

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 336/10
5282654

BETWEEN JAGENDRA MALIK
 Applicant

AND VAN INTERIORS LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Mr Choudary for Applicant
 Mr Kumar, Director for Respondent

Investigation Meeting: 5 July 2010

Further information
received: 13 July 2010

Submissions received: 20 July 2010 from Respondent

Determination: 26 July 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Malik alleges that on 23 July 2009 he was unjustifiably dismissed from his role as Safety Officer for the respondent. He says this took place after just three days of formal employment although he says he had worked for the respondent as a volunteer for several months prior to that. Mr Kumar disputes that Mr Malik was ever employed by his company at all. He says that although he supported Mr Malik in an application for a work permit his employment was conditional on Mr Malik confirming that he had the qualifications and skills to perform the job. He says that he was not satisfied of this and did not proceed with the employment.

[2] The original connection between the two men was a family one. Their respective wives are sisters. However until November 2008 (when Mr Malik came to

New Zealand) they did not know each other well. Mr Kumar and his wife have lived in New Zealand for many years and have raised their children here while Mr Malik and his family were living in Fiji. Mr Malik had worked in the mining industry in Fiji for over 17 years, most recently as a safety officer, before being made redundant.

[3] When Mr Malik arrived in this country he had only a visitor permit. His wife and children did not come with him (they remain in Fiji.) He moved in with Mr Kumar and his family and returned their hospitality by working around the house and, sometimes, in Mr Kumar's businesses. In March 2009 Mr Kumar sponsored Mr Malik's application for a work permit on the grounds that Mr Kumar had been unable to recruit a safety officer despite having advertised the position. The duties of the role as advertised¹ were:

“safety of staff on site and supervising safe installation of safety equipment on special needs vehicles and to promote and market our special needs vehicles to our customers.”

[4] The permit was eventually granted in mid July 2009. Mr Malik says he started work on 21 July and worked for three days. On the third day, he says, he was dismissed.

[5] Mr Kumar agrees that he made Mr Malik an offer of employment in about March 2009 but says it was contingent on Mr Malik providing documentary evidence of his qualifications, as well of course on the granting of a work permit. He said Mr Malik completed a short work trial but this was unsatisfactory and despite repeated requests from Mr Kumar, Mr Malik failed to produce evidence of his qualifications. Mr Kumar said that it was for this reason that he told Mr Malik, on 23 July, that there was no job for him. Immediately after that he told Immigration New Zealand that he had changed his mind about employing Mr Malik and Mr Malik's permit was revoked.

[6] Mr Malik disputed that Mr Kumar ever told him the job offer was conditional in any way. He also said that he had provided all relevant information about his qualifications to both Mr Kumar and to Immigration New Zealand in the course of

¹ In the Manukau Courier on 22 January 2009.

making the work permit application. At the investigation meeting, Mr Malik tabled copies and in some cases originals of various certificates and references relating to his skills and experience. He said that he gave the same information to Immigration New Zealand. Mr Kumar agreed that he had already seen most if not all of that information. However he said that he made an offer of employment conditional on Mr Malik having “a mechanical background” and there was no evidence of this.

[7] Mr Malik agreed he had little or no mechanical expertise but said that he never purported to have skills in this area, nor understood the job to require them. He said he provided all the information Immigration wanted and waited for the application to make its way through the system. When the permit finally arrived, he said, he started work in good faith, thinking he had on-going employment. He said it was a great shock to be told to leave after only three days. Since that happened, he has lived with other friends and supported himself with income from Fiji. He told me that because his work permit was revoked he was unable to pursue any other job opportunities, and expects eventually to be required to leave the country.

Issues

[8] The first issue for determination here is whether there was a concluded employment agreement between the parties. If there was, then it will fall to the respondent to justify the dismissal. If the respondent cannot then the final issue for determination will be the question of remedies.

(i) Was there a contract of employment?

[9] Mr Malik told me that he had signed a letter of acceptance when he was offered employment in March 2009 but did not keep a copy when it was submitted to Immigration New Zealand along with the rest of the paperwork for the permit application. I advised Mr Malik that it would assist the Authority if he could obtain from Immigration the file on the work permit application. He duly made a “personal information” request and on 13 July Immigration New Zealand supplied his file².

² Excluded from the material was certain commercially sensitive information pertaining to the respondent’s business (IRD Tax Return, Profit and Loss statements, and correspondence between the Director and third parties such as NZLTA.)

[10] Relevantly for these purposes it contained a written offer of employment signed by Mr Kumar and countersigned by Mr Malik to signify his acceptance. Attached to that letter was an executed employment agreement.

[11] After receiving copies of the file, Mr Kumar provided his response to the Authority. In it he noted that neither the letter containing the job offer, nor the employment agreement, contained any reference to remuneration. In this way he says it was “incomplete.” He says he told Mr Malik that “*a full Employment Contract will be completed prior to commencement of work.*”

[12] On 23 June 2009, in response to a query from Immigration New Zealand, Mr Kumar advised the officer dealing with the case the remuneration was to be \$15.00 per hour. The file shows that Immigration New Zealand also required certain other matters to be addressed before the permit was issued. These included a concern that NZ citizens or residents appeared to be available to do the job, that genuine attempts to recruit staff within NZ had not been demonstrated and that the position was “trainable.” On 8 July Mr Kumar responded to these concerns and shortly thereafter, the permit was granted.

[13] I am satisfied that the parties entered into a concluded employment agreement as evidenced by the documents supplied to Immigration New Zealand. The fact that the employment agreement omitted to include the rate of pay does not automatically render it void but in any event, that was rectified and it was confirmed to Immigration that an hourly rate of \$15.00 had been agreed. It now follows, since the respondent did in fact agree to employ Mr Malik, that it must justify sending him away after just three days of employment.

(ii) Was the dismissal justified?

[14] Mr Kumar noted in submissions:

“[Mr Malik]’s *qualifications and experience as he mentioned do not coincide with the evidence he had provided e.g. the qualifications and Certificates and also the fact that*

he claims he has 17 years experience as a safety officer yet he has only 8 years experience [as stated in evidence] on 5 July 2010...

I made the correct decision in judging him unfit for the job..."

[15] Mr Kumar appears to be saying that he believes Mr Malik misrepresented his skills and qualifications. However the evidence does not support this assertion. There is nothing to suggest that Mr Malik's actual level of skill was different to what he claimed to have in the application to Immigration. In particular, the documents on the Immigration file indicate that while he had 17 years in the mining industry, only the latter part was in the role of safety officer. Nor were Mr Malik's skills materially different to what Mr Kumar told Immigration he was looking for.

[16] The employment agreement did not contain provision for any kind of probation or trial period and there is no evidence to suggest that any of the requirements of procedural fairness were met in this case. Whether Mr Malik is in fact unfit for the role or whether there was some other reason for the termination of his employment (and I was told that it might be related to other serious issues within the family) it remains that the dismissal is clearly unjustified. Mr Malik has made out a personal grievance. The questions of remedies and contributory conduct now fall to be determined.

(iii) Remedies and contributory conduct

[17] Presumably because Mr Kumar chose to defend this matter on the basis that there had not been a concluded employment agreement, he did not provide very much evidence about Mr Malik's performance. Mr Kumar told the Authority that Mr Malik exaggerated the voluntary work he did in the months prior to obtaining a work permit and that it was not sufficient for him to form an impression of Mr Malik's abilities. He also told me that Mr Malik performed very poorly during the three days after he got his work permit. However he gave very little specific information and I cannot safely conclude that Mr Malik contributed (by poor performance) to the situation that gave rise to the grievance.

[18] By way of remedies, Mr Malik sought “*interim reinstatement*” and “*damages of \$10,000.00.*” At the investigation meeting he clarified that he was seeking permanent reinstatement. I am not satisfied however that this would be practicable. Mr Kumar’s business is a small one and the family issues have created a very bitter relationship between him and Mr Malik. I do not see any prospect of these two men being able to work together as things stand. The remedy of reinstatement is declined.

[19] The claim for “damages” must correctly be read as a claim for reimbursement and compensation pursuant to sections 123 and 128, respectively, of the Employment Relations Act 2000. Because Mr Malik has no work permit he has not been able to mitigate his loss. He has earned nothing since he was dismissed. He is entitled to three months lost earnings pursuant to s. 128 of the Employment Relations Act. At \$15.00 per hour, for a full time week, this equates to \$7,800.00 gross.

[20] Mr Malik has given evidence of experiencing stress associated with losing the job for which he had waited four months. It appears that some of this may be associated with the family issues which have been mentioned above. Weighing these two aspects in the balance I conclude that an award of \$1,000.00 is appropriate compensation for hurt and humiliation in all the circumstances.

[21] In summary, Van Interiors Limited is ordered to pay to Mr Malik the following:

- i. \$7,800.00 gross lost wages, and
- ii. \$1,000.00 compensation pursuant to s. 123.

Costs

[22] This issue is reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority

