

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** David Edward Whitworth (Applicant)  
**AND** Feliz Smith T/A Village Bakery (Respondent)  
**REPRESENTATIVES** Stephen Sundvick, Counsel for Applicant  
Donald Webster, Counsel for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 29 August 2005  
**DATE OF DETERMINATION** 1 September 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] David Whitworth seeks payment of two weeks' wages, with holiday pay, from Feliz Smith.

[2] There is no dispute that Mr Whitworth worked and was not paid during the relevant period, rather this problem has arisen in connection with Mr Whitworth's sale of the Mangawhai Village Bakery ("the bakery"), where he did the work, to Ms Smith. The work for which he seeks payment was carried out with reference to an arrangement the parties made in association with the sale. There is a dispute over his entitlement to payment under that arrangement.

**The vendor assistance period**

[3] The agreement for sale and purchase of the business included the following special condition of sale:

"35. Vendor assistance  
The Vendor will offer all reasonable assistance in helping the purchaser's transition for 3 (three) weeks after settlement. After this period up until the end of January 2005, the Vendor will make himself available for casual work on a paid basis for up to 24 hours per week."

[4] The agreement for sale and purchase also included the following standard clause:

"6.1(10) The vendor, ... will if required by the purchaser attend throughout normal business hours during the vendor's period of assistance ... and give the purchaser to such extent as the purchaser may reasonably desire the benefit of the vendor's knowledge and experience in the conduct of the business."

[5] It was common ground that the assistance contemplated by the clause included: showing Ms Smith how to bake bread (she was not a baker and did not know how); assisting with the ordering process; introducing Ms Smith to customers; and assisting with the day to day running of the

bakery. It was also in both parties' contemplation that assistance might be necessary on a full time basis during any vendor assistance period. Because of Ms Smith's lack of experience in running a bakery, the availability of assistance was an important factor in achieving the sale of the business.

[6] Finally, the settlement date was originally agreed to be 17 December 2004 or earlier by consent. By consent settlement was brought forward to 29 November 2004, to allow Ms Smith to attend to an immediate renovation of the premises which she had planned anyway and was now available to carry out. A letter from Ms Smith's solicitors dated 18 November 2004, formally referring to the amended settlement date, also referred to Ms Smith's intention to close the premises for a period of renovation of approximately two weeks.

[7] That is what she did, although the renovations took three weeks. Ms Smith says the vendor assistance period began when the business re-opened, while Mr Whitworth says it began on the amended settlement date. Accordingly, as far as Ms Smith is concerned, the period for which Mr Whitworth now seeks payment was part of the vendor assistance period and payment was not required. Mr Whitworth's position is that the vendor assistance period coincided with the closure of the business for renovation, was completed by the time the business re-opened, and he was entitled to payment for the work he did subsequently.

[8] Ms Smith and Mr Whitworth did not discuss directly with each other the implications for the vendor assistance period of the renovation plan and the change in the settlement date. The bakery was sold through a real estate agent, Ian Clark. In that capacity Mr Clark was closely involved in the detail of the negotiation of the sale. He agreed in evidence that, in the course of discussing the amended settlement date, Ms Smith asked him about the implications for the vendor assistance period of her plan to close the business for renovations. He told her the vendor assistance clause would operate from the day the business opened, because there would be nothing with which Mr Whitworth could assist until then. She proceeded accordingly.

[9] Mr Whitworth said it was not mentioned to him that the vendor assistance clause would come into effect after the business opened, rather than on the settlement date. Mr Clark said he did not know whether he had discussed that matter with Mr Whitworth, and I conclude he probably did not.

### **Construction of the parties' agreement**

[10] I must address this problem on the basis of the construction of the agreement between the parties, applying legal principles to the task. The jurisdiction of the Employment Relations Authority is limited to employment relationships, but the relevance of the agreement for sale and purchase is that it contains a mutual intention to enter into a casual employment relationship at the end of the vendor assistance period. Accordingly it is necessary to construe that agreement to identify when the casual employment relationship commenced.

[11] The applicable legal principles have been discussed by the Employment Court in the employment law context a number of times. For present purposes I will refer to only one, a decision of the full court in **Dwyer v Air New Zealand Limited** [1996] 2 ERNZ 435, where the court accepted a number of statements of principle including this:

“the mutual intentions of the parties are to be objectively interpreted; that documents forming part of the same transaction are to be read together; that in a commercial contract account is to be taken of the commercial purpose; that reasonableness (business common sense) of result is a relevant consideration in choosing between rival constructions; that special conditions are to prevail over standard form conditions; that the contextual matrix is to be taken into account.

...

Those principles of construction are well established as is the primary rule that the starting point is the words used by the parties in their contract. The parties, particularly knowledgeable and experienced parties, legally advised, are to be taken to have intended what they have said. It is where there is ambiguity or inconsistency that the stated principles are invoked in order that these may be resolved by reference to such matters as the background and the object and purpose of the transaction.” (at p 465, quoting from **Board of Trustees of the National Provident Fund v Shortland Securities Limited** [1996] 1 NZLR 45.)

[12] Applying the primary rule, the first question is whether the wording of clause 35 is ambiguous as to the date on which the vendor assistance period commences. While the clause provides that the period is to occur ‘after’ settlement, it does not specify that the period commences upon settlement or give any other commencement date. One application of the ordinary meaning of the word ‘after’ would be that the clause is complied with provided that the vendor assistance period did not commence before settlement – or that the word ‘after’ means ‘not before’. Another application of the ordinary meaning of the word ‘after’ would be that the clause is complied with if settlement occurs, and upon that event the vendor assistance period commences – or that the word ‘after’ means ‘next (in time)’.

[13] With the English language being what it is, the word ‘after’ has a number of synonyms. The above sets out two of them. At the same time, I must identify the ordinary and natural meaning of the word in the context in which it was used. In that respect I observe that - despite Mr Clark’s saying he used the words ‘after settlement’ to convey the first of the above meanings - the standard vendor assistance provision on the front of the agreement for sale and purchase also uses the words ‘after the possession date’. The word ‘after’ must bear the same meaning in both cases. Mr Clark’s intention is not determinative.

[14] I was not addressed on whether the standard clause has been discussed in any judicial finding which might shed light on the present matter. My limited research has not identified anything of assistance. Similarly, I was not addressed on whether there is a generally accepted understanding of the meaning of ‘after’ in the present context. Viewing the agreement and its purpose as a whole, however, I believe it is straining the meaning of ‘after’ to construe the period of vendor assistance as being capable of commencing on any date provided it followed the date of settlement.

[15] Much of the argument I heard was directed, in effect, at the reasonableness in all of the circumstances of the parties’ respective positions on when the vendor assistance period began. The same arguments could be invoked in order to assist in construing the vendor assistance provisions in the event of an ambiguity. However for the reason I have indicated, I do not believe there is an ambiguity of a kind that requires consideration of those arguments. That means, in turn, that I find the vendor assistance period commenced on the settlement date. Any accommodation necessary in respect of the closure of the bakery for renovations should have been addressed expressly in the agreement for sale and purchase, but it was not.

### **Wages owed to Mr Whitworth**

[16] Mr Whitworth worked in the bakery from 21 December 2004 to the end of January 2005, pursuant to the casual work provision in clause 35. His claim for payment is for:

- . 80.5 hours at \$15.50 per hour for the period 26 December 2004 – 2 January 2005 (inclusive); and
- . 58 hours at \$15.50 per hour for the period 3 January 2005 - 9 January 2005 (inclusive).

[17] The hours are unusually high because the period covered by the claim is the bakery’s busiest period. Mr Whitworth worked, and was paid, for the rest of January, but his weekly hours were much lower even though the period was still busy.

[18] A substantial part of the work involved baking bread. Mr Whitworth said in evidence that, if he had thought the vendor assistance period was running, he would have made sure Ms Smith could bake the bread herself. He would not then have needed to work that number of hours. For her part Ms Smith thought the vendor assistance period was running, and Mr Whitworth was working as he saw fit in accordance with it. There was no dispute that she relied heavily on him to tell her what to do and no suggestion that any instruction of hers led Mr Whitworth to work the hours he did. Nor was there any dispute that neither party mentioned the vendor assistance period. At that point the rate of pay for Mr Whitworth under the casual work provision had not even been finalised.

[19] As for the quantum of Mr Whitworth's claim, while I have found the vendor assistance period had ended, there was no evidence of any meeting of the minds about anything concerning the employment relationship with the exception of the remainder of the contents of clause 35. Those contents include a cap of 24 hours per week on the paid casual work.

[20] Thus, while Ms Smith must take the consequences of the failure to make express provision for the effect of the closure for renovations, so Mr Whitworth must take the consequences of the failure to address whether he would work or be paid for any more than the 24 hours per week set out in clause 35. I have not overlooked the fact that he worked, and was paid for, more than 24 hours per week later in January – rather I would say there was agreement about payment for those weeks but not for the weeks in question here.

[21] I therefore find that Mr Whitworth was entitled to payment for two weeks, at 24 hours per week and at \$15.50 per hour. The total owing is \$744.00. Ms Smith is ordered to pay Mr Whitworth that amount and may make deductions for tax.

[22] Since there was no express agreement that holiday pay be incorporated into the hourly rate of pay for the casual work, holiday pay is owed. It is quantified as  $6\% \times \$744.00 = \$44.64$  and I order payment accordingly.

### **Costs**

[23] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination of the Authority they shall file and serve memoranda setting out their positions on the matter.

**R A Monaghan**  
**Member, Employment Relations Authority**