

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 290
3161642

BETWEEN ANTON MICHAEL ROMIRER
Applicant

AND TAUPO BREWERY LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person assisted by Matthew Love-Parata
Louise Foley, counsel for the Respondent

Investigation Meeting: 19 and 20 April, 6 and 7 June 2023 in Taupo

Submissions Received: At the investigation meeting

Determination: 16 May 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Anton Romirer, claims he is due various amounts by way of unpaid wages, holiday pay and Kiwisaver contributions. He also seeks an order the respondent, Taupo Brewery Limited (the Brewery), return various personal items he claims it retained when he left its employ and/or reimburse him for the value there-of.

[2] These claims, outlined in an amended statement of problem lodged on 21 July 2022 followed an earlier lodging in which he named his former domestic partner and the sole director of the Brewery, Rebecca Draper-Kidd, as a respondent and implied there might also be a personal grievance claim. Ms Draper Kidd was not named in the amended statement of problem, nor was there any mention of a personal grievance with Mr Romirer confirming at the commencement of the investigation meeting that both decisions were deliberate. There is no personal grievance and Ms Draper-Kidd is not a respondent in her personal capacity.

[3] The Brewery denies any money is owing. It asserts Mr Romirer was paid in accordance with his employment agreement and that he had opted out of Kiwisaver. It stated issues pertaining to property, predominantly tools, is a matter between Mr Romirer and Ms Draper-Kidd resulting from the breakdown of their marriage but in any event nothing has been retained other than tools bought by the Brewery and which are its property.

This Determination

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[5] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[6] Mr Romirer and Ms Draper-Kidd were in a domestic relationship between February 2007 and December 2020.

[7] Mr Romirer commenced as an employee at the Brewery in March 2012 when it was in its infancy. There was no employment agreement and the Brewery states the arrangement was entered into “as a way of pulling funds out of the business at a lower tax rate”.

[8] Mr Romirer’s evidence about this time is inconsistent and confused. Indeed at one point he said he was not an employee but that is not what the statement of problem says. He said in his original Statement of Problem that he and Ms Draper-Kidd jointly created the Brewery from an idea and he was an active participant performing a range of duties though his main responsibility was the installation and running of the brewery itself. He claims it was incomplete with about 95% of the engineering done but only 60% of the software developed. Mr Romirer takes the view he had special skills with regard to software and spent a lot of time developing this.

[9] He also stated at one point early in the investigation that it was never intended he be an employee but that he and Ms Draper-Kidd were equal partners with she providing the finance and he his skills and expertise – in essence he said he was to earn his share of the business through work and for that he would receive 49% of the business. This last suggestion is strongly denied by Ms Draper-Kidd who referred to the fact she and her first husband had been very successful but she had by the time of establishing the Brewery been with Mr Romirer long enough to know he was incapable of a similar effort and had in any event had previous business failures. She simply was not willing to risk her equity.

[10] Mr Romirer says the change to employment was forced upon he and Ms Draper-Kidd when he was declared bankrupt in 2013 and her accountant advised he be an employee. As already said, confusing. He claims to have both been an employee and not, at least until 2013 though that too is questionable given the bankruptcy was gazetted on 30 May 2014. He claimed, in the statement of problem that the original agreement entered into in 2012 provided an hourly rate of \$25 per hour and required he work 9.00am to midnight, Monday to Wednesday. The Brewery states this is an absolute nonsense and his hours were always intended to be minimal once the business was up and running. It was Mrs Draper-Kidd who ran the business and worked 60 to 70 hours a week.

[11] Ultimately however these issues need not be resolved as an arrears claim is subject to the statute of limitation. As it was not raised until 2022 I need not concern myself too seriously with what occurred before early 2016 and by then the parties agree there was an agreement in place.

[12] The first was a written agreement which applied with effect 13 February 2015. Amidst its provisions it provided an hourly rate of \$25 and stated:

The Employee's usual hours of work shall be 15 hours per week with a degree of flexibility in order to meet the needs of the business, and with no minimum guaranteed hours.

[13] It is the Brewery's evidence that provision reflected what had become the normal number of hours Mr Romirer worked each week – indeed it may have been a generous estimate. In this regard Ms Draper-Kidd notes Mr Romirer had been in the business for around three years and knew exactly what he did so why would he sign an agreement that did not reflect reality.

[14] Mr Romirer initially denied signing the agreement. When it was produced he claimed the signature purporting to be his was an electronic one inserted by Ms Draper-Kidd but undermined that by suggesting her computer skills were so inadequate she would be unable to do that and under cross examination resiled and accepted he had signed though had no memory of the details he had agreed to.

[15] It is also accepted Mr Romirer hand wrote three comments on the agreement. They recorded the hours 'may' increase to 20 a week; that conducting Brewery tours was additional and "off site" hours are to be negotiated on a case by case basis.

