

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 59/10
5138286

BETWEEN THOMAS MATTHEW
BRYDEN JOHNSTON
Applicant

A N D RICHARD LOWE and
JOCELYN COLVILLE and
KARAMEA QUARRY AND
CONCRETE LIMITED and
NORTH TERRACE
DEVELOPMENTS LIMITED
Respondents

Member of Authority: James Crichton
Representatives: Applicant in person
Respondents in person
Investigation Meeting: 9 March 2010 at Westport
Determination: 12 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Johnston) was employed from September 2008 until 19 December 2009 by the respondents (Mr Lowe and/or Karamea Quarry and/or North Terrace). There was no employment agreement between the parties and the evidence is clear Mr Johnston was paid by a number of the respondent entities but both parties regarded the employment as contiguous.

[2] Mr Johnston complains that he was not paid all of the wages to which he was entitled. He says that he was paid a total of \$22,959.40 net and is still owed the net sum of \$34,640.60. In addition, when he concluded his employment, he was not paid

holiday pay and he was forced to pay \$3,500 in fines because of Transport Act infringements on vehicles owned and operated by Mr Lowe.

[3] Mr Lowe acknowledges that there are wages and holiday pay sums owing to Mr Johnston and agrees generally with the figures Mr Johnston advanced at the investigation meeting. Mr Lowe spoke of giving Mr Johnston a net sum of \$30,000 and of getting reimbursement of the fines paid by Mr Johnston as well.

[4] Mr Lowe spoke warmly about Mr Johnston's work but indicated that he was simply unable to pay the amount of money that Mr Johnston was entitled to because he had not himself been paid for work his various entities had performed. There were a number of clients of the respondents who were referred to at the investigation meeting, some for whom work had been completed and some of whom were prospective clients.

[5] Two former clients in particular were the subject of discussion. One involved a subdivision development at Little Wanganui which Mr Lowe described as a professional operation which he hoped would pay him shortly for the work that his various companies had done. If that happened, he would then be able to settle with Mr Johnston.

[6] The other former client referred to particularly in evidence was Radley Investments Limited for which Mr Lowe's various entities had performed significant work and from which certain payments had already been received. One of those payments (a cheque for \$10,000) had been made payable direct to Mr Johnston on instructions from Mr Lowe and Ms Colville. However, Mr Radley of Radley Investments Limited, in correspondence before the Authority, made it clear that he would not pay any more of the moneys owing unless and until he received a proper GST invoice. Mr Lowe considered that this was just an excuse and that Mr Radley's company simply had no money, but I ventured to point out that Radley Investments Limited was under no legal obligation to pay the money owed without a GST invoice.

[7] The matter came before the Authority by way of a statement of problem filed on 11 January 2010 and because of the large amount of money owed in wages, I have given the matter urgency. Mr Johnston erroneously thought that in filing the matter in the Authority, there was a prospect that if the Authority found his case had merit, the Authority would arrange to pay out the sum owed to him and then recover that from

the employer. I pointed out to him that this was not the position and that the Authority's role was simply to determine the legal position between the parties.

Determination

[8] I am satisfied on the evidence before the Authority that Mr Johnston is owed the net sum of \$34,640.60 in unpaid wages together with holiday pay on the total amount earned over the period of the employment and reimbursement of the moneys paid for the traffic infringement fine and the filing fee in the Authority. Mr Johnston has also sought compensation for the way in which he has been treated. I am not prepared to make an order in that regard yet because the effect of that decision might well be to prejudice the ability of the parties to resolve the wages issue and the other matters associated with the wages between them. However, I am prepared to leave that matter open for Mr Johnston to come back to the Authority if his wages claim is not able to be addressed promptly and I will then consider making orders in respect of compensation and/or penalty once I have given Mr Lowe and Ms Colville an opportunity to be heard specifically on those issues.

[9] I am particularly drawn to this course of action because of an agreement reached between the parties at the investigation meeting, the thrust of which was that Mr Johnston (who maintains a good relationship with Mr Radley of Radley Investments Limited) would contact Mr Radley immediately with a view to offering to assist Mr Radley to get his subdivision concluded and through the consent process at the Buller District Council, thus giving Radley Investments Limited something to sell, which potentially would result in cashflow which might benefit Mr Johnston. Further, it was agreed between the parties that Mr Lowe would provide a GST invoice for Radley Investments Limited if that would help get the balance of the money owed by Radley to Mr Lowe's entities paid. About \$12,000 is owing. Mr Lowe undertook before the Authority that all of that money, if paid, could be paid directly to Mr Johnston in reduction of the total wages sum owed to him.

[10] The Authority directs that Mr Johnston is to be paid the following sums by the respondents:

- (a) \$46,071.99 gross in unpaid wages;
- (b) Holiday pay for the total period of the employment in the sum of \$6,128.64 gross;

- (c) Reimbursement of the traffic infringement fines paid by Mr Johnston in the sum of \$3,500;
- (d) Reimbursement of the Authority's filing fee in the sum of \$70.

Costs

[11] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority