

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 309
3119153

BETWEEN	DANSTAN MALAGODA Applicant
AND	NORTH CITY CAR VALET (2013) LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Adrian Plunket, advocate for the Applicant Cherie Holland, counsel for the Respondent
Investigation Meeting:	13 July 2021
Submissions received:	21 June 2021 from Applicant 17 June 2021 from Respondent
Date:	20 July 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Malagoda, is from Sri Lanka and he worked as a car groomer for the respondent, North City Car Valet (2013) Limited (North City) from 26 June 2019 until 4 September 2020. Mr Malagoda's status as an employee (casual or permanent) and the circumstances surrounding the ending of his employment (whether he was asked by his employer to resign or resigned by mutual agreement) lies at the heart of this employment relationship problem.

[2] At the time Mr Malagoda lodged his statement of problem with the Authority (16 September 2020) he was self-represented. Since then, he has instructed Mr Plunket to represent him who in turn has lodged an amended statement of problem (2 February 2021)

with the Authority that sets out in more detail the claims of unjustifiable dismissal, wage and holiday pay arrears, and penalties under the Employment Relations Act 2000 (the Act) and the Wages Protection Act 1983 for not providing Mr Malagoda with an employment agreement and for alleged unlawful wage deductions.

[3] In response, North City has lodged with the Authority a statement of reply (1 October 2020) and an amended statement in reply (16 February 2021) both of which deny the claims made against it in their entirety.

Background to Preliminary Issue

[4] In an effort to demonstrate that Mr Malagoda was asked by his employer to resign without notice, Mr Malagoda provided the Authority with a secret audio recording and a written transcript of a meeting he had with Zhangyu Guo, the sole director and shareholder of North City, on 28 August 2020. This was the second of two important meetings between the two, the first of which took place three days earlier, on 25 August 2020 and was not recorded. Also present at the 28 August meeting was a Sri Lankan worker by the name of Lahiru who assisted Mr Guo translate English into Sinhalese. A copy of the transcript of recorded meeting was provided to the Authority on 28 April 2021.

[5] During a case management conference on 2 June 2021, I raised with Mr Plunket and Ms Holland the issue of admissibility of the audio recording and the transcript. Ms Holland was given an opportunity to review the material and to advise the Authority if she had any concerns regarding the admissibility of that information. The Authority was subsequently advised that North City did have such a concern because the recording had been made without Mr Guo's or Lahiru's consent. For this reason, it was argued that both the recording and its transcript should not have been provided to the Authority. In light of North City's opposition, I directed both representatives to provide the Authority with submissions on admissibility, which were duly provided.

[6] On 13 July 2021, I held a Zoom conference with Ms Holland and Mr Plunket, both of whom have provided me with helpful oral submissions. Set out below is my preliminary determination on the admissibility of the recording and the transcript for the upcoming investigation meeting on 6 September 2021.

[7] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The Secret Recording

[8] The audio recording in question is approximately 51 minutes in duration and the transcript spans 24 pages. I have listened to the audio recording in conjunction with the transcript. Although Ms Holland expressed some concern regarding the clarity of the recording, I found it comprehensible and acceptable in terms of sound quality. Voices were not muffled and while there were instances of two concurrent conversations, I could follow what was being said and by whom. As for the transcript, for the most part, I found it to be a reasonably reliable record of what was said. Of course, as to what the parties meant by what they said is a live issue in this employment relationship problem.

[9] The clear majority of the recorded conversation involves Mr Guo trying to convince Mr Malagoda why he (Mr Guo) thinks that he paid Mr Malagoda correctly in terms of the COVID-19 wage subsidy and why Mr Malagoda was not entitled to be paid more than 32 hours per week. On the other hand, Mr Malagoda is equally adamant that he should have been paid for 40 hours of work per week and not 32 hours. In the end, neither man manage to convince the other. They agree to disagree.

[10] The first minute of the audio recording records the first of several instances where Mr Malagoda puts to Mr Guo that he had been asked to resign by his employer:

Mr Guo: aa., Would mind if we go upstairs, So we all can sitting down.

