

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 261
3241559

BETWEEN KAMO LANDSCAPE &
 QUARRY SUPPLIES LIMITED
 Applicant

AND JAMES CASWELL
 Respondent

Member of Authority: Rachel Larmer

Representatives: John Robinson for the Applicant
 Brad MacDonald counsel for the Respondent

Investigation meeting: 18 and 19 April 2024 in Whangarei

Date: 3 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kamo Landscape & Quarry Supplies Limited (“KLQS”) employed the respondent, Mr James Caswell. The dates of his employment are disputed. KLQSL claimed the employment relationship ended on 28 March 2022, while Mr Caswell said that it continued until 28 February 2023.

[2] Mr Caswell lodged a number of employment related claims against KLQSL and KLQSL responded by lodging this counterclaim against him. This determination addresses KLQSL’s counterclaim only.

The Authority’s investigation

[3] The Authority held a two-day in-person investigation meeting in Whangarei during which Mr Caswell’s original claims and KLQSL’s counterclaims were investigated. The

parties wanted an opportunity to lodge submissions based on the evidence that came up during the investigation of Mr Caswell's original claims, so a timetable has been set to facilitate that.

[4] In terms of the counterclaim, Mr Robinson and his accountant Dean Subritzky of Elevate Accountants gave evidence for KLQSL. Mr Subritzky confirmed he was not aware of any documentation that would support any of the counterclaims. Mr Caswell gave evidence in response to the allegations that KLQSL had made against him.

[5] It became clear from the evidence heard during the course of the investigation meeting that KLQSL's counterclaim was without merit, so there was no need for post investigation submissions to be lodged.

[6] However, to ensure that KLQSL had been given every opportunity to provide all relevant information on its counterclaim, the parties were given until 2 May 2024 to provide any further information or submissions they wanted the Authority to consider on before the counterclaim was determined. Neither party lodged any further information or submissions.

[7] The Authority considered there was no need to delay the determination of this counterclaim until after submissions have been lodged on Mr Caswell's original claim. The two matters involve entirely different claims and evidence. It was therefore preferable to bring a timely closure of the counterclaim to the parties, by issuing this determination.

[8] The Authority discussed with the parties the evidence it expected to see during the case management conference. It also reiterated to Mr Robinson prior to the investigation meeting that KLQSL had to provide evidence that its counterclaims arose from the employment relationship, because that was not evident from the evidence it had lodged prior to the investigation meeting.

Issues

[9] The following counterclaim allegations were made by KLQSL:

- (a) Mr Caswell borrowed money he has not repaid;
- (b) Mr Caswell's loan for the Toyota Hilux is in arrears;
- (c) Mr Caswell is required to pay \$100 per week from shareholder remuneration to KLQSL;

- (d) Mr Caswell failed to repay \$200 of the \$4,900 shareholder remuneration paid to him;
- (e) Mr Caswell has not returned Mr Robinson's shotgun;
- (f) Mr Caswell did not hand over Niade inflatable in return for being gifted an aluminium boat;
- (g) The security trail camera has not been returned by Mr Caswell;
- (h) Rubbish was left on the property when Mr Caswell vacated it;
- (i) Mr Caswell misled Mr Robinson that he would become a shareholder in KLQSL;
- (j) Mr Caswell failed to sign the necessary documents to become a shareholder in KLQSL.

Jurisdiction issues

[10] The Authority only has jurisdiction over employment relationship problems that arise between parties that are in an employment relationship, as defined by s 6 of the Employment Relations Act 2000 (the Act).

[11] Mr Caswell had an individual employment agreement that was signed by KLQSL on 23 January 2021 and was then later signed by Mr Caswell. Mr Robinson's evidence was that Mr Caswell had already started work before he was given a written employment agreement to sign.

[12] The date the employment relationship ended is an issue that will be determined as part of Mr Caswell's original claim, but that finding about that was not necessary in order to determine this counterclaim.

[13] The employment agreement recorded KLQSL as the employer, not Mr Robinson personally. Therefore personal arrangements made between Mr Robinson and Mr Caswell that arose out of their longstanding association are not employment relationship problems.

[14] For KLQSL's counterclaim allegations to succeed it must establish on the balance of probabilities that they were enforceable terms and conditions of the employment relationship. KLQSL fell far short of being able to establish that. Accordingly, none of KLQSL's counterclaims succeeded.

[15] The Authority's findings on each counterclaim allegation are as follows:

- (a) *Mr Caswell borrowed money he has not repaid* – there was no evidence of KLQSL loaning money to Mr Caswell as part of the employment relationship. The investigation established this claim was about Mr Caswell not repaying what Mr Robinson claimed were shareholder advances to him (Mr Caswell). Shareholder disputes are outside the Authority's jurisdiction.
- (b) *Mr Caswell's loan for the Toyota Hilux is in arrears* – There was no evidence of Mr Caswell being provided with a vehicle by KLQSL as a term of his employment. The Toyota Hilux was not owned by KLQSL but was owned by Mr Robinson personally. Mr Robinson transferred ownership of the vehicle to Mr Caswell in 2022. There is no loan documentation to support this counterclaim.
- (c) *Mr Caswell is required to pay \$100 per week from shareholder remuneration to KLQSL* – There was no documentation to support this counterclaim. Mr Caswell did not agree to become a shareholder in KLQSL. It was not a term of his employment that he become a shareholder. Mr Caswell did not sign a share transfer form. Nor did Mr Caswell agree to repay any money to KLQSL for shares or for shareholder remuneration.
- (d) *Mr Caswell failed to repay \$200 of the \$4,900 shareholder remuneration paid to him* – The same findings made above apply here. Mr Caswell was not a shareholder, did not agree to become a shareholder and shares in KLQSL was not a term or condition of his employment. Shareholder related disputes are outside the Authority's jurisdiction.
- (e) *Mr Caswell has not returned Mr Robinson's shotgun* – This is not an employment matter. Mr Robinson purchased a shotgun but was unable to keep it himself as a result of his firearms license having been withdrawn as a condition of his bail in relation to criminal charges made against him. Mr Robinson gave Mr Caswell the shotgun to look after for him. Mr Caswell tried to return to shotgun to the Police, but they refused to accept it. The Police also told Mr Caswell he could not return the shotgun to Mr Robinson if he did not have a current firearms license. At the time of the investigation meeting Mr

Robinson still did not have a firearms license. The gun will be returned when he has a current firearms license.

- (f) *Mr Caswell did not hand over Niade inflatable in return for being gifted an aluminium boat* – This is not an employment matter. Mr Robinson’s son in law had owned aluminium boat but had left it on his property. Mr Robinson wanted to gift the aluminium boat to Mr Caswell in a personal arrangement. Mr Caswell did not want to accept it as a gift, so he offered Mr Robinson the Niade inflatable in return.
- (g) *Security trail camera has not been returned by Mr Caswell* – this item is still on KLQSL’s property.
- (h) *Rubbish was left on property when Mr Caswell vacated it* – Mr Caswell lived onsite. The provision of accommodation was not a term or condition of his employment. The living arrangement was also not documented. Mr Caswell said he had to leave in a hurry as a result of his unjustified dismissal on 28 February 2023. Non-employment related accommodation disputes are outside the Authority’s jurisdiction.
- (i) *Mr Caswell misled Mr Robinson that he would become a shareholder in KLQSL* – The Authority accepted Mr Caswell’s evidence that he did not agree to become a shareholder in KLQSL, as he was found to be a more credible witness than Mr Robinson.
- (j) *Mr Caswell failed to sign the necessary documents to become a shareholder in KLQSL* – It was not a term or condition of Mr Caswell’s employment that he become a shareholder in KLQSL. Nor did he agree to become a shareholder. Mr Caswell was not legally required to sign the share transfer documents. There was no documentation recording what had been discussed or agreed about a possible shareholding arrangement.

Costs

[16] Mr Caswell as the successful party is entitled to a contribution towards his actual legal costs and disbursements.

[17] The Authority has adopted its usual notional daily tariff-based approach to costs. The current notional daily tariff is \$4,500 for the first day of an investigation meeting. This matter

will be treated as a half-day investigation meeting for the purposes of assessing costs. The notional starting point for assessing costs for the counterclaim is therefore \$2,250 being half of the notional daily tariff.

[18] There are no factors that should result in adjustments being made to the notional starting tariff. Accordingly, KLQSL is ordered to contribute \$2,250 towards Mr Caswell's actual legal costs.

[19] Mr Caswell also incurred the costs associated with serving conduct money for a witness summons on Mr Subritzky who did not want to voluntarily attend the investigation meeting. Although Mr Robinson agreed at the CMC that KLQSL would witness summons Mr Subritzky, so it was directed to do so, KLQSL breached that direction.

[20] Mr Robinson decided to witness summons Mr Subritzky because he did not want to incur any costs/fees that Mr Subritzky would have charged KLQSL if it had elected to simply call him as a witness on its behalf. Because KLQSL would not summons Mr Subritzky as it was supposed to have done, the Authority summonsed him itself to ensure he attended the investigation meeting.

[21] However, the Authority was unable to pay Mr Subritzky the conduct money that had to accompany the witness summons, so Mr Caswell was asked to do that to ensure Mr Subritzky's attendance at the investigation meeting, given the reluctance he had expressed about becoming involved in this matter.

[22] Mr Caswell incurred \$250.70 as a result of instructing a process server to ensure the summons and conduct money had been served on Mr Subritzky. An invoice for this amount was provided to the Authority. It is appropriate that Mr Caswell be reimbursed for this disbursement he paid on KLQSL's behalf.

[23] Mr Subritzky mainly gave evidence about matters involving Mr Caswell's original claims, however he was also questioned to ascertain what he knew (as KLQSL's accountant) about the various counterclaim allegations. Mr Caswell is currently out of pocket for the costs associated with the process server, which would not have been necessary had KLQSL summonsed Mr Subritzky as it had agreed to do.

[24] It is therefore appropriate for Mr Caswell to be able to recover that disbursement now from KLQSL, instead of having to wait for the determination of his original claims to be issued, which will be some months away. KLQSL is therefore ordered to reimburse Mr Caswell \$250.70 for the cost of the process server.

Orders

[25] Within 28 days of the date of this determination, Kamo Landscape and Quarry Supplies Limited is ordered to pay Mr Caswell \$2,500.70, consisting of \$2,250 contribution towards his legal costs plus a disbursement of \$250.70 to reimburse the process server's fee.

Rachel Larmer
Member of the Employment Relations Authority