

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 292/08
5124978

BETWEEN MURRAY DEAN
 Applicant

AND CAPSTAN HOLDINGS LTD
 Respondent

Member of Authority: James Wilson

Representatives: Murray Dean in person
 Peter Breed for Capstan Holdings Ltd

Investigation Meeting: 10 July 2008 at Auckland

Determination: 14 August 2008

DETERMINATION OF THE AUTHORITY

Murray Dean's Employment Relationship problem

[1] The applicant, Murray Dean, says that his erstwhile employer, Capstan Holdings Ltd, owes him over \$9500.00 in unpaid wages, holiday pay and redundancy monies. For Capstan Holdings the sole Director and shareholder, Mr Peter Breed, says that Mr Dean was a casual employee and has been paid for the hours he worked. Mr Breed says he had made it clear to Mr Dean when he was first employed that he would be paid on an hourly rate of \$20, inclusive of annual leave payments, for hours actually worked.

The party's respective position's

[2] Mr Dean says that he was employed by Mr Breed, on behalf of Capstan Holdings, in September 2007. He says that there was no question that the job was anything other than a 40 hour week position and there was no mention of annual leave being included in the hourly rate. He points out, and has provided a copy of his

previous employment agreement to support his claim, that he was previously employed in a 40 hour week job, at \$18 per hour exclusive of holiday pay.

[3] Mr Dean says that initially he was paid regularly but, over time, payments became erratic. For example he was not paid for the week of 14 November 2007 but received two weeks pay the following week. He received no payment for three weeks but then received \$1900 on the 26th of December 2007. (a short payment according to Mr Dean of \$596 after tax). The next payment Mr Dean received was on 23 January 2008 of \$570. He says he received no payment for the three weeks prior to that and he is owed payment for this period as annual leave. In particular Mr Dean says that he was ready for work on 16 January 2008 but was advised at the beginning of the day that he would not be required to work that week. Over the next three months Mr Dean says he received a total \$4626.00 including \$280 in cash. Mr Dean says that during this period he took two days off as annual leave, for which he was not paid, but was paid for the public holidays of Waitangi day and Good Friday. The last payment he received was for the week of 26 March 2008.

[4] Regrettably there is no record as to exactly what hours Mr Dean worked after the end of March 2008. However Mr Breed says that he advised Mr Dean at the end of April or early May to *get another job* as there was no further work available. Mr Dean says that he received a text from Mr Breed on 7 May 2008 suggesting he *take another job if you can*.

[5] Mr Breed says that he offered Mr Dean a casual job on a day-to-day basis with payment being for hours actually worked. He says he made it clear that Mr Dean was to be paid a flat rate of \$20 per hour, inclusive of payment for leave. Mr Breed also says that he paid Mr Dean three weeks holiday pay, over and above the hourly rate, out of decency and had continued to pay Mr Dean even when he didn't actually work. Eventually, in May, he suggested Mr Dean find another job. Mr Breed says that there was no written employment agreement as *Mr Dean's job was expendable at any time*.

Discussion

[6] Capstan Holdings were unable to produce wage and time records for Mr Dean other than timesheets covering the period from 11 September 07 to 30 October 07. No employment agreement was ever signed by the parties. In the absence of these records the relevant legislation clearly defines a worker's entitlement.

Recovery of wages

[7] The Employment Relations Act 2000 (the Act) says, at section 132:

132 Failure to keep or produce records

(1) Where any claim is brought before the Authority ... to recover wages or other money payable to an employee, the employee may call evidence to show that-

(a) the defendant employer failed to keep or produce wages and time records in respect of that employee as required by this act; and

(b) that failure prejudiced the employee's ability to bring an accurate claim under section 131.

(2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of -

(a) the wages actually paid to the employee:

(p) the hours, days, and time worked by the employee.

[8] Mr Breed accepts that there was no employment agreement between Capstan Holdings and Mr Dean and he has been unable to produce any records to counter Mr Dean's claims. Under the circumstances, and as Capstan Holdings has been unable to produce any evidence that Mr Dean's claims are incorrect, I accept Mr Dean's evidence regarding the wages that he has received and *the hours, days, and time worked* by him.

[9] Mr Dean claims, and I accept, that he was employed for 40 hours a week and was available to work those hours from the 11th of September 2007 until 9 May 2008 when his employment was terminated - a period of 34 weeks and 3 days. During this time there were 10 days (other than public holidays) that Mr Dean did not work and was not paid, because he was “on leave”. Over the period of his employment Mr Dean was entitled to be paid for 163 days, including public holidays. From Mr Dean’s bank records I have calculated that he was paid for 121 days.

Days worked = 163

Days paid = 121

Days owing = 42

Mr Dean is owed 42 days pay x 8 hours x \$20.00 = \$6720.00 from Capstan Holdings Ltd in unpaid wages.

Holiday pay

[10] The Holidays Act 2003 does provide that holiday pay may be paid to an employee with the employee’s wages under certain circumstances. These circumstances include when:

- The employment is for an agreed fixed term(in terms of section 66 of the Employment Relations Act); or
- The work is of such an intermittent nature that it is impractical for the employer to provide annual holidays ; and
- The employee agrees in his or her employment agreement; and
- The holiday is an identifiable component of the employee’s pay.

None of these conditions were met in respect to Mr Deans employment! There is no written employment agreement. The assumption must be therefore that the employment was not for a fixed term and Mr Dean did not consent *in his employment agreement* for his holiday pay to be paid with his wages. For most of the term of his employment the work was not intermittent, and in fact Mr Dean did take time off which could have been designated and paid as annual holidays.

[11] Mr Dean is entitled to holiday pay. As his employment was for less than 12 months he is entitled to receive payment at 8% of all wages paid or owed. This calculation is:

163 days x 8 hrs x \$20.00 = \$26,080.00 gross

8% of \$26,080 = \$2,086.00

Mr Dean is owed \$2,086.00 in unpaid holiday pay.

Redundancy

[12] While it is possible that the termination of Mr Dean's employment was far from perfect he has not claimed that his dismissal was unjustified and has not raised a personal grievance. He accepts that Capstan Holdings had no further work for him and that he was genuinely redundant. There is no statutory entitlement to redundancy pay and, as there was no employment agreement, there is no contractual entitlement for Capstan to pay redundancy compensation.

Determination

[13] For the reasons set out above **Capstan Holdings Ltd is ordered to pay Mr Murray Dean the sums of \$6,720.00 and \$2,086.00, less the appropriate amounts of tax, in unpaid wages and holiday pay, within 14 days of the date of this determination.**

Costs

[14] Mr Dean represented himself in bringing his claim to the Authority and has therefore not incurred legal costs. He is however entitled to be reimbursed for the cost of filing his claim. In addition to the amounts set out in [13] above, **Capstan Holdings Ltd is ordered to pay Mr Dean \$70.00 as reimbursement of his filing fee.**

James Wilson

Member of the Employment Relations Authority

