

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Andrew Schaw (First Applicant)
AND Andrew Schaw (Second Initiating party)

AND Compac Sorting Equipment Limited (First Respondent)
AND Compac Sorting Equipment Limited (Second Responding party)

REPRESENTATIVES Andrew Gallie, Counsel for Applicant
Richard Harrison, Counsel for Respondent

MEMBER OF AUTHORITY Dzintra King

INVESTIGATION MEETING 24 June 2005
11 November 2005

SUBMISSIONS RECEIVED From applicant 28 November 2005, 6 January 2005, 2 February 2006
From respondent 6 and 17 January 2006

DATE OF DETERMINATION 3 April 2006

DETERMINATION OF THE AUTHORITY

The applicant, Mr. Andrew Schaw, claims that he has been unjustifiably dismissed by the respondent, Compac Sorting Equipment Ltd; and seeks various monetary remedies. The respondent denies the allegations.

Employment Status and Offer of Position in the United States

In an earlier determination I found that Mr. Schaw was an employee, not a contractor.

While in the United States, Mr. Schaw accepted a short term position as an employee with the respondent. After a few weeks there were discussions between Mr. Schaw, Mr. Tim Seeley, the Manager of Compac Sorting Equipment Inc, an American subsidiary of Compac Sorting Equipment Ltd, and Mr. Dave Buys, the International Sales Director for the New Zealand company. What was agreed in the course of the discussions is the subject of dispute. I found in my earlier determination that Mr. Schaw was offered and accepted a position as Technical Manager for the United States company, that he had accepted a weekly salary of NZ\$1,800 and that it had been agreed that he would be expected to work an average of a 50 hour week and that time worked above that would be compensated; but that the rate and means of compensation had not been agreed. I also found that Mr. Schaw had never agreed that he was a contractor. At the time he commenced carrying out the duties of the Technical Manager he remained an employee of the New Zealand company.

Offer and Acceptance

In order to become an employee of the United States company Mr. Schaw needed an appropriate visa. He accepted that the visa he held at the time – a B1 visa - did not permit him to be an employee of a US company.

On 4 November Mr. Seeley said in an email:

I discussed that the position is contingent on him [Mr. Schaw] acquiring a US residency status and he could then become an employee of Compac Sorting Equipment, Inc, until that is in place he would continue to work for Compac under the current terms.

A letter dated 18 November contained a written offer of the position of Technical Manager and stated:

The offer of a permanent position is subject to the following:

- *Work permit/residency for USA is obtained within the next 6 months.*
- *The role is an employee of Compac Sorting Equipment Inc (not a contractor) and subject to the usual taxes etc.*
- *Current contractor arrangement with Compac NZ of NZ\$1800 per week continues until the above work permit is obtained.*
- *A working relationship is established with Sun Pacific which allows your access to their sites. If this is unable to be achieved [sic] Compac reserves the right to withdraw this offer.*

At the time this written offer was made Mr. Schaw had accepted the offer of the position but had not been provided with a contract.

The respondent says that Mr. Schaw, who refused to sign this offer, had nevertheless accepted its terms verbally. I found previously that he did not accept that he was a contractor but made no finding about whether he had agreed to obtain a work permit/residency within a specific time period.

On 25 February a position offer said to replace the 18 November offer was sent to Mr. Schaw. It stated:

The offer of a permanent position is subject to the following:

- *Work permit/residency for USA is obtained within 12 months.*
- *An inter-company transfer “L” work visa is arranged by Compac NZ for employment by Compac Inc within 2 months*
- *Employment by Compac Sorting Equipment Inc as a manager and subject to the usual taxes etc.*
- *A working relationship is established with Sun Pacific which allows your access to their sites. If this is unable to be achieved Compac reserves the right to withdraw this offer.*

Mr. Schaw did not accept this revised proposal. Instead he consulted a solicitor, Mr. Gallie, who wrote on 11 March to Compac saying:

Currently Andy is employed pursuant to the terms and conditions set out in the position offer dated 18 November 2004.

I can advise that the proposal for variation contained in your correspondence of 25 February this year is not accepted by Andy with Andy's preference to retain, subject to the adjustments detailed below, the base terms and conditions pertaining by virtue of the document dated 18 November 2004.

There was reference to the Holidays Act, s.69N Employment Relations Act, the pay rate and compensation for overtime.

Mr. Robert Shaw, the General Manager, replied on 11 March saying:

A fundamental question which has not been answered in your letter is the ability of Mr. Schaw to work for Compac Sorting Equipment Inc. The B1 visa is a visitor visa and is not a work visa. Mr. Schaw requires a work visa to work for a US company. We have proposed an "L" visa, but you are silent in this matter. To enter negotiations requires first a resolution of this matter.

The response to this from Mr. Gallie was:

- 1. Currently Andy is employed on a permanent basis by Compac Sorting Equipment Limited and that will obviously remain the case whether or not there exists a position at Compac USA.*
- 2. Currently Andy has been working in USA pursuant to a B1 visa and as an employee of Compac Sorting Equipment Limited, although we understand seconded to Compac Sorting Equipment Inc. This arrangement can presumably continue.*
- 3. The obtaining by Andy of a B1 visa in the current instance was supported by Compac Sorting Equipment Limited and in this regard we refer you to the letter of 21 February.... Implied in this is the proposition that it was at all times intended that Andy would continue to be employed by Compac Sorting Equipment Limited as per the previous arrangement.*

Mr. Shaw replied on 21 March:

- 1. Mr. Schaw is currently a contractor to Compac Sorting Equipment Limited as set out to him in the offer dated the 18th November. ... The offer dated 18th November has not been formally accepted nor the conditions met to date....*
- 2. Compac has made an offer dated the 25th February for Mr. Schaw to be employed by Compac Sorting Equipment Ltd until such time as he could become an employee of Compac Sorting Inc (USA). This offer has not been accepted as is obviously the subject of the current negotiations.*
- 3. The application for B1 visa has progressed on the basis of Mr. Schaw becoming an employee of Compac Sorting Equipment Ltd until such time as the correct visa can be obtained.*

Visas

There was a great deal of discussion as to which visa was appropriate. Mr. Schaw and his partner wished to renew their B1 visas and Compac wanted Mr. Shaw to apply for an L visa. On 21 February Compac endorsed Mr. Schaw's and Ms Hellyer's applications for a B1.

Ms Deanna Barnard wrote to the Consulate General:

We write in support of the applications of B1 Temporary Work visas for Mr. Andrew Schaw and Ms Katrina Hellyer.

...

In the future we aim to have US-based staff knowledgeable in this field; we expect to have appointed and trained staff within 2 years. In the meantime, we would like to have Mr. Schaw and Ms Hellyer based in the USA, in order to provide those services required by our customers.

...

Ms Schaw and Ms Hellyer would remain employees of Compac NZ. ... We see their tenure in the USA as being between 16 and 24 months, and would be grateful if you could grant them permission to enter the USA with Work Visas for this period.

I accept that this endorsement was intended to be in the nature of a holding exercise while another visa was agreed upon but it was a most unwise move on the part of the respondent. While telling the US immigration authorities that Mr. Schaw was an employee the company was asserting to Mr. Schaw that he was a contractor and telling him he had to obtain a US employee visa.

On 22 February Mr. Robert Shaw emailed to Mr. Schaw as follows:

Following the various conversations last night and the below comments from Kat, we again reviewed the background and objectives for enabling the residency of you both in the USA. We considered the following:

- *How to reduce/eliminate the commercial risk for Compac NZ*
- *What are the risks in applying for both a B1 and L visa/permit*
- *The USA definition of spouse vs partner*
- *The ongoing role for Andy within Compac USA*

In conclusion we accept there is a risk in applying for a B1 and L visa/permit combination, however there is still also significant risk for Compac NZ with Andy working under a B1 in the USA. The current situation cannot continue. A solution to these issues is as follows:

- *Application for a B1 visa for both of you continues*
- *Andy becomes an employee of Compac NZ (not contractor)*
- *Andy confirms NZ residency with the IRD*
- *Normal NZ taxes are paid with standard benefits (eg ACC)*
- *Compac NZ treats Andy as an ex-pat for health and travel insurance*

I trust we can proceed on this basis

Regards Bob

On 7 March Ms Barnard emailed Mr. Schaw as follows:

In order for us to lodge a "Petition for a Nonimmigrant worker" to the USCIS, which is required in order for you to obtain an "L" visa, we will need the following information from you:

CV showing all expertise and qualifications

NZ physical address

Passport details (showing day/place of birth and full name)

Kind regards

Deanna

Meeting of 23 March

On 23 March Mr. Schaw attended a meeting at which Mr. Shaw and Ms Barnard were also present. Visa and employment issues were traversed. There was no indication that termination was being considered. Mr. Shaw said, for example, that they would have to think about the issue of the hours and get back to him. There was mention of a green card application having been made. This is a lottery for US residency. Mr. Schaw is noted as saying that he was happy with the offer of 18 November apart from the hours. He said he wanted to talk to an expert on visas as he thought an H or E visa would be better for obtaining residency than an L visa, which is what the company wanted. Mr. Schaw also said that if the company was concerned about tax they could tax him in New Zealand.

