

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA247
3125375

BETWEEN ERIC SEEKIE
Applicant

AND SOCCERPLUS NEW ZEALAND
CHARITABLE TRUST
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Beat Süess, advocate for the Applicant
Theresa Tudor, advocate for the Respondent

Investigation Meeting: 17 January 2022 by Zoom

Submissions [and further 19 January 2022 from the Applicant
Information] Received: 19 January 2022 from the Respondent

Date of Determination: 15 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Eric Seekie believes that at all material times he was an employee of SoccerPlus NZ Charitable Trust (SoccerPlus). He says he was initially employed around 3 March 2015 although there was no employment agreement. He claims the absence of an employment agreement disadvantaged him and he is owed the sum of \$58,905 unpaid wages together with unpaid holiday pay and unpaid sick leave. Mr Seekie also says that when he returned from the UK in 2018, he subsequently signed an employment agreement on 28 May 2019 and was unjustifiably dismissed in January 2020.

[2] SoccerPlus rejects Mr Seekie’s claims saying that there was no employment relationship between the parties between 2015 and the signing of an employment agreement on 28 May 2019. They say Mr Seekie was initially engaged as a volunteer soccer coach and that in essence he was a casual contractor. There were times when he undertook paid coaching work and he was paid on the basis of timesheets he submitted. It says further that the employment agreement that commenced on 28 May 2019 ended after Mr Seekie injured

himself and the ability to place him in schools and offer work disappeared resulting in a redundancy situation.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified all is made but has not recorded all the evidence and submissions received.

[4] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

The Issues

[5] The issues identified for investigation and determination are:

- (a) Between 2015 and 2017, was Mr Seekie an employee of SoccerPlus or was he engaged under some other arrangement.
- (b) Did Mr Seekie's status change when he signed an employment agreement on 28 May 2019 and if so how did that employment end.
- (c) If Mr Seekie was an employee at any material time, is he entitled for unpaid wages as set out in his claim, namely:
 - (i) unpaid coaching hours for Papatoetoe AFC - \$21,430;
 - (ii) unpaid coaching hours for NZ Cross White - \$7,645;
 - (iii) unpaid coaching house for the Valencia trip - \$1,690; and
 - (iv) unpaid hours below the guaranteed minimum from 1 June 2019 - \$4,300.

[6] Mr Seekie also claims a sum of \$50,000 in damages. It seems that this claim has come about at least in part, as a result of Mr Seekie's unhappiness with SoccerPlus' delays in settling the matter to his satisfaction.

The Authority's Investigation

[7] The investigation occurred on 17 January 2022 by way of Zoom. The investigation meeting commenced at 10.00 am in the morning and finished at approximately 12 noon.

Kim Beale gave evidence on behalf of SoccerPlus and Mr Seekie gave evidence on his own behalf. Mr Süess essentially acted as Mr Seekie's advocate.

Discussion

[8] Mr Seekie gave evidence that he came over from the United Kingdom to New Zealand to work in 2014. He coached children and was also involved with the organising and chaperoning of these groups. There seems to be two main trips he took teams on, namely to Valencia then another trip with some 90-odd players to Australia. He said he left England to be employed by SoccerPlus in 2010 and did not sign an agreement. However, as the investigation meeting progressed it became clear that Mr Seekie arrived in New Zealand in 2010 on a visitor visa. That was some four years before he started with SoccerPlus. When this was put to Mr Seekie in cross examination, he clarified that he meant it was his intention to be employed by SoccerPlus when he returned to New Zealand from England in 2018. He conceded that when he came to New Zealand in 2010 it was not to work for SoccerPlus.

[9] There is no doubt there was some arrangement between Mr Seekie and SoccerPlus under which Mr Seekie was to provide coaching services. However it seems from 2014 until he returned to England in 2017, the arrangement between the parties was in the nature of a casual contractor. There was a mix of volunteer coaching programmes and more formal arrangements whereby Mr Seekie submitted timesheets and was paid for them. No deduction for PAYE etc was made.

[10] Mr Beale gave evidence that he met Mr Seekie about the time his visa to stay in New Zealand was coming to an end, around 2014. Mr Beale was keen to help him and saw opportunities for him to be involved in some already established coaching programmes and also with some plan for the future.

[11] The established programmes included a couple of afterschool academies (SAFCA) and the Glen Eden Intermediate Academy. The new programmes were extra SAFCA programmes and SoccerPlus continued to add new venues to those programmes with one on one coaching and a Soccer4Life schools programme.

[12] Mr Beale's evidence was that many of the venues required Mr Seekie to take bags of footballs, cones, bibs and portable goals. Because he had no driver's licence, or car, he often could not do this and other coaches were hired as the programme grew.

[13] Mr Beale confirmed Mr Seekie's evidence that he attended Australian trips in 2014, 2016 and 2018. He also went with the team to Valencia in 2015 and 2016. Mr Beale was adamant that these were not paid roles. Each person going was required to pay their costs. The coaching was taken up by the Valencia CF coaches as that was the purpose of the trip. Because Mr Seekie had no money, and couldn't afford to go on the trip, Mr Beale says he himself contributed financially to the trip.

[14] Both of these trips were voluntary roles. Mr Beale was adamant that SoccerPlus did not discuss remuneration as that was not part of the deal. Every other person participating contributed financially. Mr Beale wanted Mr Seekie to be part of the trips and enjoy the experiences. He says Mr Seekie had become a close friend and if he had not been, then he would have had to meet the required fees of \$1,600 for the Australian trip and \$6,000 for the trip to Valencia. With funding as it was, if Mr Seekie at any time had requested payment for these trips, SoccerPlus would not have been in a position to invite him.

[15] The way the coaching system was set up, meant that coaches were required to fill out timesheets and were paid accordingly, accepting that at other times they worked on a volunteer basis. All of the timesheets submitted by Mr Seekie resulted in him being paid for the hours claimed. In other words, Mr Beale was clear that Mr Seekie could differentiate between coaching that was to be paid for, and voluntary coaching which was not to be paid for. For instance, he did not submit timesheets for the NZ Cross Whites' trip to Australia or the Valencia trip.

[16] In 2017, Mr Seekie left New Zealand because he was in a bad state with depression which he said was caused by him not being paid. It is noted, however, that Mr Seekie did not make any claim for unpaid wages between 2014 and 2017. Whilst it may well be he left New Zealand in 2017 because he was not making sufficient money, this does not mean that SoccerPlus owes him for unpaid wages and holiday pay covering that period of time. This claim could only succeed if Mr Seekie was an employee during that period of time.

[17] The fact that Mr Seekie did not claim unpaid wages from 2014 and 2017, yet left for England ostensibly for good, does give some indication as to how he viewed the relationship between himself and SoccerPlus during that period. He said that he did not claim for wages and holiday pay before he went because he was worried about his visa. Mr Seekie, however, gave evidence that he did not come over to New Zealand in 2010 to work for SoccerPlus

initially, and spent the period with other organisations on the same basis he worked with SoccerPlus between 2014 and 2017, not as an employee.

[18] Mr Seekie says he found the last few years very stressful. He says his relationships were affected and life became very difficult.

[19] In answer to questions put to him in cross examination, Mr Seekie confirmed that his original reason for coming to New Zealand was not to work for SoccerPlus. He confirmed that he saw Mr Beale offering him a way to earn income, as Mr Beale helping to set him up to make him more independent to assist him in any extension of his visa. He accepted that correspondence at this time with Mr Beale was orchestrated to assist with immigration in the sense there was an intention to give Mr Seekie some paid work, even in circumstances where it may not come directly from SoccerPlus. This did not create an employment relationship but again is more indicative of an independent contractor arrangement, albeit casual.

[20] Mr Seekie confirmed that on the trip to Australia and Valencia, the other coaches were not paid. He also knew that they had paid for flights when he had not. He confirmed that in respect of the trips to Valencia and Australia, there was no agreement between the parties or any set hours. He confirmed again that he did not email or raise any concerns regarding payment before he left for England in 2017.

[21] He also confirmed on the Australian trip that he was questioned by customs as to why he was in Australia with the NZ Cross Whites. He confirmed he had told Australian customs he was on a visitor visa and that he would not be paid for the trip.

[22] Mr Seekie explained that by saying when he was placed in schools by SoccerPlus he put in timesheets, but he didn't put in timesheets for other roles. He was adamant, however, that he assumed that when money came in he would be paid. By this he meant that he was aware that Mr Beale and SoccerPlus would fundraise for trips. He felt therefore at some future date he would be paid. At this point in time neither party was treating the relationship was one of employer and employee, although the arrangement was casual, Mr Seekie acted as a contractor, free to do other work whenever he wished.

[23] Mr Seekie says that he always understood that if he got a work visa he would be paid. He confirmed that he had been paid for every timesheet he had submitted and also confirmed that if he had a driving licence he could have been given more work. However, he said he lacked the time and finances to do this. Again, there is no real indication between 2014 and

2017 that Mr Seekie was in an employment relationship with SoccerPlus. There was however a casual contract arrangement in place whereby Mr Seekie was paid for contracted coaching work on the basis of timesheets he completed. Accordingly, the fact he was paid did not create an employment relationship.

The return from England

[24] What happened in 2018 is clearer. Mr Seekie says Mr Beale contacted him urging him to return from the United Kingdom, saying that if he came back to New Zealand it would not be like it was before. That is in keeping with a view that at least in 2019, the relationship between the parties was to change, with Mr Seekie becoming an employee of SoccerPlus.

The 2019 employment agreement

[25] On 28 May 2019 Mr Seekie signed an employment agreement as a football and life skills coach at SoccerPlus NZ. The employment was to start on 1 June. It acknowledged that Mr Seekie's right to work in New Zealand was temporary and the employment was conditional on him being able to work legally for SoccerPlus. It was agreed that Mr Seekie would be paid for a minimum of 30 hours each week.

[26] It was common ground that Mr Seekie injured himself in September 2019 and was unable to continue with that agreement. During that period, with the exception of one week, Mr Seekie was rostered on for 30 plus hours. The time was to be worked between 9.00 am and 5.30 pm Monday to Friday.

[27] The evidence from Mr Beale was that the agreement provided for 30 hours a week because it was related to a school. He said he had encouraged Mr Seekie to return to New Zealand because he was a friend and he was keen for him to come back. He said he was clear that the plan was to try to contract him out. SoccerPlus would not be able to fulfil the amount of time necessary for him to be classified as a coach for immigration purposes but they could contract his coaching out. Mr Beale acknowledged that he did not fully understand the employer/employee issue and did not turn his mind to it. As it happened, SoccerPlus did not pay the 30 hour guarantee because the school contract did not proceed.

[28] When Mr Seekie could not return to work because of his injury, he went on to ACC compensation based on the remuneration provided for in his employment agreement, i.e. 80 percent of his 30 hour a week salary.

[29] Mr Seekie remained on ACC until just before the investigation meeting.

Termination of Employment

[30] In January 2020 SoccerPlus terminated the employment agreement ostensibly on the grounds for redundancy. However, Mr Beale was candid and forthright in explaining what was happening. By this stage the relationship between the parties was breaking down with Mr Seekie threatening legal action. Although the ground for termination was redundancy, no process was followed and it seems that SoccerPlus terminated the employment agreement out of a sense of frustration. Further, the reason given to Mr Seekie was incorrect. His employment did not end because of redundancy, it ended because SoccerPlus felt the relationship was untenable. The dismissal does not meet the basic requirements of s 103A of the Act. It was unjustified.

[31] Although it may well be that SoccerPlus was frustrated with the arrangement, the way Mr Seekie's employment came to an end cannot be justified. Whilst accepting he was not at work because of his injuries, nonetheless he remained an employee. It seems because SoccerPlus saw the relationship as having broken down irreparably, it moved to terminate the employment. Dismissal under these circumstances was unjustified.

Conclusion

[32] I do not consider that Mr Seekie is owed any lost wages and/or holiday pay for the period between 2014 and 2017 when he went to England. When he left New Zealand, he had no intention of returning. I find that his trip to Australia and Valencia were as a volunteer coach with no expectation of payment. Other payments were made to him on the basis of timesheets he submitted. Mr Seekie does not dispute receiving those payments. In any event, he was not an employee during this period.

[33] It is, however, clear that Mr Seekie entered into a specific written employment agreement with SoccerPlus which started on 1 June 2019. Apart from one week, the agreement carried on until Mr Seekie was dismissed.

[34] Mr Seekie is entitled to be paid for the 30 hours work he was guaranteed but not paid for. He is also entitled to holiday pay from 1 June 2019 until January 2020.

[35] Mr Seekie gave evidence of the effect the termination of his employment had on him. He is entitled for compensation for humiliation, loss of dignity and injury to feelings. On the evidence I heard I assess an amount of \$15,000 is appropriate.

[36] Because Mr Seekie was away from work on ACC for a significant period of time indeed until January 2022, he has not lost wages as a result of his dismissal. Accordingly no order for lost wages is made.

[37] Section 149 of the Act requires me to consider whether or not Mr Seekie contributed to his dismissal. From Mr Seekie's perspective, he had been told his employment was ending due to redundancy. I find that Mr Seekie did not contribute to his dismissal. Accordingly no contributory conduct is found.

Orders

[38] SoccerPlus New Zealand Charitable Trust is ordered to pay Mr Seekie:

- (a) A sum of \$750 being 30 hours at \$25 per hour;
- (b) Holiday pay of \$1,560;
- (c) A sum of \$15,000 pursuant to s 123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity and injury to feelings.

Costs

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. The Authority generally applies a tariff based approach to costs of some \$4,500 per hearing day. This matter took some two hours which together with an allowance for submissions would, I assess, have occupied half a day. Accordingly, on a tariff based approach costs would likely to be in the vicinity of \$2,250. If the parties cannot agree on costs, and an Authority determination on costs is needed, Mr Seekie may lodge and should then serve a memorandum on costs with 14 days of the date of issue of this determination. SoccerPlus NZ Charitable Trust would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Geoff O'Sullivan
Member of the Employment Relations Authority