

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 90/09
5155862

BETWEEN GREGORY DOUGLAS
 ENGLISH
 Applicant

AND RNP HOMES LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Mr English in person
 Richard Preston for respondent

Investigation Meeting: 15 June 2009 at Blenheim

Determination: 29 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr English) alleges that he is owed money for unpaid wages, unpaid holiday pay and that the respondent employer (RNP) falsely completed an ACC form so as to cause Mr English disadvantage.

[2] The respondent, RNP, agrees there is an error in the ACC form, but denies that caused Mr English disadvantage and denies that there are wages owing, save for holiday pay.

[3] The parties attended in person at an investigation meeting and each answered questions from the Authority.

[4] I am satisfied that the employment relationship commenced on or about 17 November 2008 and that there was originally an agreement that RNP would pay Mr English \$20 per hour. 40 hours work per week was anticipated. However, the

evidence discloses that on the very first job that Mr English was engaged on (the building of a carport), Mr Preston was so concerned about the quality of Mr English's work that he took him aside on the job and told him that he would only pay him \$15 per hour until he proved himself.

[5] Mr English vehemently denies that any such agreement was ever reached and maintains that there was only ever an agreement for the payment of \$20 per hour and never an agreement to reduce that sum.

[6] The employment relationship continued on a 40 hour week basis until a little after 7 January 2009 at which date the evidence is clear that Mr English signed an individual employment agreement with RNP which provides for casual employment at a rate of \$15 per hour. Again, Mr English vehemently denies signing this individual employment agreement, but agrees that the signature on it is his.

[7] From that date on until 27 January 2009, Mr English worked for RNP at Bluff. The arrangement was supposed to be that Mr English was established in a house property in Bluff which was part owned by RNP and he was to continue with the refurbishing of the house property while living there. Mr Preston gave evidence on behalf of RNP (again challenged by Mr English) that RNP provided an initial load of groceries to start this arrangement off and Mr English had a list of tasks to complete.

[8] Mr Preston returned to South Canterbury (where he is based) and expected that Mr English would proceed with the work required. Until the employment located to Bluff, there had been no suggestion that Mr English's social behaviour would be problematical.

[9] Mr Preston arranged for his father (who was also working in Bluff) to visit Mr English. He found Mr English in bed at 11am with a hangover on a work day. Mr Preston also received a series of telephone calls from Mr English to his cellphone, seeking to be reminded of the address of the Bluff property. These calls were received in the small hours of the morning and judging by the way he expressed himself, Mr English was seriously intoxicated when he made these calls.

[10] Accordingly, Mr Preston made a surprise visit to Bluff to see what progress had been made. Mr English claimed that he had worked 40 hours a week, but Mr Preston felt that that was impossible as nothing of significance had been achieved.

In the result, Mr Preston says that he paid Mr English 22 hours and that that was generous.

[11] Then, towards the end of January 2009, Mr Preston received telephone advice from Mr English that his sister was coming to pick him up and that he was ceasing work for RNP. At no stage during the employment was RNP aware that Mr English had a damaged shoulder or indeed that he had hurt his shoulder while in RNP's employment. Some time after the employment relationship ended, Mr Preston received papers from ACC in respect to Mr English's claim for earnings related compensation. Mr Preston acknowledges that one of the dates he included in that material for ACC was incorrect.

[12] Mr English subsequently brought this application to the Authority.

Issues

[13] It will be convenient if the Authority considers the following issues:

- (a) What was Mr English's hourly rate?;
- (b) Is Mr English owed unpaid wages?;
- (c) Is Mr English owed holiday pay?;
- (d) Is Mr English disadvantaged by any error by RNP in respect to ACC?

What was the applicable hourly rate?

[14] I am satisfied on the basis of the evidence I heard that the applicable hourly rate was not \$20 per hour but \$15 per hour. Mr English maintained that he and Mr Preston had agreed on an hourly rate of \$20 but that he was only ever paid \$15 per hour. Mr Preston told me that on the first job that Mr English performed for him, Mr Preston was dissatisfied with fundamental aspects of Mr English's workmanship, that he took him aside on site and told him that in the circumstances, he could only afford to pay him \$15 per hour and he would review that hourly rate based on subsequent experience.

[15] I was impressed with Mr Preston as a witness. I thought that his evidence was given in a straightforward manner and I accept that what he told me about the employment relationship was truthful.

[16] My view of the applicable hourly rate is reinforced significantly by the existence of a casual individual employment agreement between the parties dated 7 January 2009 and, critically, signed by Mr English. Mr English told me that the signature was his signature, but he had no recollection of signing the document. Mr Preston told me that Mr English signed the document in the presence of a witness and that the intention of completing the written agreement was to formalise the arrangement between the parties because of the upcoming work that would follow shortly thereafter. Again, I prefer Mr Preston's recollection of events. I observe that Mr English appeared somewhat forgetful about matters that one would have thought he would remember, given this was, after all, his claim.

Is Mr English owed wages?

[17] Both parties agreed that wages were paid principally in cash, or occasionally by cash cheque, or on rare occasions by direct credit to Mr English's bank account. Mr Preston confessed that there was no proper wage record in respect to Mr English's employment. Nor had he accounted to Inland Revenue for the tax on Mr English's earnings, although he acknowledged his obligation to do so. However, Mr Preston maintained that he had paid Mr English all of the wages to which he was entitled.

[18] As Mr English's claim for unpaid wages is based principally on his allegation that he was not paid the correct rate, and I have already found that Mr English was mistaken about the hourly rate, there is little force to Mr English's argument that he is due wages by reason of having received a lower hourly rate than he was entitled to.

[19] However, there is also a dispute between the parties about whether Mr English was paid for all of the hours that he worked. To address this issue, it is important to distinguish between the two different periods of work and to identify, in the absence of proper records, the actual span of the employment relationship.

[20] On the basis of the evidence I heard, I am satisfied that the employment relationship commenced on 17 November 2008 (although that start date is disputed) and it is common ground that the employment relationship came to an end on 27 January 2009.

[21] Mr Preston said that Mr English commenced his employment, he thought, about two weeks before Christmas 2008, but Mr English was adamant in his initial evidence that he started about Guy Fawkes day. On further exploration, Mr English

remembered that he had worked on a site for Mr Preston that had required the attendance of a Timaru District Council Building Inspector and that the Building Inspector's records would confirm a building inspection on 20 November 2008 which, by common consent, was early in Mr English's employment with Mr Preston. I have spoken with the Building Inspector by telephone and he has confirmed his recollection of making that inspection on that day and seeing Mr English on site on that occasion.

[22] As it is agreed that this was Mr English's first job, and the job was a small one, I hold that it is more rather than less likely that Mr English's employment commenced on 17 November 2008.

[23] For the period from that start date down to say 9 January 2009, it is agreed that Mr English was paid 40 hours per week and that he worked 40 hours per week. Given that I have already disposed of Mr English's argument that he was paid the wrong hourly rate, for this period anyway there can be no issue about underpayment. The identification of the 9 January 2009 date is simply that that is the end of the week in which the parties both signed the employment agreement and it seemed to be accepted that shortly after that employment agreement was executed, Mr English commenced work at the Bluff property owned by the employer.

[24] In relation to the work at the Bluff property which comprises the period from say, 12 January down to 27 January, a period of just over two weeks, there is dispute about the hours that Mr English actually worked.

[25] It will be recalled that the arrangement between the parties was that Mr English was to be established in a house property owned by the employer in Bluff and that he would live in the house property while attending to its renovation. The employer would provide initial groceries, make payments in the usual way for work done based on the employee's schedule of hours provided, and the relationship would continue until the property was completely renovated.

[26] However, Mr Preston's evidence was that Mr English became unreliable, was discovered in bed on a work day at 11am suffering from a hangover, and had rung Mr Preston on more than one occasion in the small hours of the morning, clearly grossly intoxicated, unable to find his way back to the Bluff house property. Mr Preston chose to make a surprise visit to the Bluff property and found little work

had been done. Mr Preston assessed the work for the first week in Bluff as 22 hours work and he considered that generous.

[27] Mr Preston's evidence was that there was constant difficulty in having Mr English concentrate on his work obligations and Mr Preston is adamant that he paid Mr English more than he was actually entitled to.

[28] Mr English, on the other hand, denies that he worked less than 40 hours a week for the period at Bluff, says that he was constantly asking for help from Mr Preston (Mr Preston denies this ever happened) and says that he was told a vehicle would be left for him to use for the purposes of the employer's work while he was staying in Bluff. As to the latter point, Mr Preston deposed that Mr English had numerous convictions for blood alcohol offences and did not hold a current driver's licence. Mr English quarrelled with that testimony and offered to produce his driver's licence but was unable to.

[29] On balance I am satisfied that there are no wages owing to Mr English by Mr Preston. I consider that Mr Preston treated Mr English very fairly in all the circumstances.

Is Mr English owed holiday pay?

[30] Mr Preston's evidence is that if holiday pay is owed then it will be paid. That concession is a proper one in all the circumstances. The employment agreement is, in my opinion, clear. It provides for holiday pay to be paid and it has not been paid.

[31] There will be an order for holiday pay.

ACC matters

[32] When Mr English attended at the Authority's investigation meeting, he had his right shoulder in a sling and he showed me a report on surgery performed on that shoulder by a Blenheim orthopaedic surgeon, Mr Rick Wilson. Mr English's evidence is that he hurt his shoulder while working in Bluff for Mr Preston, that he told Mr Preston about the injury and that forthwith on Mr English ceasing employment with Mr Preston, he was examined by his doctor and referred for orthopaedic surgery. Mr English also deposed that he applied for and was granted earnings related compensation from ACC, but that that compensation was at 80% of

the very modest amount that Mr English had earned in Bluff (because the calculation is based on the last four weeks' earnings). Indeed, it seems that the impetus for Mr English's claim against the employer may well have been the quantum of his earnings related compensation and his conviction that the employer had not paid him enough for his Bluff work.

[33] Mr English also drew to my attention an ACC document which included a statement to the effect that Mr English had commenced his employment with RNP on 29 December 2008. Mr English alleged that Mr Preston was the source of that information.

[34] Mr Preston confirmed that he had in fact been the source of that information and he agreed that that date was incorrect. However, because ACC calculate the entitlement to earnings related compensation based on the last four weeks of employment before the injury, Mr Preston contended that there was no disadvantage to Mr English.

[35] I am satisfied on the evidence I heard that Mr Preston was completely oblivious of Mr English's injury and I do not think there is any basis for a finding that the injury was actually sustained in Bluff. Mr Preston contended that he had been told by others employed by him that Mr English had spoken of a this injury before commencing the employment. That testimony is of course hearsay and as it is not necessary for me to decide the point, I take the matter no further.

[36] I do accept Mr Preston's point, however, that Mr English suffered no deficit by RNP's error in the date on which Mr English started the employment. Nonetheless, there will be an order that Mr Preston is to correct that error with ACC.

Determination

[37] Mr English has not satisfied me that he is owed unpaid wages and accordingly there is no order in that regard. I agree that the record keeping of the employer is not satisfactory in relation to Mr English's employment, but I am satisfied that Mr Preston gave honest and truthful evidence and I take that matter no further. I am satisfied on the basis of the evidence I heard from Mr Preston that I can make the findings that I have in respect to wages.

[38] However, the position is otherwise with holiday pay. Mr English is entitled to holiday pay and has not been paid it. Mr Preston is to calculate the holiday pay due and owing to Mr English and pay it forthwith.

[39] Finally, while nothing turns on the error made by Mr Preston in the information he gave to ACC, I direct that Mr Preston is to advise ACC of the correct start date for Mr English. He may do this by providing a copy of this determination to ACC if he wishes.

[40] I further direct that RNP is to make payment of the tax owed on the moneys paid to Mr English by way of wages over the period of the employment. To ensure the employer fulfils that obligation to account to Inland Revenue for PAYE, a copy of this determination is to be provided to the Commissioner for Inland Revenue. Mr Preston will be provided with Mr English's IRD number under separate cover.

[41] If the parties are unable to deal with the orders in this determination, either may come back to the Authority for further directions.

Costs

[42] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority