear. In what formerly was the leading case *Cunningham v. T & T Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695 the Court of Appeal held:

When the terms of a contract are fully set out in writing which is not a sham (and there is no suggestion of a sham in this case) the answer to

the question of the nature of the contract must depend on an analysis of the rights and obligations so defined.

[47] In *Snook v. London and West Riding Investments Ltd* [1967] 1 ALL ER 518 it was held that a sham was a document resulting from a common intention between the parties not to create the legal rights and duties which the document gives the appearance of creating.

[48] Of particular relevance also is the clause in section 6 that the Authority is not to treat as a determining matter any statement by the person that describes the nature of their relationship. In *Jinkinson* it was also noted that relationships can change over time. At para.[69] the Court held:

... the real nature of the relationship between the parties as evidenced by the conduct was essentially different in nature to what was described in the agreement and fundamentally inconsistent with it. The effect of the parties' conduct, therefore, was to rescind the original agreement and replace it

Determination

[49] Despite the protestations of all the witnesses in this case I conclude that the individual employment agreements entered into by Mr Dauniseka and Wairarapa United were at all times a sham. I conclude that Mr Dauniseka understood throughout that he was coming to play soccer in New Zealand for Wairarapa United and that in return Wairarapa United would provide him with free travel and assist him in obtaining accommodation and work. There was never any agreement that Mr Dauniseka would be provided with work by the Club, Mr Keinzley, or Keinzley Agvet. It was clear from Mr Keinzley's evidence that he believed that all that NZIS required was an offer of employment. Furthermore, the agreement can not be interpreted to mean that the players could be farmed out to other employers as secondary employment. Their work there was their primary employment. They could not (and did not) do that work and 40 hours work per week for the Club as well.

[50] I conclude therefore that the Club entered into a sham employment agreement in writing with Mr Dauniseka on two occasions. The third agreement, although not in writing, at best for Mr Dauniseka, could only be of similar effect. Equally, I conclude that Mr Dauniseka was in no doubt from the outset that this was the nature of the relationship. It was more akin to an employment agency relationship, where the Club

acted as an agent for Mr Dauniseka in finding him employment with other employers, which is clearly not an employment relationship as defined in the Employment Relations Act. I am bolstered in my conclusion by the fact that the employment agreement imposed an extremely high fitness level on Mr Dauniseka before he could take up his job and that at the time of entering into the agreement Wairarapa United had made no application for funding, which would have been required if Mr Dauniseka was to provide the sort of coaching and mentoring services that the Club would have desired in a perfect world.

[51] Given that there was no employment relationship the Authority has no jurisdiction and Mr Dauniseka's claims must be dismissed.

[52] I should note for the benefit of the parties, however, that neither Mr Keinzley nor Keinzley Agvet ever in any way acted in the role of employer to Mr Dauniseka. It was clear throughout that Mr Keinzley was dealing with Mr Dauniseka as chairman of the Club. He never got Mr Dauniseka to do any personal work for him. He has no ownership rights in respect of Wairarapa United Football Club - he is simply the elected chairman and appointed coach. He never employed Mr Dauniseka. The same applies to Keinzley Agvet. Mr Dauniseka never did any work for it and it had no association with him at all.

[53] While that concludes the matters in issue, I make the following observations for the information of the parties. Mr Dauniseka's relationship with the Club went over three seasons, but ended at the conclusion of each season and/or when Mr Dauniseka otherwise left. Given that, any grievances he had over the first two seasons are a year or two out of time. Any exceptional circumstances would not allow him to pursue a grievance over these periods with the Club, given such a manifestly large delay. Given Mr Dauniseka's immigration issues after he left the Club in 2008, however, a determination on whether he should have been allowed to pursue a grievance over his treatment in that season would have been more finely balanced, had I concluded that he was its employee.

G J Wood

Member of the Employment Relations Authority