

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: WA 51/08  
File Number: 5087921

BETWEEN      BRANISLAV MIJIC  
                         Applicant  
  
AND              HARRY MEMELINK  
                         Respondent

Member of Authority:      P R Stapp  
  
Representatives:              Applicant in Person  
   Respondent in Person  
  
Investigation Meeting:      Wellington 17 April 2008  
  
Determination:                28 April 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      Mr Mijic is seeking \$15,500 outstanding salary from Harry Memelink.

[2]      Mr Memelink has denied the claim.

[3]      This matter has had an unfortunate history. The statement of problem was filed in the Authority on 21 May 2007. Mr Memelink was not available for the Authority's first telephone conference which was held when he had not filed a statement of reply. Mr Memelink was given an extension of time to file a statement in reply. Also, he was ordered to provide any records on payments made to Mr Mijic and any other relevant records relating to Mr Mijic's time and hours worked. Further, the parties were directed to attend mediation. A back up investigation meeting for 5 November 2007 was put in place on notice.

[4] A statement in rely was received from Mr Memelink on 31 August 2007. No documents were submitted and there was no mediation. Subsequently Mr Memelink applied for an adjournment of the investigation meeting and this was granted. Mr Mijic did not oppose the adjournment although he expressed his disappointment and concern about the delay caused by Mr Memelink.

[5] I requested a further telephone conference. The support officer made contact with “Kirsty” at Mr Memelink’s office on 3 October 2007 and Mr Mijic. No conference call took place because of difficulties getting Mr Memelink, and I directed that an investigation meeting be arranged for 17 April 2008. The parties then confirmed that date. However, I came to the conclusion that, with the delays occurring and difficulties contacting Mr Memelink, the provision of mediation services from the Department of Labour would not be constructive in attempting to resolve the issues.

### **Issues**

[6] Was Mr Mijic an employee or a contractor? Did Mr Memelink assume responsibility to pay wages and salaries for Mr Mijic from 19 July 2004? If Mr Mijic was employed who was his employer? Is Mr Mijic owed any outstanding wages, and if so, how much?

### **The Facts**

[7] Mr Mijic worked full time for Ultra Plastics Limited. Mr Mijic was employed as a production manager in that business located at 141 Hutt Park Road, Gracefield, Wellington. Under the terms of a signed employment agreement he was paid a salary of \$50,000 per year and \$1,560 petrol allowance and worked eight hours a day, 40 hours per week under the agreement. Ultra Plastics Limited was incorporated as a limited liability company on 7 December 2001. The director of that company was Mr John Curtis, a businessman.

[8] On 23 July 2004 Mr Memelink signed an arrangement to purchase most of the assets of the business, and to take the assignment of the property lease in order to operate the business on an on going basis. The effective date for the sale and purchase to be completed was 19 July 2004.

[9] Under the terms of the sale and purchase Ultra Plastics Limited agreed to change its name to Trucis Investment Limited, or such other appropriate name, to enable Mr Memelink to use the name of Ultra Plastics upon assuming the role of running the business when its assets were sold to him.

[10] At no time was Mr Memelink an employee or a director of Ultra Plastics Limited. He took over the running of the business but says that the business he ran was operated under a company called Link Technology 2000 Limited, which was incorporated on 25 March 1991, until another company called Linktech Plastics Limited was set up and incorporated on 9 September 2005.

[11] Another condition of the arrangement for sale and purchase of the Ultra Plastics business was that Mr Memelink agreed to offer employment to the two staff members and to assume responsibility for the settlement of wages and salaries accruing from 19 July 2004. Mr Memelink now says that he is in dispute over some of the terms of that arrangement with Mr Curtis.

[12] Mr Mijic says he has been short paid \$15,500 by Mr Memelink. His calculation, in the absence of any records, was based on a net entitlement of \$102,300 for the full term of his employment less the amount paid to him in net terms of \$86,800 for the period from 27 July 2004 until 31 January 2007 for 31 months, including three payments made after he left.

[13] When Mr Memelink took over the running of the business, the business was affected by a severe flood that caused an impact on the business's production. Production was also affected by water damage when the roof fell in. Mr Memelink says he has had issues with pursuing the insurance that also affected the running of the business. He also says that the business was not achieving full productivity because the machinery was not fully operational. Mr Memelink and Mr Mijic agreed that they acted with goodwill towards each other considering the flood and water damage causing losses when the business had to shut. Mr Mijic says he agreed to be paid fortnightly by Mr Memelink, instead of the previous arrangement of getting paid monthly with Ultra Plastics, and says he accepted payments by cheque and direct credit and on at least one occasion in cash. He says he deposited everything he received in the bank and signed the cheque butts for Mr Memelink. Mr Memelink does not

acknowledge owing Mr Mijic any money. He agreed that he made advances to Mr Mijic, but these were paid to Mr Mijic as a contractor. In addition he says Mr Mijic's calculation does not include a further \$8,000 he was paid. Mr Mijic denied he had missed any money in his calculation.

[14] Also, Mr Memelink says that Mr Mijic's bank statements would have referred to his deposits as "Contracting". Mr Mijic did not produce any of his bank statements to be scrutinised and did not know if there was a reference to "Contracting", but maintained he was an employee. He agreed he signed Mr Memelink's cheque butts for his money. However, he did volunteer that he knew the business was trading as "Link Technology" by Mr Memelink.

## **Determination**

### **Was Mr Mijic an Employee or Contractor?**

[15] The first matter to determine is whether or not Mr Mijic was an employee or contractor, and then to determine who the arrangement was with. The documents clearly identify that Mr Mijic's role was as an employee. His employment agreement with Ultra Plastics related to him being an employee previously prior to Mr Memelink taking over the running of the business. There was no other written agreement. Mr Mijic's role was consistent with that of an employee, although he and Mr Memelink have differences over what the role involved. Mr Memelink could not contradict Mr Mijic's evidence. Mr Mijic was not GST registered and not responsible for his own tax.

[16] Mr Memelink tried to assert that Mr Mijic was a contractor saying that Mr Mijic filed his own income tax returns and made up invoices to different companies and people. Mr Mijic agreed that there were two invoices for product and he says there were no invoices for his services and there is no record of tax being paid. Mr Memelink could not contradict this evidence. Mr Mijic accepted that he previously had been contracted by other companies but became an employee, first with Ultra Plastics supported by a written employment agreement, and then with Mr Memelink. Mr Mijic is further supported by the regularity of payments being made and no other invoices or documents being produced by Mr Memelink to suggest he was paid as a contractor.

The evidence does not establish that Mr Mijic was in business on his own account given the past practice with the existence of the employment agreement with Ultra Plastics, when Mr Mijic was employed full time; and the arrangement for sale and purchase between Mr Memelink and Mr Curtis, albeit that Mr Memelink now says that that agreement is the subject of some dispute over different terms with Mr Curtis. This was never raised previously, and I do not know of any relevant details. I have decided therefore to give that matter little weight.

[17] Finally I find that Mr Mijic was integrated as an employee in the business considering his role and notwithstanding the dispute over the role because of the regularity of the payments made and the absence of any documents from Mr Memelink and that Mr Mijic was not in business on his own. Mr Mijic clearly had a role to work in Mr Memelink's business and Mr Memelink was in control of the business.

[18] As an aside Mr Memelink claimed he did not know that he was required to have other witnesses and documents for the Authority's investigation and thought it was mediation. I do not accept that position at all. First he was on clear notice of the Authority's investigation meeting. He has had contact with the Authority's support staff and was informed of what was required. He had been given information such as the notice of investigation and was sent a minute note from the Authority. He says that because he was personally involved this somehow meant he was not able to call other witnesses and produce other evidence. I do not accept that claim.

[19] Secondly, Mr Memelink was on notice of the Authority's investigation and he was sent a Minute from the Authority that clearly distinguishes an Authority investigation meeting from mediation services. Furthermore Mr Memelink has used his difficulty in reading to explain his difficulties in understanding the process and the documents. Again I consider any difficulties he has had should have been overcome given the time that has elapsed since Mr Mijic's employment relationship problem was filed in the Authority, the adjournment that he was given and plenty of notice of the Authority's investigation meeting for him to get advice and help. Indeed he has disclosed that he has obtained advice and used his lawyer. Therefore it is reasonable to expect he knows clearly what is involved.

[20] Mr Memelink has claimed the business became something different when he took over running it. I accept the business had its difficulties but Mr Memelink could not contradict Mr Mijic or satisfy me that his arrangements of running the business meant that Mr Mijic's role was so different to make him a contractor.

[21] On another matter Mr Memelink says he has had difficulties getting his documents because his office secretary, "Kirsten" went to Australia in August 2007, has had other court cases and his new lawyers and accountants are now catching up with his affairs. He produced nothing to support his claims. He has had more than reasonable time to reply and get his documents or put up some independent verification of his circumstances. He has never raised these issues prior to the Authority's investigation meeting for any concern to be taken by me that he would be prejudiced. Furthermore, a file note on the Authority's file says that his office person "Kirsty" was available and was talked to by a support officer in October, which contradicted his evidence that she left New Zealand in August, if it is one and the same person.

### **Who was the Employer?**

[22] Next, there is the question whether the employer was Harry Memelink personally, or another company. I find that Mr Memelink did not use the name "Ultra Plastics". I find that Mr Memelink started running the business when he purchased some of the assets and took over running it effective from 19 July 2004, whereupon Mr Memelink assumed the responsibility to offer employment to the two employees (including Mr Mijic) and to pay wages and salaries from that date. There is no reliable information to suggest that the arrangement did not eventuate, although Mr Memelink has said the arrangement was subject to a dispute over the terms with Mr Curtis (Mr Curtis deposed nothing about that). Indeed Ultra Plastics Limited changed its name to Trucis Investment Limited to enable Mr Memelink to use the name Ultra Plastics in some way if he wanted to.

[23] I find that in the background there are two companies that Mr Memelink seemed to use for this business. First he used Link Technology 2000 Limited, which was incorporated on 25 March 1991, until another company called Linktech Plastics Limited was set up and incorporated on 9 September 2005.

[24] There is no clear evidence that Mr Memelink actually offered employment to Mr Mijic, and his wife who was the other employee at Ultra Plastics, under the name of these companies upon taking over the business. I find that Mr Mijic and Mr Memelink did have a talk and from that Mr Mijic agreed to fortnightly payments as a matter of goodwill. Mr Memelink's position is affected by failing to provide an intended employment agreement, which is compounded by the failure to have any alternative agreements put in writing to support his claim that Mr Mijic was a contractor.

[25] Therefore, Mr Mijic was entitled to reasonably assume his employer was Harry Memelink personally, trading as Link Tech Plastics in the absence of any new agreement and when that name had not been registered until 9 September 2005 and as he was going to be paid. Mr Memelink's reference to the other company he says he was using was not explained until the Authority's investigation and Mr Mijic had no knowledge that it was his employer. Mr Mijic understood there had been a change of owner and the business had been sold to Mr Memelink, but no other details of the arrangement.

### **Monies Owed**

[26] The sale and purchase arrangement implies that Mr Memelink had the opportunity to vary Mr Memelink's terms and conditions of employment and negotiate his own terms with Mr Mijic. Except for the agreement for payments to be made fortnightly there is no evidence of any other changes and I have accepted Mr Mijic's evidence that he understood he would be paid the same. He understood his employment continued full time, which would have meant working 8 hours a day, 40 hours a week. That is also confirmed by the existence of the sale and purchase arrangement that he could expect to be offered employment by Mr Memelink.

[27] I now turn to what is owed to Mr Mijic. He has relied upon his calculations. There are no wages and time records or any documents about the payments of any of the sums paid to Mr Mijic.

[28] The terms of any payments were vague and the carry over of the salary from Ultra Plastics is also very unclear. It was very unclear what their talk actually involved. There was no evidence that Mr Mijic complained about his wages before he left on 31

January 2007 and until he sent a letter dated 11 April 2007 to Mr Memelink. I find that in addition to the goodwill extended by Mr Mijic on his payments that he tolerated the delay in payment until after he left because he was not paid. I find that he was paid more money by Mr Memelink on three dates after leaving on 31 January that infers some money was still owed.

[29] Mr Memelink could not establish his claim that Mr Mijic had not included \$8,000 in the calculation, and the lack of bank statements from Mr Mijic has not assisted me. Given the dramatic events affecting the business, such as the flood and water damage when the roof fell in and machinery not operating, I find that there was more than likely an impact on productivity and loses being incurred and the business being shut for some period, but there was insufficient evidence that there was any variation in the employment arrangements. Furthermore, I find given these circumstances it was more than likely, given both parties early good will towards each other, that Mr Mijic's role probably did change although I can not say for sure to what degree that change was, but at least Mr Mijic was exploring and trying new ideas involved in making product, developing formula and undertaking other work such as blow moulding and injection moulding and this is not inconsistent with being an employee.

[30] I find that Mr Mijic has satisfied me that he is owed the sum he has claimed because of Mr Memelink's failure to provide any records and put in place any record of his arrangements and that these defects outweigh the evidence involving:

- The documentation supporting the claim and its calculations was not produced, such as the bank statements.
- The possibility that the bank statements refer to "Contracting" and do not identify where the payments come from.
- The lack of any clarity surrounding Messrs Memelink's and Mijic's talk and what the details of the terms actually were.
- The differences over Mr Mijic's role in the business and the impact of the other events.

[31] In conclusion I find Mr Harry Memelink employed Mr Branislav Mijic for the reasons given above. I find Mr Mijic has established he was owed \$15,500 as claimed

on the balance of probabilities for his salary which he reasonably concluded carried over from his employment with Ultra Plastics.

**Orders of the Authority**

[32] I order Harry Memelink to pay Branislav Mijic the sum of \$15,500 pay for the period of his employment until 31 January 2007.

[33] Also, Mr Memelink is to pay the \$70 filing fee to Mr Mijic.

P R Stapp  
Member of the Employment Relations Authority