

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 386
5329326

BETWEEN SAMUEL HEMA
 Applicant

AND MICHELLE BATEMAN
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Hester Sutherland-Stacey and Shima Grice, counsel for
 Applicant
 No appearance for Respondent

Investigation Meeting: 24 August 2011

Determination: 7 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The investigation of this matter commenced in December 2010 when the applicant Mr Samuel Hema lodged a statement of problem with the Authority. The problem he wished to have resolved was his dismissal by an employer alleged to be the respondent, Ms Michelle Bateman. Mr Hema claimed that the dismissal, which had occurred in October 2010, was substantively unjustified and procedurally flawed.

[2] When he lodged his claim Mr Hema also applied for directions as to service on Ms Bateman of the application and notices relating to it. This was necessary because Ms Bateman had not provided any address for service and attempts to contact her by ordinary mail sent to various addresses and by emailing other addresses had all been unsuccessful. Mr Hema considered that Ms Bateman was evading service and accordingly sought the directions for her to be served at several addresses, and he also sought leave to serve the statement of problem in Australia where Ms Bateman was believed to be.

[3] The last email received from Ms Bateman by Mr Hema, on 1 October 2010, in which a “trial period” was referred to together with a statement that Mr Hema would not be offered a position, had been sent from an Australian address. In her email Ms Bateman also advised that she was going to be in the Perth area for a further fortnight.

[4] The Authority gave the directions as to service sought by Mr Hema and gave leave for Ms Bateman to be served with the statement or problem out of New Zealand. Service outside jurisdiction is permitted under clause 4A(a) of Schedule 2 of the Employment Relations Act 2000, when the Authority has given leave and the service will be carried out in accordance with any Regulations made under the Act. The notices that are to be served include advice as to various steps that can be taken by the party served, including making objection to the Authority’s jurisdiction. The notice in this case required Ms Bateman to lodge a statement in reply within 30 days of service.

[5] Following the receipt of advice from Mr Hema’s solicitors that service had been effected as directed, an investigation meeting was set down in April 2011 but before then an application was made to adjourn it to allow a further application for substituted service of the notice to be made and for Mr Hema to apply for legal aid.

[6] Directions were given again by the Authority in May 2011, for the investigation meeting to proceed in June. Leave was granted again for the notice of investigation meeting to be served under clause 4A(a) of Schedule 2 of the Employment Relations Act. Directions were also given for the notice to be served on Ms Bateman at her last known address, as permitted by Regulation 16(3)(a)(2) of the Employment Relations Authority Regulations. The notice was also directed to be served in New Zealand on a Ms Kate Clark, a known business associate of Ms Bateman.

[7] Again because of problems with service, it was necessary to vacate the June fixture on the application of Mr Hema through his solicitors, to allow further inquiries to be made so that service could be effected.

[8] Following receipt of advice that service had been effected and after proof of service was provided for a meeting to be held on 24 August 2011, the matter proceeded on that date. There was no appearance by or on behalf of the respondent Ms Bateman.

[9] The Authority was satisfied that it was in order for the meeting to proceed, a step that Ms Bateman had been advised would be taken if she was not present at the meeting.

The claim

[10] Mr Hema gave evidence in support of his claim and produced a number of documents relevant to it.

[11] Although the written individual employment agreement Mr Hema received from Ms Bateman at the time he was employed refers to the employer as “International Cultural Youth Exchange Ltd,” the claim was brought against Michelle Bateman on the basis that she was the only person, legal or natural, who could have been his employer at material times. This was argued to be the situation because as at the date of commencement of the employment agreement International Cultural Youth Exchange Ltd was not and never had been a registered company. There had however been a company called ICYE Ltd, the acronym of the company named on the agreement as the employer, but it had been struck off the Register on 22 June 2010. ICYE Ltd had originally been called International Cultural Youth Exchange Oceania Ltd.

[12] Mr Hema had been led to believe by Ms Bateman when she interviewed him and offered him the job that his employer was a company with the name that appeared on the employment agreement. He subsequently found out he had been mistaken about that. After working as National Director of ICYE Ltd, the position described in the agreement, for about a month, Mr Hema became concerned as to the existence of his employer and found out when he checked the Register of Companies that it either had never existed or had ceased to exist before he commenced employment.

[13] However he continued performing the position of National Director and continued to have contact with Ms Bateman. The terms of the employment agreement were performed. Most importantly the payments of remuneration made to Mr Hema continued after he established that he had made a mistake about the identity of the employer.

[14] On the basis that he must have been employed by some person if he was working and being paid for it, he reasonably concluded that the employer must have been Ms Bateman. I agree that an employment relationship may be found to have

existed between Mr Hema and Ms Bateman in those circumstances and I find accordingly.

[15] I also find that there were no substantive grounds to justify Mr Hema's dismissal which was effected by the brief email from Ms Bateman received on 1 October 2010. It stated:

In regards to the trial period I wish to inform you that as ICYE Ltd is no longer registered then the company is not in a position to be able to offer you the position of National Director.

[16] I find that the employment agreement did not contain a trial period provision of any kind, whether under s 67A or the Employment Relations Act or otherwise, and in any event the dismissal was effected after the expiry of the 90 day period under s 67A.

[17] The employment agreement simply stated, at clause 5, under the heading Salary that a performance review would be carried out not later than three months from the commencement of employment and that "should the employee be offered the permanent position" then the salary would increase.

[18] I find that the trial period referred to in Ms Bateman's email was non-existent and therefore cannot be relied upon to justify the dismissal.

[19] Accordingly, I find that justification has not been established in accordance with the test under s 103A of the Act (as it was in 2010). How the employer acted and the actions of the employer were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[20] The dismissal was procedurally unjustified as Mr Hema had no warning that Ms Bateman was considering dismissing him and he was given no opportunity to comment on the proposed dismissal or to seek advice. This was a breach of s 4(1A) of the Act, which requires parties to an employment relationship to be active and constructive in establishing and maintaining a productive relationship in which the parties are, amongst other things, responsive and communicative. The employer is also required to provide the employee with access to relevant information and an opportunity to comment on that information before making a decision that will have an adverse effect on an employee's employment.

[21] I find that Mr Hema was simply notified by Ms Bateman of his dismissal without any process of any kind.

[22] Further Mr Hema was not paid his contractual notice entitlement and had to pursue Ms Bateman for the reimbursement of his expenses, which he did eventually receive from her.

[23] The notice period was stated to be eight weeks, or in lieu of that eight weeks salary was to be paid, an amount of \$6,923 gross. Mr Hema is entitled to recover that amount.

[24] He is also entitled to recover unpaid holiday pay, as no holiday or leave record was provided by Ms Bateman. The amount is established to be about \$1,500, or 8% of the gross salary payable for three months actual work, plus the holiday pay for the notice period of eight weeks.

[25] Mr Hema seeks the reimbursement of lost wages for a period of three months, being \$11,250 gross. He applied for other positions after his dismissal but was not successful and eventually returned to study. After deduction of his student allowance Mr Hema seeks \$4,810.

[26] He also seeks at the discretion at the Authority an award of \$4,810 for economic loss for a further three months period.

[27] As compensation for distress, humiliation and injury to feelings caused by his dismissal and the manner in which it was carried out Mr Hema seeks \$7,000. That is an appropriate amount to be awarded in the circumstances.

[28] Mr Hema seeks a penalty of \$5,000 for the failure by Ms Bateman to comply with s 83 of the Holidays Act 2003 which requires an employer to keep and provide access to a holiday and leave record.

Determination

[29] The Authority finds that Mr Hema's claims for remedies from his personal grievance and recovery action are made out and accordingly makes the following awards:

- 8 weeks notice pay - \$6,923 gross;

- Unpaid holiday pay - \$1,500 gross;
- Reimbursement of lost wages – first three months - \$4,810 gross;
- Reimbursement of lost wages – further one and a half months - \$2,405 gross;
- Compensation for hurt and humiliation - \$7,000;
- Penalty for breach of the Holidays Act - \$3,000.

[30] I direct that of the penalty awarded \$1,500 is to be paid to Mr Hema and the balance to the Crown.

[31] Interest at 5% per annum is to be paid from 7 December 2010 on the notice pay, holiday pay and lost wages reimbursed, until the total principal sum has been paid in full.

[32] Ms Michelle Bateman is ordered to pay the above amounts to Mr Samuel Hema.

Costs

[33] Mr Hema incurred legal fees of \$6,059.62 (including GST) and disbursements, and also paid a fee for filing his claim of \$71.56.

[34] Those costs and fees are relatively modest considering the problems experienced with service and the necessity to seek directions at various stages from the Authority.

[35] The Authority is satisfied that full solicitor-client costs should be awarded of \$6,059.62. Ms Michelle Bateman is ordered to pay that sum to Mr Samuel Hema and also \$71.56 to reimburse him for the filing fee on his claim.