

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Dario Zgomba (Applicant)
AND Bryce Eggers t/a Supreme Classic and Supreme Classic Limited
(Respondents)
REPRESENTATIVES John Langford for the Applicant
No Appearance for the Respondents
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 15 December 2005
DATE OF DETERMINATION 16 December 2005

DETERMINATION OF THE AUTHORITY

Non Appearance for the Respondents

[1] Bryce Eggers t/a Supreme Classic and Supreme Classic Limited were not represented at the Authority's investigation meeting. There was no appearance for the two respondents.

[2] I was satisfied that both respondents were on notice of the employment relationship problem lodged in the Authority (Track and Trace and Respondents' letter dated 30 August 2005).

[3] Bryce Eggers accepted service personally through the company's registered address. He wrote to the Authority on 30 August 2005 personally. His letter establishes

- That he personally was aware of the employment relationship problem. He requested to be removed personally from the proceedings.
- That the letterhead identifies the company, Supreme Classic Limited and Supreme Classic as a trading name.
- That the place of service was the company's registered office.

[4] Bryce Eggers is also a director of the company.

[5] I was satisfied a notice of direction of the Authority dated 4 November 2005 and a notice of investigation meeting dated 4 November 2005 were served on the respondents. No mail was returned from the address of the registered office of the company, where Bryce Eggers had earlier accepted service personally. I conclude that the notice was delivered and accepted.

[6] Pursuant to clause 12 of Schedule 2 of the Employment Relations Act no good cause has been shown for the respondents failing to attend or be represented. I have continued to act in the matter and proceeded.

The facts

[7] Mr Zgomba was a commissioned car sales person. He says he worked for Bryce Eggers t/a Supreme Classic.

[8] Bryce Eggers, a director of the company claims he never has traded as Supreme Classic. He claims that the applicant's employer was Supreme Classic Limited. He says an employment contract proves this.

[9] Mr Zgomba says he was employed from September 2004 until 1 March 2005. He says he resigned from 1 March 2005. He says he is owed \$5,301.78 final pay from his employer made up of the following:

○ Received Gross Earnings	\$23,908.60
○ Plus Gross Earnings Owed	\$3,365.34 (see below for the calculation)
<u>Total for Holiday pay calculation</u>	<u>\$27,273.94</u>
○ Holiday Pay (6% of total Gross Earnings above)	\$1,636.44
○ Two Statutory Holidays at time and a half	\$300

[10] He has calculated commission owing on 2 cars as:

○ 10% gross profit of \$3,871.88	\$387.19
○ 10% gross profit of \$4,781.48	\$478.15
<u>Total</u>	<u>\$865.34</u>

[11] He says he is entitled to bonuses for 3 car sales of \$1,000, \$500 and \$1,000. The total claimed is \$2,500. The total commissions and bonuses claimed is \$3,365.34. Plus the holiday pay and 2 Statutory days Mr Zgomba's claim is \$5,301.78.

Terms of Employment

[12] There was no written employment agreement produced. Mr Eggers referred to the existence of an employment contract. He promised to provide a statement in reply. It never eventuated despite being given an extension of time.

[13] I accept Mr Zgomba's evidence that his terms were verbally agreed in a discussion he had with Mr Eggers upon agreeing to work:

- \$100 per day to work 6 days per week (\$600).
- 10% of the gross profit per sale as commission.
- Payment for Statutory Holidays.

[14] Mr Zgomba says that later Mr Eggers offered him bonuses to sell difficult cars. The bonus sums would be raised by Mr Eggers at the beginning of a month. Mr Zgomba referred to three instances that are the basis of his claim above.

[15] I have accepted Mr Zgomba's evidence because he gave it in person. His oral evidence was consistent with the written statement he made and the information provided in the statement of problem. Mr Eggers did not take the opportunity to reply. He did not reasonably provide the employment contract and did not appear at the Authority's investigation meeting.

Who was the Applicant's Employer?

[16] Mr Zgomba says Mr Eggers employed him as a commissioned sales person. He says Mr Eggers traded as Supreme Classic.

[17] The factors supporting him were:

- That he gave his evidence in person. It was consistent with his written statement and information in the statement of problem.
- No employment contract was produced by the company and Mr Eggers.
- Mr Zgomba's evidence was not reliably contradicted.

- Mr Zgomba had been previously employed by Supreme Classic Group Limited. This involved another person. He says his employment with Bryce Eggers involved informal discussions at the time and Mr Eggers agreeing to finalise an employment agreement that never happened.
- Mr Zgomba referred to the businesses accountant and could identify him acting for the company but he was not sure for certain that the accountant was Mr Eggers' personal accountant. He says he referred to Supreme Classic Limited in his instructions to his lawyer to get his money because he had no success getting it from Mr Eggers and was frustrated. Emails he has produced support the bonus arrangement, and his employment by Bryce Eggers trading as Supreme Classic. The emails do not provide any certainty of any other arrangements with the company.

[18] There were also some factors that supported the company being Mr Zgomba's employer.

These factors were:

- The existence of the name of the company on the letterhead of the letter dated 30 August 2005. The trading name was also present on the letter signed by Mr Eggers.
- Mr Zgomba referred in an email dated 21 July 2005 (12.29) to his solicitor that his efforts *to recover the \$5,301.78 owing to me have been in vain and I am wondering if you would write to Supreme Classic Limited on my behalf and recover the funds owed....*In other words Mr Zgomba knew of the existence of the company and was making his demand for payment on it. He explained he did this because he had got nowhere with Mr Eggers.
- Mr Zgomba's knowledge of the accountant used in the business was the company's accountant.

[19] Examples of Mr Zgomba's pay slips were produced. These referred to Supreme Motor Group Limited. Mr Zgomba disclosed that he had been previously employed by it and resigned. It was not referred to by Mr Eggers in the letter dated 30 August 2005. I have to conclude that its role as paymaster remains unexplained.

[20] Also, a copy of a bank statement from Mr Zgomba was produced that refers to *Supreme Motor Group Supreme Motors Group Wages*. This does not help the situation but does not rule out a personal arrangement by Mr Eggers.

[21] I conclude, on balance, and accept Mr Zgomba's evidence that his employer was Bryce Eggers trading as Supreme Classic applying the doctrine of the undisclosed principal that Mr Zgomba was not told and properly informed of his employer. Also I accept Mr Zgomba's evidence that although another company in the group previously employed him it did not mean that he should have assumed that he was employed by Supreme Classic Limited. I hold that he reasonably believed his employer was Bryce Eggers. This was reasonably open to him to conclude given the failure of the respondents to produce an employment agreement and failed to reply and explain the situation. The law permits the claim to be brought against Bryce Eggers trading as Supreme Classic.

How much is the Applicant owed?

[22] I accept Mr Zgomba's evidence that he is owed \$5,301.78. He has been able to explain his claim. The respondents were requested to produce wage and time records and failed to do so. Mr Zgomba supported his claim with details in the statement of problem, his evidence and emails.

[23] The applicant explained the 2 days in lieu was for not being paid for work on Statutory holidays that he was entitled to at time and 1 half for working on 26 December 2004 and 2 January 2005. He provided me with the details of delivering and selling cars to 2 clients respectively. In the absence of the time and wage records I requested the respondents to provide I have accepted the applicant's claim.

[24] The applicant explained his claim for bonus payments for selling 3 difficult cars that Mr Eggers agreed to pay bonuses on as claimed.

[25] Mr Zgomba's calculation of holiday pay is based on 6% of his total gross earnings.

Award to the Applicant

[26] I order Bryce Eggers trading as Supreme Classic to pay Dario Zgomba the sum of \$5,301.78 commissions, bonuses and holiday pay. He is entitled to interest from the date the money was due to him and he has been denied payment for his own use. I order that Bryce Eggers trading as Supreme Classic pay interest of 7.65% per annum on the above sum from 1 March 2005 until the day of the payment being made. Leave is granted for a determination on the sum if agreement cannot be reached between the parties.

A claim for costs from the Applicant

[27] This is a matter for costs. The applicant has had to bring these proceedings to get his entitlement paid. It appears from the file record of these proceedings that the Authority's support officer attempted quite correctly to get the parties to attend mediation services provided by the Department of Labour. The record shows that there was no cooperation from the respondents. The respondents have caused the delays by not answering messages, not replying to messages and taking no initiatives knowing the problem existed. I hold that the respondents have been evasive also.

[28] Therefore the applicant was denied by the respondents the opportunity to attend mediation to try and save costs. This has been directly caused by the behaviour of the respondents and leaving it open to conclude that they have breached their duty to act in good faith.

[29] The sum of \$1,150 costs has been requested by the applicant. The sum is moderate and within the range for costs for a fixture lasting as long as this one did. Mr Zgomba has been represented by Counsel arranged for today's investigation meeting in place of his usual representative who had another fixture. I accept that there was preparation required.

[30] Therefore, Bryce Eggers trading as Supreme Classic and Supreme Classic Limited are jointly and severally to pay Mr Zgomba the sum of \$1,150 costs and the \$70 filing fee.

P R Stapp
Member of the Authority