

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 146
3001320

BETWEEN

MAURICE BEDE FOUHY
Applicant

A N D

METRO FLOORING LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Barry Keach, Advocate for Respondent

Investigation Meeting: 16 May 2017 at Auckland

Written Record of Oral Determination: 17 May 2017

**WRITTEN RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Fouhy was employed in a sales role by Metro Flooring Limited (Metro) at its Mt Roskill Carpet Court store from October 2014 until 08 July 2016. Mr Fouhy used his own vehicle and mobile phone for work purposes during his employment.

[2] While employed Mr Fouhy submitted six expenses' claims which included his petrol costs and mobile phone costs. Metro paid four of Mr Fouhy's expenses' claims while he was employed. Mr Fouhy's fifth and sixth expenses' claims remained outstanding when his employment ended because Metro had queries about his claims.

[3] None of Mr Fouhy's expenses claims sought to recover mileage. They referred to reimbursement of his petrol and mobile phone costs, together with other reimbursements such as accommodation, coffee, milk and vinyl.

[4] Mr Fouhy initially applied to the Disputes Tribunal to recover these two unpaid expenses' claims. The Disputes Tribunal issued an order in his favour but that was later set aside on the basis that the matter had not been served on Metro. Mr Fouhy's Disputes Tribunal claim involved petrol and mobile phone costs only – it did not involve a mileage reimbursement claim.

[5] When Metro applied for a rehearing of his matter Mr Fouhy tried to get the Disputes Tribunal to consider a new mileage claim but that was unsuccessful because the Disputes Tribunal said it did not have that claim before it.

[6] At the rehearing the Disputes Tribunal declined jurisdiction because Mr Fouhy's expenses claims related to an employment relationship problem.

[7] Mr Fouhy says that after that he decided to pursue a mileage claim because he was unhappy about Metro's director Mr Keach's attitude. When pressed Mr Fouhy agreed that he was unhappy that Metro had disputed liability for his last two expenses' claims and had successfully applied to reopen the Disputes Tribunal decision in his favour.

[8] Mr Keach says he queried the expenses Mr Fouhy sought to recover in his last two claims because it appeared that the amounts claimed had already also been paid by another company.

[9] Mr Keach says that meant Metro was concerned that by personally reimbursing Mr Fouhy for the same amount already paid by another company there may have been an element of 'double dipping.' Mr Keach says Metro wanted clarity on that before it reimbursed the last two expenses' claims.

[10] Mr Fouhy filed his Statement of Problem with the Authority on 20 December 2016 in which he claimed reimbursement for the two unpaid expenses claims (subsequently paid). He also sought recovery of \$5,548.32 as "*running costs for my car.*" Mr Fouhy based this claim on the 72c per kilometre mileage rate specified by the Inland Revenue Department (IRD).

[11] This was the first time the mileage claim had been pursued, some 17 months after his employment had ended.

[12] A telephone conference was held on 03 April 2017. During the telephone conference Metro said that although it disputed liability for the two outstanding expenses' claims it would nevertheless pay the amounts Mr Fouhy was claiming in order to resolve the problem given the outstanding amounts in issue were small.

[13] Mr Fouhy then said he wanted to pursue the mileage claim. Metro disputed there was ever any agreement to pay Mr Fouhy mileage at the IRD rate. This investigation meeting deals with the mileage claim only.

[14] In a witness statement filed on 28 April 2017 Mr Fouhy claims that Mr Keach, (Metro's director) agreed Mr Fouhy "*could use his own vehicle with costs to be paid by [Metro].*" Mr Fouhy told the Authority today that Mr Keach told him at the time he offered him the job that he would be reimbursed for "*running costs*".

[15] Mr Fouhy says he took that to mean he would be reimbursed for all costs including an aspect of vehicle depreciation. Mr Fouhy accepts there was no discussion of exactly what "*running costs*" would cover. Mr Fouhy acknowledged that he assumed that running costs included mileage, but did not check that with Mr Keach.

[16] Mr Keach says he agreed Metro would reimburse Mr Fouhy's "*petrol*" costs only because Mr Fouhy expressed a strong preference to continue using his own vehicle because he intended to do trips between Auckland and Palmerston North (where he was based) to wind up personal and business affairs he had there.

[17] Mr Keach says Metro would not have agreed to pay running or mileage costs because it had company vehicles and fuel cards available for Mr Fouhy to use had he wished to do so. Mr Keach says the first work vehicle was available immediately and the second became available a couple of weeks' after Mr Fouhy started work.

[18] Mr Fouhy says he kept his own log book which recorded his weekly travel. Mr Fouhy claims he travelled 11,246 kilometres while employed by Metro. He says that 3,450 kms were related to personal travel. Mr Fouhy therefore now seeks mileage reimbursement for 7,796 kms at the rate of 72c per km.

