

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 15
5445478

BETWEEN LAURENCE OWEN NORTON
(LABOUR INSPECTOR)
Applicant

A N D VINE STRENGTH LIMITED
First Respondent

SP 2007 LIMITED
Second Respondent

AJAY KUMAR GAUR
Third Respondent

Member of Authority: M B Loftus

Representatives: Alex Leulu, Counsel for the Applicant
Shaam Bhardwaj, Counsel for the Respondents

Investigation Meeting: 19 June, 20 June, 9 July and 10 July 2014 at Blenheim

Submissions Received: 24 July and 14 August 2014 from the Applicant
12 August and 2 September 2014 from the Respondents
with further exchanges up to 16 September 2014

Date of Determination: 9 February 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an action for the recovery of unpaid wages and penalties.

[2] The applicant, Mr Norton, brought a series of claims on behalf of Mr Pushpinder Kumar who is alleged to have worked for both the first and second respondents.

[3] The claims were subject to some refinement as the investigation progressed and now comprise:

- (a) A claim against the first respondent, Vine Strength Limited (VSL) for \$6,879 which is said to be a shortfall in respect to what was payable under Minimum Wages Act 1993;
- (b) A claim against the second respondent, SP 2007 Limited (SPL), for \$15,837 which is said to be a shortfall in respect to what was payable under Minimum Wages Act 1993;
- (c) A claim against the third respondent, Ajay Gaur, of \$26,640 for the recovery of a premium allegedly obtained in contravention of section 12A of the Wages Protection Act 1983;
- (d) A penalty against SPL for its failure to pay Mr Kumar the minimum wage;
- (e) A penalty against VSL for its failure to pay Mr Kumar the minimum wage;
- (f) A penalty against Mr Gaur for seeking and receiving a premium;
- (g) A penalty against VSL for its failure to keep time and wage records for work performed at a vineyard; and
- (h) A penalty for the respondents' failure to provide a written employment agreement as required by the Employment Relations Act 2000.

[4] The respondents deny the allegations on the grounds that:

- (a) VSL says Mr Kumar performed two types of work for it. It says he managed a backpacker hostel owned by VSL and for which he was properly remunerated. He also performed work on a vineyard for which he was properly remunerated albeit via indirect payments made into his wife's account;
- (b) Both VSL and Mr Gaur deny Mr Kumar paid a premium contrary to the provisions of the Wages Protection Act;

- (c) Both Mr Gaur and SPL deny the claims regarding work Mr Kumar says he performed at a takeaway shop owned and operated by SPL. They say he was never employed by SPL and while it is accepted he did perform some tasks at the takeaway this work was voluntary and the result of a request from Mr Kumar who sought the work to broaden his skills.

Background

[5] Mr Kumar came to New Zealand from his native India in 2008. He came to study in Auckland and his visa allowed him to work which he did.

[6] He met Mr Gaur, the sole director of and a majority shareholder in both VSL and SPL. He says Mr Gaur offered him a job as manager of a Blenheim backpacker hostel owned by VSL (formally known as BK Horticulture Limited) which accommodated workers engaged on its various horticultural contracts in the area. He says the offer was attractive for a number of reasons. It and the future opportunities that might result provided a better use of his qualifications, the remuneration package was attractive and there was also an offer of work for Mrs Kumar.

[7] To accept though, Mr Kumar would have to obtain a work visa. He says Mr Gaur offered to help in this respect and he (Kumar) therefore accepted the offer. He moved to Blenheim to commence albeit before attaining the required work visa.

[8] Mr Kumar says all was well on commencement (19 July 2011) but troubles soon arose. He says that approximately a fortnight after commencement he was approached by Mr Gaur who advised he could no longer afford to honour the employment agreement. Mr Kumar says he was told he would have to perform vineyard work or the backpacker role would cease. He says he then transported workers to the vineyards and remained there as a supervisor. He also says that apart from the first payment he received nothing until after his visa application was approved in November 2011.

[9] Mr Kumar says he was also asked to work at the takeaway. He says he worked approximately 25 hours a week in the evenings but was never remunerated.

[10] Mr Kumar says his vineyard work ceased in October when he returned to the Backpackers. From that point he claims he was paid but then required to return the

money to Mr Gaur. Mr Kumar claims he did this in response to a demand he pay Mr Gaur \$10,000 for the latter's support with a residency application. Mr Kumar claims this was so the wage records would show payments being made in accordance with his employment agreement. He says he and his wife were therefore forced to survive by using savings he had accumulated.

[11] The employment ended in August 2012 and Mr Kumar left Blenheim at that time. He approached the Labour Inspectorate in February 2013 with his allegations and these were investigated by Mr Norton who subsequently chose to pursue these allegations.

Determination

[12] The investigation took four days and involved considerable evidence, both oral and documentary. Similarly there were detailed submissions for which Counsel are thanked. The above has all been considered but the outcome is, I conclude, determined by a couple of key points and only those shall be referred to.

[13] Turning first to the claim Mr Kumar was required to pay a premium in order to be employed. In essence Mr Kumar claims that while he was paid for his work as manager of the backpackers, he was then required to withdraw the monies paid and return it to Mr Gaur. He claims the requirement was enforced by a gang member who performed various duties for Mr Gaur.

[14] This is a civil claim so the required level of proof is *balance of probability* as opposed to the criminal standard of *beyond reasonable doubt*. That said it is well established that when the allegations are serious, as they are here, the supporting evidence must be as convincing as the charge is grave.¹

[15] This claim did not fare well when put to the test. Mr Kumar's evidence fell well short of compelling. It was often incomplete with questions not being fully answered, inconsistent and contradictory. In particular there are specific examples which directly relate to this claim.

[16] Mr Kumar gave evidence about specific instances upon which he says he withdrew money and returned it to Mr Gaur however this evidence was severely undermined when tested. One example involved a withdrawal of some \$900 which

¹ *NZ (with exceptions) Shipwrights etc Union v Honda NZ Ltd* [1989] 3 NZLR 82

occurred on 30 January 2012 with, according to Mr Kumar, the money then being passed to Mr Gaur. Mr Kumar was however unable to explain a deposit of equal quantity made the same day into another account used by him and his wife. The conclusion is obvious – the money was transferred between accounts held by Mr Kumar and not passed to Mr Gaur as alleged.

[17] There was then the fact some claims of withdrawal were not supported by entries in Mr Kumar's bank accounts, the number of accounts which altered as the investigation progressed. Originally it was implied Mr Kumar only operated one bank account but there appears to have been at least four and the way in which this information came to light reflected badly on Mr Kumar. The existence of each account was not volunteered but had to be extracted and ultimately not all records could be produced.

[18] There was then a claim Mr Kumar was living off his savings as the repayments meant he was effectively working for nothing. Again the claim was undermined when evidence emerged which suggested a large portion of these alleged savings were either repatriated to India or used there during a visit Mr Kumar and his wife made in the first quarter of 2012.

[19] There is also the allegation the requirement to pay was enforced by a gang member. Again the supporting evidence is vague and inadequate.

[20] Similarly the evidence tendered in support of Mr Kumar's claims will not alter the outcome. While Mr Kanda saw money being passed from Mr Kumar to Mr Gaur he was unable to say exactly why. He, along with Mr Kumar, also gave evidence which suggests there may have been perfectly legitimate reasons for the payments with talk of loans and the fact Mr Kumar collected money on behalf of Mr Gaur at the backpackers.

[21] When I consider Mr Kumar's evidence and the way in which it was presented I conclude it is, given the gravity of the allegation that Mr Kumar was forced to pay a premium, insufficiently convincing. For these reasons this claim is dismissed. It follows the ancillary claim for a penalty is also dismissed.

[22] Turning now to the claim VSL did not pay Mr Kumar for the work he performed in the vineyard. Notwithstanding my reservations about Mr Kumar's

evidence this is a claim that must succeed if only because VSL accepts Mr Kumar worked in the vineyard during the period in question (19 July to 23 October 2011).

[23] Here I must also comment on Mr Gaur's credibility. In a manner similar to Mr Kumar, parts of Mr Gaur's evidence were marred by inconsistency and he has not assisted the impression by accepting he gave false information to the Labour Inspector when Mr Norton started making enquiries. Here I also note the rationale for giving the false responses (protecting Mr Kumar's interests in respect of his immigration aspirations) raises questions about what was occurring here and its legality.

[24] Returning to the claim. As already said VSL accepts Mr Kumar worked in the vineyard. It also accepts he was not paid instead claiming the monies were paid to Mrs Kumar. Here it should be noted she also worked in the vineyard though there is a serious disagreement over how much work she performed.

[25] The simple fact is an employment agreement is one formed between an individual and his or her employer. It cannot be assigned and third parties cannot be used to undertake the obligations thereof. That principle, normally discussed when an employee tries to get another to perform his or her work must, in my view, extend to an employers' obligation to pay wages. That is because of the combined effect of various statutes.

[26] Both deal with a worker /employee as an individual with the Wages Protection Act 1983 requires the payment of wages to the worker concerned.² Similarly the requirement to maintain time and wage records in both the Minimum Wage Act 1983 and the Employment Relations Act 2000 deal with each worker and the wage record applying thereto as an individual.

[27] It may perhaps be argued the payment can be assigned but that would have to be a deduction for which there is written consent.³ There is no such document in existence here.

[28] The evidence therefore leads me to conclude work was performed but there is no acceptable evidence of payment. Section 132 of the Employment Relations Act 2000 provides that where there is a claim for the recovery of monies the employee (in this case represented by the Labour Inspector) may call evidence to (a) show the

² Section 4.

³ Section 5 of the Wages Protection Act 1983.

failure to comply with s.130 and (b) that it prejudiced his or her ability to accurately quantify the claim (s.132(1)). There is no argument there is no time and wage record. The evidence is that it was requested and its absence has left Mr Norton with little option but to estimate the amount due. Indeed the evidence is his efforts were also initially hampered by Mr Gaur's misleading responses.

[29] Section 132 provides that in such circumstances I accept the claim as valid unless the respondent can prove it is inaccurate (s.132(2)). As VSL cannot show the claim to be inaccurate an order for the amount sought (\$6,879 including holiday pay) shall be entered against the first respondent, VSL.

[30] Turning now to the claim Mr Kumar is owed wages of work performed at the takeaway shop operated by SPL.

[31] Despite initially arguing Mr Kumar did not work at the shop that later changed. It is now accepted he was present but it is argued his presence was minimal and voluntary.

[32] I am not convinced by the argument Mr Kumar worked voluntarily at the shop. It, and the tendered rationale for his request he be allowed to do so, lacks credibility. It is difficult to see what skills he would gain to assist his aspirations to manage an organisation.

[33] There is then the fact this was a commercial operation. Such operations tend to pay their staff and it would be rare for them to rely on voluntary labour. Indeed, and as argued by Mr Leulu, there was no logical rationale tendered as to why someone would volunteer to perform onerous work for the personal benefit of another.

[34] As the Court said in *Salad Bowl Limited v Howe-Thornley*⁴ an employment situation is likely to exist when there is an expectation of reward and the economic benefit for the employer. Here there is evidence of an expectation of remuneration if only in kind (food, cooking oil and the promise of support with a residency application) and no doubt SPL received an economic benefit.

[35] Nor do I accept the argument Mr Kumar's attendance was minimal. As already indicated I have some qualms about the evidence of both he and Mr Gaur, so

⁴ [2013] NZEmpC 152; [2013] ERNZ 326

in this instance I rely on that of the witnesses who saw Mr Kumar at the shop. The evidence would suggest a frequent presence.

[36] The conclusion Mr Kumar as at the shop and working then raises the question of what is he owed. When I again consider Section 132 of the Employment Relations Act 2000, the lack of time and wage records along, Mr Norton's evidence about his investigation and the lack of an effective counter to the claim I conclude it should be allowed in full.

[37] The second respondent, SPL, will therefore be ordered to pay the amount sought - \$15,837 including holiday pay.

[38] Finally there are the claims for penalties to be imposed against both VSL and SPL. There are significant deficiencies with respect to the actions of both – a failure to pay appropriate wages, a failure to keep time and wage records and a failure to provide appropriate employment agreements. These failures were aggravated by Mr Gaur providing misleading responses to Mr Norton.

[39] The evidence shows little, indeed no, real attempt by either company to comply with its obligations as an employer and there are also issues of deterrence. The situation in this respect is not dissimilar to that considered by the Court in *Xu v Naenae Auto Service Station Ltd and McIntosh*⁵ and which strongly suggests a penalty is appropriate.

[40] Having considered the evidence, the significant level of deficiency and recent penalties I consider each should pay \$5,000.

[41] Finally I note there was no claim for interest.

Conclusion and Orders

[42] For the above reasons I make the following orders.

[43] The first respondent, Vine Strength Limited, is to make the following payments no later than 4.00pm Monday 9 March 2015:

⁵ ([2004] WC 13A/04, Colgan CJ, 18 November 2004

- a. \$6,879.00 (six thousand, eight hundred and seventy nine dollars) gross for unpaid wages and holiday pay. Payment is to be made to Laurence Norton, Labour Inspector, for the use of Mr Pushpinder Kumar; and
- b. a further \$5,000.00 (five thousand dollars), being a penalty payable to the Crown pursuant to section 135 of the Employment Relations Act 2000. Payment is to be made to the Ministry of Business, Innovation and Employment (MBIE).

[44] The second respondent, SP 2007 Limited, is to make the following payments no later than 4.00pm Monday 9 March 2015:

- a. \$15,837.00 (fifteen thousand, eight hundred and thirty seven dollars) gross for unpaid wages and holiday pay. Payment is to be made to Laurence Norton, Labour Inspector, for the use of Mr Pushpinder Kumar; and
- b. a further \$5,000.00 (five thousand dollars), being a penalty payable to the Crown pursuant to section 135 of the Employment Relations Act 2000. Payment is to be made to the Ministry of Business, Innovation and Employment (MBIE).

[45] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority