

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Steve Humphrey (Applicant)  
**AND** Murphy's Kitchen and Home Renovators Limited (Respondent)  
**REPRESENTATIVES** Trent Petherick for the Applicant  
David McLeod for the Respondent  
**MEMBER OF AUTHORITY** P R Stapp  
**INVESTIGATION MEETING** Napier, 26 October 2006  
**DATE OF DETERMINATION** 6 November 2006

**DETERMINATION OF THE AUTHORITY**

Employment relationship problem

[1] The parties require a determination on the terms of the employment arrangement they had, the reasons for the employment relationship ending, whether or not the Applicant has a personal grievance, and if he is entitled to any remedies.

[2] The applicant says he was employed full time by the Respondent. He says that he was dismissed because he raised an issue about the payment of statutory holiday pay for Easter 2006. The Respondent denied this.

[3] The Respondent says the applicant was only employed on an "on-call" arrangement. It says that the arrangement was brought to an end for genuine business reasons. It says it owes nothing to Mr Humphrey.

**The fact**

[4] Mr Humphrey commenced employment as a joiner with Murphy's Kitchen and Home Renovators Limited on 20 March 2006.

[5] Murphy's Kitchen and Home Renovators Limited is a joinery business and second hand building supplies business in Napier that employed up to three people before one left in November 2004. When Mr Humphrey started to work for the company David Murphy was drawing wages and Wayne James was employed as the kitchen supervisor.

[6] Mr Murphy says he employed Mr Humphrey to work because he had a contract to make kitchen units for the Housing Corporation and had purchased a new machine that he needed Mr Humphrey to build some racks for. His contract required 7 units being made that were stacked until the bench tops arrived. He was told by Mr Peter Trow, the project manager for the company supervising the contract, that the contract would end and a new tender would probably be unsuccessful. Subsequently the contract was not renewed. The machine that Mr Humphrey had purchased did not arrive until after 21 April and Mr Humphrey had left.

[7] This was Mr Humphrey's first job since returning from the UK. Despite him being a trained primary teacher he had been unsuccessful in obtaining work in that profession. For the first two or three days he was paid cash, but the arrangement was changed and thereafter he was paid through the company's computer accounting system. He received pay slips that initially did not have his occupation recorded. During the course of his employment Mrs Bev Murphy included his occupation as "*on-call sales joiner*" on the computer as she became familiar with using the accounting programme. This was the first time she had entered an employee's details. Previously details of the company's employees were loaded by the accountant.

[8] Mr Humphrey was paid \$16.50 per hour and paid weekly, although he worked variable hours until his employment was terminated on 21 April 2006.

[9] On 20 April 2006 the applicant raised with Mr David Murphy, the company's director, an issue about being paid for Easter. Mr Murphy believed he did not owe Mr Humphrey any statutory holiday pay. However, Mr Humphrey sought legal advice and Mr Murphy contacted the Labour Department and decided to pay Mr Humphrey his statutory Easter pay on the basis of 8 hours per day.

[10] Mr Humphrey says he was told by Mr Murphy that "*I'll pay your holidays but tomorrow will be your last day*". Mr Murphy agreed to pay the holiday pay but denied making this comment. He agreed he had decided to end the arrangement before telling Mr Humphrey and did not include Mr Humphrey in any prior discussion on the decision and other possible options.

[11] Mr Humphrey returned to work on 21 April 2006 and worked 5 hours before deciding he had had enough because Mr Murphy would not change his mind about the decision he had made the previous day.

### **The Authority's determination**

[12] The difference between Messrs Mr Humphrey and Murphy on the employment arrangements was a difference of understanding I hold. Mr Humphrey's arrangement can be distinguished as a permanent arrangement as opposed to being on call because there was a change in the arrangement from being paid in cash to the accounting computer programme. He was paid weekly. He worked consecutive days albeit his hours varied from week to week. There was no employment agreement. Another person had been employed previously in the business, albeit there had been a time lapse between that person leaving and Mr Humphrey joining the business. I have balanced these considerations with Bev Murphy's evidence when she explained that she inserted Mr Humphrey's occupation on the computer pay slip during the time he was working and when she found time to do it and had become familiar with the programme. Her evidence was genuine and I accept it. She did not have any direct dealings in Mr Humphrey's arrangement being put together and was doing what she learnt from other people. Therefore her evidence that his arrangement was on-call has not been sufficient to tip the balance. Also, Messrs Murphy and Humphrey are in dispute about what their arrangement involved.

[13] Mr Murphy's representative, Mr McLeod, accepted that Mr Murphy's action amounted to a dismissal and the onus rested on the Respondent to justify its action. This, I agree is correct. He submitted that the decision made by Mr Murphy was for a genuine business reason because of the loss of the Housing Corporation work and the existence of the on-call arrangement in the employment relationship, which meant Mr Murphy, did not have to consult Mr Humphrey.

[14] With respect I do not accept the submission that the action did not require consultation. Consultation is required under Section 4(1A) of the Employment Relations Act. S 4 (1A) makes it clear that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his employees to provide to the employees effective access to information and an opportunity to comment before such decisions are made. Also the recent judgment of *Simpsons Farms Ltd v. Aberhart* (unreported, Cogan CJ, AC52/06, 14 September 2006), makes clear, this means that consultation is necessary in any redundancy situation.

[15] Mr Murphy's decision was predetermined because Mr Humphrey was not informed of the possibility of his employment ending and the reason for it ending. Moreover he had no chance to consider any options and have any input that a fair and reasonable employer would have allowed before making its decision. Indeed I am not satisfied that Mr Murphy even considered any options that a fair and reasonable employer would have done.

[16] These failures were significant enough to mean that the Respondent's attempt to justify the reason does not stand up to scrutiny. Indeed after the applicant raised his grievance on 5 May 2006 the Respondent replied, through a lawyer it was using at the time, and did not allude to the loss of the Housing Corporation work. During the Authority's investigation meeting Mr Murphy referred for the first time to the affects of Trade Me on his second hand part of the business. This supports the Applicant's representative's submission that the reasoning is after the event and was not used to justify the action at the time.

[17] I now turn to the reasons relied upon by the employer for Mr Humphrey's dismissal. Maybe if the situation had been handled differently the employer could have been able to justify its actions. However, on balance I hold that it has not been able to support its reason of a genuine business decision at the time because:

- There was a holiday pay issue that preceded the decision made to dismiss Mr Humphrey.
- Mr Humphrey says Mr Murphy's conduct was aggressive and agitated but he was not able to sufficiently substantiate that claim, I hold.
- The reasoning was advanced after the decision had been made without consultation and coincidental with the holiday pay issue.
- Mr Humphrey had no input on any options and suggestions. Indeed it would appear that Mr Murphy did not consider any other options (in answer to a question from the Authority).
- There was no causal linkage between the number of units being produced, the loss of the contract and the company's financial circumstances. The Respondent has not relied upon any financial information. Mr Murphy only relied upon his "*gut feeling*". Of course the size of the business and any loss of a contract would support Mr Murphy and his "*gut feeling*" in this regard but it falls short of justifying the situation I hold, given the above factors.

Also the number of units was narrowed and clarified during the Authority's investigation, whereas left to the written statements produced by the Respondent the wrong inferences could have been taken on the size of the contract (Messrs Murphy and Trow).

- Both parties had a different understanding of their employment relationship. I have decided in favour of the evidence produced by Mr Humphrey only to the extent that he worked regularly, was paid weekly and there was a change to the method of how he was paid that was taken at his initiative. The nature of the employment relationship does not detract from the obligations the employer has.
- I observed that on one issue during the course of the investigation that he became confused, but was able to correct the situation by retrieving documents to assist him mitigate his loss. Any confusion he might have had and him not being able to substantiate his claims were not enough for me not to believe him.
- The situation of Mr Humphrey getting a lawyer could not have come as a surprise to Mr Murphy because Mr James told Mr Murphy that that was what Mr Humphrey had told him he was actually going to do.
- The incorporation of the holiday rate in the hourly rate is not sufficient to establish reliably that the employment was intermittent given it was regular albeit for only a very short period and Mr Ellison was paid weekly. The parties were both operating in ignorance of the law.

[18] In conclusion the process followed by the Respondent did not meet the legal requirements and the Respondent has not been able to justify its decision at the time. As I said, however, maybe if the situation had been handled differently the employer could have been able to justify its action by properly marshalling its information, assessing the options and giving Mr Humphrey an opportunity to be involved. Mr Humphrey has a personal grievance.

[19] I now turn to remedies. During the Authority's investigation it was established that Mr Humphrey's loss of wages would have been approximately 8 weeks from the date he left. He has shown an attempt to mitigate his loss and did indeed obtain employment later. He accepted that he took no issue with Mr Murphy at the time about not having an employment agreement and that he agreed with the arrangements for the first two days pay and then set about to change the method of how he was paid. I hold that he could have worked out April 21 but decided he had had enough and

left. There was no agreement on any notice that a fair and reasonable employer would have given. There was no contribution by the applicant, I hold.

[20] Mr Humphrey is entitled to compensation for the loss of his wages and under s 123 (1) (b) of the Act I must award him that loss, which is less than three months and in the circumstances where there is no contributory fault. Murphy's Kitchen and Home Renovators Limited is required to pay Mr Humphrey \$4,224 for 8 weeks loss of wages.

[21] Mr Humphrey has made a claim for a reasonable sum of compensation for humiliation loss of dignity and injury to feelings to be determined by the Authority (\$10,000 was claimed in the statement of problem but Mr Humphrey and his counsel commented that such a sum was at the top end for a case of this nature). Mr Humphrey relied upon his own evidence for his claim and he decided not to support his claims with any other evidence. This was not satisfactory. However, I accept, because there was evidence of him being upset and he says he was "*knocked for six*", that his feelings were affected by the employer's action. He should receive \$3,000 compensation given the length of service, that it was Mr Humphrey's first job upon returning to New Zealand and considering both parties' acquiesced on the employment arrangements.

[22] The employer failed to provide the intended employment agreement. This was a breach of the Act. The Respondent has now corrected that situation for his other employee. His failure at the time was with the knowledge that the law required the intended agreement to be provided and the applicant's lack of any concern at the time does not mitigate the situation. This is not a situation in which a portion of any penalty should be paid to the Applicant, as I advised the parties during the investigation meeting. The employer's failure at the time has directly contributed to this employment relationship problem. The Respondent's action was a breach of the Act. The claim has been brought within the timeframe under the Act (s 135 (5) applied). Murphy's Kitchen and Home Renovators Limited is to pay the Crown \$250 penalty for the breach of the Act in not providing an intended employment agreement as required.

### **Summary**

[23] Murphy's Kitchen and Home Renovators Limited is to pay:

- Steve Humphrey \$4,224 wages and \$3,000 compensation, and
- The Crown \$250 penalty.

[24] Costs are reserved

P R Stapp  
Member of the Authority