

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 155
5156702

BETWEEN AVI AVRAHAM COHEN
Applicant
AND NCSA HOLDINGS LIMITED
Respondent

Member of Authority: Alastair Dumbleton
Representatives: Piliki Talanoa, advocate for Applicant
Shamil Arachchie, advocate for Respondent
Investigation Meeting: 27 July 2010 and 22 March 2011
Determination: 15 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a statement of problem lodged by him with the Authority the applicant, Mr Avi Cohen, complained about “non-payment/underpayment of wages, holidays, sick leave, overtime hours, public holidays etc” and “no payslips issued at all.” Mr Cohen quantified the amount he sought as unpaid wages, holiday pay and sick leave as \$3,571.60 in total.

[2] In a written submission attached to the statement of problem there is also a request for the Authority to consider ordering payment of compensation for “unfair dismissal.” Mr Cohen attached to his application a handwritten memorandum dated 3 September 2008, from him to Mr Shamil Arachchie who is a director of the respondent company, NCSA Holdings Limited. The memorandum, headed “resignation letter,” contains Mr Cohen’s advice that he is resigning from his employment with NCSA’s hair and beauty salon, which was one of several in New Zealand operated under the name ‘Kess.’

[3] There is no dispute that NCSA employed Mr Cohen to work in its Kess salon at St Lukes, or that under a written employment agreement he was to be paid \$13 per hour to work 40 to 45 hours a week.

[4] In a further memorandum to Mr Arachchie, Mr Cohen referred to his earlier resignation and an injury which was preventing him from working. Later, in a letter dated 17 February 2009, Mr Cohen's advocate, Mr Piliki Talanoa, referred to the dispute raised by Mr Cohen about unpaid wages and unpaid holidays but made no mention of any claim of unjustified dismissal. It would appear that in relation to such claim a personal grievance was not raised with the employer until March 2009, some six months after Mr Cohen had notified his resignation. If so, the grievance was raised outside the 90 day period specified by s 114 of the Employment Relations Act 2000. It therefore cannot be considered by the Authority unless leave is sought and obtained under s 114 of the Act.

[5] NCSA lodged a statement in reply in response to Mr Cohen claim. Attached to it was a schedule showing hours worked in each week from July 2007 until July 2008 and wage payments calculated at \$13 per hour. Included in the schedule were payments for time and a half and statutory holidays, and also for sick leave and annual leave. Another schedule detailed payments made to Mr Cohen and the cost of products, mainly cigarettes, supplied to him by a shop adjacent to the salon and owned or operated by NCSA. Among the items was payment of a fee of several hundred dollars on Mr Cohen's behalf to obtain a work permit for him. The respondent provided a detailed schedule of products and services supplied to a total of \$998.32.

[6] The total wages due to Mr Cohen for his entire employment was given in NCSA's schedule as \$21,343.90. The total paid to Mr Cohen including the \$998 cost of products and services was \$21,343.90 in the schedule. NCSA denied owing Mr Cohen any wages or pay for holidays or sick leave. It concluded its statement in reply by saying "we are still open to go through any discrepancies which he has with our calculations (attached and provided to him)."

[7] The parties tried to resolve this dispute through mediation but were not successful and the Authority proceeded with an investigation meeting in July 2010. This was adjourned after evidence was taken from Mr Cohen and Mr Arachchie, to allow the Authority time to inspect three Eastlight folders of mainly handwritten wage

and time records kept by NCSA between January 2008 and February 2009. The detailed information in the records, which were volunteered to the Authority by Mr Arachchie, related to Mr Cohen and a number of other NCSA employees. The records included daily timesheets of hours worked and payments made to individual employees.

[8] Following the investigation meeting the Authority wrote to the parties advising that it had finished examining the folders of records and other material provided at the investigation meeting. The Authority advised that it considered there was insufficient evidence to support Mr Cohen's claims that he was underpaid for the hours he worked for NCSA, noting that the employer had provided a schedule tending to show that he had been fully paid and had also provided daily handwritten timesheets and other information recorded by it over the period of employment. Against that information was Mr Cohen's unsupported evidence that he had worked more than 45 hours in many weeks throughout his employment and had not been paid for all his time. Mr Arachchie noted that while initially Mr Cohen had claimed 90 hours unpaid, this escalated to 235 hours without explanation. Mr Cohen had also initially claimed to have "all the records" supporting his claim, but he did not produce any to the Authority.

[9] Before determining the claim the Authority offered an opportunity for Mr Cohen and his representative Mr Talanoa to inspect the folder material provided to the Authority and make any submissions they wished to about it. Mr Cohen eventually came to the Authority and looked at that material on 22 March 2011. He advised that after inspecting only one folder he thought it would take him many hours to check them all and even then he had nothing to compare the records in the folders against.

[10] The information the Authority has about the termination of Mr Cohen's employment is that this followed a period where he could not work because of injury and complications that arose in his recovery from that. In July 2008 he had an accident at work and was put off on ACC from 27 July to 2 September 2008. On 3 September he gave his resignation in writing to Mr Arachchie.

Determination

[11] I am satisfied that the information given in the schedules provided by NCSA has been taken from the records contained in the three folders and that those were reasonably accurately kept records of the hours worked by Mr Cohen and payments made to him. After considering that material and the evidence given by Mr Cohen and Mr Arachchie, the Authority is not satisfied that Mr Cohen is owed any money, whether for unpaid wages, underpaid wages, holiday pay including public holidays and annual holidays, or sick leave.

[12] I am satisfied that no grievance was raised by Mr Cohen within 90 days of the termination of his employment, and therefore the Authority cannot consider his claim of “unfair dismissal.” The evidence there is before the Authority strongly suggests he resigned.

[13] Accordingly, no orders are made against NCSA Holdings Limited and this investigation is concluded.

A Dumbleton
Member of the Employment Relations Authority