

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 643  
3132836

BETWEEN                      ADIN NASAR  
   Applicant

AND                              EXPERT IT GROUP  
   LIMITED  
   First Respondent

   ZABIULLAH SHARIF  
   Second Respondent

Member of Authority:        Marija Urlich

Representatives:             Gerardus Elwell, counsel for the Applicant  
   A.S Seumanutafa and J.M Tata, counsel for the  
   Respondents

Investigation Meeting:        14 September and 2 November 2022

Submissions and further    2 November 2022 from the Applicant  
information received:        9 November 2022 from the Respondents

Determination:                5 December 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]        Adin Nasar worked for Expert IT Group Limited (EIGL) from Wednesday 25 November 2020 until 3 December 2020. He says he was an employee and is entitled to be paid for the hours he worked and holiday pay. He also says he was unjustifiably dismissed for which he seeks remedies. Mr Nasar says leave should be granted to join Zabiullah Sharif, the managing director of EIGL as a person involved.

[2]        EIGL says at all relevant times Mr Nasar was a volunteer who sought work experience following an unsuccessful interview for a systems engineer role. EIGL says at Mr Nasar's request it agreed to give him work experience as a volunteer, this was

agreed to in writing by the parties and was the true nature of the employment relationship. It says he is not entitled to any of the remedies sought.

### **The Authority's investigation**

[3] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Nasar, Mr Sharif and Yousef Syed and Musa Patel, who at the relevant time were employees of EIGL and had dealings with Mr Nasar. Mr Syed and Mr Patel gave their evidence by audio-visual link. Mr Nasar attended the second investigation meeting by audio-visual link. There was no objection to Mr Nasar and the named witnesses attending remotely. A friend of Mr Nasar filed an unsworn statement in support of his claim but did not attend the investigation meeting to affirm his evidence and be questioned. No weight can be given to the statement.

[4] 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 orders made. It has not recorded all evidence and submissions received.

### **Issues**

[5] The issues for investigation and determination are:

- a) Was Mr Nasar employed by EIGL?
- b) If so was Mr Nasar unjustifiably disadvantaged and/or unjustifiably constructively dismissed by EIGL?
- c) If so is Mr Nasar entitled to a consideration of remedies sought including:
  - i. compensation for humiliation, loss of dignity, and injury to feelings under s123(1)(c)(i) ERA;
  - ii. lost wages pursuant to section 123(1)(b) of the Act?
- d) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Nasar which contributed to the circumstances which gave rise to his grievances?

- e) If Mr Nasar was an employee did EIGL breach Mr Nasar's employment agreement by failing to pay him for all hours worked?
- f) If so, is Mr Nasar entitled to arrears of unpaid wages calculated at the applicable minimum wage rate including payment of holiday pay and interest?
- g) Did EIGL breach any obligation owed to Mr Nasar under the Employment Relations Act 2000, Minimum Wage Act 1983, Holidays Act 2003 or Wages Protection Act 1983?
- h) If Mr Nasar was an employee of EIGL, did it breach the duty of good faith owed to him under s 4 Employment Relations Act 2000?
- i) Should leave be granted to join Mr Sharif as a person involved?
- j) Is either party entitled to an award of costs?

### **The relevant law**

[6] Section 6 of the Employment Relations Act 2000 sets out the meaning of employee and includes a person employed to work for hire or reward under a contract of service and excludes volunteers who do not expect and do not receive reward:

s.6 Meaning of employee:

- (1) In this Act, unless the context otherwise requires, Employee –
  - (a) Means any person of any age employee by an employer to do any work for hire or reward under a contract of service; and
  - (b) includes –
    - (i) a homemaker
    - (ii) a person intending to work; but
  - (c) excludes a volunteer who –
    - (i) does not expect to be rewarded for work to be performed as a volunteer; and
    - (ii) receives no reward for work performed as a volunteer
- (2) In deciding ... whether a person is employed by another person under a contract of service, the .... Authority-... must determine the real nature of the relationship between them.

[7] In making a s 6 assessment the following sets out how the Authority should assess the real nature of the relationship:<sup>1</sup>

All relevant matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test.

[8] The Employment Court has recently endorsed a broader more nuanced approach to assessing employment status:<sup>2</sup>

All of this is a long way of saying that whether a contract of service exists may arise inferentially. Conducting an analysis of the common law markers of contractual relations as a precursor to the mandated inquiry under s 6 is unlikely to be helpful and may well lead to perverse results. If Parliament had intended such an approach it is likely s 6 would have been framed very differently. Rather, Parliament mandated a broader, more nuanced, approach. That is reflected in *Bryson's* identification of the range of features that generally exist in employment relationships, including high levels of integration and control by the putative employer over the work (when, where, how, why) undertaken by the putative employee; who is benefitting from the work; and what the economic reality of the relationship is. In short, the Court is concerned with conduct in context.

[9] With respect to volunteers in *Courage* the Court found there is a distinction between being a volunteer for the purposes of section 6 and doing work voluntarily. The Court found work usually performed for pay can be an indicator that it is economic in nature.<sup>3</sup> In that case the reward was food, accommodation and security within the community.

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<sup>1</sup> *Bryson v Three Foot Six Limited (No. 2)* [2005] NZSC 34 at [32].

<sup>2</sup> *Courage v Attorney-General* [2022] NZEmpC 77, (2022) 18 NZELR 746 at [142].

<sup>3</sup> Above at [187].

## **Discussion**

### *Background*

[10] In October 2020 Mr Nasar completed a post-graduate diploma in informatics, the study of computational systems. He then started looking for a position in that field. This was not to be Mr Nasar's first employment in New Zealand, though it would be in his chosen field. He had relevant overseas work experience.

[11] On 18 November 2020 Mr Nasar submitted an online expression of interest for a system engineer position with EIGL. EIGL is a business providing information technology services in the Auckland region. Mr Patel, by email requested a copy of Mr Nasar's curriculum vitae which he provided. He then received an interview invitation by an electronic platform which he, reasonably, understood to be a job interview for the advertised systems engineer position.

[12] On 23 November, Mr Nasar, at Mr Syed's invitation, met with him at a café near to the EIGL offices. He said Mr Syed asked about his family, how he was supporting himself in New Zealand and that if came to work for EIGL could he afford to work for the first few weeks without pay. He says at that meeting he agreed to work for a few weeks for free on condition it would convert to a full-time job.

[13] Mr Syed's recollection of the conversation is different. He says it was a casual conversation about Mr Nasar's technical skills and that he told Mr Nasar he may not have the skills needed for the role. In reply Mr Nasar said he was keen to learn and asked for a volunteer opportunity. He said as they have a similar background, they would have discussed some personal matters during the course of the conversation. It is difficult to resolve this dispute because there is no evidence to corroborate either witnesses' recollection. However, given my findings below I prefer Mr Syed's recollection of events.

[14] There is a further dispute between the parties as to the events on 23 November. Mr Syed says following the café meeting Mr Nasar attended the interview as invited in the EIGL offices with himself and Mr Sharif. He says the interview was to assess Mr Nasar's suitability for the role in an interview setting. Mr Nasar was assessed as not

having suitable skills for the role and he asked again for a volunteer opportunity to learn the skills he did not have.

[15] Mr Nasar says the interview with Mr Sharif and Mr Syed did not occur. I find it is likely the interview did occur because this is the invitation he accepted.

[16] On 24 November Mr Nasar says Mr Syed contacted by telephone and congratulated him on being 'selected'. He says he understood he had been selected for the system engineer role but no terms or conditions of employment were discussed. He attended the office the next day and signed a one-page volunteer agreement he was given. He said he asked Mr Syed why the agreement did not refer to his becoming a permanent employee in two-weeks and Mr Syed said he should not worry.

[17] Mr Syed agreed he telephoned Mr Nasar on 24 November to offer him a volunteer opportunity which he Mr Nasar accepted. He then downloaded a template volunteer agreement from a government website but was unable to recall the details of how he had put the document together. Mr Syed said on 25 November he and Mr Nasar went through the document, Mr Nasar signed it and he signed it as Mr Nasar's 'line manager'. The agreement has some features which do not sit comfortably with volunteer status – it includes Mr Nasar will "work" full-time hours, refers to a project end and six monthly and annual reviews and a 21-day notice period. Mr Syed said these were included in error because he was unfamiliar with the template. The evidence from EIGL demonstrates the process Mr Syed followed was different to the employment process it usually undertakes with new employees.

