Determination Number: WA 12/05
File Number: WEA 57/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Scott William Savage (Applicant)
AND	Aerial Abseil Access (NZ) Limited (Respondent)
REPRESENTATIVES	Scott William Savage on his own behalf David McLay for the respondent
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	13 and 20 January 2005
DATE OF DETERMINATION	21 January 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. Mr Scott Savage, the applicant, claims that his former employer, Aerial Abseil Access (NZ) Limited (Arabac), failed to adhere to the terms of a variation annexed to his individual employment agreement. On behalf of Arabac, its Managing Director, Mr David McLay, claims that the variation was never put to him and was consequently never agreed to between Mr Savage and Arabac.

The Facts

2. Mr Savage commenced employment with Arabac shortly before the passage of the Employment Relations Act 2000, which meant that no contract was required in writing. Early in 2001 Arabac, quite properly, decided to put all staff on a proper footing by implementing written individual employment agreements. Mr Savage was issued with a standard form agreement that Arabac had prepared. Mr Savage took it

home and studied the intended agreement. He had a number of concerns about the agreement, but noted that in clause 16 the parties could agree to vary the terms and conditions if done in writing and signed by both parties, which would be known as an "Annexed Variation to Original Individual Employment Agreement".

3. Mr Savage then proceeded to type up such an annexed variation. The variation was to cover concerns he had that included his desire for a flat rate payment of $26 to $28 per hour. The original standard agreement provided for four different rates according to the type of work that the workers did at any given time. However, the workers had approached Mr McLay as a group to indicate that they wished to have a flat rate payment. Accordingly, four rates of pay in the employment agreement were replaced with one flat rate payment of $21 per hour.

4. Mr Savage was concerned about that rate of payment, however. In his annexed variation he set out the following clause –

> *"That within the time of the contract being signed by both parties and of a period not exceeding six months a flat rate settlement of between $26 to $28 per hour will be implemented."*

5. He showed the variation to Mr Mark Connor, a coworker, who suggested the deletion of one issue that was no longer relevant because of the flat rate, and the addition of leave arrangements in respect of offshore work.

6. On 6 April 2001 Mr McLay came to speak to Mr Savage about the contract. They discussed the variation and Mr McLay agreed to Mr Savage's terms. Accordingly both parties signed the document (including the variation) and it was witnessed by Mr Connor. At that point it became binding on both parties.

7. However, despite Mr Savage raising the issue a number of times, Mr McLay declined to implement the agreement, even although he increased Mr Savage's pay twice thereafter. By the time the agreement for an increase to $26 to $28 per hour would have occurred, Mr Savage's pay had been increased to $23 per hour. Then on 7 January 2002 his pay was increased to $25 per hour.

8. By the end of 2003 Mr Savage had had enough of not being paid at the rate that had been agreed. Mr McLay asked Mr Savage to bear with him because of the delay in

obtaining well paid offshore work on a permanent basis, but Mr Savage left a few weeks before that contract became permanent at the end of 2003.

Credibility

9. In cases such as this where there are disputed versions of the facts there can be no certainty as to exactly what happened. The Authority is forced to determine the matter on the balance of probabilities. The facts as set out above were determined on this basis for the following reasons.

10. Mr McLay claims that any variation would have had to have been typed up by the company on its standard form and properly signed by the parties and witnessed, which did not occur. However, that was not necessarily how Arabac dealt with all such matters. Even in Mr Savage's case it was accepted that schedule B, which related to hourly rates, was amended by the parties by the deletion of all bar one of the rates. That deletion took place by three of the four rates being ruled out by hand, and the word "offshore" being replaced with "flat" in handwriting. Thus it is clear that Arabac did not always deal with matters in the formal way that Mr McLay claims.

11. Mark Connor gave evidence to the Authority. I accept from his evidence that he saw Mr Savage's variation, and indeed made additions to it, before it was put to Mr McLay. He also witnessed Mr Savage talking to Mr McLay about the intended agreement with the annexed variation in his hand, and overheard them discussing pay rates, which was one of the key matters included in the variation. Mr Connor witnessed the signed agreement and as far as he is aware, contrary to Mr McLay's evidence, the variation, which was initialled by Mr Savage but not otherwise signed, was contained within the document that both parties signed. Mr Connor made the very cogent point that if Mr Savage had simply intended to sign the offered individual agreement without any annexed variation then there would have been no need for the five minute discussion which took place between him and Mr McLay before Mr Connor witnessed the signing of the agreement.

12. Mr McLay also claims that Arabac would not have agreed to pay Mr Savage more than its highest paid worker without the certainty of more offshore work, which was

more profitable for the company, yet this did not occur until some 18 months later. However, at the time of the signing of the agreement between the parties Arabac was confident of obtaining more profitable offshore work.

Determination

13. It is clear from the above that Mr Savage is entitled to be paid the arrears of wages owing. He claims a figure of between $7,256.50 (being his losses at the rate of $26 per hour) and $19,327.50 (being his losses at the rate of $28 per hour) before interest. I do not accept that Mr McLay on behalf of Arabac would ever have agreed to pay Mr Savage a rate of more than $26 per hour from 6 October 2001. This is because the well paid offshore work was not cemented in until after Mr Savage left.

14. The sum owing to Mr Savage is therefore $7,256.50, plus interest. Interest is not easy to calculate because the sum owing increased each week. However, it is clear that from 6 October 2001 until 7 January 2002, $1,831.50 became owed. Two years interest at 6% would be $219.78. Equally, between 7 January 2002 and 12 January 2004, $5,425 became owed. One year's interest at 6% is $325.50.

15. I therefore order the respondent, Aerial Abseil Access (NZ) Limited, trading as Arabac, to pay to the applicant, Scott William Savage, the sum of $7,256.50 gross in lost remuneration, and $545.28 gross in interest.

Costs

16. Costs are reserved in the event that Mr Savage has incurred any expenses that he considers that Arabac should meet.

G J Wood
Member of Employment Relations Authority