Termination

The following day Mr. Schaw received a letter of termination. This says:

You verbally accepted our offer of November 18... The subsequent offer of 25th February has not been accepted by you. ... You are now not able to meet the conditions of the November 18 offer and we must therefore advise it is withdrawn.

On 31 March Mr. Gallie notified the company that Mr. Schaw believed he had been unjustifiably dismissed. In that letter Mr. Gallie said:

The Company's decision to terminate the relationship appears to have been based primarily on the fact that Mr. Schaw had sought legal advice in the context of seeking to negotiate ongoing terms and conditions of employment and that you have claimed an erosion of trust and confidence as a result of his doing so.

Mr. Gallie also made passing reference to a confidentiality deed entered into during a previous period of employment when seeking reimbursement for two years. The confidentiality document contained a restraint of trade for a two year period.

Decision

Mr. Schaw's employment status with the NZ company was not that of a permanent employee. His employment status with Compac Sorting Equipment Ltd was of an interim nature, pending his obtaining the correct visa to enable him to become an employee of Compac Sorting Equipment Inc.

A major issue is what the duration of the interim arrangement was and what would happen if he did not obtain a visa allowing him to work for the US company, which was the position that he had been offered and accepted.

During the investigation Mr. Schaw said he had not seen the letter Mr. Gallie wrote on 11 March stating that he was employed pursuant to the letter of 18 November prior to its being sent. I think Mr. Schaw is mistaken. On the balance of probabilities I find that Mr. Schaw did accept the six month period set out in the letter of 18 November. Mr. Gallie's letter is evidence of that acceptance. If Mr Gallie had misconstrued Mr Schaw's instructions it is odd that Me Schaw made no attempt to rectify the impression given in that letter until the second hearing. What Mr. Schaw had problems with was not the time period but his employment status, the type of visa and compensation for overtime.

Indeed, whether or not Mr. Schaw agreed to the time restriction on the obtaining of the US work visa it is implicit in the arrangement that such a visa would have to be obtained and that it would need to be obtained as soon as possible. The company had quite legitimate concerns which were set out in Mr. Shaw's email of 22 February. Mr. Schaw had not paid tax in either the United States or New Zealand and the company also had a concern regarding its potential liability in the United States if nexus were established.

I appreciate that Mr. Schaw had concerns about the type of visa that would best suit him insofar as obtaining residency in the US and his partner's ability to live in the US with him were concerned. However, Mr. Schaw could not dictate the type of visa. If the visa being proposed by the company was not acceptable to him for personal reasons then he was not in a position to take up the Technical Manager's job that had been offered. He could certainly raise his concerns with the company, which he did; and the company endeavoured to accommodate him.

Justifiability

The dismissal was unjustifiable. Mr. Schaw had no warning that the arrangement would be terminated. He had asked for additional time and had not been told he could not have it. The fact that the company considered that the visa requirements could not be met within the specified time period was not put to him; and in any event the company had clearly previously been prepared to extend the deadline. People not present at the 23 March meeting were involved in the decision making and that also was unfair.

Remedies

1. Reinstatement

This is not possible. The period for which Mr. Schaw was to have been employed by the respondent has expired. Mr. Schaw still does not have an appropriate visa to be an employee of the American subsidiary.

2. Reimbursement

Reimbursement can only be awarded for the period up to 17 May 2005. In regard to the matter of reimbursement the fact that Mr. Schaw made no attempt to mitigate his loss has been raised.

Mr. Schaw says that he was bound by a restraint of trade entered into on 8 August 2003. The heading was "'Competition'". This purported to prevent Mr. Schaw from:

for a period of two years thereafter conduct[ing] on [his] own account or be[ing] concerned or interested in whether directly or indirectly with any other person, firm or corporate conducting the business of manufacture or sale of products which compete with the Company's products.

The enforceability of such a clause is clearly arguable. Mr. Schaw says that when he was terminated Mr. Nagele told him that the company would enforce the restraint. When discussions did finally take place between the parties' representatives Mr. Schaw was informed that the company was not seeking to enforce the restraint. Despite having been given that information Mr. Schaw surprisingly continued to assert that he was bound by it. Mr. Schaw said that he had not attempted to find other employment because of the restraint and because he had made an interim reinstatement application.

The respondent says that while Mr. Schaw was in the USA he made efforts to find other employment with a company called Paramount and so it is obvious that at that stage he did not consider he was bound by the restraint or even give it consideration. However, Paramount was a client of Compac's and would not have fallen within the ambit of the restraint in that it did not manufacture or sell products.

