

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 60

File Number: 5311378

BETWEEN Hamish Davey
 Applicant

AND Brendon Molan and Grange
 Transport Limited
 Respondents

Member of Authority: Denis Asher

Representatives: Mr Davey represented himself
 Peter Brosnahan for the respondents

Investigation Meeting Whanganui, 7 April 2011

Submissions Received On the day of the investigation

Determination: 18 April 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Davey employed by either of the respondents (Mr Molan/the Company)? If he was, was he unjustifiably disadvantaged, and if so, what if any remedies are owed to the applicant?

[2] Mediation did not resolve this employment relationship problem.

The Investigation

[3] During a telephone conference on 15 November 2010 the parties agreed to a one-day investigation in Whanganui on 7 April 2011 and timelines for filing witness statements.

Background

[4] Many of the relevant facts are not disputed by the parties.

[5] Early into the week beginning 8 February 2010 Mr Davey approached the Company regarding employment opportunities.

[6] He spoke with Mr Molan and completed an application form.

[7] On 11 August Mr Molan spoke by telephone to Mr Davey's wife; at that time the applicant was en route to Auckland to look for work.

[8] Mrs Davey says Mr Molan offered her husband work, an offer she says she accepted on the applicant's behalf: Mr Molan denies that claim, and says he telephoned only to invite the applicant to look at his business operation and decide if he was interested, while the Company could assess Mr Davey's capabilities.

[9] Mr Davey says, as a result of his wife advising him of the telephoned offer and her acceptance, he telephoned Mr Molan later on the same day and accepted his offer of employment: Mr Molan again denies offering employment to the applicant, but said he only spoke to what is described in par 8 above.

[10] The parties do agree that Mr Davey went out with the Company's driver employees, in its trucks, shortly thereafter, over the period Tuesday 16 to Thursday 18 February. The applicant says that at that time he was an employee: Mr Molan denies the claims and says he was only accommodating Mr Davey's expressed wish to get a feel for his Company's operation while simultaneously assessing his suitability for employment should a vacancy occur.

[11] Mr Davey says that, when reporting on the morning of Friday 19 February, he was told by Mr Molan that he had no work for him and would call the following Monday if he did. Mr Davey also claims that Mr Molan said, amongst other things, that he hoped the applicant did not expect to be paid for the work he had done, and that he never paid for the first five days.

[12] Mr Molan denies the applicant's claims and says that he simply told Mr Davey there was no vacancy at the time and he would be in touch if and when one arose.

[13] A subsequent text exchange between the two men seems to have reflected their differing views as to whether or not Mr Davey was or was not an employee.

[14] Mr Davey says he was unjustifiably disadvantaged (statement of problem). The remedies he seeks include lost wages and compensation for humiliation and distress (including his filing fee, a total of \$6,960 is claimed).

Discussion and Findings

[15] A credibility finding is required as to what was said by the parties, so as to determine whether or not Mr Molan employed Mr Davey (in his own right or on behalf of the Company).

[16] The issue is not what was said by Mr Molan to Mr and Mrs Davey but, on a balance of probabilities basis, what is more likely to have been said.

[17] To that end I find in favour of the respondents, on the basis of the argument advanced by their counsel, Mr Peter Brosnahan. His argument was to this effect: his clients would not entrust to the applicant road ranger truck and trailer stock vehicles worth over \$400,000 each without being satisfied that – in addition to being licensed to drive them – Mr Davey could be relied to do so safely and competently. As became clear during the investigation, while licensed to drive truck and trailer units, Mr Davey had no recent driving experience of stock vehicles. In fact, he admitted his previous experience in paid driving employment was for an Auckland bus company, some time before 2000. Mr Davey could not point to any regular paid employment since that time. I therefore accept that it was and is inherently unlikely for the

respondents to have offered employment to Mr Davey without being satisfied as to his suitability to undertake a challenging driving position.

[18] Further evidence that no contract of employment was ever formed by the parties can be found in Mr Davey's concession that his discussions with Mr Molan never extended to terms and conditions of his employment, including hours of work, rate of pay. As the applicant conceded, his claim for unpaid hours worked is based on what he understands to be "*the going rate in New Zealand for a truck driver*" (oral evidence).

Determination

[19] For the reasons set out above I am satisfied Mr Davey was never an employee of the respondents and is therefore unable to bring an allegation of unjustified disadvantage per s. 102 of the Employment Relations Act 2000.

[20] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority