

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 42
5282926

BETWEEN Navjot Singh
Applicant

AND Mahadeep Property Developers
Limited
First Respondent

AND Harvinder Singh Walia
Second Respondent

Member of Authority: Denis Asher

Representatives: Lars Hansen for Mr Singh
No appearance by or for the respondent

Investigation Meeting New Plymouth, 9 December 2010

Submissions Received From the applicant on the day of the investigation;
amended statement of problem filed on 20 December
2010 and request for same from director of first
respondent on 10 January 2011

Determination: 11 March 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Can Mr Walia be joined to these proceedings? Was the applicant, Mr Singh, employed by either of the respondents (the Company or Mr Walia)? Is Mr Singh owed outstanding wages and holiday pay? If he is owed unpaid monies should it attract interest from the time his employment ceased? Can the respondents counter-claim for damages against Mr Singh?

[2] Mr Singh also seeks to recover his \$70 filing fee.

[3] Mediation did not resolve this employment relationship problem.

The Investigation, Decision to Proceed and Addition of Second Respondent

[4] During a telephone conference with the parties on 15 September 2010, which was attended by the director of Mahadeep Property Developers Limited, Mr Mandeep Singh, I directed this matter to an investigation in New Plymouth on 8 October 2010. Mr Mandeep Singh is not related to the applicant.

[5] At Mr Mandeep Singh's initiative, the parties subsequently sought – and I accepted – an adjournment. The matter was then set down to be investigated in New Plymouth on Thursday 9 December 2010.

[6] First by telephone (by way of a conversation with an Authority support officer on 8 December) and then by email on the same day, Mr Mandeep Singh sought further evidence from the applicant and an adjournment until it was provided. The latter request was opposed by counsel for the applicant, Mr Lars Hansen, on the ground that, in addition to a particularised response set out in Mr Hansen's email also of 8 December, his client could respond further to the request for evidence at the investigation, that Mr Mandeep Singh had had ample time to then to request discovery in respect of that evidence and the investigation had been adjourned once already at his request.

[7] An Authority support officer subsequently advised Mr Mandeep Singh that I was declining his adjournment request. I reached this decision for the following reasons:

- a. I accepted the argument advanced by the applicant's representative; and
- b. Mr Mandeep Singh's last representative (Mr Karl Gill) had earlier confirmed that a settlement proposal was with his client for settlement but then, much later, reported he was unable to get a response from him and was therefore unable to act for the applicant.

[8] Another emailed request for an adjournment was forward by Mr Mandeep Singh at 08.10 on the morning of the investigation. On this occasion he advised that Mr Harvinder Singh (sic) (who I understand is Mr Mandeep Singh's father) would provide "*key evidence*" but was not medically fit to travel; a medical report was subsequently provided by email at 10.32.

[9] However, by that latter time I had:

- a. In the absence of the medical certificate, declined Mr Mandeep Singh's latest request for the same reasons set out above;
- b. Notwithstanding the medical certificate, I did not regard the request as credible as I had already spoken to a person by telephone (shortly after 09.00, when the investigation was scheduled to commence) who identified himself to me as Mr Walia, that he was Mr Mandeep Singh's father, and that he did not know where his son was or how to contact him. He did not advise me he wished to appear at the investigation and/or that he was too ill to attend; and
- c. Notwithstanding the above, Mr Mandeep Singh, as director of the respondent company, offered no reason for his absence.

[10] I therefore proceeded with the investigation and took the applicant's evidence. There was no appearance by or for the respondents. The only evidence presented by or on behalf of the latter to date is that contained in the statement in reply received on

22 December 2009 and a discursive, non-sworn statement with attachments received on 5 October 2010, from an unidentifiable author (the signature being illegible but possibly that of Mr Mandeep Singh).

[11] By way of an application during the investigation and an amended statement of problem received on 20 December 2010, counsel for the applicant, Mr Lars Hansen, sought to have Mr Harvinder Walia added as the second respondent. Neither the first respondent nor Mr Walia has responded to that application. I am satisfied the amended statement of problem was properly served on the respondents as Mr Mandeep Singh advised on 20 January 2011 that the document was not attached to the email notice of 20 December 2010 and asked that it be sent again: it was forwarded then to the same email address by an Authority support officer. I note here advice from the applicant's representative, Mr Lars Hansen that, as his email forwarding the amended statement of problem makes clear, it was sent to the Authority and Mr Mandeep Singh at the same time and as the Authority had received the attachment it followed Mr Mandeep Singh must have as well.

[12] No further communications have been received by or on behalf of the respondents.

[13] Because of the applicant's uncontested evidence, summarised below, I am satisfied it is fair and reasonable to add Mr Walia to these proceedings as the second respondent.

Background

[14] Mr Singh says he was employed by the respondents from 21 June to 14 August 2009. He claims the following unpaid monies:

- a. 575 hours worked by the applicant for that period as particularised in the attachments to the statement of problem, multiplied by the agreed, minimum adult hourly rate of \$12.50 = \$7,187.50 gross;
- b. Less \$400.00 nett cash payment by respondent on 15 July; plus

- c. Holiday pay (8% of \$7,187.50 gross) = \$575.00; plus

- d. Interest at the 90-day Bill Rate from his last day of work until the date payment is made (being an amendment to his claim put forward at the investigation)

[15] Mr Singh denies the counter-claims by the respondents (which are set out in the statement in reply and include allegations the applicant owes monies totalling \$2,500 in respect of a licence fee for use of the business premises; electricity, water and internet charges, reimbursement for vehicle damage and the cost of a pair of sunglasses). The applicant does not accept he was responsible for the alleged damages, fees and living costs.

[16] In his statement of problem and witness statement received on 28 September (both being copied to Mr Mandeep Singh) the applicant explained that he had finished his studies, was looking for full time employment and was advised that Mr Walia was looking for an employee "*to manage ... the gas station in Hawera*" (par 2 above).

[17] Mr Singh said he was picked up on 20 June by Mr Walia in Auckland and transported to Hawera, where he commenced employment the following day.

[18] Mr Singh said no employment agreement was ever signed, that he recorded his daily working hours and regularly communicated to Mr Walia (when the latter was not present in Hawera) daily details of fuel sold, payments made to BP, EFTPOS and bank accounts, and the amount of cash retained in the business till.

Discussion and Findings

[19] I have no evidential basis or other reasons to dispute the credibility of the applicant's allegations that he was engaged by one or other of the respondents, on the minimum wage and that he worked the hours claimed almost entirely without pay.

[20] This finding is reinforced by Mr Singh's documentary evidence of frequent emails between him to Mr Walia reporting relevant daily sales figures, etc (see attachments to Evidence in Support of Applicant filed on 30 November 2010).

[21] The absence of a written employment agreement and the uncontested evidence of the second respondent hiring Mr Singh points to Mr Walia being the actual employer. However, because of their close business relationship (including Mr Walia identifying Mr Mandeep Singh as his son, and the latter making representations as to his father's health and him having key evidence to provide), I am satisfied liability for matters arising out of this employment relationship should rest, jointly and severally, with both respondents.

[22] In the absence of affirmed or sworn evidence in support of the respondent's counter-claims I have no reasons or basis other than to accept Mr Singh's denial of any liability and to reject the respondent's counter-claims.

[23] In its statement in reply filed on 22 December 2009 the respondent denied Mr Singh's allegations but said that while he was allowed to live in its gas station premises (since sold) "*he never worked, much less 575 hours. Sometimes Mr Walia used to ask the Applicant to help him in banking or to look after a customer if he was busy*" (7th bullet point, par 2, statement in reply).

[24] A finding in favour of Mr Singh's claim is reinforced by the respondents' admission he did some work for them.

[25] A finding in favour of Mr Singh's claim is reinforced by the fact he was given some monies, i.e. \$400 nett on 15 July 2009.

Remedies

[26] I am satisfied the respondents are, jointly and severally, liable to pay to Mr Singh the following monies as claimed by the applicant:

- a. On the basis of 575 hours worked by the applicant for the period of his employment as particularised in the attachments to the statement of problem, multiplied by the agreed, minimum adult hourly rate of \$12.50 = \$7,187.50 gross less \$400.00 nett cash payment by respondent on 15 July; plus
- b. Holiday pay of \$575.00 gross (being (8% of \$7,187.50 gross); plus

- c. Interest at the 90-day Bill Rate from his last day of work until the date of payment plus 2%.

[27] Leave is reserved to the parties to submit these interest calculations back to the Authority if agreement on the same is not forthcoming.

[28] I accept Mr Singh's claim he should be compensated the \$70.00 filing fee.

Determination

[29] The respondents, jointly and severally, are to pay to Mr Navjot Singh \$7,187.50 (seven thousand, one hundred and eighty-seven dollars and fifty cents) gross less \$400.00 nett cash paid to the applicant by the respondents, plus holiday pay of \$575.00 (five hundred and seventy-five dollars) gross; plus interest on the same at the current 90-day Bill Rate from his last day of work until the date of payment plus 2%, plus Mr Singh's filing fee of \$70.00 (seventy) dollars.

[30] Costs are reserved. Subject to submissions from the party, I would expect them to follow the event and reflect the actual costs of a half day investigation as well as possibly additional costs arising out of the respondents' failures to act in good faith in respect of these proceedings.

Denis Asher

Member of the Employment Relations Authority