

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 97
5466220

BETWEEN LOUISA MOHITAKA, PAUL
 KING, RICHARD
 ANFERNEE-SHRAMAK
 COOPER, MAPA IESE
 MATAEO VERA
 Applicants

AND ALI ROY AND JOB DONE
 HORTICULTURE LIMITED
 Respondents

Member of Authority: P R Stapp

Representatives: Alan Cressey for Applicants
 No appearance for Ali Roy
 Nasir Javed for Job Done Horticulture Limited

Investigation Meeting: 2 October 2014 at Hastings

Determination: 7 October 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a wage arrears and holiday pay claim. In addition, the applicants claim they each have been unjustifiably dismissed from their employment. They have also claimed penalties against the respondents for failing to have written employment agreements and failing to provide wage time and holiday records.

[2] The respondents have not lodged a statement in reply. The respondents were requested to arrange and/or provide wage time and holiday records. There has been no response.

[3] The respondents were given every opportunity to lodge statements in reply and to respond before the Authority's investigation meeting. Ali Roy has done nothing. Mr Nasir Javed, the director of Job Done Horticulture Limited, turned up to the investigation meeting only after the applicants organised a professional server to trace him.

[4] There has been no good cause to explain the failure of Ali Roy to attend the Authority's investigation meeting. I am satisfied that Mr Roy was served and the proof of this is courier track and trace, after a telephone conference held on 12 September 2014¹. Mr Nasir Javed says that Mr Roy has gone to Pakistan, but other than what he says he has been told he had no proof that Mr Roy is in Pakistan. Mr Roy has not kept the Authority informed of his arrangements. I accept that there is no good cause to support his failure to attend the Authority's investigation meeting. I decided to continue fully in the matter as if Mr Roy attended or had been represented. Mr Nasir Javed attended to reply. Mr Nasir Javed was provided with the opportunity to respond to the evidence he heard from the applicants. He denies that the applicants were employed by Job Done Horticulture Limited to work in the Bay of Plenty.

[5] Three of the four applicants are on legal aid. These are Louisa Mohitaka, Paul King and Mapa Iese Mataeo Vera. Richard Cooper is not legally aided.

[6] I decided that mediation would not be constructive because Mr Roy had been difficult to contact and it was uncertain that the respondents would engage as there were difficulties in service. Mr Roy made no attempt to follow up on the telephone conference when his phone connection was lost. Also no statement in reply had been lodged.

Issues

[7] What were the employment arrangements?

[8] If any wages are owed how much and to whom is it owed?

[9] What were the reasons for any employment ending?

¹ Minute of the Authority dated 12 September 2014.

[10] Is this a matter for penalties?

Facts

[11] Ms Mohitaka says she was offered work in the Bay of Plenty by Ali Roy the manager at Job Done Horticulture Limited, at a rate of \$15.93 per bin of kiwifruit picked or the daily minimum wage, whichever was higher. At the time she had been working for Job Done Horticulture Limited picking fruit in the Hawkes Bay. The proposed arrangement was for the work to take place in the Bay of Plenty and a rate per bin to be paid to a team made up of seven people, and at the end of each day the total amount for all bins would be divided evenly between the team. She was left to arrange the team of pickers. She expected the arrangement would last for the kiwi fruit picking season, 16 weeks, including pruning after the picking. In the Bay of Plenty the team stayed at Backpackers accommodation.

[12] Louisa Mohitaka gathered a team of seven to pick, including whanau and Mr King. The arrangement presented an opportunity for her to get her whanau into paid work. She confirms that the team all went to the Bay of Plenty and arrived there on 8 May. On arrival introductions occurred with Mr Roy and Mr Nasir Javed. The reasons for Mr Javed's presence are in dispute. Ms Mohitaka says that Mr Nasir Javed was there because his company was the employer. He says he was there to assess an interest in a business proposition from Mr Roy to carry out the work in a partnership or some other arrangement. Mr Roy's offer did not identify who the employer actually was. No one has been paid the agreed sum. There were no employment agreements.

[13] Work apparently occurred on 9 May, but only after the fruit had dried in the morning. The team started work at 1pm, excluding Mr King who was at Work and Income trying to get assistance because his wallet had been stolen with his money and his cards. He returned and started work at 2pm. Mr King and Ms Mohitaka say they all worked until 6pm that day, finishing when the day got too dark to see the kiwi fruit.

[14] There are no details about work time from 10 May to 14 May 2014. No one could remember any details. On 15 May Mr King returned to Work and Income for

assistance, but needed Ms Mohitaka to take him there, and he had to walk back to the Backpackers accommodation as the others were working.

[15] Mr Roy met him when he got back to the backpackers accommodation. Mr King says Mr Roy dismissed them because they did not work hard enough. Ms Mohitaka says that on 15 May 2014 she learnt from Mr King about being dismissed. The others say they worked out the rest of the day. They say they worked from 10.00am to 5.45pm based on Ms Mohitaka's and Mr King's evidence. At the end of the day they were meant to get paid, but were not paid. Ms Mohitaka says that on 16 May she learnt from Mr Roy directly that she had been dismissed and believed that applied to the whole team. There was no more work for them. She says there was no reason for this.

[16] A week later Ms Mohitaka met Messrs Roy and Nasir Javed in the street. It is common ground that her younger son (not a party) was paid \$300 cash, and she says only after Mr Nasir Javed said to Mr Roy to "just pay him". Mr Nasir Javed denies this completely. She returned to Hastings when she was unable to get any other work in the Bay of Plenty after being dismissed and not being paid. Ms Mohitaka was on the domestic purposes benefit at the time she entered into the arrangement with Mr Roy, and planned to declare her earnings once she started to get paid. She explained the arrangements with Work and Income in regard to work and the receipt of the Domestic Purposes Benefit was that her benefit would be adjusted upon the receipt of any income and she was allowed to work any hours she obtained.

Determination

[17] In the absence of any reply and response from Ali Roy he at least has some responsibility as he entered into the arrangement with Ms Mohitaka. It is unclear whether or not there was any mention of the name of Job Done Horticulture Limited, except that Ms Mohitaka knew it existed because she had previously been employed and that Mr Roy was the manager. Mr Nasir Javed says that Mr Roy was operating in the Bay of Plenty in his own business. Mr Nasir Javed denied employing the team at all for the Bay of Plenty work. It is possible that Mr Roy was entering into his own arrangements with the applicants through Ms Mohitaka, or he was responsible to Job Done Horticulture Limited being the employer. I hold that Ms Mohitaka and the other

three applicants were employees, which has not been challenged. I am not convinced that Mr Nasir Javed's evidence is reliable that the company had nothing to do with the applicants. This is because:

- i. He has only taken an interest in the matter at the investigation meeting. He provided no defence in writing. There was no statement in reply lodged. He failed to provide any wage time and holiday records for Ms Mohitaka and Mapa Vea whom he accepted he had previously employed. He did not provide any written employment agreement that applied to them.
- ii. He confirmed that the documents and papers in the matter had been served on him, but that he had only lightly read them.
- iii. He did not adequately explain the reasons why he was in Tauranga with Mr Roy on 8 May and during the week when he and Mr Roy met Ms Mohitaka and her younger son in the street and Mr Roy paid off the younger son.
- iv. He says Mr Roy was in business on his own account, but could not produce any evidence to support this contention.
- v. Mr Roy is allusive. During the conference call with him his connection on the telephone was broken and upon trying to reconnect with him there was no answer to the call. He was no longer able to be contacted and despite a message being left for him he did not return any call to take an interest in the matter. He has not been communicative and has failed to adequately respond knowing that this matter was being dealt with by the Authority. If he has gone to Pakistan he certainly never properly advised the Authority at the time of the telephone conference and indeed even after it, when he reasonably would have been expected to make some contact. No details have been provided from him since.
- vi. Mr Roy and Mr Nasir Javed had an employment relationship and they continued their contact with each other at least up until a week after the applicants' employment ceased in the Bay of Plenty.

- vii. Mr Nasir Javed explained that Mr Roy had a company registered for his business. This does not seem to be the case having checked the company register.

[18] There is no proof of any other employment arrangement or that the real nature of the relationship is an issue in regard to any other type of arrangement for the applicants. Any such alternative arrangement however seems improbable based on the applicant's evidence and where the respondents have failed to reply and respond in the proper way. There have been no wage and time and holiday records produced. The records have been properly and reasonably requested by the applicants' representative, and the Authority has also requested such records be produced. There are no written employment agreements. There is one document that purports to be some type of confirmation of an arrangement and request for petrol and rent in advance from Work and Income for the team. Its relevance is the date on it that confirms at least an arrangement with Mr Roy and the intention to travel to the Bay of Plenty before the start date.

[19] I hold that Mr Ali Roy and Job Done Horticulture Limited are jointly and severally liable as the employer.

[20] The applicants have not produced any documentation of their own to prove that they worked for all the time they have claimed and to establish any money owing in regard to any work filling bins. They have not been able to discuss what arrangements existed for tallying the bins, but indicated that someone else was in charge of the arrangements for keeping time records of the hours worked. They were not able to produce any documents and have not supported trying to make any arrangements to obtain such documents. None of them have calculated any sums of money that they say they are owed. Therefore the only time verified by their evidence is the work on 9 May and 15 May by the hour, based on what Ms Mohitaka and Mr King say. I accept that Ms Mohitaka worked from 1 pm to 6pm on 9 May and a full day (10.am to 5.45pm) on 15 May, and Paul King worked from 2pm to 6pm on 9 May 2014. They say they had half an hour for lunch. Her hours were 12.15 in total for that time. His hours were 4 hours in total after lunch. In addition I accept that Mr Cooper and Mr Vea also worked the same time as Ms Mohitaka on the same dates. The applicable minimum wage is \$14.25 (from 1 April 2014) per hour. The

applicants have not satisfied me that the arrangement was for a minimum daily rate because: the variable hours that they did work; the hours were subject to the fruit drying and weather; that none of them kept any details of the days and hours they say they worked and Mr King decided to go to Work and Income instead of making any arrangements for his absence. They are entitled to their holiday pay as no payments were made.

[21] I accept that Ms Mohitaka and Mr King were dismissed, which has not been challenged. There has been no reason advanced for the decision to dismiss them. The dismissals are entirely defective. No concerns were put to them by the employer in any formal setting. They had no opportunity to comment and rely. In such circumstances the employer could not have considered any explanation from them. They were unjustifiably dismissed.

[22] As to the others I have to accept also that they were employees because this has not been challenged at any stage where there has been a personal grievance raised in letters to the respondents, statements of employment relationship problem lodged and then served on the respondents and Ms Mohitaka's evidence. She says she only arranged the members of the team and was not responsible for their employment or to pay each of them. She says that responsibility rested with Mr Roy and/or Job Done Horticulture Limited. Mr King's information confirms this. It follows that as they were part of the team Ms Mohitaka correctly assumed they too had been dismissed, and conveyed that to them. This is supported by there being no more work.

[23] The applicants are entitled to remedies for personal grievance. First there are lost wages for each applicant. I am not satisfied that the applicant's lost wages amount to the 16 weeks claimed by Ms Mohitaka. This is because she failed to produce any details of her wages and hours of work sufficient for a calculation except for the amounts in this determination. Also she has not satisfied me that the amount of time she says they all could have reasonably expected to work has been supported by adequate evidence. Certainly the other applicants seem not to be in any position to say. They each would have been entitled to notice. I am not satisfied that Ms Mohitaka's claim for 16 weeks for lost wages has been established given the amount of hours actually worked and the loose arrangements. They are each entitled to at least a week's wages for notice based on the hours they have proved they worked, the nature of their employment and the sector. I have reduced the claim for lost wages to

4 weeks because the employment appears to have had no guarantees and the work could be affected by weather conditions. Indeed Mr King and Ms Mohitaka were not consistent with their dates when the employment ended and were inconsistent and had trouble trying to remember some of the hours they say they worked. The arrangements were vague and unsupported by any documentation and the applicants could not produce any records of their own to establish that they would have worked all the time claimed. Furthermore there were differences between Ms Mohitaka and Mr King about the anticipated length of time they would work and no details to support their claims. I have had to rely on their oral evidence that has been largely uncontested without thorough cross examination and any proper response from the respondents. Indeed Mr King seemed to decide for himself when he actually worked and he took time off, albeit this seems to be because of his financial circumstances and his stolen wallet and visits to Work and Income for assistance. He cannot expect payment for this and had no evidence that he would be paid for it.

[24] Ms Mohitaka has established her claim that the dismissal did have some impact on her given her living arrangements in the Bay of Plenty, the shortage of money and the care for the other people. I accept she reacted by trying to find other work. Also the impact of the total lack of any proper procedure supports her claim that she was hurt and humiliated and particularly about how she was informed of the decision and that it happened at the backpacker accommodation. She is entitled to \$2,000. The other three applicants are entitled to a much less sum given that their evidence barely established a sum for humiliation, loss of dignity and injury to feelings about the impact on them, except about how they felt. I award them each \$600. I realise that compensation must not be illusory, however in the current circumstances, and as appalling as the employment arrangements were, I have kept in mind the short period that the applicants were employed, that two of them had previously worked for Job Done Horticulture Limited and that the others did not have employment prior to this.

[25] There is a claim for penalties. This is for the respondents' failure to have written employment agreements and failure to provide wage time and holiday records. There is no doubt that the respondents are in breach of the requirements to have written employment agreements and to produce wage time and holiday records. I have decided not to apply a penalty because the primary claim that is important is for each of the applicants to get paid for their work that they established they did.

[26] Costs in the matter amount to an assessment of the daily tariff for a half day hearing plus the filing fee and service costs. The costs are in the order of \$1,750 plus the filing fee and service costs. There was only one application lodged for the applicants. The arrangement for service independently of the Authority was required. The investigation meeting lasted approximately half a day. This involved the preparation of one formal written witness statement and the usual documents produced in the lead up to the Authority's involvement and lodging a statement of problem which are all inclusive of the daily rate.

Summary of Orders

[27] Ali Roy and Job Done Horticulture Limited are jointly and severally to pay to:

(a) Louisa Mohitaka:

- a. \$173.14 wage arrears plus \$13.85 holiday pay;
- b. \$692.56 lost wages;
- c. \$2,000 compensation;

(b) Paul King

- a. \$57 arrears of wages plus \$4.56 holiday pay;
- b. \$228 lost wages;
- c. \$600 compensation.

(c) Richard Cooper;

- a. \$173.14 arrears of wages plus \$13.85 holiday pay;
- b. \$692.56 lost wages;

c. \$600 compensation.

(d) Mapa Vera:

a. \$173.14 arrears of wages plus \$13.85 holiday pay;

b. \$692.56 lost wages;

c. \$600 compensation.

[27] The claim for penalties is dismissed.

Costs

[28] Ali Roy and Job Done Horticulture Limited are jointly and severally to pay to the applicants jointly the total sum of \$1,750 costs and \$71.56 filing fee and \$212.75 (inclusive of GST) service fees.

Final matter

[30] A certificate of determination is to be issued for enforcement on the Authority's orders on the sums to be paid.

P R Stapp
Member of the Employment Relations Authority