

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 7/08
5094760

BETWEEN HAVENLEIGH GLOBAL
SERVICES LIMITED
Applicant

AND PRASIT TOEIKRATHOK,
GRITTAPAT KHAORSRI,
WANLOP NGAMPAK,
CHARAN BOONSOM, PHIT
KHANGSAMRONG,
KHWANTA
KHANGSAMRONG, ORASA
KHAMBUT and SURACHET
KANMIKA
Respondents

Member of Authority: James Crichton

Representatives: Brian Fletcher, Counsel for Applicant
Shayne Boyce, Advocate for Respondents

Investigation Meeting: 10 September 2007, 17 and 18 September 2007, 26
September 2007 at Blenheim

Submissions: 5 December 2007 from Applicant
15 January 2008 from Respondents

Determination: 23 January 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Havenleigh Global Services Limited (*Havenleigh*) seeks a declaration from the Authority that the various allegations made against it by the respondents collectively (*the Thai workers*) have no legal basis and a direction that an overpayment of wages in relation to two of the Thai workers be returned to Havenleigh.

[2] In response to that claim the Thai workers say that they were unjustifiably dismissed by Havenleigh, unjustifiably disadvantaged by reason of the loss of temporary work permits and

subject to unlawful duress. The Thai workers also claim reimbursement of lost wages totalling over \$72,000 and deny that there has been any overpayment of wages as Havenleigh claims. There is no initiating application before the Authority from the Thai workers as required by S 158 of the Act.

[3] This is, as counsel for Havenleigh correctly observes, *a somewhat unusual application* where in effect the employer is seeking declarations from the Authority having been unable to obtain clarification of the detail of the Thai workers' claims.

[4] If that is the position, then the only matters for determination by the Authority are the matters raised by Havenleigh. Before considering this fundamental issue though, it is useful to traverse the factual background.

[5] The Thai workers are all Thai nationals having been recruited to come to this country to work in New Zealand vineyards.

[6] It is common ground that the Thai workers arrived in this country between 2005 and the middle of 2006 and that they commenced work with Havenleigh at various dates during that period.

[7] Examples of standard form letters from Havenleigh to potential Thai workers were put into evidence during the investigation meeting. In essence, the letter traverses the usual matters one would expect in a document of this kind, offering employment as a vineyard worker with Havenleigh for a term of one year with a minimum pay rate and other pay rates referred to in the document. Hours of work are traversed as are accommodation arrangements.

[8] On 16 April 2007, the Thai workers allege they were given three days' notice of an employer requirement that they move from Marlborough to Hawke's Bay in order to remain in employment.

[9] Contemporaneously, the Thai workers also allege that they were given a new employment agreement to sign which they say was presented to them as being a document from Havenleigh which, amongst other things, entitled Havenleigh to deduct from wages due to them up to \$3,000 in circumstances where the Thai workers breached their employment or immigration obligations and Havenleigh suffered loss in consequence.

[10] Havenleigh denies each of these allegations. Its evidence is that the workers were offered an opportunity to work in vineyards other than in Marlborough because there was no work in Marlborough and the alternative was that if workers wished to remain in Marlborough they would,

of necessity, be off pay. In the result, the facts disclose that some workers accepted the opportunity to move to other venues in New Zealand and some did not.

[11] Havenleigh also denies that the contract entitling it to make significant deductions from the Thai workers' pay emanated from Havenleigh at all, notwithstanding that it contained the signature of Havenleigh's managing director, Mr Andrew Forward. Havenleigh's evidence is that the document in question came from the Thai recruiting agency called Luck Agency which was responsible for recruiting the majority of the Thai workers in their own country. The document was designed to deal with the situation where workers absconded at the end of their contracted work period and thus caused loss to various of the parties who had been responsible for bringing them into New Zealand, including Luck Agency.

[12] In the result, the facts disclose that some of the Thai workers signed the subject agreement and some did not. Havenleigh is adamant that the agreement was not its and that it was not a term of its employment agreement with the Thai workers that the latter sign such a document.

[13] Apparently to identify their legal obligations, the Thai workers contacted the Immigration Division of the Department of Labour in particular to seek advice about their entitlement to work in districts of New Zealand other than the one specified on their Temporary Work Permits. The Thai workers understood the advice given to them from officials was that they were not able to work in other districts.

[14] On or about 17 April 2007, that is a day after the Thai workers allege they were given notice of Havenleigh's intention to move their place of employment, the Thai workers received notice of the revocation of their Temporary Work Permits.

[15] A number of the Thai workers were then out of work for various periods, some as long as eight weeks, before being able to obtain fresh documentation and obtain fresh employment with another employer.

[16] Havenleigh denies that it was ever the position that the Thai workers could not work in different parts of New Zealand than the one specified in their Temporary Work Permits. The legal position according to Havenleigh is that provided a *variation of conditions* (VOC) is applied for, workers can move from district to district without breaching their immigration status. There does seem to be an issue about the timing of the application for a VOC. The evidence of the Thai workers was that they understood from officials that the VOC needed to be applied for in advance; Havenleigh, on the other hand, indicated that its habitual practice was to apply for VOCs retrospectively and in bulk in relation to the total group of workers affected. Be that as it may, there

was no evidence before the Authority that any of the Thai workers had been the subject of an application for a VOC, whether retrospectively and in bulk or otherwise.

[17] The Thai workers allege that the cancellation of their Temporary Work Permits by officials was a consequence of improper action taken against them by Havenleigh.

[18] Havenleigh denies acting improperly; it says that its legal obligation is to advise the Immigration Division of the Department of Labour if and when workers cease to work for it, notwithstanding that those workers are sponsored into New Zealand on a Temporary Work Permit by it. Havenleigh said in its evidence that that was in fact the position. The workers in question were no longer working for Havenleigh because it had no work to offer them and accordingly it had an obligation to advise the Immigration Division of the Department of Labour.

[19] On 11 April 2007, some of the Thai workers spoke with Mr Laurie Norton, a Labour Inspector based at Nelson. Mr Norton had a subsequent discussion with two more of the Thai workers on 30 April 2007. As part of his investigation into what he himself described as *a wide ranging series of claims against Havenleigh ...*, Mr Norton spoke with the managing director of Havenleigh, Mr Andrew Forward.

[20] Mr Norton arranged for the Thai workers to attend mediation with Havenleigh on 20 June 2007 but that mediation was not successful in resolving the differences between the parties.

[21] Mr Norton also drew the Thai workers' attention to the personal grievance process and in consequence, a letter dated 29 May 2007 was forwarded to Havenleigh on behalf of the Thai workers allegedly raising a personal grievance in respect of unjustified dismissal, unjustified disadvantage and duress.

[22] Correspondence from Havenleigh's counsel to the Thai workers' adviser after receipt of the letter allegedly raising a personal grievance sought details of the basis of this grievance in order that the matter could be addressed by Havenleigh. In responding to that request for what amounted to *further and better particulars*, Mr Maurice Duffy, a Christian pastor based at Seddon in Marlborough, indicated that the Thai workers would be instructing an employment law specialist and that *in light of this I unfortunately at this time are (sic) unable to respond to any of the points raised in your letter on behalf of your client Havenleigh Global Services Limited*.

[23] This approach resulted in a further letter from counsel for Havenleigh dated 18 July 2007 in which Havenleigh indicated its intention to make its own application to the Authority for a declaration if the Thai workers were not minded to progress the matter urgently themselves.

[24] In the result, there was no application from the Thai workers to the Authority and the application from Havenleigh was received in due course and is now the basis for this determination.

Issues

[25] The first and most fundamental issue in this matter is the question of the Authority's powers to respond appropriately to the application made. In essence, this is a question of jurisdiction and it is fundamental to the disposal of the matter between the parties on the basis of the documents before the Authority at present and the evidence that the Authority has been able to adduce from its investigation meeting.

[26] For reasons which I will make clear shortly, I am not persuaded that the Authority is able to grant the relief sought by Havenleigh nor am I persuaded that the Thai workers have properly notified their alleged grievance in accordance with our law.

Jurisdiction

[27] The only proceeding in front of the Authority, in terms of s.158 of the Employment Relations Act 2000, is the statement of problem filed by Havenleigh, the employer.

[28] The terms of s.158 are clear. The section contemplates proceedings before the Authority being commenced with the lodging of an application in the prescribed form. Given that the only *application in the prescribed form* is the statement of problem filed by the employer party, that must be the genesis of the Authority's consideration of this matter.

[29] The Thai workers' proceedings are exclusively a response to the statement of problem filed by Havenleigh and that response is encapsulated in the Thai workers' statement in reply to Havenleigh's statement of problem.

[30] The Authority, by its statute, has wide powers. In particular, in s.160 of the Act, subsection (3) provides as follows:

(3) *The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.*

[31] The subsection just referred to, together with the general direction in s.157(1) of the Act that the Authority is charged with ... *making a determination according to the substantial merits of the case, without regard to technicalities*, casts a broad onus on the Authority to seek to resolve differences between parties to an employment relationship without concern for the legal niceties.

That being the legal position, it is incumbent on the Authority to seek to resolve differences that parties have, even where the matter is not *of the type described by the parties*.

[32] However, it does not seem to me that those broadly expressed principles go so far as to allow the Authority to act ultra vires its governing statute. In taking action in a matter, the Authority must have a legal basis for doing so and in particular must have jurisdiction to act in the manner requested.

[33] In the particular circumstances of the present case, I am satisfied that the proceedings have been initiated by Havenleigh, the employer, and have been responded to by the Thai workers. It follows that the only application of jurisdiction that can be available to the Authority is its jurisdiction to act on the application made by Havenleigh.

[34] That brings us to a consideration of just what it is that Havenleigh is seeking by way of a remedy to its employment relationship problem, and even to the more fundamental question of whether Havenleigh has in truth an employment relationship problem.

[35] Havenleigh seeks a declaration that it has no liability in relation to the matters it understands are at issue as a consequence of the Thai workers allegedly raising a personal grievance by their letter of 29 May 2007.

[36] It is difficult not to have some sympathy for Havenleigh. It received the 29 May 2007 letter from the Thai workers which raised broad allegations of unjustifiable dismissal, unjustifiable disadvantage and duress.

[37] There was no other detail. Havenleigh sought further and better particulars but, despite extensive efforts in that regard, no further details were provided.

[38] That being the position, Havenleigh, after giving notice to the Thai workers of its intention so to do, filed its own application in the Authority, having already sought to encourage the Thai workers to make their own application.

[39] Havenleigh's application seeks a declaration that it has *no liability on the grounds raised*. The word *declaration* is a term of art. The provisions of the Declaratory Judgments Act are relevant. A declaration may issue out of the High Court on terms and conditions consistent with the Declaratory Judgments Act. A declaration can only issue out of the High Court because the High Court has originating jurisdiction, something which the Authority lacks. It is my considered view that the Authority has no power to issue a declaration as requested by Havenleigh.

[40] Furthermore, it is difficult to see what else the Authority can do to address the employment relationship problem between these parties within the framework of the proceedings before it. Even if it were available to the Authority to issue the declaration requested by Havenleigh, it cannot be the position that the effect of the issue of such a determination is to bring to an end any claim or claims which the Thai workers may have against their former employer. Clearly the effect which Havenleigh is seeking is to bring the matters in dispute to a head and conclude them by the Authority's processes. It seems to me that allowing such an outcome, given my view of the law, must be an abuse of process.

[41] A related issue is whether the Thai workers have, in truth, legitimately raised a personal grievance. My view is that they have not. I reach this conclusion because, although the nature of the allegations against Havenleigh are identified in their letter of 29 May 2007, the details on which the Thai workers rely to ground their allegation was not provided to Havenleigh in that letter and has not subsequently been provided, at least until the evidence heard in the Authority's investigation meeting.

[42] Perhaps it could be argued that the Thai workers have perfected the defect in the 29 May letter by the evidence that they gave to the Authority during the September 2007 investigation meeting. However, that argument does not seem well founded, at least because the sheer extent of the evidence is such as to be confusing.

[43] Further, the structure of the investigation meeting, of necessity, is not designed to provide an employer party with further and better particulars of the basis of an alleged personal grievance in order that that employer can respond appropriately to the claim made.

[44] In all the circumstances then, while I have sympathy for Havenleigh in its desire to confront the allegation it faced and deal with it, particularly in the context where much of the progressing of the argument was through media statements made by supporters of the Thai workers, I am not persuaded that the Authority can assist the employer in making the order it seeks.

[45] I also need to say that I have sympathy for the Thai workers and their predicament. Clearly, they are strangers in a foreign land and a number of well meaning New Zealand citizens have sought to assist the Thai workers in a variety of ways. I must say that some of that help, while no doubt absolutely genuine, has perhaps been misguided and has resulted in exacerbating misunderstandings which are inherent in the language difficulties which the present arrangements seem to guarantee.

Decision

[46] Having given earnest consideration to the application before the Authority and the significant quantity of evidence that has been adduced, I have reluctantly reached the conclusion that the Authority is not able to assist the parties in the resolution of their employment relationship problem as it lacks the jurisdiction to make the order sought by the applicant, Havenleigh, and indeed is unable to offer Havenleigh any other order or decision which could properly address its concerns.

[47] I also need to say that, while I sympathise with Havenleigh and its predicament, I also have sympathy for the Thai workers and their difficulty in understanding their rights and obligations in a foreign country, notwithstanding the help that they have obviously been given by a number of well meaning New Zealand citizens.

[48] Just as I am not persuaded that the Authority can grant the relief sought by the applicant, Havenleigh, so I am also not persuaded that the Thai workers have legitimately and properly raised a personal grievance with Havenleigh that Havenleigh can respond to in accordance with New Zealand law.

[49] I must express the Authority's dismay that the difficulties which these parties have had in addressing their differences seems to have been the subject of comment in the news media which has generated, I fear, more heat than light.

[50] During the course of the investigation meeting, there was clear evidence given that some or all of the Thai workers had paid significant sums of money to agencies in their home country to enable them to obtain employment in this country. I am absolutely satisfied on the evidence I heard that none of those sums of money were paid, in whole or in part, to Havenleigh and that there is no reason to think that Havenleigh is in any way responsible or involved in the payment of such sums by the Thai workers. However, the Authority was concerned to hear about this practice and accordingly I direct that a copy of this determination is to be made available to the Secretary of Labour in order that the Immigration Division of the Department of Labour may be aware of the Authority's concern and may take whatever action it considers appropriate.

James Crichton
Member of the Employment Relations Authority

