

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

[2014] NZERA Wellington 80
5444730

BETWEEN JAMAL ZAYTOUN
Applicant

AND MOHAMMAD MUSTAFA
KHAN TRADING AS BIT
TECHNOLOGY LIMITED
Respondents

Member of Authority: P R Stapp

Representatives: Ross Jamieson Counsel for applicant
Mr Khan in Person¹
No appearance for BIT Technology Limited

Investigation Meeting: 10 June 2014 at Wellington

Further Submissions: By 4 July 2014²

Date of Determination 28 July 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Zaytoun claims he was employed by Mohammad Mustafa Khan personally. He says that Mr Khan traded as BIT Technology Limited (BIT and/or BIT Technology) and says that the company was not his employer.

[2] Mr Zaytoun claims he has not been paid for his full hours worked and worked for less than the minimum wage. He says he ceased working in his employment

¹ Mr Khan only attended part of the Authority's investigation meeting and was not present for the full time. As the hearing had been set down for the full day and the evidence was completed I decided to proceed with Mr Jamieson's submissions.

² Arrangements were made for Mr Khan's representative to make written submissions in reply to Mr Jamieson's written submissions tabled at the investigation meeting. Mr Handy did not attend the Authority's investigation meeting for good cause which related to his personal reasons. He agreed for the Authority's arrangements to proceed. Mr Jamieson replied in writing.

because he was not properly paid. He claims that he has a constructive dismissal because the end of his employment was foreseeable given he was not being properly paid. He is claiming penalties for breaches of the Employment Relations Act and Minimum Wage Act (statement of problem and amended statement of problem lodged in the Authority). At the Authority's investigation he included a claim for instigating, inciting and aiding and abetting a breach. He is seeking wage arrears plus interest and compensation and costs.

[3] Mr Khan denies all the allegations and says that he was not Mr Zaytoun's employer, personally. BIT Technology Limited did not attend the Authority's investigation to defend the claims. It is no longer trading.

Issues

[4] Who was Mr Zaytoun's employer?

[5] Is Mr Zaytoun owed any wages for the hours he says he worked and who is required to pay (Mr Khan personally or BIT Technology Limited)?

[6] Do the employment agreement and wage and time records from Mr Khan have any veracity? Mr Zaytoun says the documents cannot be relied upon.

[7] In submissions from Mr Jamieson accusations and allegations have been made that Mr Khan personally instigated, incited and aided and abetted the wage underpayments, and further that he provided false wage time and holiday records. The former is a more particularised claim than the general matter claimed in the amended statement of problem seeking for penalties.

Facts and findings in the employment relationship problem

[8] Mr Khan is the director of BIT Technology Limited. BIT Technology Limited was incorporated on 28 August 2003. The business is involved in retailing computers and parts and repairs. It traded from stores in Newtown and Lower Hutt. Mr Zaytoun's employment was based at the Newtown shop. The business, involving both shops has since been sold, although Mr Khan's company BIT Technology

Limited remains registered, but is not trading. Mr Zaytoun started work on 22 September 2010.

[9] The employment came about through family associations and friendships.

[10] Mr Zaytoun was employed by BIT Technology Limited. My reasons are:

- a. That there is an organisational chart supporting the arrangements for the company. Mr Khan was listed as the director of the business. Mr Zaytoun was listed as a sales and HR person. The name of the company was clearly prescribed.
- b. That the purported timesheets and the Trainee Appointment Letter dated 16 February 2011 refer to BIT Technology Limited. Mr Zaytoun accepts that he signed the letter, but claims it is not a proper employment agreement as required under the Employment Relations Act. However, given that Mr Zaytoun did sign the appointment letter and having regard to the other documents, it is likely that there was some form of agreement between the parties and supports that Mr Zaytoun had knowledge of the existence of BIT Technology Limited, and as such makes it difficult for him to establish the undisclosed principal to claim that Mr Khan was his employer personally.
- c. That Mr Zaytoun was paid by BIT Technology Limited.
- d. That documentation involving Work and Income refer to BIT Technology Limited as the business and “employer”. The documents refer to a wages subsidy arrangement. The arrangement was signed off by Mr Khan as the director and Mr Zaytoun as the employee. The arrangement was dated 27 May 2011, after Mr Zaytoun had started work.
- e. That Mr Ashraf Zaman, a witness called by Mr Zaytoun, gave evidence that he worked personally for Mr Khan. However working for an individual may mean just that, but not necessarily being employed by them. The documentation about Mr Zaytoun’s situation does not convince me that I should rely entirely on what Mr Zaman says his situation was with Mr Khan. There was no employment agreement and Mr Zaman had no other documents

to support his contention. Further he says he did not know about the existence of BIT. That may be so, but I am still left with Mr Zaytoun's evidence and documents that make it more likely than not that BIT Technology Limited was his employer.

- f. That the family associations and friendships could explain Mr Zaytoun's genuine belief that he was working for Mr Khan personally, despite the legal situation. The mere existence of the company (named and registered and operating at the time) and that Mr Zaytoun knew about it makes it more likely than not the company was the employer, I hold.
- g. That there is conflicting evidence and much of what has been said and the interpretation of documents leaves the veracity of the wage time and holiday records and other documents, unexplained and untested by any thorough cross examination.

[11] Also, I have been informed that BIT Technology Limited is no longer trading. The claim that Mr Khan was the employer personally may therefore relate more to do with enforcement and getting any money owed from him. The two issues of the correct employer and enforcement have overlapped and became blurred. I am confident in my assessment and because there is an underlying issue about enforcement I am not striking out Mr Khan personally. The employment relationship problem may need to involve enforcement to bring it to a close. That may be a matter for the future. For the avoidance of any doubt any claim in regard to the responsibility of payment can be pursued in the current employment relationship problem, and/or separately as an enforcement action.

[12] Mr Zaytoun's claim for the hours he says he worked and the underpayment has not been defended by BIT Technology Limited at the Authority's investigation meeting, despite the claims being denied having regard to the statement in reply. Although the claim has been denied the lack of a proper defence, evidence and any witnesses means that I conclude that the claims must succeed on the basis of Mr Zaytoun's evidence of his claim. In this regard Mr Zaytoun's evidence was that he worked 57 hours per week. He says that he was not working in another business. He says that there were exchanges over pay and that he had to cope on what he received and waited to be paid fully. This is explained in the off-set calculations of the money

he received. He gave examples of situations when he needed money and that there were heated discussions about getting paid. He has raised serious doubt about Mr Khan's documentation and whether or not Mr Khan's documents are reliable considering his own records about the time he worked and the pay. On the basis of Mr Zaytoun's calculations and the hours he says he worked I accept the claim for \$83,054.75 arrears of wages. My reasons for the sum are:

- a. That the calculations for the hours worked have been set out in the amended statement of problem lodged in the Authority on 6 April 2014.
- b. That the periods of the calculations have been broken down to take account of the minimum wage applying in each period.
- c. That money received by Mr Zaytoun in the same periods has been deducted and accounted for.
- d. That Mr Zaytoun has his own records and notes of calculations and times.

[13] Mr Zaytoun is also entitled to holiday pay in the sum of \$921.25. This is the balance of leave required to be paid.

[14] No calculations have been done on the interest payable and no submissions made on the dates for interest to apply. Leave is granted to provide this for an order to be made later.

[15] I now turn to the claim for constructive dismissal from Mr Zaytoun. Mr Zaytoun has made his claim that he left his employment because he was not paid properly. He has established the claim and that the underpayment of wages was significantly serious to make it foreseeable that he would leave his employment. He raised the matter with his employer first, and coincidentally the employer initiated mediation with a claim for a laptop computer to be returned.

[16] Mr Zaytoun has claimed \$15,000 for compensation. He has not contributed to the personal grievance given it related to the employer failing to pay wages properly

(s. 124 of the Act applied). I hold that the evidence for compensation from Mr Zaytoun about the financial impact on him and how he felt should amount to \$5,000. There is no claim for any other lost remuneration because Mr Zaytoun wants to recover the large amount owing as his primary interest.

[17] On the matter of penalties the company is no longer trading, and as such little purpose would be achieved in making any order for penalties as originally claimed for breaches of the Employment Relations Act and the Minimum Wage Act. It would cause an unacceptable cost for the Crown to chase money that is likely never going to be recovered without its own costs and risks. Also, I am of no mind to order penalties to be paid to Mr Zaytoun because his remedies fix his employment relationship problem and he has an order for the amounts he is owed plus interest to be calculated for being deprived of the use of the money he was entitled to, and he has been awarded compensation for a personal grievance.

Orders of the Authority

[18] BIT Technology Limited is to pay Jamal Zaytoun;

- a. \$83,054.75 arrears in wages;
- b. \$921.25 holiday pay;
- c. \$5,000 compensation for hurt humiliation and loss of dignity in terms of s 123 (1) (c) (i) of the Employment Relations Act.

[19] Leave is reserved for a calculation on interest (that would have to be set at 5%), if required. There have been no submissions made on the calculation and dates for interest and the period it should be applied to.

[20] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority