

Immigration New Zealand reasonable to conclude permit-holder working outside visa conditions and to issue Deportation Liability Notice

Legislation	Ombudsmen Act 1975, Immigration Act 2009, Employment Relations Act 2000
Ombudsman	Peter Boshier
Case number(s)	434589 (previously unpublished)
Date	2017

Immigration New Zealand (INZ) issued a Deportation Liability Notice (DLN) when complainant was observed working at a restaurant and outside conditions of work visa—Ombudsman found INZ’s decision reasonable in the circumstances

The complainant claimed that INZ’s decision to issue the DLN had been unreasonable because he had been helping out a friend at a restaurant, he had not received gain or reward for the work he did and therefore he had not breached the conditions of his permit. A DLN is triggered when INZ determines that there is sufficient reason to deport the visa holder. This preliminary decision is based on the information available to the decision maker at the point in time that the notice is served. Section 4 of the Act and Immigration Instruction W2.2.1 defines work as any activity undertaken for gain or reward. The note to W2.2.1 states that the definition ‘*does not require work as an employee*’. Gain or reward is defined as any payment or benefit that can be valued in terms of money. Thus, the definition of work in the immigration context is relatively broad, and goes beyond actions performed by an ‘*employee*’.

The complainant was observed on three occasions serving customers at a restaurant but he claimed he was not being paid by the restaurant and was working part-time for another employer as named on his visa. The Ombudsman could see no reason why the Immigration officer should not have issued the DLN at the time. Following the issuance, the complainant had the opportunity to give good reasons for why the deportations should not proceed. The complainant explained there were humanitarian reasons for remaining in New Zealand (including the fact that a serious earthquake had occurred in his home country Nepal). He also

provided a letter from his employer named on his visa that stated the complainant was working for him but had been 'on leave' for 2 weeks, and proof of his earnings from IRD.

The Ombudsman considered that INZ provided the complainant with sufficient opportunity to comment on the concern that he had breached the conditions of his visa. It is noted that INZ requested additional information about the complainant's income at the relevant time which meant the complainant had effectively been provided with a further opportunity to explain his circumstances to INZ. It was also noted that the restaurant owner had not provided any information to verify the complainant's claim that he was working on a voluntary basis or why the complainant had previously stated that he was working part-time at the employer named in his visa, whereas his visa had been for fulltime work.

The Ombudsman observed that for INZ to establish whether a person is working in terms of the Immigration Act is a matter of examining all the circumstances of the particular case, in light of the purpose of immigration instructions. The Ombudsman considered that the INZ officer's initial view that complainant was 'working', was justified and that although INZ did not obtain any direct evidence that the complainant received '*gain or reward*' for working at the restaurant, it is apparent that the complainant had provided assistance in the restaurant which would otherwise have been provided by a New Zealand worker and that the complainant contributed to the operation of the restaurant. For these reasons the Ombudsman agreed with INZ that the complainant's 'good cause' submissions were not compelling. There were also concerns about gaps in the complainant's bank statements. It appeared that the complainant had in fact been working part time for the employer named on the visa and it seemed reasonable to assume that the complainant undertook employment elsewhere.

On the balance of the information at hand, the Ombudsman formed the opinion that INZ was reasonably entitled to conclude that the complainant was working at the restaurant and entitled to issue the DLN. The Ombudsman also concluded that INZ had provided the complainant with the opportunity to comment before deciding not to cancel the DLN. The complaint was not sustained.

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