

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Deo (Applicant)
AND Peter McGann t/a McGann Construction (Respondent)
REPRESENTATIVES Michael Deo in person
Peter McGann, in person
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 3 March 2005
DATE OF DETERMINATION 1 April 2005

DETERMINATION OF THE AUTHORITY

[1] Mr Michael Deo claims he was employed by Mr McGann from 21 June 2004 until 15 July 2004 as a carpenter. Mr Deo claims that when his employment ended Mr McGann owed him \$1,525.00 for hours he worked. Mr Deo says the wages are still outstanding.

[2] Mr McGann, in response, says Mr Deo was never an employee. Mr McGann says he offered Mr Deo some temporary work and that the arrangement he entered into with Mr Deo was that he would be paid \$25.00 cash under the table for each hour worked.

[3] The issues for determination are twofold. Firstly I need to establish whether or not Mr Deo was an employee in terms of the Employment Relations Act 2000. If the answer is affirmative, then I need to determine whether wages are owed to Mr Deo.

Was Mr Deo an employee or a contractor?

[4] Whether there was an employment relationship between the parties is governed by section 6 of the Employment Relations Act 2000. An employee is a person employed by an employer to do any work for hire or reward under a contract of service. Section 6(2) requires the Authority, in deciding whether a person is employed under a contract of service, to determine the real nature of the relationship between the parties. This includes a consideration of all relevant matters including

any that indicate the intentions of the persons. The Authority is not to treat as a determining matter any statement by the parties that describes the nature of their relationship. The emphasis is upon the determination of the “real relationship”.

[5] Factors important to determining the status of the parties includes:

- the intention of the parties;
- how the arrangement between the parties worked in practice;
- the nature and the level of control exercised over the applicant;
- whether the applicant provided his own equipment;
- was the applicant carrying on a business on his or her own account including any financial risk taken and opportunity for profiting from sound management; and
- industry practice¹.

[6] The evidence provided at the investigation meeting was adamantly disputed by both parties. One point of common ground was that there was no written employment agreement or other documentation setting out the terms applying to the engagement of Mr Deo.

[7] Mr Deo says it was his intention to be an employee and that the agreement reached was for payment of \$25.00 per hour after tax and acc deductions. Mr McGann says he agreed to pay Mr Deo \$25.00 per hour cash, under the table.

[8] Mr Deo was paid weekly. He received payment based on the number of hours he had completed. He was paid regularly for the first three weeks of his engagement. Mr Deo was not required to produce an invoice to Mr McGann in order to be paid. The only documents Mr Deo provided to Mr McGann were pieces of paper stating the number of hours he had worked in that week. Those pieces of paper were not available for the Authority to scrutinise.

[9] The work undertaken by Mr Deo on behalf of Mr McGann was an integral part of Mr McGann’s business.

¹ See *Privy Council in Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 [1990] ICR 409 (PC); *Koia v Carlyon Holdings Ltd* (unreported), AC 56/01, 20 August 2000; and *Three Foot Six Limited v Bryson* (unreported), 12 November 2004, CA 246/03, Court of Appeal.

[10] Mr Deo was subject to the close supervision of Mr McGann in undertaking his duties. He reported directly to Mr McGann and sought instructions from him as to what work was required to be carried out. Mr McGann told me Mr Deo made a lot of mistakes which required fixing. Mr McGann corrected those mistakes at his own cost and did not require Mr Deo to correct the mistakes himself.

[11] Mr McGann told me he "...sacked..." Mr Deo because he was incompetent. These are words normally attributable to an errant employee rather than a contractor who has failed to complete their obligations. Mr McGann says that when he sacked Mr Deo he retained his final pay to cover the expense of correcting a mistake made by Mr Deo, which cost Mr McGann \$1800.

[12] Mr Deo used his own tools and nails to undertake his duties. He also used his own vehicle to pick up materials required for his work.

[13] Immediately prior to Mr Deo undertaking his work with Mr McGann, Mr Deo was working as a contractor to another company. In that relationship he was liable for the payment of his own tax and ACC levies. Mr Deo is currently undertaking similar work, again as an independent contractor with the responsibility for his own tax and ACC levies. Mr Deo is adamant that he was not paying the tax or acc liability for the payments he received from Mr McGann as he understood these were Mr McGann's responsibility.

[14] Mr Deo was paid only for the hours he actually worked for Mr McGann. There is no evidence to suggest that if Mr Deo worked harder or smarter he could profit in any way from his labours other than for payment at the hourly rate agreed between the parties.

[15] It is common practice in the building industry to employ both contractors and employees. In this case Mr McGann was adamant that he never employed any employees, preferring only to employ contractors.

I have applied the relevant tests and find that it is more likely than not that Mr Deo was an employee employed by Peter McGann t/a McGann Construction. The Authority therefore has jurisdiction to determine the arrears of wages claim.

Arrears of wages

[16] Mr Deo claims he is owed wages for the period 5-15 July 2004. Mr McGann conceded at the investigation meeting that he owes Mr Deo two days pay but says Mr Deo did not work after 6 July 2004. Mr McGann says the two days pay was retained to cover the expense involved in fixing the mistake made by Mr Deo.

[17] The Wages Protection Act 1983 prohibits employers from making any deductions from wages unless the employee has provided his “...*express consent*...” to such deductions. Mr McGann had no written consent from Mr Deo to make any deductions from wages due to him.

[18] Mr McGann told me Mr Deo is claiming more hours than he actually worked. Mr McGann has been unable to produce any wage and time records, pursuant to section 130 of the Employment Relations Act 2000. Mr Deo, however, provided the Authority with a copy of a calendar for the month of July 2004. This extract confirms the dates and times Mr Deo claims he worked for Mr McGann.

[19] Because wage records have not been kept for Mr Deo, section 132 of the Employment Relations Act 2000 requires that I give Mr Deo the benefit of the doubt. Mr McGann must bear the consequences of his failure to comply with his legal obligations as an employer.

I find Mr Deo is entitled to arrears of wages in the sum of \$1,525.00 net and order Peter McGann t/a McGann Construction to pay that amount to Mr Deo.

Costs

[20] In pursuing his employment relationship problem to the Authority Mr Deo has incurred the cost of the \$70.00 filing fee. **I order Peter McGann t/a McGann Construction to pay to Mr Deo \$70.00 by way of reimbursement of this fee.**

Vicki Campbell
Member of Employment Relations Authority