

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 157
5608414

BETWEEN LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS INNOVATION
 AND EMPLOYMENT
 Applicant

AND PARS AUTO LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Shona Carr for Applicant
 Paul Pau for Respondent

Investigation Meeting: 29 and 30 November and 21 December 2016

Submissions Received: 23 March and 5 April 2017 from Applicant
 31 March 2017 from Respondent

Determination: 29 May 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The Labour Inspector has failed to establish to my satisfaction that the complainant was employed by Pars Auto Limited or that it owes the complainant wages and/or holiday pay.**
- B. The application for the imposition of penalties is declined.**
- C. Costs are reserved.**

Confidentiality of complainant

[1] In accordance with section 151 of the Immigration Act 2009 the name of the complainant has been anonymised to protect the complainant's confidentiality under that Act.

Employment relationship problem

[2] A Labour Inspector employed by the Ministry of Business, Innovation and Employment claims Pars Auto Limited (PAL) has breached the Employment Relations Act 2000 (the Act), the Minimum Wage Act 1983 (MWA) and the Holidays Act 2003 (Holidays Act) in respect of a complainant who told the Labour Inspector he was an employee of PAL. The Labour Inspector claims arrears of wages for unpaid minimum wages and holiday pay and penalties for alleged breaches of minimum standards.

[3] PAL denies the Labour Inspector's claims and says it never had an employment relationship with the complainant.

[4] For the reasons that follow I have found that the Labour Inspector has failed to establish on the balance of probabilities that the complainant worked as an employee for the hours claimed or that he is owed the sums claimed for arrears of wages and/or holiday pay. Because of my findings on the substantive matters I have declined to impose any penalties.

[5] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from the Labour Inspector and PAL but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[6] The investigation into the Labour Inspector's claims became protracted with a fourth day being set down to hear from PAL's final witness on 17 March 2017. The witness had been too ill to attend previous investigation meeting dates. On 17 March 2017 the Authority received advice that the witness continued to be too unwell to attend the investigation meeting and the hearing date was vacated. I am satisfied I have enough information from the many witnesses who gave evidence that not

hearing from the final witness for PAL would not disadvantage it or cause any prejudice.

[7] Throughout the investigation meeting I was assisted, where necessary, by an interpreter in the Farsi language.

Credibility

[8] Credibility became an important issue throughout my investigation into the Labour Inspector's claims. I have carefully evaluated the evidence I heard and have considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration there is and in particular what documentation exists to support one version or another.

[9] The standard of proof is on the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. I have found this very difficult as not one witness was more convincing in their evidence than another. When I have reviewed the evidence from the witnesses for the Labour Inspector and PAL I have found areas of their evidence which simply do not seem credible.

Labour Inspector's investigation

[10] During the course of investigating the Labour Inspector's claims against PAL inconsistencies in the findings of the Labour Inspector and the information provided in support of her findings emerged. At the investigation meeting the Labour Inspector confirmed that when she reported her final conclusions she relied completely on the statements provided to her by the complainant and his witnesses.

[11] By way of example the Labour Inspector concluded:

- a) The complainant had been sponsored by his girlfriend to come to New Zealand. The complainant's ex-wife gave evidence that she was paid to enter into a marriage with the complainant to allow him to come to New Zealand. They had met online and then met up in Greece. The complainant came to New Zealand in 2011 and married. The marriage lasted about three months.

- b) The Labour Inspector concluded that Mr Nasser offered the complainant a job after meeting him at church. The evidence at the investigation meeting has established that the complainant was already working when he met Mr Nasser and that he met Mr Nasser through Mr Nasser's association with Mr Reza Zamani who employed the complainant in 2011.
- c) The Labour Inspector has not recorded the complainant's 2011 work history in her report. The evidence at the investigation meeting established that the complainant was employed by Mr Zamani during 2011. Even though Mr Zamani was interviewed by the Labour Inspector this information was not forthcoming by him. Mr Namani told the Labour Inspector he only met the complainant in 2012. The Labour Inspector interviewed Mr Behzad Norouzi after interviewing Mr Zamani. During the Labour Inspector's interview with Mr Norouzi he told the Labour Inspector Mr Nasser knew the complainant through the complainant working with Mr Zamani. Mr Norouzi told the Labour Inspector that the complainant had been working and living at Mr Zamani's car yard on West Coast Road.
- d) The Labour Inspector claims the complainant started working for Mr Nasser on 5 January 2012. The Labour Inspector interviewed Mr Sirous Zohrabi who told her that the complainant worked for Mr Nasser from the end of 2012 or early 2013. Mr Norouzi told the Labour Inspector he overheard Mr Nasser telling the complainant he should work for him and that this was sometime in early to mid-2012. In his interview Mr Zamani told the Labour Inspector that he met the complainant in 2012 when the land Mr Zamani leased for his car yard was sold to Mr Nasser. The information Mr Norouzi gave to the Labour Inspector that the complainant had been working for Mr Zamani during 2011 was never clarified by the Labour Inspector.
- e) The Labour Inspector concluded that Mr Nasser took the complainant to the Ministry of Social Development (WINZ) so he could apply for a benefit. This is based on the complainant's report during the initial telephone call to the MBIE helpline where the complainant states that Mr

Nasser had arranged for him to be taken to WINZ by Mr Akar Rasekh. The complainant told MBIE that he did not know about WINZ. The records provided by WINZ show that the complainant attended WINZ with a Mr Rasekh on 21 May 2013. The WINZ records also show that the complainant had attended the WINZ office on 2 October 2012 and that he was accompanied by Mr Alan Tasker. Mr Tasker is the Pastor at the church in which the complainant was baptised after converting to Christianity. At the investigation meeting Mr Rasekh told me it was the complainant who asked him to go to WINZ with him so that he could help him complete the forms.

- f) The Labour Inspectorate concluded that the complainant was kept at the work site and was not allowed to leave unless he was accompanied. During an interview with the complainant on 15 September 2015 he advised the Labour Inspector he was a member of a gym which he attended. During his interview Mr Tasker told the Labour Inspector the complainant would often attend his house and have meals with his family. The complainant also told the Labour Inspector Mr Nasser gave him a car to use which he did.

[12] In her report the Labour Inspector states that after the complainant was issued with a work visa and IRD number in May 2013 he was made to sign a rent book stipulating that he pay Mr Nasser \$200 per week rent and a \$600 bond. In addition the Labour Inspector concluded that Mr Nasser also required the complainant to pay \$200 each week for food.

[13] The Labour Inspector states that after being approved for a benefit Mr Nasser increased the rent to include \$10 for power. The complainant was then required to pay \$210 of his benefit to Mr Nasser and to work off the remaining \$190. Mr Tasker told the Labour Inspector the complainant had told him he was to be paid \$500 each week.

[14] The Labour Inspector concluded that the complainant did not receive any cash for his work as all payments for his work were subject to deductions by Mr Nasser for accommodation and food which equated to his total wages. The Labour Inspector has not commented on the arrangements for food and accommodation prior to May 2013.

Mr Nasser told me the complainant stayed in the accommodation for free from January 2012 and denied ever receiving any money from the complainant for rent.

[15] The Labour Inspector has not identified any agreements or offers made about what the complainant would be paid for any work undertaken. This is consistent with the complainant's statements to the Labour Inspector that no money was discussed and all he was looking for from Mr Nasser was shelter until his immigration status was resolved.

[16] The Labour Inspector had not explained to my satisfaction the discrepancy between the complainants information that he was to be paid \$400 each week and that this amount was deducted from his wages each week in return for the accommodation and food, and her conclusion that the complainant was paying \$210 each week from his benefit for accommodation and worked off \$190 each week for food.

[17] The approach taken by the Labour Inspector when undertaking her investigation also gave cause for concern. Apart from the inconsistencies identified above, during the interview with the Complainant on 15 September 2015 the Labour Inspector is recorded as telling the complainant (verbatim):

I want Nasser in big trouble for this ok. Nasser thinks he is big and powerful, ok. Nasser thinks that he is not going to get into trouble ok. Nasser is very wrong. Nasser is in trouble. He is not too big. I am bigger than Nasser.

...

...we don't want Nasser to know about us ok. Because I don't him to try and go out of business and hide his money ok.

...

Because otherwise we can't get your money. If he hides his money and runs away I can't get your money. So I don't want him to know you've talked to me so don't tell him you've talked to the Labour Department or to the Labour Inspectorate or anything. Don't tell him that.

...

Ok, cos I know Behzan and Reza are very angry but I don't want them to tell that they have spoken to me ok. We keep it a secret alright because I don't want him to hide his money. Until I've finished with him.

[18] At the investigation meeting the Labour Inspector explained that she told the complainant this because she was trying to assure him that Mr Nasser would be held accountable and in an attempt to convey her concerns that the employer may go out of business to avoid its responsibilities.

[19] I accept the Labour Inspector's explanation however there must be a better way to convey such concerns. Understandably PAL has taken exception to the statements made by the Labour Inspector.

[20] After completing the interviews of the complainant and his witnesses, the Labour Inspector wrote to PAL on 29 September 2015 demanding copies of wage and time records, holiday and leave records, and all employment agreements for all employees who worked for PAL from 2009.

[21] On 12 October 2015 PAL responded to the Labour Inspector denying it was an employer. PAL explained that the complainant had "*helped out from time to time*" but he was never employed by PAL. In the email Mr Nasser asked the Labour Inspector to clarify whether it was a requirement that he be interviewed by the Labour Inspectorate.

[22] The Labour Inspector advised Mr Nasser that there was no legal requirement for him to attend an interview but that it was necessary to give employers the opportunity to speak directly with the Labour Inspectorate to address any concerns face to face.

[23] On 16 October 2015 the Labour Inspector emailed Mr Nasser again and reiterated her request for copies of the records. The Labour Inspector advised Mr Nasser that she had concluded the complainant was an employee and that he was owed \$141,774.40 in outstanding wages and holiday pay and demanded payment.

[24] On 21 October 2015 Mr Nasser emailed the Labour Inspector denying PAL was an employer and requested all information held by the Labour Inspector regarding the allegations made by the complainant and requested copies of all witness statements held by the Labour Inspector together with the information used by the Labour Inspector to calculate the figure of \$141,774.40. Mr Nasser told the Labour Inspector that he wished to avail himself of the opportunity to be interviewed and requested the Labour Inspector supply her questions in writing which he would be happy to answer, also in writing.

[25] The Labour Inspector refused to provide any questions in writing, advising Mr Nasser that the Labour Inspectorate does not conduct interviews in writing. The Labour Inspector offered the opportunity for a face to face interview. In relation to Mr Nasser's request for information and the calculations of the alleged arrears the Labour Inspector referred Mr Nasser to her letter dated 16 October 2015.

[26] By 1 November 2015 Mr Nasser had not received all of the information he had requested. He emailed the Labour Inspector and reiterated his position that he was happy and willing to answer any questions the Labour Inspector may have if they could be provided to him in writing. The Labour Inspector refused Mr Nasser's request confirming her previous advice that Labour Inspectors do not carry out interviews in writing.

[27] The Labour Inspector, in undertaking her role, is a statutory officer exercising statutory powers. In exercising her powers, the Labour Inspector is required to adhere to the principles of natural justice.¹ This includes a responsibility on the Labour Inspector to provide disclosure of relevant material so that a respondent can know the case against them.²

[28] Natural justice also requires an opportunity to be heard, for a party to put their case either in writing or in person. The refusal by the Labour Inspector to provide full information to Mr Nasser regarding the interviews she had undertaken, and the calculations she had made of the arrears of wages was a breach of duty as was the refusal to allow Mr Nasser to respond to the Labour Inspector's questions in writing.

[29] The letter from the Labour Inspector dated 16 October 2015 did not set out how the arrears of wages was calculated and did not set out the detail on which the Labour Inspector relied in reaching her conclusions that the complainant was an employee.

[30] While I have accepted the Labour Inspector's explanations about the statements made in the interview on 15 September 2015 I am concerned the statements indicate the possibility that the Labour Inspector was not as impartial as one would expect from a statutory officer. This is reinforced by further statements by

¹ New Zealand Bill of Rights Act 1990, s 27(1).

² *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130.

the Labour Inspector during the 15 September interview that indicated the Labour Inspector would be taking the case to the Authority. When she made these statements, the Labour Inspector had not completed her investigation or heard from PAL.

[31] I find the investigation by the Labour Inspector was inadequate. The Labour Inspector failed to follow up a number of discrepancies in the statements provided by the witnesses she interviewed before reaching conclusions and failed to provide PAL with full information or the opportunity to respond to that information in a way PAL requested.

Arrears of wages

[32] The Labour inspector claims the complainant was an employee and has made an application for the payment of minimum wages for the use of the complainant totalling \$123,561.00 and for holiday pay totalling \$18,213.70.

[33] In arrears of wages claims the applicant bears the onus of proof.³ I have already identified a number of inconsistencies between the witnesses interviewed by the Labour Inspector including the complainant. At the investigation meeting further evidence came to the fore regarding activities undertaken by the complainant during the period in which he told the Labour Inspector he was working for PAL.

[34] The evidence adduced during my investigation meeting shows that the complainant was heavily involved in buying and selling cars through car fairs at Ellerslie and in Auckland city and Trade Me. The evidence shows that during the time the complainant says he worked for PAL 9 hours a day, six days a week, he was buying, selling and repairing vehicles either he had purchased directly, or vehicles owned by others (not Mr Nasser). The evidence shows that these repairs were carried out at PAL's premises or at other properties owned by Mr Tasker and Mr Hills.

[35] The witnesses giving evidence on behalf of the Labour Inspector said they saw the complainant working on vehicles at various times at PAL's workshop. I am not satisfied the vehicles the witnesses saw the complainant working on were owned by PAL or Mr Nasser. I find it is more likely than not that most were either owned by the complainant, Mr Tasker or Mr Hill. My finding is supported by the evidence

³ Employment Law (online loose leaf ed, Brookers) ER 131.07(1) and Mazengarb's Employment Law (online ed, LexisNexis)ERA131.15.

given by Mr Nasser. Mr Nasser says that shortly after he met the complainant the complainant asked if he could use the workshop to work on his own cars before they were sold. Mr Nasser granted permission for the complainant to work in the workshop on the basis that the complainant provided all his own tools and materials.

[36] On the balance of probabilities it is more likely than not that the complainant was operating his own business buying, repairing and selling vehicles including vans which were equipped with sleeping facilities and sold to tourists and was not working as an employee for PAL. Even if the complainant undertook some work for PAL the Labour Inspector has failed to establish to my satisfaction that the complainant worked the number of hours claimed.

WINZ benefit

[37] The complainant was in receipt of a WINZ benefit from May 2013. Periodically the complainant was required to complete a statutory declaration confirming his current situation.

[38] In making his declaration the complainant confirmed to WINZ that he was not working in either paid or “*unpaid work*” or had experienced changes to his financial situation. What the complainant disclosed to WINZ was that he was undertaking English lessons in order to assist him to find work. The declarations made by the complainant are inconsistent with his assertion to the Labour Inspector that he was working full time hours for PAL.

Buying, repairing and selling of vehicles

What the complainant said

[39] During the interview with the Labour Inspector on 15 September 2015 the complainant told the Labour Inspector that PAL registered a number of vehicles in his name personally because Mr Nasser had told him he could only register six in his [Mr Nasser’s] name.

[40] The Motor Vehicle Sales Act 2003 requires traders to register if they sell more than six vehicles within a 12 month period. Mr Nasser owned and operated PAL which was a registered motor vehicle trader from 6 January 2004 until 6 January 2017. As a registered trader PAL was not limited in the number of vehicles it could register.

[41] During the interview on 15 September the Labour Inspector noted a payment received by the complainant amounting to \$1,400. The complainant told the Labour Inspector the money was from a tourist and was payment for a vehicle they had purchased which was in his name. The complainant told the Labour Inspector he had to give the money back to Mr Nasser as the vehicle was actually owned by Mr Nasser. There was no equivalent withdrawal of the funds from the complainant's bank account. The explanation given by the complainant about how the funds were returned to Mr Nasser, in light of the evidence obtained during my investigation meeting, seems unlikely.

[42] I have concluded that it is more likely than not that the complainant did not have to return the money to Mr Nasser and that the money was the result of the sale of a vehicle owned by the complainant, or one of his business associates, Mr Tasker or Mr Hill.

Mr Alan Tasker

[43] Mr Tasker gave the complainant \$5,000 (this has since been paid back) which the complainant used to purchase vehicles which he put in Mr Tasker's name. The complainant stored at least three (may be four or five) vehicles at the church. Mr Tasker acknowledged that it is possible that the complainant, rather than working for PAL, was using PAL's premises to work on his own vehicles. Mr Tasker loaned the complainant a further \$60,000 and this money is still outstanding.

[44] It is more likely than not that the vehicles registered in Mr Tasker's name was because the complainant could only register a maximum of six cars in a 12 month period before he had to be registered as a Motor Vehicle Trader under the Motor Vehicle Sales Act 2003. This was information well known to the complainant.

Mr Allan Hill

[45] Mr Hill told me during the investigation meeting he did not know who owned the vehicles the complainant was working on in the PAL workshop. In 2013 Mr Hill loaned the complainant about \$16,000 which he told me was an investment in the business of buying and selling vehicles. The complainant still owes Mr Hill about \$7,000.

[46] Mr Hill told me that he witnessed the complainant taking vehicles to the car fairs and confirmed the vehicles, which were mostly Toyotas and Hiace vans were being sold by the complainant on his own behalf. He recalled there were six or seven vehicles that he was aware of.

[47] The vehicles were all registered to Mr Hill so that he had security over them.

Mr Gomers

[48] Mr Eugene Gomers is the manager of the Auckland Car Fair located at the Ellerslie Race course. Mr Gomers knows both Mr Nasser and the complainant. His uncontested evidence is that both Mr Nasser and the complainant were selling vehicles on their own behalf at the car fair nearly every week since 2011.

[49] When questioning Mr Gomers, I was surprised to learn that no records are maintained of those who pay to use sites at the car fair. The business is a completely cash business with no record of any transactions with the exception of those who are registered Motor Vehicle Traders. I heard evidence that suggested vehicles were bought and then on-sold without the ownership of the vehicles being changed between each transaction. If that is the case then it would be impossible to ascertain the actual number of vehicles owned and sold by any individual.

Conclusion

[50] I find it is more likely than not that during the period he told the Labour Inspector he was employed to work for PAL the complainant was operating a business buying and selling vehicles. The complainant may have been doing so in breach of the Motor Vehicle Sales Act 2003.

[51] As advised at the investigation meeting I have directed that a copy of this determination is provided to the Registrar of Motor Vehicle Traders.

[52] As I have set out, during the time the complainant told the Labour Inspector he was working for PAL, he was in receipt of a WINZ benefit. As noted earlier the complainant did not disclose to WINZ any changes to his financial situation when completing the periodic statutory declarations. The disclosure of the complainant's income relating to the sale and purchase of vehicles is a matter between the

complainant and WINZ. As indicated at the investigation meeting I have directed that a copy of my determination be provided to the Ministry of Social Development.

Penalties

[53] The Labour Inspector has applied for penalties to be imposed on PAL for its failures to:

- a) provide written employment agreements,
- b) pay minimum wages;
- c) pay annual holiday pay;
- d) keep a wage and time record; and
- e) keep Holiday and Leave Records

[54] It is clear PAL has not maintained any employment records. This is consistent with Mr Nasser's view that the relationship he had with the complainant was not an employment relationship. Mr Nasser maintains he offered the complainant shelter and food at a time when he needed a place to stay. He says he has done this on other occasions for others from his country of origin.

[55] This is consistent with what the complainant told the Labour Inspector during the interview on 15 September 2015. The complainant told the Labour Inspector that before he moved into the accommodation at the worksite he did not discuss money with Mr Nasser at any time and that he just wanted to find shelter and obtain an answer from Immigration New Zealand on his application.

[56] The Labour Inspector has not established to my satisfaction that the complainant undertook any work for PAL as an employee. It was therefore not required to maintain records. The application for the imposition of penalties is declined.

Costs

[57] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Pars Auto Limited shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Labour Inspector shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[58] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

General comments

[59] During my investigation into the Labour Inspector's claims evidence was given that there was work undertaken which seems on the face of the evidence to be contributing to the profitability of PAL's business. The evidence discloses that at least one of these people was also in receipt of a WINZ benefit and had not disclosed to WINZ that he was working on an unpaid basis.

[60] As held by the Court in *Salad Bowl Ltd v Howe-Thornley*,⁴ if a person performs work for a business which contributes to its operations as a commercial enterprise they are entitled to be paid at least the minimum wage. While PAL has been successful in its defence of this claim, it is now on notice that any and all those, including family members, working in the business and contributing to its commercial operations are entitled to payment for their efforts an appropriate records must be maintained.

Vicki Campbell
Member of the Employment Relations Authority

⁴ [2013] NZEmpC 152.