

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Mark Abraham Jose (Applicant)

**AND** Barter and Exchange Limited trading as Victoria Motor Services  
(Respondent)

**REPRESENTATIVES** Gail McAsey for the Applicant  
Susan Robson for the Respondent

**MEMBER OF AUTHORITY** P R Stapp

**INVESTIGATION MEETING** Wellington,

**DATE OF DETERMINATION** 15 December 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] Mark Jose is seeking money he believes he is owed by Barter and Exchange Limited trading as Victoria Motor Services (Victoria Motor Services) for airfares and accommodation (amounting to \$4,283.50 or \$6,814), final pay for 7.5 hours' work or a final week's pay amounting to \$420, holiday pay (amounting to \$1,067.05 or \$1,080.49) and the payment of \$300 cash for painting the workshop. He has also claimed \$10,000 for compensation for damages-not specified.

[2] Victoria Motor Services' owners, Manuel and Judith Mendoza, denied the claims. They say Mr Jose refused to work out his two weeks' notice, was responsible for the workshop having to close resulting in losses to the business, and are claiming from Mr Jose the sum of \$731.17 for parts and tools put on account by him during his employment.

**Background and facts**

[3] Prior to being employed by Victoria Motor Services, Mr Jose was employed by another company, Auto Supreme Group, under a work visa from immigration services.

[4] In November 2004, Mr Mendoza and Mr Jose discussed the prospect of Mr Jose working for Victoria Motor Services provided Mr Jose made arrangements for a variation to his work visa. A letter dated 17 November 2004 on Barter and Exchange letterhead that referred to Victoria Motor Services and a MIKKEN Trust was prepared by Mr Mendoza and signed and given to Mr Jose to read and sign. Mr Mendoza says he only received a signed copy back at mediation (October 2005). Messrs Jose and Mendoza dispute the place where the letter was handed over, at the service station or Mr Mendoza's home, respectively.

[5] The letter included the following matters:

- A rate of pay of \$NZD14.00 per hour.
- Hours of work: 40 hours per week, maximum of 60 hours.
- Travel and accommodation. A Trust called MIKKEN Trust, would pay for second class airfares for Mr Jose and his family to Wellington, New Zealand and back home (to the Philippines). Mr Jose had to pay his rent to MIKKEN Trust.
- Timesheets would be required in order for Mr Jose to be paid.
- Insurance would not be provided by Victoria Motor Services.
- Immigration: Every attempt would be made to assist Mr Jose, who was required to obtain a valid visa, to allow him to remain and work in New Zealand.
- The duration of the contract would be dependant upon performance.
- The start date would be as soon as Mr Jose was allowed to work lawfully.
- The expiry date of the offer would be 30 December 2004.

[6] Mr Mendoza says the letter was prepared for the purpose of assisting Mr Jose to get a variation to his work visa because he was having difficulties with immigration. Mr Jose denied having any difficulties with immigration.

[7] Mr Mendoza says that at that time he was completing due diligence to purchase Victoria Motor Services and he hoped to settle before end of the year. He says that the negotiations for the purchase fell through but were recommenced in December 2004. An agreement for sale and purchase was reached for taking over the business on 7 January 2005, and Mr Mendoza says he had a further discussion with Mr Jose about becoming an employee. Mr Jose says that the letter dated 17 November was his employment agreement and he planned to change his employment and arrange for his two daughters to join him, which they did on 24 January 2005. His wife joined him later, on 29 August 2005.

[8] Mr Mendoza says he gave Mr Jose a letter of job offer dated 26 January 2005, upon the completion of taking the business over, and an employment agreement and job description were attached to it. Mr Jose accepted that he received the letter but did not receive any attachments.

[9] Mr Jose says he applied to the immigration service for a variation on the conditions of his work visa on 4 February 2005. He commenced work at Victoria Motor Services on 7 February 2005 with a variation.

[10] Mr Mendoza says that when he obtained information that he was required to make changes to allow for the new Holidays Act he presented Mr Jose with another agreement (the second agreement) to sign and return. Mr Jose denied this. He remained adamant that the letter dated 17 November 2004 represented his employment agreement.