Mr Malagoda: I don't mind I don't mind

Mr Guo: We don't have any things to hide

Mr Malagoda: I'm here for that reason mate

...

Mr Malagoda: I spoke. You asked me to resign last Tuesday right

Mr Guo: yes. yes

Mr Malagoda: you asked me to resign. So you asked me to immediately resign Tuesday evening, So You asked me to immediately resign Tuesday evening. Right but, I said I can't I need two weeks to

Mr Guo: Yes what we agree. You can work here till next Friday

Mr Malagoda: but you asked me to resign Tuesday evening immediately.

Mr Guo: no no we already discussed Tuesday evening I said ok.

Mr Malagoda: Yes, Once after I spoke to you that I can't resign like that

Mr Guo: ye ye. I realize that. I straight way I said, I have no problem.

...

[11] Ms Holland submits that the audio recording is prejudicial to both parties because neither Mr Guo nor Mr Malagoda appear to have correctly understood each other as English is second language for them both. Ms Holland further submits that when Mr Guo starts to answer a question, he appears not to understand what has been asked of him and nor has he given his answers much thought.

[12] On the issue of whether Mr Malagoda was asked by Mr Guo to resign, Ms Holland submits that the recording is ambiguous in that Mr Malagoda says at the very end of the meeting (page 23 of the transcript) “I feel like you (Mr Guo) asked me to resign.” Here, it appears that even Mr Malagoda himself is not sure whether he had been asked to resign.

[13] In her submissions, Ms Holland referred me to the Court of Appeal decision in *Talbot v Air New Zealand*¹ where the Court of Appeal disagreed with the Employment Court which had ruled inadmissible, a secret recording of a telephone conversation that had been conveyed to two disclosed listeners using a speaker phone. The Employment Court had ruled that the recording was inadmissible as evidence because it had been obtained unfairly and did not accord with the spirit of the implied duty of fair dealing. In allowing the secret recording into evidence, the Court of Appeal held that there may well be cases where a tape recording breached the implied duty of fair dealing. However, the subject did not lend itself to “generalisations” and that each case turned on its own particular facts.²

[14] Ms Holland also referred me to several decisions from the Authority (differently constituted) including *Simms v Santos Mount Eden Limited*³ where it was acknowledged at [23] that many may find a secret recording of a conversation to be “unacceptable” or even “abhorrent”. However, even so, the overriding principle was that of fairness – both to the applicant and to the respondent.

[15] In *Nicol v Canterbury Concrete Cutting NZ Limited*⁴ the Authority observed that a party who made a secret recording could be in breach of the obligation to act in good faith.

¹ [1995] 2 ERNZ 356.

² Above at 368.

³ AA254/03, 21 August 2003.

⁴ [2018] NZERA Christchurch 180.

[16] In *Murwira v KJ and PE Radich Limited t/a Sunshine Childcare Centre*⁵, in allowing a secret recording by the applicant into evidence, the Authority cited three reasons for doing so. First, the applicant was a party to the private communication and could lawfully record it. Second, the transcript was the best evidence about an event that proved central to the issue before the Authority and thirdly, the contents of the recording ultimately favoured the respondent's case. The respondent was not unfairly disadvantaged by how the applicant came to produce that evidence.

[17] Ms Holland finally submits that Mr Malagoda did not record the meeting in order to obtain an accurate recording of what was said. Rather, his intention was to intentionally trick Mr Guo into saying that he had told him to resign. For this reason, the Authority cannot in good conscience and equity admit the audio recording and the transcript into evidence.

[18] Given the outcome of this preliminary determination, it has not been necessary for me to set out in great detail Mr Plunket's submissions opposing North City's application for exclusion of evidence. Mr Plunket reminds me that proceedings within the Authority are not subject to the Evidence Act 2006 and that in any case, the recording will assist me with my investigation.

Discussion

[19] The Authority has a broad discretion to consider evidence and information that may not be admissible in a court of law. This is clear from section 160 of the Act which relevantly states:

160 Powers of Authority

...

(2) The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

(2A) The Authority must allow cross-examination of a party or a person to the extent with subsection (2).

...

[20] The only limit on the power to receive information and evidence is the Authority's "equity and good conscience" jurisdiction which is an amorphous concept but is essentially natural justice and fairness writ large for both the applicant and the respondent.

⁵ [2017] NZERA Auckland 384.

[21] There is no issue as to identity. As previously stated, I have listened to the audio recording in conjunction with the transcript. I can discern who is talking to whom and although there are some minor typographical errors with the transcript (page 3 “Lahiru” is the typed response but what was said in the recording was “name”) the document as a whole is reasonably accurate.

[22] Since *Simms* was decided in 2003, s 160(2A) of the Act has become part of the employment law landscape.⁶ It provides an express right of cross-examination which did not previously exist. The concerns that North City have about the audio recording and the transcript are well traversed by Ms Holland in her written and oral submissions.

[23] The audio recording and the transcript is relevant information that will assist me with my investigation. It is a contemporaneous record of one of two important meetings Mr Malagoda had with Mr Guo, the first being on 25 August 2020, which was not recorded. Although the Evidence Act 2006 does not strictly apply to proceedings within the Authority, I have considered sections 7, 8 and 30 of that Act as a matter of precaution. These sections deal with relevance, the general principle of exclusion, and improperly obtained evidence. Even after considering these sections, I find that Mr Malagoda’s secret recording and transcript should be admitted into evidence for the reasons given above and for the fact that Ms Holland will have the opportunity to cross examine Mr Malagoda as to his motives for making the surreptitious recording.

Determination

[24] The overriding principle of fairness is determinative of this admissibility challenge by North City. It is a challenge that has been brought in good faith. However, I find that there is material in the recorded conversation that potentially benefits both parties to this employment relationship problem. Neither Mr Malagoda nor North City will be disadvantaged by my decision to include the recording and the transcript as evidence in this proceeding. Admissibility only gets the information in through the door. How much weight that is ultimately given to it, remains to be seen.

[25] I am satisfied that both Ms Holland and Mr Plunket will use the recording and the transcript for the benefit of their client’s respective cases. Excluding this relevant piece of

⁶ Effective 1 April 2011 by s 29(1) of the Employment Relations Amendment Act 2010.

information from them would have the unintended consequence of creating the very thing this evidentiary challenge seeks to avoid; unfairness.

[26] Mr Plunket has asked me to indicate on a preliminary basis where I see the substantial merits of the case lie. It is premature to give a reliable indication at this stage, but to assist the parties to consider their options, based on the documents that have so far been provided, it appears *prima facie* that Mr Malagoda was initially employed as a casual employee who was not provided with an employment agreement at the commencement of his employment. Whether Mr Malagoda's status changed to that of a permanent employee at a later stage is not known. Further information is required. The copies of Mr Malagoda's payslips and what appears to be his time and wages record suggest *prima facie*, that he did not work a set number of hours for North City every week.

[27] The above are my tentative views only and I reserve the right to take a different view as more information from the parties come to hand. However, if the parties feel that further mediation might help them resolve their differences, I am willing to direct them to mediation services if such a direction is sought.

[28] Finally, at the end of the Zoom conference with the representatives, the following timetable directions for the provision of written statements and relevant supporting documents were made by consent:

- (i) Mr Malagoda to lodge and serve his written statement and any other additional information not already provided to the Authority by **4pm Friday 6 August 2021**.
- (ii) North City to lodge and serve its written statements for its witnesses and any other additional information not already provided to the Authority by **4pm Friday 27 August 2021**.
- (iii) Mr Malagoda to lodge and serve his written statement in reply (only if required) by **4pm Friday 3 September 2021**.
- (iv) The Investigation Meeting **at 280 Queen Street, Auckland on Monday 6 September 2021 at 10 am** is confirmed.

Costs

[29] Costs are reserved pending the final determination of this employment relationship problem.

Peter Fuiava
Member of the Employment Relations Authority