

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 502
3253079

BETWEEN ELFIE ABONITALLA
Applicant

AND STONELOU FARMING
LIMITED
Respondent

3284280

BETWEEN STONELOU FARMING
LIMITED
Applicant

AND ELFIE ABONITALLA
Respondent

Member of Authority: Helen Doyle

Representatives: No appearance by Mr Abonitalla
Ben Coleman, counsel for Stonelou Farming Limited

Investigation Meeting: 8 August 2024 by AVL

Submissions: On the day

Determination: 21 August 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Elfie Abonitalla says in his statement of problem lodged on 25 September 2023 that he was unjustifiably disadvantaged and dismissed from his employment with Stonelou Farming Limited (Stonelou). Mr Abonitalla was employed as a full-time farmhand by Stonelou from in or about 13 May 2022 to 12 December 2022.

[2] Stonelou is a duly incorporated company having its registered office at Timaru and carrying on the business as a dairy farm.

[3] In its statement in reply Stonelou did not accept that Mr Abonitalla was disadvantaged in or dismissed from his employment. Stonelou made a claim for payment of all debts owed by Mr Abonitalla to Stonelou.

[4] Stonelou subsequently lodged a separate statement of problem in which it claimed reimbursement for payment of various expenses and payment for work not undertaken by Mr Abonitalla.

[5] The expenses claimed are as follows:

(a)	Variation of work visa condition	\$940.00
(b)	Air travel fees	\$1,726.24
(c)	Air travel fees	\$1,090.71
(d)	Hours paid but not worked	\$11,022.76

[6] Mr Abonitalla denied in his statement in reply that he owed \$14,779.71 to Stonelou and said that any expense that Stonelou may have incurred in relation to a purported variation of visa conditions, air travel fares and payment of salary for the period where Mr Abonitalla was not working was never agreed expressly or impliedly to amount to a loan agreement to be repaid at a later date.

The Investigation Process

[7] The Authority set the matter down for an investigation meeting in Oamaru on 8 August 2024 at a case management conference on 14 February 2024.¹ Mr Abonitalla was represented at the case management conference by David Cain from Sacked Kiwi. Stonelou was represented by Mr Coleman. The parties had attended mediation but the matter had not resolved.

[8] The Authority timetabled for a separate statement of problem for the counter claim and for a statement of reply to be lodged and served. The directions of the Authority were that the two files would be consolidated and investigated together.

¹ Directions of the Authority dated 14 February 2024.

There was advice from Stonelou that the amounts claimed in the counterclaim were inextricably linked to the ending of the relationship.

[9] Mr Cain asked that Mr Abonitalla appear by audio visual at the investigation meeting from the Philippines. There was agreement to that. The Authority advised it would arrange for a Tagalog interpreter at the investigation meeting.

[10] The Authority set out in the notice of direction the issues for investigation from the first statement of problem. They were whether there were any changes to rostered hours in September 2022 and the events of 12/13 December 2022 including telephone discussions and related communications in order to determine how the relationship ended. A timetable for an exchange of statements of evidence was set.

[11] There was a subsequent request for an extension of time by Mr Cain for Mr Abonitalla to lodge his statement of evidence which was granted.

[12] On 27 June 2024 following that request Mr Cain wrote to the Authority and advised that despite continued efforts to get hold of Mr Abonitalla over the past few weeks, no instructions had been received. Mr Cain indicated in his email that he did not have a physical address for Mr Abonitalla and the only contact details were an email and a telephone number connected to a WhatsApp profile. These were provided.

[13] Mr Cain asked that his firm Sacked Kiwi be recorded as no longer acting for Mr Abonitalla. Leave was granted to Mr Cain to withdraw.

[14] An Authority Officer subsequently wrote to Mr Abonitalla at the email address provided asking for confirmation whether he wished to proceed with his claim and appear by way of audio visual at the Authority meeting set for 8 August 2024. There was no response to that email within the timeframe stipulated and a statement of evidence was never received from Mr Abonitalla.

[15] The Authority advised the parties that the investigation meeting on 8 August 2024 would proceed via audio visual. Mr Abonitalla was always going to attend the meeting in that manner. I am satisfied that Mr Abonitalla was advised by way of email from an Authority officer at the address provided by Mr Cain of the Teams link.

[16] On 8 August 2024 the Authority delayed the start of the meeting for ten minutes, however there was still no appearance by Mr Abonitalla.

[17] In the absence of any advice supporting there was a good cause for the non-attendance by Mr Abonitalla the Authority decided to proceed.²

[18] The Authority heard evidence from Stafford Adams who is the sole director of Stonelou about its claim for reimbursement.

[19] Mr Coleman made an application for dismissal of Mr Abonitalla's claim and made submissions directed to the claim for reimbursement of the amounts Stonelou claims are owing.

The issues

[20] Should Mr Abonitalla's claims against Stonelou be dismissed?

[21] What is the basis for claims that Mr Abonitalla is liable to reimburse Stonelou for expenses and payment for hours not worked?

[22] Should there be an order for reimbursement of all or any of the amounts Stonelou say are owed to it by Mr Abonitalla?

[23] What if any order should be made for costs?

Should Mr Abonitalla's claims against Stonelou in file number 3253079 be dismissed?

[24] It is more likely than not that Mr Abonitalla was advised by Mr Cain of the investigation meeting date and time and that there was agreement to his attendance by way of audio-visual link.

[25] When Mr Cain was granted leave to withdraw as representative the Authority communicated directly with Mr Abonitalla at the email address provided but there has been no response to the email. Mr Abonitalla was then sent a copy of the Teams link so he could connect to the Teams meeting.

[26] There is advice in the notice of investigation meeting that if Mr Abonitalla does not attend the investigation meeting the matter may be dismissed and costs may be

² Employment Relations Act 2000 schedule 2 clause 12.

awarded against him.³ As a result of the failure to appear Mr Abonitalla was unable to establish his claim.

[27] Mr Abonitalla's claims against Stonelou are dismissed.

What is the basis for claims that Mr Abonitalla is liable to reimburse Stonelou for expenses and payment for hours not worked?

[28] Mr Adams said in his evidence that Stonelou paid for Mr Abonitalla's variation of work visa conditions, two plane flights and his salary payments for periods when work was not performed and claim those amounts back.

[29] Text messages attached to the statement in reply to file number 3253079 show issues in the employment relationship were coming to a head prior to 12 and 13 December 2022. Mr Adams said that during a telephone call on 13 December 2022 Mr Abonitalla said that he would resign if the amounts he owed were rescinded.

[30] There is a text message from Mr Adams to Mr Abonitalla on 13 December 2022 as below:

As discussed on the phone, We will pay your 2 weeks wages and \$500 worth of wet weather gear and gum boots, as a full and final payment. You will have up to two weeks to move out. This will wipe your debt to us and we wont chase you for it as long as you cause no issues going forward.

[31] Mr Adams said that Mr Abonitalla agreed to what was proposed. It appears that a payment was made to Mr Abonitalla as set out above however the content of subsequent text messages supported that Mr Abonitalla became unhappy soon after. He instructed Mr Cain and a statement of problem was lodged which included an unjustified dismissal claim

[32] Mr Adams said that in those circumstances the way was clear for recovering the amounts Stonelou say are owed.

[33] Even though Mr Abonitalla was not present at the investigation meeting the Authority still needs to be satisfied that there is a valid basis for the claims for

³ Employment Relations Authority Regulations 2000 Schedule 1 Form 8.

reimbursement. These types of claims are not straightforward notwithstanding there is documentary evidence that expenses have been paid by Stonelou for Mr Abonitalla.

[34] In Stonelou's statement of problem reliance is placed on clause 14 in the employment agreement. That is a clause concerned with payment of wages or salary and deductions. Initially the clause did not appear to apply however having considered the documentation including the documentation relating to the final pay and the subsequent amount paid at the time the relationship ended holiday pay may have been withheld.

Overpayment of salary

[35] The evidence and text messages show that Mr Adams was generous to Mr Abonitalla and his family throughout the period of employment. There was a payment for two weeks salary when Mr Abonitalla was overseas and became unwell. The text messages about that are between Mr Abonitalla's wife and Mr Adams.

[36] Mr Adams has provided pay records that he says show whilst Mr Abonitalla was overseas for a period between 26 July 2022 and 23 August 2022, he received his full pay. When Mr Abonitalla returned to work Mr Adams says that he was paid his ordinary salary payments notwithstanding periods he was too unwell to work and/or work full time.

[37] The evidence and consideration of the text messages about payment of salary during the period of incapacitation and/or for other periods where work was not performed do not show it was agreed by Mr Abonitalla these payments were to be a loan that he would repay. The payments were not payments by mistake or under duress supporting a right to some equitable remedy. Arguably they could be seen as a payment in advance of a sick leave or holiday leave entitlement. The basis for any reimbursement is unclear.

[38] I do not order in these circumstances reimbursement of the amounts that Stonelou says were an overpayment of salary.

Airfares

[39] Stonelou paid for two airfares for Mr Abonitalla shortly after he was employed. Mr Abonitalla had advised Mr Adams that he needed to travel for a family emergency.

Stonelou paid for the first flight but Mr Abonitalla missed it. Stonelou paid for a second airfare as a result.

[40] It is clear from the text messages between Mr Abonitalla and Mr Adams that this was regarded as a loan. Mr Adams in a message dated 15 July 2023 to Mr Abonitalla stated that:

I'll pay for the Saturday on but you will pay me back still. Total you will owe is \$2700 Round figures.

[41] Mr Abonitalla responded:

[42] It's ok boss..the important for me now is to see my family.

[43] Mr Adams responded:

We can take it out of holiday pay as you will be entitled to 4 holiday after 12 months work but you won't be away 4 weeks. OK I'll book it now.

[44] The final pay breakdown which is provided as part of the documentation leaves doubt as to whether holiday pay was ever paid out to Mr Abonitalla. The final pay breakdown shows 79.63 accrued hours of leave. The total figure for the final payment is \$4,886.70 which includes salary of \$2,692.31 and what is referred to as "termination pay" of \$2,193.39. I conclude the termination pay is likely holiday pay. Deductions for PAYE, rent power and a figure for unspecified deductions of \$3,182.76 are made from both the salary amount and holiday pay bringing the final payment to Mr Abonitalla down to zero. The evidence supported Mr Abonitalla had made a repayment of about \$100 toward the flights. An amount of \$100 appears on the final pay breakdown as flight repayment but it is not clear whether this is a credit or suggests an ongoing liability for that amount.

[45] The final payment subsequently made as set out above was two weeks salary being \$2,692.31 gross and \$500 for wet weather gear and gumboots as a full and final payment.

[46] It remains unclear if holiday pay was withheld but it appears likely to have been. In those circumstances it must be credited towards the flights and it is unclear what amount, if any, is still owing for these.

[47] I decline in those circumstances to make an order for the repayment for the flights.

Payment for variation of work visa conditions

[48] I accept that this was paid by Stonelou but there is no evidence to support this was a loan that Mr Abonitalla was expected to repay. I make no order for repayment in those circumstances.

Should there be an order for reimbursement of all or any of the amounts Stonelou say are owed to it by Mr Abonitalla?

[49] I am not satisfied that orders should be made for repayment of money in the sum of \$14,779.71 to Stonelou by Mr Abonitalla for the reasons set out above.

Costs

[50] The claim against Stonelou was dismissed. Stonelou was unsuccessful in its counterclaim.

[51] The investigation meeting took a little over one hour. In the exercise of my discretion as to costs I conclude it appropriate that costs lie where they fall.

Findings and orders made

[52] Mr Abonitalla's claims in file number 3253079 are dismissed.

[53] Stonelou's claims in file number 3284280 are not made out.

[54] Costs lie where they fall.