While I accept that the matter of the restraint was obliquely raised in Mr. Gallie's letter of 31 March it was not until after my previous determination was issued that the parties talked about the matter. Mr. Schaw said he had not discussed it with Mr. Gallie and had made no attempt to ascertain its enforceability.

Mr. Schaw did not take steps to mitigate his losses and I am therefore unable to make an award of lost remuneration.

Reasons for Dismissal

Mr. Schaw maintains that he was dismissed because he had hired a lawyer to assist him in his dealings with the respondent. I can understand why this claim has been made; there is a closeness in time between the obtaining of a lawyer and the termination of employment. However, I do not think the link is strong enough for me to be able to say that but for the hiring of Mr. Gallie Mr. Schaw's employment would not have been terminated. I think the overriding reason for a frustration with the lack of progress on the visa issue.

Compensation

Mr. Schaw was unjustifiably dismissed and deserves to be compensated. I accept his evidence that the termination was a shock and was unexpected. He believed he was still in the process of negotiation and had no advance warning that the respondent was intending to terminate. The respondent is to pay Mr. Schaw the sum of \$8,000 pursuant to s.123 (c) (i).

Overtime Claim

I am unable to make any award for the extra works as there was no evidence that any agreement as to the rate of compensation had been agreed. However, given that the respondent did make an offer regarding the hours it may be that this is something it can reconsider in the interests of fairness.

Holiday Pay

Mr. Schaw was on leave while he was in New Zealand. However, I am satisfied that that leave was in the nature of time in lieu for overtime hours worked and not annual leave. Annual leave payments should therefore be made to Mr. Schaw.

Penalty for Breach of Holidays Act

I decline to award a penalty for breach of the Holidays Act. This was not a case where the respondent deliberately refused to make the appropriate payments. The respondent, mistakenly, maintained that the applicant was a contractor.

Penalty for Breach of s.4A Employment Relations Act

Mr. Gallie submitted that the employer had intended to undermine the employment agreement or employment relationship. I am unable to make a finding that this was the case. Until the sudden

termination took place the parties were negotiating and the employer was making efforts to accommodate Mr. Schaw.

Unjustified Action

I accept that Mr. Buys and Mr. Schaw had a heated exchange. Mr. Schaw said he “felt” verbally abused by Mr. Buys. I do not have sworn evidence from Mr. Buys. If Mr. Buys did call Mr. Schaw a “fucking wanker” then that is clearly unacceptable. However, I suspect that Mr. Schaw’s memory of the call is coloured by subsequent matters and is the opposite of emotion recollected in tranquillity.

Expenses

The respondent has agreed to pay relevant work related expenses upon production of receipts. The future loss claim cannot stand because reimbursement is limited to 17 May 2005. I am uncertain about the Xpress Rentals claim and the parties need to discuss this and attempt to ascertain what part of this is related to the period of employment. If the parties cannot reach agreement on the expenses claim issue leave is reserved to come back to the Authority.

Allowances

Mr. Schaw has claimed allowances for two periods of work preceding the one at issue in this and the previous determination. Those periods were a fixed term employment period from 8 August 2003 to 14 March 2004 with Compac and a period with Sun Pacific from 14 March 2004 to 30 August 2004 when Compac paid the wages.

The offer accepted by Mr Schaw for the fixed term period makes no reference to overnight allowances being payable. I do note that the remuneration for the US employment was significantly higher than the NZ employment and that the employer undertook to provide accommodation both in NZ and in California. There is no contractual basis for this claim.

Mr. Schaw had previously indicated that he was not owed any additional monies for the period during which he was seconded to Sun Pacific. Also, I have no evidence of any agreement that overnight or sharing allowances would be paid for this work.

Interest

If Mr. Schaw was not paid his final salary until June then he should receive interest at the rate of 7% from the date of dismissal until the time the money was paid. He is also entitled to be paid interest on his holiday pay at the same rate.

Statutory Holidays

Unless there is a dispute about whether Mr. Schaw worked the days in question he is entitled to be paid for working them and also entitled to be paid interest on arrears.

Claim for Loan Recompense and Relocation

I cannot make any orders in this regard. The period of employment ceased on 17 May 2005 and I was not given any evidence regarding agreement to pay relocation.

Contribution

While Mr. Schaw did contribute to the personal grievance by questioning and delaying visa applications, this behaviour is not blameworthy as it was part of a negotiating process and I therefore decline to make any reduction in the remedies.

Costs

The parties should try to settle this themselves. If they are unsuccessful in doing so the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority