

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 11
5444145

BETWEEN	ALEXANDRA GORYACHEVA Applicant
A N D	MICHAEL LEVERTOFF First Respondent
A N D	NEW ZEALAND INDUSTRIAL FUEL DUTY AGENCY LIMITED Second Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
No appearance for either Respondent

Investigation Meetings: 8 October 2014 at Tauranga
9 January 2015 at Auckland

Date of Determination: 14 January 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Goryacheva) claims wages she says are owed to her from her employment with the respondents.

[2] On the evidence before the Authority, it is apparent that Ms Goryacheva was employed initially by the first respondent (Mr Levertoff) in his personal capacity, but then agreed with him that her employment relationship transfer to the second respondent (NZ Fuel Agency).

[3] The evidence before the Authority is clear that there was a written agreement between Ms Goryacheva and Mr Levertoff for the transfer of the employment and that

the terms and conditions of the employment, save for the change in the name of the employer, remained unchanged.

[4] It is also apparent that Ms Goryacheva has identified a global sum which she says she is owed from the totality of the employment relationship (that is her initial employment with Mr Levertoff together with her subsequent employment by NZ Fuel Agency). While the amounts of wages due and owing in respect of each portion of the employment can be readily calculated, the complicating factor is that some payments on account of the totality of the wages owing have been made and it is unclear on the evidence whether those payments have been made by Mr Levertoff personally or by NZ Fuel Agency.

[5] Once the statement of problem was filed in the Authority, it was provided to both Mr Levertoff and NZ Fuel Agency in accordance with the Authority's invariable process. In relation to Mr Levertoff personally, the Authority's file contains evidence of his having personally received a copy of the statement of problem. In addition, there is an email from Mr Levertoff dated 20 March 2014 addressed to the Authority and acknowledging receipt of the statement of problem directed to NZ Fuel Agency. That email is signed off by Mr Levertoff as "*Managing Director NZIFDA*".

[6] That 20 March 2014 email also indicated that NZ Fuel Agency was referring the statement of problem to its lawyer who was named in the email and the Authority then proceeded to engage with that lawyer in respect of progressing the matter. The short point is that no statement in reply was ever filed in the Authority and the lawyer identified as acting for NZ Fuel Agency was unable to obtain instructions and subsequently sought leave to withdraw.

[7] I convened a telephone conference with the parties prior to NZ Fuel Agency's lawyer withdrawing and directed the parties to mediation. That direction, dated 29 May 2014, did not achieve its desired result; NZ Fuel Agency did not engage with the mediation set down process.

[8] A further telephone conference was convened by me as a consequence of which I determined to hear the evidence of the applicant who is now resident in Tauranga and that object was effected in the first investigation meeting on 8 October 2014.

[9] Mr Levertoff was in another part of the country and I endeavoured to have my Authority officer contact him to propose that I interview him in his own locale, in order to progress the matter, but my Authority officer was unable to make contact with Mr Levertoff to convey that proposal.

[10] My Authority officer then commenced an extended period of endeavouring to engage with Mr Levertoff and in the absence of any input from him at that time, fixed an arbitrary date for his evidence to be taken in the matter and then caused the notice of hearing for that date, together with the Authority's summons, to be served on Mr Levertoff by a process server engaged by the Authority.

[11] Mr Levertoff then re-engaged with my Authority officer and, after some email exchanges, proposed to attend on me to give his evidence on 10 January 2015.

[12] When we pointed out to Mr Levertoff that 10 January 2015 was a Saturday and suggested the alternative date of 9 January 2015, he agreed and in an email dated 11 November 2014 to the Authority Mr Levertoff said:

I ... look forward to meeting with the ERA.

I have every intention of cooperating with the ERA and am available on the date set (January 9 2015).

Thank you for providing that new timeframe. It works in with my situation. ...

[13] On 12 November 2014, I caused the following email to be sent to Mr Levertoff in reply:

The Member has asked me to thank you for your email and your indication that you intend to attend the reconvened investigation meeting on 9 January 2015 at our Auckland offices.

[14] I am satisfied then that the Authority has done everything it reasonably could have to provide the respondents in this matter with a proper opportunity to be heard. I know that the process the Authority has adopted has frustrated Ms Goryacheva but I felt it was important to do everything I could to give Mr Levertoff the opportunity to respond to Ms Goryacheva's claim. Notwithstanding those efforts on the part of the Authority staff, at the appointed time for Mr Levertoff to give his evidence in response, he had not attended and despite waiting for him for over an hour after the appointed time, he did not appear.

[15] I am satisfied then that Mr Levertoff has chosen not to engage in the Authority's process despite the efforts that have been made to give him that opportunity and I now proceed to determine the matter in his absence.

[16] The only evidence that is before the Authority is the evidence of Ms Goryacheva. This is a straightforward wages claim. Section 132 of the Employment Relations Act 2000 (the Act) applies. The only evidence of what is owed is the employee's own record in the absence of any evidence from the respondents. Ms Goryacheva's evidence is that her calculations of what she is owed were based on her own records, and in respect of her employment with Mr Levertoff personally, some records she says she obtained from him. In the absence of any alternative evidence from the respondents I consider I am entitled to rely on her calculations.

[17] Because there is simply no evidence from the employer parties, it is impossible for me to do anything other than base my calculations on the evidence of Ms Goryacheva and in reliance on s.132(2) of the Act, I now accept as proved the claims Ms Goryacheva has made in respect of the wages owed to her by one or other of the employers.

[18] I accept without reservation that Mr Levertoff and/or NZ Fuel Agency may accept Ms Goryacheva's calculation; it may be that there is no dispute about the calculation of the amounts owed but in the absence of any evidence from the employer parties, despite the Authority's efforts in that regard, I cannot take that issue any further. Certainly it is the case that payments have been made on account in respect of unpaid wages but Ms Goryacheva's evidence is that there is still a significant sum outstanding. Her evidence is that the total amount still owing is \$6,977.48 and it is that amount which, given the evidentiary issues I have just traversed, I am satisfied she is owed by one or other of the employer entities.

[19] The challenge in the present case is that Ms Goryacheva was employed first by Mr Levertoff personally (and there are two employment agreements between them evidencing that), and then subsequently both parties agreed to the transfer of the employment from Mr Levertoff personally to the second respondent, NZ Fuel Agency.

[20] There is some challenge in identifying precisely when this change in employer was made. On the face of the documents before me, one construction is that the employment with Mr Levertoff lasted around a month from 2 July 2013 down to 31 July 2013 and that the new employment with NZ Fuel Agency commenced on and from 1 August 2013. This conclusion is available because the letter evidencing the change in employer, which is dated 13 September 2013, provides as follows:

By mutual agreement, from 1 8 2013 your employment with Michael Levertoff trading as NZIFDA has been transferred to the New Zealand Industrial Fuel Duty Agency Limited.

[21] A further provision in that letter is relevant as well. The final paragraph of the letter records that this change in employer is the result of “*a verbal mutual agreement discussed on 29 July 2013*”. Ms Goryacheva does not quarrel with the terms of that 13 September 2013 letter.

[22] But of course the letter purports to record in writing the terms of an agreement reached verbally on 29 July 2013, some six weeks before the letter itself is actually dated. There may be an argument for the view that the change in employer actually only took effect on 13 September 2013, the date of the letter.

[23] However, given that Ms Goryacheva’s evidence is not to challenge the terms of this agreement, including the verbal agreement reached on 29 July 2013, I think the better view is that Mr Levertoff was the employer from 2 July 2013 to 31 July 2013 and the company commenced employing Ms Goryacheva on and from 1 August 2013 thereafter.

Determination

[24] Ms Goryacheva says she is owed \$6,977.48 and for reasons I have already made clear, I am satisfied that is the award of lost wages she is entitled to.

[25] The only complicating factor in making the award to her is that she was employed initially by Mr Levertoff personally and subsequently, with effect from 1 August 2013 down to the finish date of 31 October 2013, a total of three months, she was employed by NZ Fuel Agency.

[26] Because payments have been made on account and it is not clear on the evidence whether those payments have come personally from Mr Levertoff or from

the second respondent, it is difficult for the Authority to correctly apportion what is due and owing.

[27] However, I note that Ms Goryacheva worked for Mr Levertoff for about a month (2 July to 31 July 2013) and for NZ Fuel Agency for exactly three months.

[28] The only proper approach I think, given the state of the evidence, is for me to apportion the debts due and owing in those proportions.

[29] Accordingly, I direct that the first respondent, Michael Levertoff, is to pay to Ms Goryacheva the sum of \$1,744.37 net and New Zealand Industrial Fuel Duty Agency Limited is to pay to Ms Goryacheva the sum of \$5,233.11 net, each being in settlement of unpaid wages due and owing by the respective employers to Ms Goryacheva.

[30] Mr Levertoff and New Zealand Industrial Fuel Duty Agency Limited are also to account to the Inland Revenue Department for the income tax deducted at source in respect of these sums.

[31] A certificate of determination in respect of each of these orders is to be made available to Ms Goryacheva with the issuance of this determination.

Costs

[32] There is no issue as to costs.

James Crichton
Member of the Employment Relations Authority