

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 201/10
5307132

BETWEEN

ADAM SATHERLEY
Applicant

AND

MIRI FLEMMING AND FIRE
AND ICE SHOPFITTING AND
PROJECT MANAGEMENT
LIMITED
Respondents

Member of Authority: P R Stapp
Representatives: Applicant in person
No appearance for Respondents
Investigation Meeting: 1 December 2010 at Napier
Determination: 16 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Satherley has claimed that he is owed 2 weeks wages totalling \$1,722 nett not paid during his employment, and \$3,444 for 4 weeks lost wages, \$1,092 telephone bills and \$646 expenses. Also, he is seeking \$2,692 for the cost of wear and tear on the use of his vehicle and \$50 to recover interest he had to pay on a loan to cover the non payment of wages during his employment. He has also claimed unpaid holiday pay. He says that he was forced to find other work because he was not paid fully.

[2] Miri Flemming (aka Miri Stacey-Flemming and Miri Stacey) acknowledged in a letter dated 10 May 2010 to Mr Satherley (attached to the statement of problem filed on 12 July 2010) that he had not been fully paid, and she promised payment when funds became available.

[3] There was no statement in reply filed by the respondents.

Issues

[4] Who was Mr Satherley's employer?

[5] Is Mr Satherley owed any money? Do the sums relate to his employment? If so, how much is he owed and what for?

[6] What was the reason he left his employment? Does the reason constitute a constructive dismissal?

The non appearance of the respondents

[7] The first attempt at service using the PO Box number provided by the applicant resulted in no return of the mail. For certainty of service the statement of problem was served on 29 September 2010 by the Authority using a courier service, where the statement of problem was accepted for service at Ms Flemming's director's address (signed for by "Bensh") and at the company's registered office (signed for by "Sari" a business advisor). That business advisor is apparently the same person referred to by Ms Flemming in her letter to Mr Satherley. The business advisor also wrote to Mr Flemming during his employment about his pay difficulties and gave him payslips (attached to the SOP).

[8] Attempts were made to serve the notice of investigation meeting and all documents on Ms Flemming using a professional server. Service was attempted at Ms Flemming's director's address, and on the company at its registered office. However, at her director's address, where there was an old function centre, the premises were found to be derelict, and neighbours informed the professional server that the Flemmings (including Ms Flemming's partner, Dirk Flemming) had moved (first letter from the server). Also, the professional server tried to achieve serve at the registered office address and was satisfied that an occupant there had nothing to do with either of the respondents (second letter from the server).

[9] Another attempt was made to serve the respondents by the Authority at the PO Box number used for the business. This was done to ensure notice was provided to the respondents of the investigation meeting and the applicant's amended statement of problem clarifying his claim for money. In particular it was to ensure notice was put on the company that I had joined it to the proceedings pursuant to section 221 of the Employment Relations Act (11 October 2010) and that for completeness all the papers and documents were served. Letters on file confirm that this was dated 27 October 2010. I was satisfied that the respondents have been served with all the relevant papers on the Authority's file. In this regard I am satisfied there is proof on the file that service was achieved at that address (the PO Box number used from the business's web site and the SOP) on both respondents. The business address is consistent with payslips received by Mr Satherley during his employment, where the business name was referred to, and on a business card used by Mr Satherley. There was no mail returned from that address.

[10] There has been no good cause from the respondents not appearing, not attending and not being represented at the Authority's investigation meeting. I decided to proceed fully in the matter with the investigation meeting as if the respondents had appeared and been represented (clause 12 Schedule 2 of the Employment Relations Act 2000).

The facts

[11] Mr Satherley's employment commenced on 5 October 2009. He was employed to work in a business called "Fire and Ice" and involved professional shop fitting. Miri and Dirk Flemming were referred to as the business owners in the written employment agreement produced by Mr Satherley. Mr Satherley accepted that "Fire and Ice" is not the proper legal entity for his employer. He has accepted that Fire and Ice Shopfitting and Project Management Limited was his employer, and his claim for the money owed is against the Company and not Ms Flemming personally. He acknowledged that he was aware of the existence of the Company during his employment.

[12] Mr Satherley's annual salary was \$58,240 (payslips and agreement) plus expenses (the agreement) including \$10 per week for vehicle running costs. Although

Mr Satherley made a different claim based on what he says was a dispute over the running costs rate, he had signed off on the \$10 per week minimum rate.

[13] I am satisfied that Mr Satherley was entitled to \$861 nett (in the hand) per week and that he would be reimbursed the use of his telephone. I am satisfied that he could pay expenses and be reimbursed for them.

[14] Although there was an employment agreement, Ms Flemming's letter to Mr Satherley supports his claim. Also, Ms Flemming's failure to attend and give evidence means that I must give weight to Mr Satherley's claim because I have no reason to doubt his reliability and honesty. Indeed he came across as an honest, credible witness, I hold.

[15] He started his employment as project manager/North Island manager on or about 5 October 2009. This was supported by an email Mr Satherley produced at the investigation meeting. His last day of work was 6 May 2010. He worked for approximately 30 weeks and 4 days.

[16] He had decided that he had to look for alternative work to pay his way. He did not return to work. He tried to get paid by writing to Ms Flemming. She replied on 10 May 2010 promising that when funds were available he would get paid, but she understood if anyone decided to leave and she acknowledged understanding that people do not work for free and those staff who could not hang in she wished them well and was sorry that things had got so dire. His last full pay from Fire and Ice was made on 26 April 2010. This carried him through until 2 May 2010. Mr Satherley received three part payments later, which he says were for expenses (26 May 2010, 2 June 2010 and 16 June 2010). There has been no information provided by the respondents about the details of these payments. The payment totalled \$700.

[17] Mr Satherley found new work and commenced a new job from 2 June 2010.

Determination

[18] Mr Satherley is owed arrears in wages for 2 weeks (being the weeks ended 2 and 9 May 2010) for which he was not paid and I accept Mr Satherley's claim for

\$1,722 wages nett (in the hand). This amounts to \$2,240 gross wages (from the pay slips). He is entitled to interest on this sum because he was denied the use of his wages. The interest is calculated on the 90 day bill rate plus 2% from the date the payment was last due until the date of the investigation meeting (210 days).

[19] Also he was not paid for holidays. There are no documents identifying any holiday pay being paid and reconciled. Thus, I have relied on the applicant and his information from the payslips and the holidays he says he took during the period of his employment. An estimate of Mr Satherley's gross earnings is \$33,968.22 9 for 30 weeks 4 days. He would have been entitled to 8% of his gross earnings in the period.

[20] I accept his claim for \$1,092 telephone expenses. I accept his claim for \$646 itemised expenses. This is a total of \$1,138, less \$700. He is owed \$438. I accept that Mr Satherley used his own vehicle during his employment and is owed (\$10 per week under the terms of the employment agreement) \$300 for the use of his own vehicle.

[21] I am satisfied that Mr Satherley left his employment to get another job on 6 May 2010 because he had not been properly paid. He attempted to get his wages during his employment without success. There were promises made, but they were not fulfilled, I hold. The non payment of wages is a sufficiently serious breach of the terms and conditions of employment that would make it foreseeable that an employee would resign. That applies in this case. Mr Satherley has a personal grievance.

[22] I hold that he did not contribute to the situation giving rise to his personal grievance. I accept Mr Satherley's claim for 4 weeks lost wages of \$3,444 caused by the employer's breach of not paying him and his decision to leave and look for alternative work. He mitigated his loss by looking for other work. He also had to incur interest on a loan that he had to take out to cover his unpaid wages. I have no doubt from Mr Satherley's evidence that there was a financial impact on him when he was not properly paid and there was an impact on his emotional state supported by his letters to Ms Flemming and she acknowledged that. Mr Satherley did not specify a claim for compensation but I accept that the thrust of his employment relationship problem and the nature of his itemised claims are related to compensation for a remedy. I award him the sum of \$4,000 compensation for hurt and humiliation.

Orders of the Authority

[23] Fire and Ice Shopfitting and Project Management Limited is to pay Adam Satherley:

- a. \$2,240 gross wages.
- b. \$64.44 interest
- c. \$2,717.45 holiday pay
- d. \$438 telephone expenses and itemised expenses.
- e. \$300 vehicle expenses.
- f. \$3,444 lost wages.
- g. \$4,000 compensation.

[24] In addition Fire and Ice Shopfitting and Project Management Limited is to pay Adam Satherley the \$70 filing fee.

P R Stapp
Member of the Employment Relations Authority