

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
[AUCKLAND/WELLINGTON/CHRISTCHURCH]**

AA 283/09  
5155774

BETWEEN                      EQUIPMENT AND  
   TRANSPORT LEASING  
   LIMITED  
   Applicant

AND                              ALAN REID (LABOUR  
   INSPECTOR)  
   Respondent

Member of Authority:        Dzintra King

Representatives:            Mark Flyger, Advocate for Applicant  
   Alan Reid, Advocate for Respondent

On the Papers:                30 July 2009 from Respondent  
   16 July and 6 August 2009 from applicant

Determination:                17 August 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]     The respondent served a demand notice pursuant to s 224 Employment Relations Act 2000 on the applicant, Equipment and Transport Leasing Limited (“ETL” or “the company”) on 11 March 2009.     The demand notice was for the payment of \$3,073.85 in annual holiday pay.     The applicant objects to the issuing of the demand notice.

[2]     An employer may lodge an objection to a demand notice within 28 days of the notice being served.

[3]     Pursuant to s 226 the Authority is to determine whether or not the whole or any part of the wages or holiday pay or any other money specified in the notice is due to the employee by the employer and, if so, the amount payable.

[4]     ETL contends that holiday pay is not owed because:

- the real nature of the employment relationship was not one between an employer and an employee; and
- there was unfair bargaining which left the applicant in a position of diminished capacity.

[5] The applicant seeks:

- a. A determination that the real nature of the employment relationship was not one of employment;
- b. An order pursuant to s69 that ETL be paid a sum equivalent to the holiday pay sought;
- c. Cancellation of the employment agreement in its entirety from 17 July 2007 or such other time as the Authority considers appropriate;
- d. Costs.

[6] The applicant also says that there has been a breach of s 4 (1) which was so fundamental that it went to the genesis of the employment relationship.

### **Background**

[7] Mr James Garvey was employed by ETL in July 2007. He signed an individual employment agreement and the wages records produced to the Labour Inspector for the period from 25 July 2007 to 1 November 2008 show that during the period Mr Garvey worked for the applicant he took 11 days' annual leave. The records indicate that PAYE was paid, and Kiwisaver deductions were made. Mr Garvey had the use of a company car, a company cellphone and the company's computer.

[8] ETL contends that Mr Garvey embarked upon a plan to start his own business while still employed and that this plan was there at the time employment commenced.

[9] Mr Garvey was dismissed in September 2008. In October 2008 he provided an affidavit for proceedings brought by Porter Hire Limited against ETL and Mr and Mrs Carson, the directors of the company. In November 2008 ETL filed proceedings in the High Court against Mr Garvey and his company, Garvey Equipment Limited,

alleging breach of the employment agreement and breach of confidentiality. The Statement of Claim refers to an employment agreement and to an employment relationship. In December 2008 Mr Garvey notified the company of a personal grievance for unjustified dismissal.

### **Real Nature of the Employment Relationship**

[10] Section 6 Employment Relations Act 2000 deals with how to assess whether a person is an employee or a contractor. It refers to determining the real nature of the relationship and to a need to consider the intention of the parties. On the material before me Mr Garvey was not a contractor. He signed an individual employment agreement as an employee, he paid PAYE and had Kiwisaver deductions made as an employee and he used the company's vehicle, phone and computer. The fact that Mr Garvey may, as alleged, have intended to behave deceitfully towards his employer does not mean he was not an employee.

### **Unfair Bargaining**

[11] Section 68 sets out the circumstances in which bargaining for an individual employment agreement will be unfair. These include age, sickness, mental or educational disability, a disability relating to communication and emotional distress. Mr Flyger contends that at the time of bargaining Mr Garvey failed to communicate his true intention to form his own hire business "leaving ETL in a position of diminished capacity". Because ETL was not privy to this intention it "did not have the required level of necessary understanding that would be capable of producing a fair bargain".

[12] While I agree with Mr Flyger that an employer is unlikely to enter into an employment agreement with a potential employee who wishes to work against the employer's interests, the failure to convey such information would not be covered by s 68. This could be categorised as misleading or deceptive behaviour but that would not bring it within the ambit of s 68. The applicant did not have an inherent diminished capacity to comprehend. A disability relating to communication could cover matters such as a speech difficulty, a hearing disability, an inability to read or to comprehend the language that is being used when the bargaining takes place. The

applicant was capable of comprehending the employment agreement that was being entered into.

[13] As the matter does not fall within s 68 I am unable to make an order for compensation or to vary or cancel the contract.

### **Breach of Good Faith**

[14] Section 4 (4) (ba) provides that the duty of good faith is applicable to bargaining for an individual employment agreement. The duty of good faith requires that parties must not, either directly or indirectly, do anything to mislead or deceive or that is likely to mislead or deceive the other party.

[15] If the applicant could establish that it had been misled or deceived by Mr Garvey, that would not alter ETL's obligation to pay holiday pay.

[16] The remedy for a breach of good faith is a penalty pursuant to s 4A.

### **Decision**

[17] There was an employment relationship and Mr Garvey is owed holiday pay. If ETL feels that Mr Garvey has breached his employment agreement, that is a separate issue from the obligation to pay holiday pay.

[18] The objection to the demand notice fails. ETL is to pay the sum of \$3,073.85 specified in the demand notice.

**Costs**

[19] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority