

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 12
5415081

BETWEEN PETER JOHNSON
 Applicant

AND NZL MARQUIS LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Joe Richardson, advocate for the Applicant
 Alyn Higgins, counsel for the Respondent

Investigation Meeting: 21 November 2013 at Masterton

Further submissions and
information in writing 19 December 2013

Date of Determination: 4 February 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The real nature of the relationship between Mr Johnson and NZL Marquis Limited (Marquis) is whether Mr Johnson is an employee and entitled to wage arrears (under the Minimum Wage Act), and whether or not he was dismissed.

[2] Mr Johnson claims that he was employed at the Marquis of Normanby Hotel at Carterton from 5 July 2010 when the business was purchased by Mr Ramesh Dayal from Mr Michael Shale.

[3] Underlying Mr Johnson's claim is a claim for wages in compliance with the Minimum Wage Act, and notice (without a written employment agreement); and annual leave that he says he was not paid during his employment. He is claiming remedies (lost wages and compensation) for a personal grievance. Late in the claim he requested penalties.

[4] Mr Johnson says that he was primarily the driver of the hotel's courtesy coach, opened and closed the hotel as and when required, reported incidents to the Police and carried out stocktaking with the general manager. In December 2012 he was asked by Mr Dayal to return all his keys in his possession including the keys for the van and the security keys for the hotel and that when he was not at the hotel using them, they should be left there. This happened only after Mr Johnson had made enquiries with the Ministry of Business, Innovation and Employment (MBIE) about the nature of his employment relationship.

[5] The relationship between Mr Johnson and Marquis ceased, by text on 10 January 2013.

[6] Marquis denies all Mr Johnson's claims, and contends that Mr Johnson was never an employee, but instead was a regular patron at the hotel helping out as a volunteer as he was a lonely person looking for company and companionship with patrons and the employees at the hotel.

Issues

- i. Was Mr Johnson employed by NZL Marquis Limited?
- ii. If he was employed, how much is he owed for wages and annual leave? How many hours did he work?
- iii. How did the relationship end?
- iv. If Mr Johnson was unjustifiably dismissed, how much lost wages and compensation is he entitled to?

The Law

[7] This matter relates to s 6 of the Employment Relations Act as to whether or not Mr Johnson was an employee for his claim to have any success. Since the claim has been emphatically denied, I am required to assess the real nature of the relationship and particularly to have regard first to the definition of an employee under the Act, which excludes a "volunteer", being a person who does not expect to be rewarded for work to be performed as a volunteer and receives no reward for work performed as a volunteer.

[8] Second the traditional tests of the real nature of the relationship must be considered having regard to all relevant matters and with regard to the control in the relationship, the organisation and integration in the respondent's business of Mr Johnson's role and the business relationships of both Mr Johnson and Marquis.

The facts

[9] The Marquis of Normanby Hotel is located in Carterton. It has approximately five employees. The business was previously owned by Mr Michael Shale (a sole proprietor) who sold the business to Mr Ramesh Dayal. Mr Dayal's business operates under a registered company called NZL Marquis Limited. Mr Dayal is the director. The business has a general manager, Mr Elliot Jacquierey. Other employees include Lucy Harmon, the bar manager.

[10] The hotel is a pub and provides accommodation and had previously provided meals. It is licensed for the sale and supply of alcohol for consumption on the premises and provides bar snacks and food until 2am. A courtesy van/coach, owned by the business, is provided to transport customers without charge. It is used by customers, by arrangement, for pickups and drop offs in the Carterton area. The van was regularly driven by Mr Johnson. Patrons arranged with him to transport them home or elsewhere personally at the hotel. He picked patrons up from their homes when arrangements were made by text.

[11] Mr Johnson regularly attended the hotel. He is a pensioner. He does not drink alcohol and does not smoke. While he was at the hotel he was allowed to eat food and was allowed the use of a small alcove area off the side of the bar. While he says he waited to take away customers in the coach he was allowed to rest and watch TV at other times. At least on one occasion he was asked not to hang around upstairs.

[12] Mr Johnson says that Mr Shale gave him \$20 for driving the van, and he attended to small tasks. When Mr Dayal took over the business, Mr Dayal decided to pay Mr Johnson \$50 per shift for undertaking the driving of the van on Thursday, Friday and Saturday. He says he asked for an employment agreement, but was never given one. Also he claims that he worked on some Sundays and at other times too. However, Mr Johnson was not included on the bar roster for any other work. Mr Dayal called the money given to Mr Johnson "koha". Mr Johnson reasonably expected some payment I hold on the basis that he had an arrangement with Mr Shale

and with Mr Dayal, and the payments were made regularly. Mr Dayal says that he paid the money to Mr Johnson in cash out of his own wages from the business and sometimes left an envelope with the money in it at the bar for Mr Johnson. It was usually handed over to Mr Johnson by someone else. On at least two occasions this involved Mr Jacquiery giving him the money in a packet, and once Ms Lucy Harmon, a bar manager, handed over the money to Mr Johnson in a packet. Mr Dayal says that when money was taken from the till to pay Mr Johnson he put in the till slips for the payment taken from the till and this enabled reconciliation at a later time to avoid any discrepancies in the till take. I hold that this clearly was a business transaction in the context of Marquis's operation.

[13] Mr Johnson wore a fleecy jacket top that was provided by the hotel and worn by other staff employed at the hotel. Mr Dayal also said that the jacket tops were given away as prizes to patrons. Mr Johnson did not contradict this evidence, from Mr Dayal. Mr Johnson did not produce this evidence until the very end of the investigation meeting and other witnesses had no opportunity to reply. It should have been reasonably put to them by Mr Richardson (if he knew about it), and the Authority should have been alerted properly much earlier. I hold that the fleecy jacket could be worn voluntarily and publicised the hotel, and there is no evidence that it was a compulsory part of any uniform.

[14] Sometimes Mr Johnson received cash, between \$5-\$10 from the patrons he drove home and/or picked up at their initiative; and he kept the money for his own personal use. The sum of money in total does not amount to much. There was no procedure in place for the collection and/or the use of the money by the hotel.

[15] Mr Johnson's attendance at the hotel caused some issue for Mr Dayal. This included Mr Johnson eating the hotel's food, for example pies; calling the police over numerous incidents inside and outside the hotel; and being possessive of the hotel's security keys and the coach key. The fact is that Mr Johnson was given the keys to the premises and the coach and he was allowed to open and close the premises. At about the same time Mr Johnson started to make enquiries about his entitlements and this included some contact with the Ministry of Business, Innovation and Employment labour inspectorate. This led to Mr Dayal requiring Mr Johnson to hand in all his keys and to leave the coach key at the hotel whenever he was not there.

[16] Next, Mr Jacquierey texted Mr Johnson to tell him that his “*services were no longer required*”. Mr Johnson did not return to the hotel after 10 January 2013. The matter has remained unresolved and it falls to the Authority to make a determination.

Determination of the Authority

[17] Mr Johnson was not a volunteer, I hold. I hold that he clearly came to expect the regular payment from Mr Dayal. I hold that underlying the employment relationship problem is that Mr Johnson probably was seeking companionship and company with the patrons and employees and the owners of the Marquis hotel given he is a pensioner and living on his own and is not a drinker and not a smoker. Indeed this is affected by the facts that Mr Johnson had the security keys of the hotel and was allowed to open and close the premises and on occasion drove the owners and employees to private functions in which he was being included and to take Mr Dayal to the airport and return. In addition there were tasks that he undertook regularly such as stock taking with Mr Jacquierey, driving the courtesy coach and he called in to the police on some occasions about matters associated with the hotel. More importantly he was paid the money regularly by Mr Dayal that could be interpreted as a reward. Because it was regular and Mr Dayal offered the sum, which Mr Johnson accepted, it was not likely to be a donation and/or a gift and it would not fit the definition of koha, I hold.

[18] Since Mr Johnson was not a volunteer the label he has put on the relationship as an employee is not determinative of the relationship because Mr Dayal adamantly denies employing him. There was no employment agreement and there are no wage time and holiday records relating to him. Not one of the independent witnesses giving evidence for Mr Johnson has been able to refer to any employment arrangements and terms and conditions of employment for him at Marquis, nor do they have any direct knowledge about any terms and conditions applying. However, they did see him as a part of the Marquis business at least when he was driving. There is common ground that he opened up and closed the premises on some occasions and was given the keys to do this. He did interact with the police on some occasions in regard to patrons’ behaviour. There are no time records for attendance and there were no arrangements for collecting money received from patrons and no arrangements for the use of the money by Marquis.

[19] It is likely that Mr Johnson did things he wanted to; he ate food when he wanted to and helped out when he wanted to and otherwise watched TV. This may have coincided with periods of waiting time. He was involved with some stocktakes which were conducted by Mr Jacquiery who was present each time. There is no doubt that Mr Johnson helped Mr Jacquiery because he produced itemised records in writing of the stocktaking and Mr Jacquiery confirmed that Mr Johnson was present during stocktaking. It is more likely than not that he helped out because he was there, and Mr Jacquiery took advantage of it with the help he received from Mr Johnson. Mr Johnson kept the original stocktake sheets and they obviously were not required as a record for the hotel. Next he was allowed to eat food on the premises, but there is no proof that permission for this related to any employment arrangement. Finally the critical point is that he drove the courtesy van/coach upon request either from arrangements made with the patrons and/or Mr Dayal. He was the primary driver of the vehicle, I hold. His possession of the keys and taking the vehicle home supports my conclusion. Mr Dayal paid and/or arranged for him to be regularly paid in cash. The coach was an important part of the business and although Mr Johnson was the primary driver of the van, other people drove it too. Mr Johnson had possession of the coach keys and was allowed to take the vehicle home and return it to the hotel. In addition he had possession of the fleecy top, which other employees also had, and the tops were given away as prizes. It was also a convenience that Mr Johnson had the security keys, whereupon he was allowed to open and close the premises. These would not be related to tasks that ordinarily in a business that someone simply as a patron and/or friend would be allowed to do and/or be expected to undertake without some responsibility and possibly reward. As such Mr Johnson was clearly trusted as being honest and reliable. The most favourable outlook I give to this is that the respondent has used Mr Johnson to its advantage and if there was any employment relationship it would have to have been with Marquis and not Mr Dayal personally and who is not cited as a respondent in the current proceeding. Mr Johnson was not abused because he clearly wanted to do what he was allowed to do, and he was given free food and was paid \$50 per day for his effort without making any claim on wages until he went to MBIE. Next, he was allowed the use of the vehicle outside the usual deliveries and pickups and set downs, but I do accept that the latter has not been thoroughly accounted for given the competing claims from Mr Johnson and Messrs Dayal and Shale about the time and sort of things Mr Johnson may have used the coach for. As such it is not possible to estimate and/or identify the actual hours of Mr

Johnson's attendance at any time. In this regard Mr Johnson has not established his claim except for making an estimate from memory of his hours as a full week (38 hours) including waiting time. I hold that the waiting time has to be excluded from any calculation because the nature of the employment was on call casual, but there has to be some recognition for work at other times than on Thursday, Friday and Saturday. Also, Marquis's submission that if Mr Johnson was an employee his claim for 38 hours per week does not equate with the work available and that there would only be about an 1 hour's work each day, that is three days per week (for which he was paid \$150). He was not on a roster, like the bar staff.

[20] It seems that the relationship came to grief when Mr Johnson asked a labour inspector to become involved in an investigation about his purported employment status. Otherwise there is no evidence before this occurring that Mr Johnson claimed any particular wages and prior to Mr Dayal changing the arrangements to avoid any employment matter arising, calling in the security keys and requiring Mr Johnson to leave the coach key at the hotel when he did not have the van. Nothing was put in writing from Mr Johnson of any claims beforehand, although he has kept his own diary notes. Other staff and Mr Dayal were available to use the coach and fulfil any pickups and set downs if required. At best the fear of any litigation over Mr Johnson's role would seem the most likely explanation for Mr Dayal wanting to straighten out his business affairs at least as they applied to Mr Johnson. This is the link to Mr Jacquier's text dispensing with Mr Johnson's services. Indeed even if Mr Johnson had any expectations of being paid over time he never kept his own full record of hours and there is real doubt that he worked full time hours and there was no log book of the use of the coach. Mr Johnson's failure to keep his own full records has added to his failure to reliably calculate what he believes he might be owed in wages. These have always been the subject of revised and changing estimates at best. There are no time records. The calculations I have insisted on Mr Johnson completing have been subject to changes and alterations and revisions which, I hold, further casts doubt on the particulars of the claim as being entirely reliable. As a result Mr Johnson's claim has been nothing more than an estimate.

[21] Mr Johnson was not in business on his own. There is no evidence that Mr Johnson was required to wear the fleecy top given it was used for prizes and other staff used them too. Mr Johnson simply kept any cash reward from patrons when he

drove the coach for them and there was no requirement for any payment to be handed on to Marquis.

[22] I hold that on balance Mr Johnson was an employee. The real nature of his employment was a regular on call casual employee because:

- a. Mr Johnson was paid for reward.
- b. Mr Johnson came to expect a payment as it had been offered by Mr Dayal and regularly paid.
- c. The payments were made as part of Marquis's business operation.
- d. The coach arrangement was an integral activity in the business and Mr Johnson was very much part of that role. He drove the coach.
- e. There were regular days of work, being Thursday, Friday and Saturday each week, although he was not on the bar roster for any other work. His hours more likely than not included waiting time and without any evidence that this would have been paid time.
- f. Mr Johnson's activities were controlled by Mr Dayal and Mr Jacquiery and they had advantage of his time and effort.
- g. Mr Johnson was not in business on his own account and he was not a volunteer.

[23] I hold that Mr Johnson was unjustifiably dismissed. There was no reason for the dismissal. Underlying the decision of the employer was Mr Johnson's enquiries with MBIE to ascertain his employment status and entitlements. Also Mr Dayal had concerns about Mr Johnson having the keys, eating on site and where he was resting. This matter was never put to him at the time as part of any investigation and/or disciplinary process. Marquis failed to follow the procedure requiring a sufficient investigation of any allegations, failed to raise any concerns with Mr Johnson, failed to give Mr Johnson an opportunity to respond to any concerns and thus failed to genuinely consider any explanation from Mr Johnson.

[24] Mr Johnson claimed penalties, which was not part of the original claim and was only raised late in the case and without any adequate notice. I have dismissed the

claim because he has established his right to the arrears of wages, holiday pay and been successful in receiving monetary remedies for a personal grievance.

Remedies

[25] I now turn to the remedies claimed. First on the wages I have not been satisfied that Mr Johnson has satisfactorily established his claim for 38 hours per shift, and therefore I can only make an estimate of what would have been the amount of hours he would have worked. He was paid \$50 per day for three days per week with some Sundays and other times. I estimate that his total hours would have been 4 hours per day, (12 hours per week). This also takes into account any extra time given the absence of any particular details. My reasons are:

- a. The casual arrangements to drive the coach as and when required.
- b. Mr Johnson was not rostered to work like other employees.
- c. There were no fixed hours and time required to work.
- d. Mr Johnson did not keep details and has no evidence of hours he estimated from his memory.
- e. Mr Johnson had no other regular duties, except the occasional opening and closing and stocktaking.
- f. Mr Johnson had the use of the van for personal matters.
- g. There is no verification of any work times.
- h. There was waiting time without any firm arrangements for pay.
- i. There was no coach log book and or any details of the travel involved.
- j. The money paid by Mr Dayal more likely than not related to Mr Johnson working to pick up and set down patrons using the coach, the occasional opening and closing the hotel.
- k. The mutual advantage enjoyed by both parties attending hotel functions.
- l. The full amount paid was for Thursday, Friday and Saturday. In this regard the amount has been related to hours, and not as a full time worker.

[26] His claim has been over three periods to account for changes in the minimum wage. In total; I have calculated he is entitled to a total of \$969 gross being the balance of his wages under the minimum wage for the three periods until 30 January 2013. Notice has been included in lost earnings that will follow. His holiday entitlement over the full period is \$1,709.52.¹

[27] I now turn to the claims for lost wages and compensation. Mr Johnson would be entitled to three months lost wages (13 weeks being a quarter of the year) from 1 February 2013 (to 3 May 2013), but for the failure to properly mitigate. The minimum wage rate is \$13.50 (between 1 February 2013 and 31 March 2013), and \$13.75 (from 1 April 2013). He has not contributed to his dismissal. I have reduced his entitlement to lost wages to eight weeks lost wages due to him not sufficiently mitigating his loss and this amount is \$1,296 lost wages based on the minimum wage applying.

[28] His compensation has only been minimally established and I award him \$1,000 (without deduction) for being hurt about the way he was dismissed and the impact on his feelings.

Orders

[29] NZL Marquis Limited is to pay Peter Johnson:

- a. \$969 total gross wage arrears;
- b. \$1,709.52 total gross holiday pay;
- c. \$1,296 gross lost wages for unjustified dismissal;
- d. \$1,000 nett compensation under s 123 (1) (c) (i) of the Employment Relations Act.

[30] The late claim for penalties is dismissed.

¹ See Calculations in Appendix 1 attached.

[31] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority

Appendix 1

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|--|---|---|------------------------|
| Minimum Wage Period: | | | |
| 5 April 2010 – 31 March 2011 | $\$12.75 \times 12 \times 39 \text{ weeks}$ | | \$5,967.00 Total Gross |
| | $\$150.00 \times 39 \text{ weeks}$ | - | \$5,850.00 |
| | Sub-Total Due | | \$ 117.00 |
| | | | |
| 1 April 2011 – 31 March 2012 | $\$13.00 \times 12 \times 52 \text{ weeks}$ | | \$8,112.00 Total Gross |
| | $\$150.00 \times 52 \text{ weeks}$ | - | \$7,800.00 |
| | Sub-Total Due | | \$ 312.00 |
| | | | |
| 1 April 2012 – 30 th January 2013 | $\$13.50 \times 12 \times 45 \text{ weeks}$ | | \$7,290.00 Total Gross |
| | $\$150.00 \times 45 \text{ weeks}$ | - | \$6,750.00 |
| | Sub-Total Due | | \$ 540.00 |
| | | | |
| | Total Due | | \$ 969.00 |
| | | | |
| Holiday Pay Period: | | | |
| 5 April 2010 – 31 March 2011 | $\$5,967 \text{ Total Gross} \times 8 \div 100$ | | \$ 477.36 |
| 1 April 2011 – 31 March 2012 | $\$8,112 \text{ Total Gross} \times 8 \div 100$ | | \$ 648.96 |
| 1 April 2012 – 30 January 2013 | $\$7290 \text{ Total Gross} \times 8 \div 100$ | | \$ 583.20 |
| | Total Holiday Pay due | | \$1,709.52 |
| | | | |
| Lost Wages from 31 January 2013: | $\$13.50 \times 12 \times 8 \text{ weeks}$ | | \$1,296.00 |