[19] Mr Keach says that he was not aware of the log book. He challenges the accuracy of the mileage claimed. Mr Keach says the log book is not Metro's log book so he was not aware of it until Mr Fouhy referred to it in his Statement of Problem.

[20] Mr Keach further questions the reliability of the log book because it does not record what the work related travel involved in terms of what clients were visited or what work activities the travel related to.

The issues

[21] The issues to be determined by the Authority are:

- (a) Did Metro agree to reimburse Mr Fouhy for his mileage?
- (b) If so, how much is he owed?
- (c) What if any costs should be awarded?

Did Metro agree to reimburse Mr Fouhy for his mileage costs?

[22] During the telephone conference with the parties, the Authority advised that the usual elements of contract formation would need to be established to support Mr Fouhy's claim that he is owed reimbursement of his mileage at the IRD rate.

[23] The Authority advised the parties that that would involve them providing evidence regarding offer, acceptance, intention to create legal relations, certainty of terms, behaviour in accordance with or contrary to the alleged agreement to pay mileage, relevant documentation and the like.

[24] Mr Fouhy bears the onus of establishing on the balance of probabilities that Metro agreed to reimburse him for his mileage costs. I find that Mr Fouhy has been unable to discharge that onus.

[25] There is no dispute that the parties did not expressly discuss reimbursement of mileage. I therefore find no offer to reimburse mileage was made. It therefore follows that I am not satisfied that there was any mutual agreement reached to pay Mr Fouhy mileage in addition to reimbursing his petrol costs.

[26] Mr Fouhy acknowledged that because mileage was not expressly discussed his claim is therefore based on an assumption. I also find that Metro did not say or do anything to lead Mr Fouhy to reasonably believe that it would reimburse him for his mileage. I do not accept that a legally binding contractual term can be created on the assumption of one party only.

[27] I also find that the relevant documentation does not support the existence of a contractual term. I consider it tends to support Mr Keach's evidence that reimbursement of petrol only was discussed and agreed. All of the expenses claims Mr Fouhy submitted expressly referred to "*petrol*" expenses only. There was no other documentation produced that would have established offer and acceptance around mileage reimbursement.

[28] I find that the conduct of the parties, both during the employment relationship and immediately following it, strongly suggests that only petrol reimbursement was agreed. I consider that if mileage reimbursement had been agreed Mr Fouhy would have claimed that in addition to the petrol and mobile phone reimbursements claimed in his monthly expenses' claims.

[29] I also consider it significant that while Mr Fouhy sought to recover his two unpaid expenses claims after his employment ended he did not mention mileage reimbursement at all. He waited almost a year and a half before pursuing a mileage claim.

[30] The fact that Mr Fouhy pursued a Disputes Tribunal claim without including mileage also tends to undermine his claim that he was owed unpaid mileage because the parties had reached a mutual agreement that mileage would be reimbursed.

[31] I accept Mr Keach's evidence that the offer of employment did not contain any representation, whether express or implied that Mr Fouhy would be reimbursed for his mileage. While it would have been open to the parties to have discussed and agreed on mileage reimbursement I find that did not form part of the pre-employment negotiations. Nor was it subsequently agreed during the course of the employment relationship.

[32] I accept on the balance of probabilities Mr Keach's evidence that Metro agreed to reimburse Mr Fouhy for his reasonable petrol costs only because he wanted to use his own vehicle instead of the company vehicles on offer. Those petrol costs have been reimbursed in full.

[33] I consider it significant that there was no discussion during the employment relationship about reimbursement at the IRD mileage rate. Nor was this a claim which Mr Fouhy raised upon termination of employment. This is an entirely new claim which was put before the Authority for the first time on 20 December 2016.

[34] I also accept Mr Keach's evidence that Metro did not require Mr Fouhy to complete a logbook. I further find that the purported logbook information provided by Mr Fouhy does not indicate what work-related activities he was undertaking, which clients it related to or what time of day or date his alleged work travel occurred.

[35] Even if I had found that mileage reimbursement had been an agreed term and condition of the employment (and I have not), I consider that the evidence Mr Fouhy produced to support his claim does not meet the necessary evidential threshold necessary to establish Metro's liability for the amount claimed.

Outcome

[36] Mr Fouhy's claim for reimbursement of mileage at the IRD rate does not succeed because he failed to establish to the required standard of proof that mileage reimbursement was a mutually agreed contractual term of his employment.

Costs

[37] Mr Fouhy has not succeeded on his claim and Metro was not legally represented so there is no issue as to costs.

Rachel Larmer
Member of the Employment Relations Authority