

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 226
5583287

BETWEEN WELLINGTON CHAKONDA
Applicant
AND S & G PLUS AUTO ELECTRICAL
LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in person
Shanta Kumar, Representative for Respondent
Investigation Meeting: 4 July 2016 at Auckland
Submissions received: 4 July from Applicant and from Respondent
Date of Oral Determination: 4 July 2016
Date of written determination: 5 July 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Wellington Chakonda, claims that he has not been paid wages during the period 31 August 2015 to 18 September 2015 when he was employed by the Respondent, S & G Plus Auto Electrical Limited (S&G).

[2] S&G denies that it offered employment to Mr Chakonda and claims that any offer of employment was subject to him satisfactorily completing a practical work test. As he did not do so, employment was not offered to him.

[3] S&G further claims that Mr Chakonda worked 4 days only during the period 31 August 2015 to 18 September 2015.

Issue

[4] The issue for determination is whether or not Mr Chakonda is entitled to unpaid wages by S & G.

Background Facts

[5] S & G is a workshop specialising in vehicle electrical work including fitting car alarms and re-gassing of air-conditioning systems and currently employs 5 employees.

[6] On or about August 2015 Mr Raj Patel, General Manager, and Mr Dermal Kumal, Foreman, were injured and not attending work on a regular basis, and S & G placed an advertisement on Trade-Me for an Auto-Electrician.

[7] Mr Chakonda saw and applied for the advertised job and was interviewed by Mr Ashh Govind, Managing Director. During the interview Mr Chakonda said he was offered employment by Mr Govind as an Auto Electrician at an hourly rate of \$28.00 per hour.

[8] Mr Govind said that Mr Chakonda produced a copy of his qualifications at the interview together with his work references. Mr Govind said it was his standard policy to make any offer of employment subject to a practical test involving the fitting of car alarms and reversing cameras.

[9] Mr Chakonda said he commenced employment on Monday 31 August 2015. His agreed hours of work were from 8.00 a.m. to 5.00 p.m. Monday to Friday. In addition he worked two Saturdays from 8.00 a.m. to 12.00 p.m. on the first Saturday and from 8.00 a.m. to 2.00 p.m. on the second Saturday.

[10] His work included fitting of car alarms. Mr Chakonda said he had been slow in completing the first fitting which occurred on the first day of employment, but after that he was able to complete the fitting of car alarms on 2/3 cars a day.

[11] Mr Chakonda said he had not met Mr Kumar during his employment at S & G, and had met Mr Patel on only a few occasions, one being when they drove together to collect car parts and take them back to the S & G workshop.

[12] Mr Chakonda said it had been agreed he would be paid weekly, however he received no payments at all during the period of employment, despite asking Mr Govind on a couple of occasions for payment. As a result, he had ceased employment on 18 September 2015.

[13] Mr Govind said he had told Mr Chakonda during the interview that he would be offered employment provided he satisfactorily completed a practical work test, and Mr Chakonda had agreed to this.

[14] Mr Govind confirmed that he had provided nothing in writing to Mr Chakonda.

[15] Mr Govind said he had become concerned when Mr Chakonda took longer than anticipated to complete a car alarm fitting task assigned to him on the first day, and he had to engage another auto electrician to finish the job.

[16] He also experienced ongoing concerns over the quality of Mr Chakonda's work. As a result he had decided not to offer Mr Chakonda employment with S&G.

[17] Mr Govind said that Mr Chakonda had only worked 4 days during the three week period.

[18] Mr Patel confirmed that he had not been present throughout the whole period when Mr Chakonda was working at S & G due to having a hand injury; however he had been present at Mr Chakonda's interview. He had also accompanied Mr Chakonda to collect some auto parts on one occasion.

[19] Mr Kumar said he had not been present during Ms Chakonda's interview; however Mr Govind had told him that Mr Chakonda was the new auto electrician.

[20] He had been told that Mr Chakonda was very well qualified for the position; however he had been advised that Mr Chakonda was taking more time than expected to complete the jobs assigned to him.

[21] Both Mr Patel and Mr Kumar confirmed their understanding that Mr Chakonda had not successfully completed the practical work test and on that basis, employment had not been offered to him.

Determination

[22] The work which Mr Chakonda had been asked to undertake during the alleged practical work trial for S & G had consisted of auto electrical work, this including installing car alarms on customer vehicles. These were tasks which S & G had agreed to provide to customers and for which it intended to seek payment.

[23] I find that this work was not merely a test of Mr Chakonda's auto electrical abilities, but consistent with the Employment Court's finding in *The Salad Bowl Limited v Amberleigh Howe-Thornley*¹ it was legitimate work which benefitted S&G's commercial enterprise.²

[24] I also find that Mr Chakonda's expectation that he would be paid for this work to be a reasonable expectation based on his interview discussion with Mr Govind.

[25] Mr Govind said that any offer of employment was subject to satisfactory completion of a work trial. This was not confirmed in writing, and is denied by Mr Chakonda.

[26] The Employment Relations Act 2000 ("the Act") makes provision for trial periods at ss 67A and 67B. The Act states:

s. 67A When employment agreement may contain provision for trial period for 90 days or less

(1) An employment agreement containing a trial provision ... may be entered into by an employee ... and an employer.

(2) Trial provision means a written provision in an employment agreement that states, or is to the effect, that –

(a) For a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period

[27] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal.

[28] I find that Mr Chakonda's employment was not subject to a trial period pursuant to s 67A (2) of the Act since the provision was not in writing.

[29] I find that Mr Govind offered Mr Chakonda employment, Mr Chakonda accepted that offer. I accept Mr Chakonda's evidence that he was offered remuneration of \$28.00 per hour. The failure to pay Mr Chakonda was unlawful under the Minimum Wage Act but the failure to pay any money to Mr Chakonda does not invalidate the parties' agreement.

[30] During the period of employment Mr Chakonda was to work as directed in the S & G workshop and otherwise to present himself to customers as a member of the staff of the business. The offer, which was accepted by Mr Chakonda, included a working week Monday to Friday, and on two occasions Saturday mornings.

¹ [2013] NZEmpC 152 at para [51]

² *ibid* at para [51]

[31] On this basis I determine that Mr Chakonda was an employee in accordance with s 6 of the Employment Relations Act 2000 (the Act) which states:

*(1) In this Act, unless the context otherwise requires, **employee-***

(a) Means any person of any age employed by an employer to do any work for hire or reward under a contract of service;

[32] The Wages Protection Act 1983 governs the payment of wages between an employer and an employee. In accordance with s 4: *an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*

[33] There have been no wage and time records provided in respect of Mr Chakonda.

[34] I accept Mr Chakonda's evidence regarding the actual dates he was employed as the employers have not provided time and wage records.

[35] I find that Mr Chakonda is owed monies in respect of non-payment of wages and he is entitled to payment of wages for the hours which he worked by S & G.

Remedies

[36] S & G is ordered to pay Mr Chakonda the sum of **\$3,640.00 gross** in respect of unpaid wages for the period 31 August 2015 to 18 September 2015 (calculated as \$28.00 per hr x 8 hours per day x 15 days, and \$28.00 per hr x 10 hours over 2 days).

[37] The outstanding sum owed to Mr Chakonda is to be paid within 28 days of the date of this determination.

[38] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum³.

[39] I consider that it is appropriate that S & G pay interest on the outstanding sums owed to Mr Chakonda.

³ Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

[40] S & G is to pay interest of 5% on the outstanding sum due to Mr Chakonda.

[41] Mr Chakonda is to be reimbursed the filing fee of \$71.56.

Costs

[42] While costs are reserved, I note here that, subject to his submissions, Mr Chakonda was not legally represented and, unless he incurred legal costs, it is therefore unlikely he will have grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority