

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 156/10
5306785

BETWEEN PASCAL FUSTER
Applicant

AND TIM BROWNIE
Respondent

Member of Authority: M B Loftus
Representatives: Dr Juergen Gnoth, Advocate for Applicant
No appearance for the Respondent
Investigation Meeting: 29 July 2010 at Queenstown
Submissions received: At the Investigation Meeting
Determination: 3 August 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This a wage arrears claim brought by the applicant, Mr Pascal Fuster, against the respondent, Mr Tim Brownie.

[2] It is claimed that the respondent failed to pay due wages and holiday pay to Mr Fuster in the amount of \$8,008.26 gross.

[3] The original claim is amended to the extent that the applicant now seeks interest and costs. I am willing to accept the amendment, given Dr Gnoth raised a claim for interest in correspondence to Mr Brownie on 3 December 2009. The costs claim involves reimbursement of the \$70 filing fee charged by the Authority and the cost of Dr Gnoth's travel to the investigation meeting.

Non appearance on behalf of the Respondent

[4] Mr Brownie failed to appear at the scheduled meeting. That was not, given his previous dealings with the Authority, a surprise.

[5] The application was filed on 24 May 2010. Despite notification that Mr Brownie was required to lodge a statement in reply within 14 days, the required statement has never been received.

[6] The Authority's normal procedure sees the scheduling of a telephone conference at which the parties discuss the forthcoming investigation meeting, its timetabling and conduct. Mr Brownie avoided attempts to schedule this call so, in accordance with the Authority's processes, a time was set and the parties advised.

[7] Written notification that the telephone conference had been scheduled for 24 June was sent to Mr Brownie by both post and e-mail on 16 June. Whilst he waited a week, it at least had the effect of eliciting a response. By e-mail dated 23 June Mr Brownie advised "*I will not be here tomorrow so we will need to change the call to after Tuesday next week*".

[8] The Authority chose to assist and rescheduled the call to a time acceptable to Mr Brownie. Dr Gnoth, on behalf of the applicant, was accepting of the altered arrangements.

[9] Despite that, Mr Brownie failed to participate. No apology, excuse or reason was ever proffered.

[10] As a result, and again in accordance with normal processes, the Authority set a date for the matter to be heard, 27 July.

[11] Receipt of that notice again prompted a response from Mr Brownie, though once again he waited nearly a week before bothering. He advised in an e-mail sent at 6.36pm on 7 July that he wished to defend the claim but that the scheduled date of 27 July 2010 was inconvenient. He went on to advise that he would be available on either of the following Thursdays, 29 July or 5 August. Again the Authority, with

Dr Gnoth's agreement, acceded. The investigation meeting was set for 29 July 2010 and the parties were formally advised on the 9th.

[12] At 5.51pm on Tuesday 27 Mr Brownie e-mailed the Authority advising that if Mr Fuster could provide evidence of a valid work permit, payment would follow, albeit at an amount prescribed by Mr Brownie and on a drip feed basis. Not that such a proposition has anything to do with the Authority, he asked that the receiving Support Officer "... *come back to us on this so there will then not be a need to meet this Thursday at 11.00am*".

[13] Mr Brownie was advised to attend as scheduled.

[14] His response, received, at 12.04pm on 28 July advises:

"I have lost my license and are on bail so it is best settled by some other means as per my email. The car has been impounded and I have counselling scheduled for Thursday Friday this week not by choice".

[15] There is no documentary support of his claims and an inference that none of the latest excuses was known at the time of the previous email sent 18 hours previously. "Counselling" is not arranged at that sort of notice, at least not two days of it. I ordered the meeting, scheduled to meet Mr Brownie's needs, proceed as scheduled.

[16] No further excuse or explanation has been forthcoming.

[17] The above chronology speaks for itself. Mr Brownie cannot avoid his obligations by hiding forever. It is clear that he is aware of the scheduled meeting but has, when it comes to excuses for his non-availability, exhausted every ounce of credibility he may have had. In my mind Mr Brownie's explanations no longer carry the most infinitesimal of weight. It is only proper, having waited some 18 months, that Mr Fuster have his claims addressed and determined so the investigation meeting continued as scheduled.

Determination

[18] Mr Fuster worked at the Glenorchy Hotel mid November 2008 to approximately 18 January 2009. The wage record that he proffered to the Authority, and which he states he obtained from Mr Brownie, shows earnings of \$8,008.26 gross, including holiday pay.

[19] He says he never received that money. I accept that claim given his willingness to list witnesses capable of corroborating his claim and subsequent e-mail traffic from Mr Brownie effectively acknowledging the debt.

[20] Mr Fuster's claim does, however, raise one issue. He cites Mr Brownie as the respondent, yet he worked at the Glenorchy Hotel and there is (at least was until struck off at the company's request on 5 July 2010) a company known as Glenorchy Hotel Limited. This raises a question as to who the employer was.

[21] For three reasons I believe it appropriate to allow the matter to continue as filed. This means that I consider Mr Brownie to be the respondent and personally liable for the moneys that are going to be found to be payable. I reach this conclusion for the following reasons:

- (i) Mr Fuster, when asked, is adamant that he formed his employment relationship with Mr Brownie and states that he was unaware the company even existed. I have no reason to disbelieve him.
- (ii) Mr Brownie has, through correspondence he provided to both the Applicant (through Dr Gnoth) and the Authority, raised only one potential defence and that is the absence of a work permit. He has not suggested the matter is incorrectly filed and that he is not the respondent.
- (iii) Glenorchy Hotel Limited has, in seeking to be struck off, declared that it has discharged its full liabilities to all known creditors. Given the timing of the application, this declaration could not have been properly made if it had been Mr Fuster's employer. The existence of his claim was well known by the time the Company's application was filed earlier this year.

[22] Returning to the arrears. As said in 19 above, there are various e-mail's from Mr Brownie acknowledging the debt. Aside from the e-mail sent to the Authority of

27 July which clearly infers money is owing, there is an e-mail trail between Dr Gnoth and Mr Brownie in which Mr Brownie details unsuccessful attempts to pay the money claimed to Mr Fuster late last year (2009). Mr Fuster had, by then, returned to his home in Switzerland and, if Mr Brownie is to be believed, there were problems in arranging an international deposit. That is followed by Mr Brownie's unequivocal statement of 13 February 2010 that "*A bank draft has been ordered so he [Mr Fuster] will have it [the money] by the end of the week*". He didn't.

[23] While various e-mails from Mr Brownie clearly confirm the money is owing, he now raises the issue of Mr Fuster's work permit. His suggestion that he will pay upon its production suggests he sees its possible non existence as a justification for non payment. It isn't, though in any event there is no substance to the suggestion that Mr Fuster did not have a work permit. He says that not only did he have one, which he produced for the Authority, Mr Brownie assisted him in obtaining it. Even if he did not possess a work permit, that would not justify non payment. No work permit may raise a question as to whether or not work should have been offered, but it was. Once work is performed, there is an entitlement to payment given no ability to deduct for illegal employment in the Wages Protection Act 1983.

[24] It is time Mr Fuster received the monies he is owed and an order will be made accordingly.

Interest

[25] Dr Gnoth seeks, on Mr Fuster's behalf, interest on any amount found to be owing. Interest is to reimburse someone for use, by others, of money that is theirs. In this instance there is no doubt that by failing to make payments properly due the respondent has continued to have use of money rightfully belonging to Mr Fuster, even after having acknowledged the debt as owing. This is a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[26] When ordering interest the Authority may consider an amount up to the current 90 day bank rate plus 2%. The 90 day rate is currently 3.28% which makes 5.28% the total possible. I consider that to be an appropriate amount given the circumstance of this failure and the lack of an argument to the contrary.

[27] The evidence would indicate that the obligation to pay arose no later than the cessation of Mr Fuster's employment on or about 18 January 2009. That is the date from which the interest is to be payable.

[28] There shall therefore be an order that the respondent pay to Mr Fuster interest on the arrears owing at the rate of 5.28% per annum from 18 January 2009. The amount payable as of today is \$651.05.

Costs

[29] The costs claim is minimal. It is limited to the reimbursement of the \$70 fee incurred for filing this claim in the Authority and the cost of Dr Gnoth's transport to this hearing. Dr Gnoth travelled from Dunedin which, according to the Automobile Association, amounts to round trip of some of 566km. Inland Revenue recognises 70 cents per kilometre as being an appropriate rate for reimbursing the use of a private car as Dr Gnoth used here. Applying that rate to the distance travelled gives a travel reimbursement of \$396.20.

[30] The costs were incurred and the claim has been totally successful. In such circumstances I consider it appropriate the claimed reimbursement occur.

[31] I therefore order that Mr Brownie reimburse the claimed costs and pay Dr Gnoth, on behalf of the applicant, the sum of \$466.20.

Orders

[32] For the reasons given, the following orders are made:

- (i) The respondent is to pay to Mr Pascal Fuster wage and holiday arrears in the sum of \$8,008.26 (Eight thousand and eight dollars and twenty six cents); and
- (ii) The respondent is to pay to Mr Fuster interest at the rate of 5.28% per annum from 18 January 2009. As at the date of this decision, the sum owing amounts to \$651.05 (six hundred and fifty one dollars and five cents) increasing by \$1.16 for each day that passes between now and payment; and

- (iii) The respondent is to pay to Mr Fuster a reimbursement of costs incurred in the sum \$466.20 (four hundred and sixty six dollars and twenty cents); and
- (iv) The respondent is to pay the above sums no later than Friday 20 August 2010; and
- (v) All payments are to be made to Dr Juergen Gnoth, the Applicants representative, and he will distribute the funds appropriately.

Mike Loftus
Member of the Employment Relations Authority