[11] During Mr Jose's employment the following occurred:

- The parties agreed to deductions being made to Mr Jose's wages for the payment of hand tools purchased for Mr Jose's use by Mr Mendoza. These deductions continued over twenty pay weeks. Agreed deductions were also made for a purchase of a van. The agreed arrangements were made verbally.
- Mr Jose agreed with Judith Mendoza for deductions to be made from his wages for automatic payments to pay his rent to the MIKKEN Trust.
- Agreement was reached that Mr Jose would be paid \$300 cash for painting the workshop. This was an outstanding matter when Mr Jose resigned. Mr Jose denied agreeing that the sum was to be off set for tools and other items ordered by him at work.

[12] Mr Jose resigned on 9 September 2005. He says that he offered to work out any notice until 13 February 2005 but that Mr Mendoza told him "*it didn't matter, today or tomorrow, it makes no difference*". Mr Mendoza denied that he said this and says he got in two casuals to complete Mr Jose's work on 10 and 11 September 2005, because he was not sure Mr Jose would return after he says he declined Mr Jose's offer to continue to work, but for \$26 per hour. Mr Jose denied saying this. Mr Mendoza agreed that he said to Mr Jose that he was leaving the business in the lurch.

[13] Mr Jose says that he returned to work on Monday 12 September and there was nothing for him to do so he handed in a written resignation to take effect from 13 September. He says that Mr Mendoza said to him "*You don't have to work here any longer as it does not make any difference at all, today or tomorrow or you can go now*". He says he left after that. Mr Mendoza denied making the comment. Mr Jose confirmed the events of the 12<sup>th</sup> in a pre-dated email written on Sunday 11 September about what had happened.

[14] Mr Mendoza denied letting Mr Jose go as he wanted him to work out two weeks' notice under the agreement of 26 January. Mr Mendoza says Mr Jose decided to leave because he would not pay him the \$26 per hour that another employer was prepared to pay him. Mr Jose denied this. In the meantime, Mr Jose had received an offer for other employment on 31 August and accepted it on 1 September 2005. Mr Jose agreed to start work with the new employer on 14 September for \$18.35 per hour.

[15] Mr Jose and the Mendozas then had a dispute on the amount of Mr Jose's final pay and holiday pay due. The Mendozas off set pay in lieu of notice not worked out by Mr Jose and the \$300 cash for the painting. Initially Judith Mendoza deducted two weeks wages in lieu of notice from Mr Jose's final pay but corrected this upon receiving advice. The \$300 cash owing to Mr Jose for painting the workshop was offset from the wages and holiday pay total. The Mendoza's say Mr Jose owes them a total of \$731.17 for items and tools Mr Jose put on account, and \$90, for tow away fees. Mr Jose denied that he owes any money for the cost of these items.

[16] Mr Jose did not accept two cheques (the first for \$399.00nett and a replacement for \$225.04nett) that the Mendozas sent him, for the payment of the amount they believe they had to pay him, because one cheque was made to the wrong person and the second cheque Mr Jose says was not what he was entitled to.

### **Decision**

[17] Mr Jose was employed by Barter and Exchange Limited from 7 February 2005 until 9 September 2005, although he did go into work on 12 September but did not work. He was paid \$14.00 per hour according to the wage and time records produced.

[18] There are a number of issues in this matter. They are:

- What was the parties' intention for the 17 November letter?
- What happened between Mr Jose and Mr Mendoza on 9 and 12 September 2005?
- What would reasonable notice be?
- What is the correct calculation for the final pay and holiday pay?
- Does Mr Jose owe any money to Victoria Motor Services for items and tools?
- Determine various factual issues that exist between the parties.
- Has the employer incurred any damages?

[19] I can determine the matter of credibility immediately. I have preferred the Mendozas' evidence as being more reliable than that given by the Joses. My reasons are:

- Mr Jose did not reasonably disclose during these proceedings that he was responsible for at least two of the items he listed for the Mendozas that he had ordered during his employment, on account and not paid for. He acknowledged that he owed money for them, and had kept the items in his possession. He did not reasonably disclose that he had paid \$100.13 on invoice to a Sulco representative and that it was repaid to him when the representative had found out it had been paid by Victoria Motor Services. His initial payment of the Sulco sum supports him accepting some responsibility for the item that he had in his possession. He did not reasonably disclose that he had accepted another job on 1 September 2005 to start on 14 September when he gave his notice to Mr Mendoza on 9 September. Mr Jose explained that he thought he would not be paid if he did give earlier notice. First, this would be consistent with a view that he did owe the Mendozas some money. Second, Mr Mendoza's reaction to Mr Jose leaving the business in the lurch supports Mr Mendoza needing him to continue working when he was the only full time mechanic

working at that time. Third, Mr Jose gave evidence that he was prepared to work out any notice and told the Authority that he could have made other arrangements to start later with his new employer.

- Mr Jose's evidence was not plausible on not giving earlier notice because he says he thought he would not get paid. Mr Mendoza put in place special arrangements during the employment for Mr Jose to pay for tools he needed to purchase at the start of his employment. This involved payments deducted from Mr Jose's pay over 20 weeks instead of 10 weeks that the distributor would normally require. During the Authority's investigation the Mendozas explained that they did not seek further payments from Mr Jose for items he had ordered at the time because they considered he could not afford any more deductions from his pay and at the time the system for accounting for invoices needed to be changed to identify invoices with account numbers and names. I accept their evidence in the absence of anything to challenge it and that it was supported by Mr Jose's list of items and the various invoices produced.
- Mr Jose could not adequately explain his pre dated email of 11 September on the events of 12 September about what had happened.
- Mr Jose made a decision not to disclose information to the Authority and to Mrs Jose that was relevant to the proceedings about two items from his list on the Collins order, which he was responsible for, and the payment and repayment of the \$100.13.
- Mr Jose deliberately avoided giving reasonable notice because he was not able to adequately explain his actions.
- Mr Jose's evidence was not consistent when he had an agreement to start new work on 14 September and saying that he could have delayed starting his new job without verifying that that could have happened.

- Mr Mendoza's responses, replies and explanations were more plausible and supported by documents. Mr Jose's claim for airfares was not adequately supported by documents (although two tickets were produced for the children), and his claim suffered because he referred to different figures.
- The Mendozas satisfied me that their claims have been backed up with some detail and from the source records, although they were not produced (workshop job sheets, invoices, cash book entries and GST returns). The Joses did not produce sufficient records for their claim particularly on the airfares and put in an exaggerated claim for compensation for damages that I will comment again on later.
- It is more probable that the 17 November letter was signed at Mr Mendoza's home because he was not the owner of Victoria Motors Services at the time. He explained he visited the service station three times for due diligence and that Mr Jose was not present. I accept his evidence that the letter was drawn from details of "IT" arrangements Mr Mendoza obtained from his home computer. Mr Jose was not able to give dates and times and was not able to independently verify his evidence that he attended the service station.
- Julia Jose has relied on Mr Jose's information to assist him pursue his claim and support what she says he told her. Mr Jose did not tell her he had paid \$100.13 and that it was repaid to him. He did not disclose that he accepted and acknowledged the two payments from the list produced by the Mendozas for orders from Collins that involved Mr Jose. I have considered any likelihood that Mr Jose was confused and misunderstood the matters put before him and was nervous at the Authority's investigation meeting. I have rejected this because he was represented and had an opportunity to provide his evidence in writing and reply before the investigation meeting. Also he had plenty of time prior to the

Authority's investigation meeting to get his evidence sorted out. That he did not do so has affected the reliability of his claim, I hold.

- The mistake in the 17 November letter to the MIKKEN Trust instead of the Mendoza Family Trust was not sufficient to make the Mendozas' evidence unreliable given the background of that document and when it was prepared.
- The existence of prior verbal arrangements between Mr Jose and the Mendozas for deductions to be made from wages for the payment of rent and a van.

[20] I am satisfied that the letter of 17 November 2004 cannot represent the terms and conditions of employment. My reasons are:

- There is no employer party to the document. It refers to Victoria Motor Services. This is a trading name and not a legal entity. There has never been an issue that Mr Mendoza was the employer, personally. Mr Mendoza signed the letter as the managing director of Barter and Exchange Limited t/a Victoria Motors although he was not the owner of the business at that time. Mr Mendoza was involved in negotiations and due diligence to purchase the business. There was no work visa variation for Mr Jose to lawfully start work at Victoria Motor Services. I am mindful that there is nothing to prevent the parties entering into a prospective employment arrangement but in this case it is clouded by the dispute over the letter's use, due diligence and negotiations for the purchase of the business.
- The letter appears to be more consistent with an "IT" contract that Mr Mendoza says he used from his computer and adapted to help Mr Jose get a varied visa. This was a plausible explanation.
- The accommodation provisions required Mr Jose to pay MIKKEN Trust for rent. The Trust is not a party to these proceedings. It certainly was not Mr

Jose's employer. During the Authority's investigation it emerged the reference to the MIKKEN Trust was a mistake when it should have been the Mendoza Family Trust.

- Mr Mendoza says that Mr Jose did not sign the 17 November 2004 letter in front of him, and the next time he saw it signed and dated, was when it was produced at mediation.
- Mr Jose says he did not use it for his visa variation and could not recall using it.
- Mr Jose continued to work at the Supreme Group until shortly before 7 February 2005.

[21] I hold that the deductions made by the Mendozas during Mr Jose employment to his wages, were in breach of the Wages Protection Act. The Mendozas, however, reasonably believed that they had authority given Mr Jose's complicity. Their action was not deliberate. They were also in breach of making deductions from the final pay given that no written authorisation existed. Ignorance of the law whilst it is not a defence does not prove that the Mendozas have not been telling the truth and nor does it makes their evidence unreliable because, I hold they honestly believed that they were owed \$731.17 by Mr Jose for tools and items he had ordered for his personal use. Also they believed that they had agreement that the \$300 cash payment for painting would off set the sum owed by Mr Jose.

[22] The next issue is about whether or not Mr Jose received any attachments to the 26 January letter that included a draft employment agreement and job description. Given that it is accepted that the draft agreement was not apparently signed by Mr Jose, can the terms be implied? This is relevant on the issue of reasonable notice.

[23] The letter of 26 January implies general terms and conditions existed and superseded any terms referred to on 17 November 2004. This is because Mr Jose accepted the existence of the 26 January letter and says he used it for his visa variation. Mr Jose, in the absence of any written term on notice, would be expected to provide some notice. It would have been reasonable for him to have given more notice, and possibly earlier than 9 September, given that he accepted a new job on 1 September. However, he did not at the time have a variation to his visa for a new job. This could have been an explanation for what he did but he has not relied upon it and not even raised it in the matter now before the Authority.

[24] Mr Jose did not raise the explanation of seeking a delay to the start of his new employment, with Mr Mendoza, until he gave evidence at the Authority's investigation meeting. He says that he simply did not give earlier notice because he thought he would not get paid, and as I previously said, I do not accept this is a plausible or reasonable explanation.

[25] It is my decision that reasonable notice would have been two weeks. This is because Mr Jose was the only fulltime mechanic in the workshop. Work was already being outsourced for "WOFs". The other certified mechanic employed by Victoria Motor Services was off work injured at the time. Mr Jose would have been aware of such circumstances and the importance of his role and that leaving without notice would have left Mr Mendoza in the lurch, as Mr Mendoza says.

[26] The next issue is whether Mr Jose could have reasonably decided that he was not required to work out any notice? He could not have reached such a decision, because what Mr Mendoza is alleged to have said is rebutted by the situation that Mr Mendoza found himself in, with work to be done, and no one to do it, and that Mr Mendoza accepted that he did say to Mr Jose that he was leaving the business in the lurch.

[27] Also, Mr Mendoza's evidence that Mr Jose would have worked for more money is supported by him having to get casuals in to do the work for him on 10 and 11 September because Mr Mendoza says he did not know if Mr Jose would return to work after Mr Jose's claim for more money was rejected.

[28] Thereafter Mr Mendoza had to use the casuals after hours and to keep the business carrying on, and he had to do some jobs himself before employing another mechanic. Although the statement of reply was not totally accurate about the business closing, the business was certainly affected by Mr Jose's action, and Mr Mendoza's difficulty was supported by him only being able to use the contractors after hours and do some of the jobs himself.

[29] What is Mr Jose owed for his final pay? He has made two claims; a further 7.5 hours or \$420 for 30 hours. The record clearly supports that he finished on Friday 9 September and although he called into the service station on 12 September he did not work. He is owed his final week's wages for 14 hours amounting to \$196 according to the employer's records. There can no issue on the timesheets produced and not signed by Mr Jose because Mr and Mrs Jose have used the same hours from the documents for the calculation of their claims. I note that at the time a deduction was calculated for rent of \$190 and the van for \$77. Mr Jose accepted the tenancy arrangements and payments on the van that should be taken into account in the final pay as they were at the time by Judith Mendoza in her calculation. The two sums were not challenged by the Joses.

[30] Mr Jose cannot include 30 hours extra that he did not work purportedly for unpaid notice when he resigned voluntarily to take up another job and commenced working with the new employer almost immediately. There was no evidence that the new employer would have agreed to a delayed start. Mr Jose is owed \$196 final pay. I accept the Respondent's calculation of holiday pay from the record produced that amounts to \$1,067.05. Mr Jose is owed \$1,067.05 holiday pay.

[31] Also Mr Jose has not been paid \$300 gross for painting the workshop, although I found it was a personal payment to be made by Mr Mendoza. Mr Mendoza has accepted that the payment will be made through the business.

[32] Mr Jose has made a claim for compensation for damages of \$10,000. This is wholly misconceived, without sufficient details and support. Mr Jose has not established separately his claims for accommodation and airfares by relying upon the letter of 17 November as an employment agreement, which I have rejected. Putting these claims to one side I fail to see what he has claimed \$10,000 for, especially given there has been no claim made of any unjustified action disadvantaging Mr Jose in his employment. Even if I am wrong that he had no chance to work out any notice I fail to see how he was unjustifiably disadvantaged, given his resignation to start work almost immediately with a new employer and the Mendozas set about to pay him what they thought he was due. The employment relationship problem related to a wages and recovery matter.

[33] The itemised account that the Mendozas say Mr Jose owes amounts to a total of \$731.17. It is made up of the following amounts:

• Collins Auto Parts (“Mr Jose’s list”)	\$147.38
• Sulco Tools	\$100.13
• BNT	\$409.01
• Repco	\$74.65
Total	\$731.17

[34] The difficulty with this is that there was never any inventory or record kept of where missing tools and items, identified from the invoices presented, might have ended up. Both parties deny having them. There was no independent verification, and even where Mr Mendoza has provided a

list of tools and items left behind, I have decided that Mr Jose owes not only \$20.80 and \$25.50 from his list that he says he is responsible for and kept the items, but also he paid \$100.13 for the Sulco invoice to the Sulco representative. Mr Jose acknowledged some responsibility for the item, even although the amount was repaid by the rep when he found out it had already been paid by Victoria Motor Services later. The other invoices produced by the Mendozas involved Mr Jose ordering tools and items he used and now cannot account for. The fact that I have found his evidence unreliable in regard to the other issues commented on above is not sufficient for me to conclude that he is lying about not having the tools and items that I took him through from each of the invoices, but he has not been able to account for them and although there is a dispute about whether or not there were workshop tools Mr Jose is not assisted in his claim by Mr Mandoza organising the purchase of personal tools for Mr Jose's use. The amounts Mr Jose is claimed to owe are directly related to his employment with Victoria Motor Services and I order that Mr Jose pay Barter and Exchange Limited the total sum of \$731.17.

[35] What damages has the employer suffered? It has to satisfy me that it has suffered a loss. It engaged contractors to work on 10 and 11 September because Mr Mendoza says he did not know if Mr Jose would return to work. The Respondent says it had *to close* in its statement of reply. That is not totally accurate as I have already commented on. Mr Mendoza produced invoices of the costs from the contractors that Mr Jose's failure to give notice caused the business. There have been no separate claims made for these expenses. They are evidence of some expenses that had to be covered by the business. They could have been avoided by Mr Jose giving better notice and clarity of his situation and what he was going to do after 9 September 2005.

[36] I am satisfied that the business was affected by Mr Jose's action of giving notice late and not giving reasonable notice and not remaining at work. It is more than probable he decided to leave with the bare minimum of any notice, especially since he says he did not have any employment

agreement other than the terms he says existed in the 17 November letter that made no provision for notice. The Respondent accepts it has been difficult to determine the actual amount of the loss despite calculating a sum from a drop in income for two weeks in September 2005. It has been suggested that I impose a penalty against Mr Jose for breaching the implied term to give his employer reasonable notice as an alternative to remedy the situation. Having made the finding that Mr Jose did fail to give reasonable notice, I also find his action was deliberate.

[37] An action for a penalty from the Respondent was not raised in the statement in reply in these circumstances as an alternative to address any losses suffered by the employer.

[38] Given the lack of proper prior notice and the quasi criminal nature of penalties, I decline to take this approach.

[39] However, an assessment of a loss would be reasonable given the circumstances and because there is some debate about the extent of the loss on the business from the figures produced by Judith Mendoza. She says she relied upon source documents that would have included the workshop job sheets, invoices, cash book entries and GST returns. I have accepted that her calculations from the computer would have included the information from sources to produce a spread sheet of earnings/income on a monthly basis and that she worked out an average for the September that Mr Mendoza says Mr Jose left the business in the lurch. The assessment was \$3,500 for work turned away but not verified by any a statement of accounts for the same period that could have been reasonably produced if the Respondent had wanted to. Another approach is to use the amount equivalent to the cost of the contractors Mr Mendoza employed having regard to the receipts produced amounting to \$400. I also have to deduct the savings made on the cost of Mr Jose's wages that were not required. A diary produced has not assisted me in the matter any further about the extent of the work available in the period and what work was actually turned away. There was

no direct evidence of any work actually being turned away. Therefore, there will be no award of any damages.

[40] The final claim from the Respondent is for the sum of \$90 it paid to have a vehicle that Mr Jose was responsible for, and he left at the business, towed away. I accept he had some responsibility for that vehicle that upon resigning he could have been reasonably expected to take away with him. This claim was put in Mr Mendoza's statement to the Authority that Mr Jose decided not to reply to. Because Mr Jose insufficiently replied to the claim I hold that he was responsible for clearing away the vehicle. The Respondent has been put to an unnecessary expense to do so and this was supported by an invoice made following a cash payment at the time. Mr Jose is to reimburse this sum also.

### **Summary of Orders**

[41] Barter and Exchange Limited trading as Victoria Motor Services owes Mr Mark Jose:

- \$196 gross final pay.
- \$1,067.05 gross holiday pay.
- \$300 gross cash for painting the workshop.

[42] A deduction needs to be made from the above for the rent payment of \$190 and the van repayment of \$77 that have not been challenged by Mr Jose amounting to \$267. The total owed by Barter and Exchange Limited to Mr Jose is \$1,296.05.

[43] Mr Jose is to pay Barter and Exchange Limited trading as Victoria Motor Services:

- \$731.17.
- \$90 for tow away expenses.

[44] Mr Jose's claims for airfares and accommodation are dismissed.

[45] The total owed by Mr Jose to Barter and Exchange Limited is \$821.17.

[46] I suggest that the balance of \$474.88 gross be paid by Barter and Exchange Limited to Mr Jose. Although there was no proof of any written authorisation for deductions to be made from wages there was a practice of verbal authorisations given on the rent and the van, so an offset in this situation seems a practical way of settling up the differences.

[46] Costs are reserved.

P R Stapp  
Member of Employment Relations Authority