[16] It was around this time the marriage was in some difficulty and Mr Romirer ended up leaving the domestic home and the Brewery. He later returned to both but on doing so entered into an agreement with Ms Draper-Kidd that his earlier agreement would be amended with respect to the pay rate. It was agreed he wanted, and would get, \$200 clear a week which led to a regular payment of \$228 gross. His hours would be consistent with that and anything additional still had to be approved with that essentially remaining the arrangement.

[17] What Mr Romirer is now trying to persuade me is that he worked around 60 hours a week and should, given the skilled nature of the work he was performing, have been paid at least \$45 per hour. In support of this he cited a number of tasks he claims to have performed including ones purportedly performed on a rural property the two occupied.

[18] That said it is accepted Ms Romirer spent many hours on the Brewery's premises though it is the company's evidence that far from working he was engaged in private pastimes largely involving surfing the internet. When he was in the bar it was not to serve or work but to drink and tensions arose as there is ample evidence he had a knack of annoying some patrons. Indeed it got to the point that Ms Draper-Kidd told Mr Romirer in a discussion on reopening the Brewery after covid that he had to get out and try to find a part time job.

[19] The Brewery is adamant Mr Romirer simply did not do a number of the things he referred to when illustrating the veracity of his claims.

[20] For example he claimed he submitted applications to the Companies Office. Aside from the fact that occurred before the commencement of the timeline I am considering the response is that was one off that probably took an hour at most.

[21] He claimed he was the manager of the Brewery yet numerous witnesses attested to the fact this was not so and Ms Draper-Kidd performed that role. There was also a lot of support for the proposition that while he was often on site he rarely worked. As Ms Draper-Kidd put it. “He treated the business like his headquarters or a club room. He sat in the office and surfed the internet, he used the space out the back of the building to work on his personal vehicle, and he entertained friends when they came in”.

[22] Mr Romirer also claimed to have been the brewmaster and having to spent an inordinate amount of time performing that function, the Brewery again disagrees. Putting aside the fact that one of his early complaints was that the agreement of 2015 described him as a “Brewer Trainee” it in fact says he was responsible for supervising the brewer trainee this is not disputed at least to the extent it is agreed brewing was his primary function. What the Brewery add though is that it bought the equipment it did because neither he nor Ms Draper-Kidd had any brewing experience and the system they purchased was essentially “set and forget”. The Brewery adds that when Mr Romirer left his replacement was doing the job in somewhat less hours than Mr Romirer was paid for.

[23] Mr Romirer also claimed to have spent considerable time trying to install some new fermenters that were purchased in 2017. He was adamant he could easily program them but never did so and all they ever did before being sold as unnecessary was carbonate one batch of ginger flavored water in 2020.

[24] He also claimed to do a lot of IT related work and while the Brewery accept he was often playing on the computer this was his passion and one computer and a security system required no upkeep or maintenance – indeed the replacement would not spend an hour a week on such tasks.

[25] He also claimed to be the *maître d'* and ‘master of ceremonies’. To that the Brewery says no – Ms Draper-Kidd was front of house and in summer employed 2 to 3 other staff to assist. Indeed the Brewery goes so far as to say there were concerted attempts to keep Mr Romirer away from the customers given a propensity to upset.

[26] Mr Romirer also claimed to have been active in “graphics and design”. To that the Brewery says he designed the initial graphics in 2012 and updated the logo in 2020. In addition there were a couple of beer labels he designed but that was that.

[27] He also claims to have been ordering goods required for the Brewery process and while that is accepted the reply is it did not take long and was poorly done. Indeed after he left the Brewery had to dispose of nearly \$10,000 of unused and expired wort (an ingredient in the brewing process).

[28] Mr Romirer also claimed to have been responsible for conducting Brewery tours but the response was that in fact he refused to do so and another person had to be engaged to do that. After considerable toing and froing Mr Romirer agreed with that.

[29] He also claimed to have been renovating the restaurant and constructing various fixtures. It is accepted a fireplace was installed which took two weeks; a ceiling was pulled down and he and a friend replaced it in a week; a stage was built in three days and there a balcony that was stopped and then had to be removed after he left as he had failed to get a resource consent.

[30] Finally there was considerable evidence of Mr Romirer's private use of Brewery resources, expenditure of Brewery funds on private items and other benefits, largely travel related, which the Brewery paid for as Ms Draper-Kidd often included work related purposes.

Discussion

[31] As already said Mr Romirer raised six claim but as Ms Foley submitted they can effectively be summarised as three. Those are:

- (a) A claim for wage arrears and if that is successful, holiday pay thereon. This claim appears to be based on the Applicant's assertion that he should have been paid for 60 hours per week, arguably at a rate not less than \$45 per hour, but was in fact paid \$228 for most of his employment;
- (b) That KiwiSaver was not deducted and paid and therefore he should be compensated for the employer's contribution to his KiwiSaver; and
- (c) That tools purchased by the Respondent were in fact part of some arrangement under which he could retained them or claim compensation for not being able to do so.

[32] In my view Mr Romirer's claims face considerable difficulties.

[33] First his evidence was weak, inconsistent and riddled with assertions from which he subsequently had to resile with a couple of examples being referred to above. In closing submission Ms Foley cited 12 examples of significant inconsistencies and argued they strongly undermined Mr Romirer's credibility. I have to agree each of the examples cited occurred and they did indeed undermine Mr Romirer's credibility. Mr Romirer when he had the chance to reply chose to address only one of these points.

[34] Secondly his evidence was countered by consistent evidence from multiple witnesses that he was not working as claimed but in fact indulging in private activities of doing nothing other than surfing the internet. Add to that the fact I accept some of his evidence was simply incorrect with key examples concerning the brewing equipment. Mr Romirer claims it arrived in an incomplete state and he then completed the installation. He then claims he subsequently spent considerable time reprogramming and updating the equipment and he was adamant the supplier would back his claims.

[35] The supplier was a person with a significant reputation in New Zealand's micro brewing industry. Far from supporting Mr Romirer's evidence it contradicted significant portions there-of and was almost totally consistent with the opposing evidence of Ms Draper-Kidd. It was his evidence the equipment was far from incomplete and he and his team installed it. He agreed it was a set and forget process and indeed attempts to reprogram would invalidate the warranty. As for the additional fermenters the advice has always been don't though the evidence is Mr Romirer went ahead playing on Ms Draper-Kidd's technical ignorance and promises there would be no issue and/or cost.

[36] Third, portions of his claim simple stand no chance with the obvious example being the assertion his skill set was such he is due no less than \$45 per hours. That has no contractual basis given the fact he accepts he did in fact enter into the two key arrangements Ms Draper-Kidd claims he did – the 2015 agreement and the alteration under which the pay rate reduced upon his 2016 return to \$228 per week.

[37] The biggest problem though is the agreement which Mr Romirer eventually accepted he entered into. He was paid in accordance with it. Furthermore it required that if he was to perform additional tasks he had to seek prior approval and there is no evidence of adherence to that requirement. It is, in my view, difficult to seek payment for work, assuming work was performed but was neither required or approved.

[38] I also have concerns, similar to those expressed by the Brewery that nothing was ever mentioned while Mr Romirer was in employ. It was only after he had left and, at least from his perspective, issues arose with the matrimonial property arrangements that he first raised these claims. He states in the original statement of problem this was because he was unaware of his status as an employee but as the evidence proved in the investigation that was simply wrong. It is, I conclude, far more likely linked to another statement he made in the original SoP which was “I have since found out through my lawyer that I am not able to claim more than half of one percent of the business I helped build” and this was the way he decided to address that but he did not help himself by adding things like an untenable hourly rate to try and achieve a sum he thought he was due based on his perception of the businesses’ value.

[39] It was, as I have already said, a way that lacked sufficient supporting evidence and flew in the face of agreements he reluctantly accepted he entered into.

[40] While a number of additional issues were aired and discussed the reason why I have reached the conclusion I have should be obvious from what has preceded. Mr Romirer has not made out his wage claim.

[41] The failure to establish the wage claim means the holiday pay claim must also fail.

[42] Turning now to the claim for Kiwisaver. It is the Brewery’s position an opt out form applied and Mr Romirer advised he would take care of that with the Inland Revenue. It now appears he may not have done so but in any event an employer contribution is one that matches an employees. Whether rightly or wrongly there was never an employee contribution to match and Mr Romirer took no issue with that at the time. In such circumstances it would, in my view, be improper to now hold the Brewery to an arrangement it understood had been set aside.

[43] Finally there are the tools. In the original Statement of Problem which Mr Romirer drafted he stated “my work at Taupo Brewery was aided by my personal tools, power tools, computers, IT equipment and audio systems. Many of which were replaced over the years. It is my understanding that Personal Equipment used in the workplace because the workplace has no tools but subsequently gets replaced by the workplace is owned by the original Personal Tool Owner.”

[44] By the time he come to swear his affidavit Mr Romirer states at paragraph 4.5 “it was always understood between TBL and myself that any replacement property purchased would remain my personal property, as TBL was replacing a tool that was damaged during the course of my employment to TBL’s benefit.”

[45] These are not the same rationales and Mr Romirer failed to give any detail about how this understanding was reached and there is no evidence of any actual discussion about the issue. Indeed there is no evidence the Brewery even required Mr Romirer use his personal tools. The Brewery’s evidence is that if tools were purchased it would pay for them and they therefore belong to the business. I agree.

Conclusion and Orders

[46] For the above reasons I conclude Mr Romirer has failed to establish his claims. They are dismissed.

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed the Brewery may, as the successful party, lodge a memorandum on costs within 28 days of the date of issue of this determination. From that date Mr Romirer will have 14 days to lodge any reply memorandum. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.¹

Michael Loftus
Member of the Employment Relations Authority

¹ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.