

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 131
5322900

BETWEEN NOEL DESMOND
COVENTRY

AND VINCENT SINGH T/A 4
SQUARE DESIGN

Member of Authority: Yvonne Oldfield

Representatives: Clive Bennett for applicant
Vincent Singh in person

Investigation Meeting: 29 March 2011

Determination: 1 April 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] When this matter was first lodged on 15 October 2010 Mr Coventry was, with his wife's help, representing himself. At that time, he said, he had been employed by Mr Singh for six weeks but had received only part payment. Direct requests to his employer had not succeeded in resolving the issue. With his wages seriously in arrears he sought the Authority's help on an urgent basis. Mr Coventry's claim was as set out in the following schedule:

w/e	Hours	Payable
12/9/10	40	\$1,200.00
19/9/10	64.5	\$1,935.00
26/9/10	46.5	\$1,395.00
3/10/10	41.75	\$1,252.50
10/10/10	28.5	\$855.00
17/10/10	41	\$1,230.00
Total	262.25	\$7,867.00
Less paid		(-) 2,500.00
Owed		\$5,367.00

[2] In its Statement in Reply (lodged 27 October) Mr Singh asserted that Mr Coventry was not an employee but an independent contractor.

[3] However Mr Singh has subsequently confirmed that he does not dispute the number of hours Mr Coventry worked, or that only part payment was made to him. Mr Singh's position was and remains that full payment was not due until satisfactory completion of the jobs Mr Coventry was working on. Subsequently he has added a further reason for on-going non-payment: that the monies are being withheld to cover of the cost of a tool that Mr Coventry damaged during his employment.

[4] On 9 November Mr Bennett advised that he was instructed to act for Mr Coventry and that the claim was being amended. He explained that Mr Coventry had given notice of resignation (characterised by Mr Bennett as a constructive dismissal resulting from the non-payment) but had been summarily dismissed before completing the notice period. Both the constructive dismissal and the summary dismissal were asserted to be unjustified.

[5] Mr Bennett later amended Mr Coventry's claim to include (in addition to the arrears originally claimed) compensation for unjustified dismissal, lost earnings for the balance of his notice period, holiday pay at 8% of his earnings, and interest on the arrears and holiday pay. Mr Coventry did not claim for further post-dismissal loss because he began a new role immediately after the expiry of his notice period.

[6] Mr Bennett acknowledged that as a result of these changes to the claim it was no longer appropriate for the matter to be dealt with on an urgent basis. On 29 November a conference call was convened with Mr Bennett and Mr Singh. Mr Singh advised that he was unavailable to attend mediation or to attend an investigation meeting (even in respect of the preliminary question of jurisdiction) over the summer period because it was a very busy time for his business.

[7] After hearing from both parties, and in order to accommodate Mr Singh, I directed the parties to mediate by 11 February 2011. After establishing that both parties were available for an investigation meeting on 29 March 2011 I also advised that this date would be held for an investigation meeting in the event that the matter

did not settle. I confirmed that if that meeting went ahead it would address all matters (jurisdictional and substantive.)

[8] On 9 February Mr Bennett advised that several alternative dates had been proposed for mediation by the Labour Department but the respondent had not been prepared to meet on any of them. An Authority support officer attempted without success to contact Mr Singh for an explanation. After the expiry of my direction to mediation the Authority therefore proceeded to set down an investigation meeting for 29 March 2011 as previously agreed by the parties.

[9] Nothing was heard from Mr Singh or anyone representing him until his arrival at the investigation meeting on the morning of 29 March. He announced that he had sought representation from Mr Victor Ramen but due to illness Mr Ramen could not attend that day. Mr Singh therefore sought an adjournment. An Authority support officer contacted Mr Ramen who said that as of the day prior to the investigation meeting he had not understood himself to have instructions to act for the respondent. He confirmed that he was in any event unable to attend the Authority that day. Referring to the matter as a misunderstanding between him and Mr Singh he sought an adjournment on the respondent's behalf.

[10] The terms of the direction to mediation and the date of the investigation meeting were set in order to accommodate Mr Singh's very limited availability. At no stage prior to 29 March did he take appropriate steps to obtain a variation to either the direction to mediation or the proposed investigation meeting date. He did not return calls from the Authority support officer who attempted to establish why the direction to mediation had not been complied with. Finally despite having four months' notice of the investigation meeting Mr Singh waited until shortly before the meeting to seek legal advice or representation. Because of this background, and in fairness to the applicant, Mr Singh's application for adjournment was declined and the investigation meeting proceeded, as originally agreed, on March 29.

Issues

[11] In the Statement in Reply the respondent party was identified in the same way as in the Statement of Problem and as set out here. At the investigation meeting I

asked Mr Singh about his business arrangements and he told me that he was operating through a limited liability company called 4 Square Design Limited. However a check of the Companies Register has revealed that this company was incorporated on 3 December 2010, well after Mr Coventry's association with the business had ended. A director search by the name Vincent Singh gave no results other than 4 Square Design Limited. The respondent in these proceedings therefore continues to be Mr Vincent Singh in person.

[12] The issues for determination are as follows:

- i. whether Mr Coventry was an employee;
- ii. whether Mr Coventry's resignation amounted to an unjustified constructive dismissal;
- iii. whether his summary dismissal was unjustified and,
- iv. what if any remedies he is owed, including wages, holiday pay and interest and remedies for any unjustified dismissal.

(i) Contractor or employee?

[13] Mr Coventry is a qualified cabinet maker. In the latter part of 2010, after being made redundant from employment he had held for seven years, he saw on Trademe an advertisement for what he took to be employment with the respondent. Because Mr Coventry has a hearing loss and speech impediment, his wife telephoned on his behalf and arranged for him to be interviewed at the respondent's factory on 6 September.

[14] Mrs Coventry accompanied her husband to his interview with Mr Singh. It is common ground that the parties agreed an hourly rate (\$30.00.) They also discussed the work that was being offered (shop fitting work in the respondent's factory and at client premises) and the fact that the hours of work would be variable depending on what work the respondent had on. All agreed that Mr Singh told Mr Coventry that he would be required, on a regular basis, to submit a schedule of his hours of work and that he would be paid on that basis. It is also common ground that Mr Singh was

looking for a senior and experienced tradesperson and that there was a possibility, should things work well between the parties, that Mr Coventry would eventually be given a supervisory role within the factory. Finally it was agreed that he would start the next day.

[15] The parties do not agree about whether a trial period was discussed. Mr Singh says he told Mr Coventry he would be on a two month trial whereas Mr and Mrs Coventry recall hearing that no trial was needed because of Mr Coventry's experience and qualifications.

[16] The parties also differ on what was said about the nature of the relationship. Mr and Mrs Coventry recall talk of a written employment agreement and an assurance from Mr Singh that this would be sorted out as soon as possible. They say nothing in either the advertisement, or the interview, suggested to them that this was anything other than employment.

[17] Mr Singh believes he made it clear that the engagement was as a self employed contractor, as was the case with all his other shop fitters. He said only his office administrator was on an employment agreement. He conceded that employment could have been a possibility later on, saying his offer to Mr Coventry was to join the respondent as a contractor for two months, after which he might consider him as a full time employee in the role of workshop manager.

[18] Mr Singh did not provide a written contract or any other written confirmation of the terms of the engagement. He told the Authority that he never does because he does not understand this to be required in a contracting situation. He said he did not require his workers to submit GST invoices or to be GST registered and did not himself pay GST in relation to their services. He said he paid his contractors when he was paid by his clients and never deducted any withholding tax from these payments. He said that \$30.00 an hour was the most any tradesman could ever hope to earn and he would not have paid this rate to any employee in his factory.

[19] Mr Coventry agreed that \$30.00 was at the upper end of what a tradesman in this line of work might receive however he said it was commensurate with his level of

skill and experience (Mr Coventry is 62) and he has been paid \$28.50 by other employers.

[20] Over the six weeks that Mr Coventry was with the respondent, he worked a total of 262.25 hours, after taking off two days' bereavement leave when his father passed away. In other words, he averaged over nine hours of work a day. He told the Authority that in that time he provided the office administrator with his IRD number and Kiwisaver forms and even, in the end, a template for an employment agreement that his wife had been able to source. However he says at no time before these proceedings were lodged did Mr Singh or the administrator advise that the respondent's position was that he was a contractor.

Determination

[21] Although some of the evidence is in dispute, there is no dispute that Mr Coventry worked full time for the respondent on and off site, was paid an hourly rate which though high was not outside the range for a senior tradesman, and submitted timesheets rather than GST invoices.

[22] These arrangements align more closely with a conventional employment relationship than with a relationship of principal and contractor. If Mr Singh intended (in the face of what otherwise looked like employment) to create a contract for services this intention should have been clearly expressed. There is insufficient evidence to suggest that it was. It must also be noted that (though disputed) Mr Singh's own evidence was that he planned to put Mr Coventry on a trial period. This too is inconsistent with an intention to make him a contractor.

[23] I conclude that Mr Coventry was an employee, and therefore that the matters raised in these proceedings are within the jurisdiction of the Employment Relations Authority.

(ii) Constructive dismissal

[24] Both Mr and Mrs Coventry made repeated requests for payment (to no avail) before he finally decided to leave the respondent's employ. Mr Coventry's resignation

was given orally on 13 October and confirmed in writing 15 October, in the following terms:

“As I told you on 13th October I will be leaving the job with Tuesday 26th October being my last day.

I cannot work for you because your constant promises to pay have all been lies. I have worked so hard and not paying me is too stressful. There doesn't seem to be any plans or systems for payroll. I would like my final pay including holiday pay in my bank account on 26th October.”

[25] This clearly put the respondent on notice that Mr Coventry was leaving the job because of the on-going underpayment. Although it would not appear that he gave prior indication that he would leave if he was not paid, I consider that this was self evident after six weeks of repeated requests for payment. I accept that the resignation amounted to a constructive dismissal.

(iii) Summary Dismissal

[26] When he resigned Mr Coventry told the respondent that he intended to leave on 26 October. Mr Singh told the Authority that from the resignation on, Mr Coventry became disruptive, raising his voice in the workshop and failing to treat tools and materials with care. This, he alleged, culminated in damage to an expensive saw. Mr Singh says for this reason he decided that Mr Coventry should leave, and dismissed him on 19 September.

[27] Mr Coventry does not dispute that by this time, he was getting very upset with the situation he found himself in. Also, as I observed when speaking with him, he speaks loudly, presumably as a result of his hearing loss and speech impediment. However he vehemently denies damaging a saw or behaving in a manner that was unsafe or unworkmanlike. Indeed he was insulted by the suggestion. Overall, I found Mr Coventry to be a more credible witness than Mr Singh and I am not satisfied that Mr Singh has justified the early termination of Mr Coventry's employment.

[28] It follows that Mr Coventry has made out a case of unjustified dismissal.

(iv) Remedies*Wage arrears*

[29] There is no dispute as to the hours worked, or the fact that full payment for these hours was not made. Mr Singh says that payment was initially withheld because he never paid his workmen until each job was finished. Later, he said, he continued to withhold payment because some of Mr Coventry's work was of a poor standard and had to be redone and because of the damage to the saw (which cost over \$3,000.00.) However no firm evidence was supplied in support of these assertions. I am satisfied that no deduction should be made from Mr Coventry's claim.

[30] The respondent is therefore ordered to pay to Mr Coventry the sum of \$5,367.00 gross arrears of wages.

Holiday pay

[31] There is no suggestion that Mr Coventry took any paid leave or received any holiday pay. He is therefore entitled to holiday pay at 8% of his total earnings. Total earnings, as set out in the schedule above, were \$7,867.00. Mr Coventry is therefore owed holiday pay of \$629.36.

Interest

[32] The newly amended clause 11 of Schedule 2 of the Employment Relations Act provides as follows:

“Power to award interest

(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

[33] The Authority thus has a discretion to order interest on the arrears and holiday pay recovered at the rate prescribed under section 87(3) of the Judicature Act 1908 (8.4% per annum.)

[34] There is no evidence that this is a case where the employer was unable to pay or where there has been any genuine dispute about what was owed. I am satisfied that it is a fit and proper case for the Authority to order interest on the sums recovered. The respondent is therefore ordered to pay 8.4% per annum interest on the arrears and holiday pay from the date of termination (19 September 2010) until the date of payment.

Compensation for dismissal

[35] Mr Coventry told the Authority that the issues with payment were compounded by the subsequent unsupported criticisms of his work. As a senior tradesman who takes pride in his work he found this very distressing. As well, the termination came not long after he been made redundant from another job, and near the time that his father passed away. He said that the whole business affected his mental and physical health for some time.

[36] I accept this evidence however I also note that Mr Coventry was only with the respondent for a very brief period and found other work very quickly. In all the circumstances I consider an award of \$3,000.00 appropriate. I note also that in a case of this type there is no question of there being any contributory conduct.

Lost earnings

[37] Mr Coventry is also entitled to wages for the period 19 to 26 September (a further weeks' wages.) I have already noted that his hours of work averaged nine hours per day or 45 hours per week, giving an average gross weekly wage of \$1,350.00.

(vi) Summary of orders:

[38] Mr Vincent Singh, respondent in these proceedings, is therefore ordered to pay to the applicant the following sums:

- i. arrears of \$5,367.00 gross;**
- ii. holiday pay of \$629.36;**
- iii. interest on the arrears and holiday pay at 8.4% per annum from 19 October 2010 until the date of payment;**
- iv. lost earnings of \$1,350.00 gross and**
- v. compensation of \$3,000.00 for hurt and humiliation.**

(v) Costs

[39] Costs are reserved. If the issue cannot be agreed and an application for costs is to be made this should be lodged (with supporting submissions) within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority