

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 307/08
5126110

BETWEEN	SEUNGWHAN BAK Applicant
AND	WASAN INTERNATIONAL CO LIMITED First Respondent
AND	WASAN INTERNATIONAL CONSTRUCTION & DEVELOPMENT LIMITED Second Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
Edward Kang, advocate for Respondents

Investigation Meeting: 12 August 2008

Determination: 27 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated a claim made by Mr Seungwhan (Patrick) Bak that he was underpaid wages of \$7,832.09 and did not receive annual holidays of three weeks on pay, due from his employment with Wasan International Co Limited or Wasan International Construction & Development Limited, or both.

[2] The two companies were represented by Mr Edward Kang who is the sole director of them.

[3] Mr Bak and Mr Kang provided information and evidence to the Authority from which I am able to determine this claim.

[4] I note that the parties did not attempt to resolve the claim in mediation, apparently because of resistance or opposition to that course from the respondent companies. I also note that despite being required to do so, neither company lodged a statement in reply to the claims. Further, Mr Kang did not come on the line for the telephone conference that had been arranged by the Authority with him earlier as part of this investigation.

Real nature of parties' relationship

[5] Mr Kang contended that Mr Bak had not been an employee of either of his companies but had been an independent contractor and that the claim therefore was not within the jurisdiction of the Employment Relations Authority. Mr Kang also contended that the relationship had been with Wasan International Construction & Development Limited and another company, D & D, the pair of which had jointly contracted the services of Mr Bak.

[6] Mr Kang requested and was given time to find and provide to the Authority any evidence such as the written contract he thought there had been, to support his claim that D & D was involved and that Mr Bak had been a party to a contractual arrangement with that entity. No further evidence has been supplied by Mr Kang within the extra time given. Mr Bak is entitled to a determination without further delay, particularly in view of the earlier failures by the Wasan respondent companies to co-operate with this investigation.

[7] Mr Kang accepted as a genuine company record the Monthly Detail sheet for the 2007/2008 tax year, which showed monthly deductions of PAYE made from gross income paid to Mr Bak by "*Wasan International Construction.*" The payments shown were from September 2007 to 31 March 2008. In four of those months Mr Bak was paid \$3,846, and in other months he was paid more.

[8] Mr Kang said that PAYE had been deducted at the request of the Inland Revenue Department but that this was not because Mr Bak had been an employee under an employment relationship.

[9] Having considered, as required by s 6 of the Employment Relations Act 2000, the real nature of the relationship between Mr Bak and his employer or employers, I am satisfied that it was an employment relationship and that the Authority therefore has jurisdiction to investigate and determine the claim brought by Mr Bak.

[10] I am satisfied by the evidence of Mr Bak that from about June 2007 he worked full-time five and sometimes six days a week at the head office of the two Wasan companies in Queen Street, Auckland. He was paid a salary from which PAYE was deducted. He received no other remuneration by way of commission or bonus or profit sharing, and was not an investor or partner in any business of the companies.

[11] His work mainly involved preparing applications for resource consent needed for building and similar projects, and he also did some immigration consultancy work for the Wasan companies. He was under the direction of Mr Kang in the work that he performed and had no opportunity or ability to work for anyone else. Cards printed under the logo of Wasan described Mr Bak as the “*Project Manager*” of both companies. I find that he was integrated into the Wasan businesses and in reality was an employee rather than a contractor.

Underpayments – wages and holiday pay

[12] Mr Kang did not seriously dispute the amount Mr Bak calculated that he had been underpaid. There are 11 weeks in which he was not paid \$730.19, but from the total an amount of \$200 paid in one particular week has been deducted to get \$7,832.09.

[13] In addition, as an employee Mr Bak was entitled to three weeks annual holidays on pay. He worked for over a year and took no holidays, I find. Therefore he is entitled to \$2,190.57 for holiday pay, in addition to the unpaid wages or salary.

[14] I find that the claim brought by Mr Bak succeeds for those amounts, in a total of \$10,022.66.

[15] Further, Mr Bak is entitled to interest on that sum which I fix at 9%, the current 90 day bank bill rate being about 8.2%.

[16] The employer of Mr Bak is likely to have been the company Wasan International Construction & Development Limited. It was incorporated in June 2007 and its name is on the top of the employer’s Monthly Detail of PAYE payments made to the Inland Revenue Department on behalf of Mr Bak.

Determination

[17] Accordingly, the Authority orders Wasan International Construction & Development Limited to pay to Mr Bak as wages and holiday pay a total of \$10,022.66. Interest is also to be paid on that sum at the rate of 9% from 4 June 2008 when claim was lodged by Mr Bak, until payment has been made in full.

Costs

[18] The second respondent company is also to reimburse Mr Bak the \$70 fee paid by him to lodge his application in the Authority for this investigation.

A Dumbleton
Member of the Employment Relations Authority