

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Mr Mark Horn (Labour Inspector) (Applicant)  
**AND** Cool Cars Limited (Respondent)  
**REPRESENTATIVES** Mr Mark Horn for Applicant  
Mr Malcolm Mulligan for Respondent  
**MEMBER OF AUTHORITY** Vicki Campbell  
**INVESTIGATION MEETING** 18 October 2006  
**DATE OF DETERMINATION** 26 October 2006

DETERMINATION OF THE AUTHORITY

[1] The applicant Labour Inspector seeks an order requiring the respondent company to pay outstanding annual holiday pay to a former employee, Lennox Thompson. He also seeks interest on that amount, a penalty for failure to pay and his filing fee.

[2] CCL did not turn up for the investigation meeting at the appointed time. No statement in reply has been received from the respondent. I am satisfied that the statement of problem and the notice of investigation meeting were both served on the respondent.

[3] The investigation meeting commenced at 10.00am on 18 October 2006. The respondent did not make an appearance at that time. The notice setting down the investigation meeting sets out the consequences of non-attendance. I adjourned the meeting briefly at 10.05am to allow the respondent time to appear.

[4] During the adjournment I contacted Mr Michael Barraclough, Employment Relations Authority Support Officer, and asked him to try and make contact with the respondent. He was successful and advised me that Mr Mulligan, the company accountant, had requested that the investigation meeting be adjourned until 11.00am to allow him time to attend and represent CCL.

[5] I granted the adjournment.

[6] Mr Mulligan attended the investigation meeting and sought leave to defend Mr Horn's claim. CCL had not lodged its statement in reply within the prescribed period and a further

extension of time. Mr Mulligan explained it had not done so because he had been busy with other paper work. He explained that it was his fault the statement in reply was not filed.

[7] I granted CCL leave to defend Mr Horn's claim being satisfied it was just to do so and with Mr Mulligan's assurance that he was in a position to proceed at the investigation meeting.

### **Employment Relationship Problem**

[8] Mr Horn claims the payment of \$1,110.00 for outstanding holiday pay owing to Mr Lennox Thompson for his employment at CCL, plus interest, a penalty and costs. CCL says no money is due to Mr Thompson as he was not an employee, rather, he was a contractor.

[9] The issues for this determination require me to:

- identify the real nature of the employment relationship; and
- determine whether holiday pay owing to Mr Thompson.

### **The real nature of the employment relationship**

[10] To determine the real nature of the employment relationship I must consider all relevant matters, including any indication of the parties' intention, but am not to treat any description of the relationship by the parties as determinative (section 6 of the Employment Relations Act).

[11] Mr Thompson attended an interview with Ms Heather Jacobs, the owner of CCL, in early 2005 and commenced work in April 2005. Mr Thompson says that during the interview he and Ms Jacobs discussed the business, what his responsibilities would be and that the remuneration was based on a retainer plus commission. He says that initially he was unsuccessful in his application, but a couple of weeks after the interview Ms Jacobs contacted him and offered him a job.

[12] The parties did not enter into a written agreement. In the absence of any written record of the parties' intention I must look at how Mr Thompson's engagement operated in practise, any relevant documents and evidence of arrangements for payment and taxation.

[13] There is no dispute that the following terms were agreed:

- remuneration was made up of a retainer of \$250.00 per week and commission of \$250.00 for each vehicle sold and paid for;
- the days of work would be Monday – Saturday inclusive with every fourth weekend off;
- the hours of work on those days was 8.00am to 5.30pm.

[14] Mr Thompson's responsibilities included sales, obtaining finance and insurance for clients, arranging mechanical work as required and identifying methods of prospecting. Mr Thompson reported directly to Ms Jacobs, who was the Dealer Principal (DP).

[15] Two weeks after commencing his employment Mr Thompson was asked by Ms Jacobs to sign tax forms. The forms were for the deduction of "withholding tax". Mr Thompson says he enquired of Mr Mulligan why was he signing these particular forms and was told that it was the company's preference. Mr Thompson says that he suggested to Mr Mulligan that as he had a GST number perhaps he should be a contractor and provide invoices. He says Mr Mulligan said "no" to his suggestion.

[16] Mr Mulligan says he recalls parts of that discussion. He certainly recalled speaking with Mr Thompson about the ins and outs of him being a contractor and providing invoices, but decided it would be too messy.

[17] Mr Mulligan accepted that Mr Thompson was not an "*independent*" contractor to CCL, but he believed that putting him onto the withholding tax regime gave him the opportunity to gain tax benefits.

[18] While Mr Thompson was registered for GST at the commencement of his employment, he never filed any GST returns. Neither did he undertake any work for anyone else, outside of the work undertaken on behalf of CCL. Indeed, Mr Thompson says that the staff were not allowed to work for anyone else.

[19] While tax status is not determinative of the employment status I am satisfied that Mr Thompson received no personal tax advantage from having withholding tax deducted.

[20] Mr Thompson says that for the first three months he was required to attend daily staff meetings with Ms Jacobs where they discussed what was happening with various sales and promotions. He said the requirement to meet diminished over time as Ms Jacobs stopped coming into the office as much.

[21] Mr Mulligan accepted at the investigation meeting that Mr Thompson was required to be on site during the agreed working hours. Mr Thompson was in constant contact with Ms Jacobs when she wasn't on site because a deal could not be closed or the conditions of a deal altered without the DP's permission. I am satisfied that the control asserted by Ms Jacobs was consistent with an employer/employee relationship.

[22] Mr Thompson's work was integral to the operations of CCL and was not an accessory to it. This point was also accepted by Mr Mulligan at the investigation meeting.

[23] There was no evidence that Mr Thompson took any financial risk in the business or provided his own equipment. I am satisfied that Mr Thompson was not in business on his own account.

[24] Standing back and looking at the relationship as a whole I find Mr Thompson was an employee.

### **Outstanding holiday pay**

[25] Given my determination that Mr Thompson was an employee it follows that he is entitled to receive holiday pay for his period of employment. There is no dispute that the holiday pay had not been paid and neither has the amount ever been in dispute.

**Cool Cars Limited is ordered to pay to the Labour Inspector for Mr Thompson's credit the gross sum of \$1,110.00 in respect of outstanding holiday pay and to do so within 28 days of the date of this determination.**

### **Interest**

[26] The Authority has discretion to award interest on unpaid holiday pay. The respondent's withholding of Mr Thompson's statutory entitlements warrants an award of interest for the period he has been denied what is owed to him.

[27] The interest calculated under clause 11 of Schedule 2 of the Employment Relations Act is to be at a rate not greater than the 90-day bill rate at the date of the order plus 2 per cent. Interest is to be paid at the rate of 8.5%.

**Cool Cars Limited is ordered to pay to the Labour Inspector for Mr Thompson's use interest on the sum of \$1,110.00 at the rate of 8.5% per annum from the date of filing, 8 August 2006 until the date of payment and such interest to be paid within 28 days of the date of this determination.**

### **Penalty**

[28] I am satisfied that the respondent has failed to comply with the requirements of the Holidays Act 2003 to calculate and pay holiday pay owing to Mr Thompson. The respondent had no argument that Mr Thompson had not worked for him and accrued the minimum statutory entitlements.

[29] Mr Mulligan held a genuine belief, albeit incorrectly, that Mr Thompson was a contractor and therefore was not required to pay holiday pay. Under the circumstances I am not satisfied that a penalty is payable in this matter.

**Costs**

[30] The Inspector shall have his filing fee.

**Cool Cars Limited is ordered to pay to the Labour Inspector \$70.00 in reimbursement of the filing fee on this application and to do so within 28 days of the date of this determination.**

Vicki Campbell  
Member of Employment Relations Authority