[18] Mr Nasar started with EIGL that day. He attended the office during normal office hours between 25 November and 2 December 2020 (excluding the Saturday and Sunday). During this time he did IT related tasks set by Mr Musa and minor administrative tasks examples of which were moving boxes and shifting Mr Sharif's car. He also attended prayers with co-workers during the day after which they shared lunch which one of them had purchased. Mr Nasar did not have a password to log onto the EIGL computer system. Mr Nasar did not have any responsibilities assigned to him other than to perform the tasks Mr Patel assigned him daily and participate in the life of the office. In evidence, after initially claiming EIGL had produced falsified records,

Mr Nasar accepted the tasks set for him by Mr Musa were training. He also accepted he did not expect to be paid.

[19] During this time Mr Nasar also worked as an Uber Eats driver to earn sufficient income to pay his outgoings and was commuting to the EIGL offices from across the city. He said he soon realised working at EIGL all day and then for Uber Eats late into the evening along with the transport costs he was incurring was unsustainable.

[20] On 2 December Mr Nasar said he raised his concerns with Mr Syed and suggested he could work three days a week. He says the request was declined and he offered to work fewer hours every week if EIGL would pay his fuel, food and rent. He says this also was not accepted and that he was told to work until Friday and then finish. He then asked to leave immediately. Mr Syed then asked him to drive with him and during the course of the drive continued to suggest he work for EIGL for free because of the valuable opportunity it presented.

[21] Mr Syed's recollection of these conversations was Mr Nasar said he wanted to be paid, he replied you are a volunteer and need to pick up the right skills and Mr Nasar left soon after.

[22] On 3 December Mr Nasar emailed Mr Sharif and Mr Patel subject line "Goodbye and thank you for the opportunity":

It was a pleasure working with you guys, I am sorry that I had to leave at short notice.

Unfortunately, I couldn't find the verbal terms and conditions set forward by Yousef viable. As much as I would have loved to continue working for Expert IT, I am struggling to make ends meet due to reduced hours in my primary source of income which is not enough to cover my expenses.

[23] They replied with their best regards. There is no suggestion EIGL expected Mr Nasar to give or work out a notice period.

[24] On 15 January 2021 Mr Nasar raised a personal grievance with EIGL.

*Was Mr Nasar a volunteer or an employee?*

[25] Mr Nasar accepts he signed the volunteer agreement but submits the real nature of the relationship was that of employment and he is entitled to the incidences of such including payment for each hour worked and access to the personal grievance procedure under the Employment Relations Act 2000. He says further EIGL's true purpose in offering him the volunteer agreement was that he undertake a free work trial to assess his suitability for the position and to benefit from his free work.

[26] He relies on the interview process he went through, the discussions with Mr Sharif, Mr Syed and Mr Patel and the tasks he undertook during the period he worked for EIGL. He says the wording of the volunteer agreement he signed suggests he was an employee. He addition, he says he was rewarded for his work with meals.

(i) *For hire or reward?*

[27] An employee works for hire or reward.<sup>4</sup> Mr Nasar says he received a reward in exchange for work in the form of lunch. He accepted he shared meals with co-workers after they attended prayers at a local mosque. The evidence given by Mr Sharif and Mr Syed was attendance at prayers was not a work requirement and a meal was shared after prayers by those who attended because it was convenient and an expression of shared values.

[28] I am satisfied Mr Nasar did not receive a reward in the form of lunches for the work he performed. The lunches he shared with co-workers resulted from their attendance at prayers which was not a work requirement.

[29] Did Mr Nasar expect to be paid for the work he performed? There are significant factors which indicate the parties had a shared intention that Mr Nasar would not be paid for the work:

- (i) the parties signed a document titled "Volunteer Agreement" which expressly states Mr Nasar agreed he was a volunteer and would not be paid for the work performed;

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<sup>4</sup> Employment Relations Act 2000, s 6(1)(a).

- (ii) Mr Nasar accepted in evidence to the Authority that he did not expect to be paid for the work he did at EIGL; and
- (iii) he sought to renegotiate the terms of the volunteer agreement so that he would receive a reward in the form of money towards food, fuel and rent.

[30] I understand Mr Nasar says he did not have much time to consider the volunteer agreement. EIGL says his becoming a volunteer was discussed over the telephone, Mr Nasar came into work the next day and the volunteer document was then discussed with him it to which indicated his agreement by signature. I have found EIGL's account is more likely to have been what occurred.

[31] There are no statutory requirements for a volunteer agreement. I do not understand Mr Nasar's advances a duress argument, the tests for which would unlikely be met on the facts. I am satisfied Mr Nasar had understood he would not be paid by EIGL before he attended work on 25 November, he was provided the agreement which, broadly, recorded that agreement and he has indicated agreement by his signature.

(ii) *Was this in fact a work trial?*

[32] In *Salad Bowl Limited v Howe-Thornley* the Employment Court had to determine whether an individual was an employee when undertaking a work trial. The Court observed that an interview alone between a prospective employee and employer would rarely amount to work in an employment relationship giving rise to employment rights and obligations including the expectation of payment, and that satisfaction with the work performed is not a condition of employment. In finding Ms Howe-Thornley was an employee while undertaking a work trail the Court stated:<sup>5</sup>

Where the reasonableness line is likely to be crossed most commonly and "work" may be engaged in, for which there may well be a requirement for payment as well as where other incidents of an employment relationship arise, is where the employer gains an economic benefit from the employee's activity. In this case, for example, the defendant performed a number of the range of tasks which would have been undertaken by her had she continued to work for the plaintiff. Although the economic or other business or operational benefit to the employer may not have been optimal at that point due to the needs of the defendant to be shown what to do and to develop the necessary skills, the

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<sup>5</sup> *Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152 at [27].

defendant was nevertheless performing work for the plaintiff and contributing to its business.

[33] EIGL strenuously denies Mr Nasar was on a work trial. It says it provided him an opportunity to get some training in a work environment which it has done for a few people over the years. It relies on the volunteer agreement and the emails between Mr Musa and Mr Nasar which set him training tasks on matters which were not 'live'. It says it did not need to assess Mr Nasar's skills for the system engineer role because this had occurred at the café meeting on 23 November and the interview that day.

[34] EIGL produced at the direction of the Authority evidence of all volunteer and work-trial arrangements it has entered over the years. It does not show EIGL relies on volunteer workers or unpaid work-trials. Mr Syed had a volunteer period with EIGL before he secured employment. While I make no comment on the lawfulness or otherwise of that arrangement, which is not before me to determine, it is difficult to extrapolate those circumstances to Mr Nasar's given the disputed evidence as to whether Mr Nasar's was a work trial and the evidence before the Authority that suggests Mr Nasar agreed to be a volunteer without reward.

[35] An important consideration is the economic benefit EIGL may have derived from Mr Nasar's work. While I accept Mr Nasar's output would not have been optimal given he was performing mostly training tasks and that the benefit to EIGL was limited, in the short time he was there it could not be said he made no contribution to the business. Such a situation is likely in most new employment relationships – a new employee will require time to become familiar with the role responsibilities and the workplace before the full benefit of an employee's work is gained. The difficulty with Mr Nasar's claim is he has not been able to establish the parties agreed or, were likely to have agreed that this was a work trial and the weight of evidence is that Mr Nasar was at all times a volunteer.

## **Outcome**

[36] Weighing all the relevant factors I am satisfied for the six days Mr Nasar worked for EIGL he was a volunteer. The evidence is this is what he understood the arrangement to be, he signed an agreement which described him as a volunteer, and I am satisfied he had no expectation of payment because he sought to renegotiate the

terms of the volunteer agreement to that of employment when he realised he could not balance the voluntary work with EIG with his paid work. He received no reward for the work he performed consistent with a volunteer.

[37] Mr Nasar's claim is unsuccessful.

### **Costs**

[38] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. At the end of the investigation meeting the parties requested the Authority determine costs in this determination. The information needed as to actual costs is not before the Authority.

[39] If parties are unable to resolve costs between them and an Authority determination on costs is needed Expert IT Group Limited may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Nasar 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.

[40] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[41] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>6</sup>

Marija Urlich  
Member of the Employment Relations Authority

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<sup>6</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).