

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 11
5297739

BETWEEN ROYCE GENE JULIAN
AND GLEN EDEN MECHANICAL
& TYRES 2005 LIMITED

Member of Authority: Yvonne Oldfield
Representatives: Mr Julian in person.
Poi Teei for Respondent
Investigation Meeting: 22 July 2010, 22 September 2010.
Determination: 12 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns a claim for arrears of wages and holiday pay. Mr Julian claims that the respondent (Glen Eden Mechanical) employed him as an auto electrician and mechanic from July to November 2009. Mr Julian says that although he was paid each week (in cash) the payments were always short of what he believed he was owed for the hours worked. Mr Julian says that despite repeated requests the respondent's "owner" Vishwa Reddy, did not pay him the shortfall in his wages. He provided the Authority with a Schedule setting out what he said he was owed. It is attached to this determination as Appendix 1.

Issues

[2] The statement in reply did not address the specifics of Mr Julian's claim. Instead it stated that "*no one is employed by Glen Eden Mechanical & Tyres 2005 Ltd*" and described Mr Julian's claim as extortion.

[3] At the first day of the investigation meeting (22 July 2009) the respondent was represented by Mr Vishwa Reddy, who explained that his wife, Mrs Irene Reddy, was the respondent's sole director but that he ran the business in which she had little involvement. Mr Reddy told the Authority that there were a total of five people working at Glen Eden Mechanical in late 2009: himself; a family member named Ash Prasad; a contractor, and (in contradiction to what he had stated in the Reply) two employees. He said Mr Julian was not amongst these five. He said Mr Julian had spent time around the workshop "in a social way" with other staff and may perhaps have been sub-contracted to Mr Prasad or to the contractor, but Glen Eden Mechanical had never employed him or paid him anything.

[4] Mr Julian told the Authority that he was hired by Mr Reddy personally and was usually handed his wages by Mr Reddy personally too. He said that he had never been given a written employment agreement to sign, but as far as he knew he was an employee.

[5] Mr Julian's father, Gene Julian, accompanied him to the investigation meeting as his support person and as a witness. He said that in late 2009 he and his son's mother had gone in to Glen Eden Mechanical and Tyres and asked Mr Reddy about their son's wages for that week. He said all Mr Reddy said was that their son had already been paid.

[6] As a result of the very material differences in the evidence, both parties requested that the Authority hear from other witnesses about whether or not Mr Julian was a full time member of the respondent's staff. The investigation meeting was therefore adjourned to enable the attendance of additional witnesses to be arranged. The respondent meanwhile engaged Mr Teei as its representative. At the resumption evidence was taken from several more witnesses, one under summons.

[7] The principal issue for determination is the question whether Mr Julian was employed by Glen Eden Mechanical and Tyres. The respondent has rejected Mr Julian's claim in its entirety but has not addressed its specifics. I have therefore questioned Mr Julian about the detail of the claim, including the terms of employment that were said to have been agreed between the parties, the hours alleged to have been worked, holidays to have been taken and payments to have been made.

[8] The issues for determination are therefore:

- i. whether Mr Julian was employed by the respondent;
- ii. if so, what the terms of employment were, and
- iii. what if any wages and holiday pay remain outstanding.

(i) Whether there was an employment relationship between the parties

[9] Royce Julian told the Authority that he heard about the job at Glen Eden Mechanical and Tyres through his brother. He said he first met with Mr Reddy to talk about working for him on or about 3 July 2009. He said Mr Reddy took his phone number and later called him back to say he could start work on 10 July. Mr Julian also said that he was usually given his wages by Mr Reddy but occasionally when Mr Reddy was not present Ash Prasad paid him.

[10] At the investigation meeting on 22 July 2010 both parties had confirmed that a Mr Phil Harris had been employed by the respondent in the period Mr Julian claimed to have worked there. Mr Harris was therefore summoned to give evidence at the resumption of this matter. The respondent did not challenge Mr Harris's evidence.

[11] Mr Harris was able to confirm that he worked full time at Glen Eden Mechanical and Tyres from July 2009. Mr Harris is a qualified Warrant of Fitness inspector and was employed in that capacity. Mr Harris told me that he was referred to the job by Work and Income and stayed until February 2010 when the respondent laid him off as a result of the recession. He went immediately to another job. During the six months of his employment Mr Harris understood his wages were subsidised by Work and Income and when he was employed all his "paperwork" was done by them. He did not sign an employment agreement. He told the Authority he was at times paid in cash.

[12] Mr Harris said that he thinks he saw Mr Julian at Glen Eden Mechanical and Tyres on his first day there. He said he recognised Mr Julian as they had met because

Mr Julian used to work for a company that provided auto electrical services to Mr Harris's former employer. Mr Harris said Mr Julian was on the premises of Glen Eden Mechanical and Tyres every day except when sick. Mr Harris usually worked 40 hours a week himself and although he did not know for sure, he thought Mr Julian probably worked longer hours than him.

[13] Mr Harris said he was not in a position to know in what capacity Mr Julian worked but he said that he appeared to take direction from either Mr Reddy or from Ash Prasad (the ones who dealt with the customers and whom customers paid.) He said he did not know anything about the circumstances of Mr Julian leaving. He said he did not take much notice at the time but thought it was "*roughly the end of November or early December.*" He said he has not seen him since then.

[14] Mr Julian's mother, Jeanette Schiska, gave evidence at the resumption that twice during September 2009 she had gone to get her son's wages from Mr Reddy. She said she collected two payments of \$200 each. She said that she assumed her son was an employee because she spoke to Mr Reddy on that basis and he did not say otherwise.

[15] Several witnesses also gave evidence at the resumption at Mr Reddy's request. These witnesses supplied written statements. Mr Teei told the Authority that Mr Reddy had taken these statements down. Given the importance of credibility in this matter I have questioned each of these witnesses about what they knew of Mr Julian's association with the respondent rather than rely on what they have said in their witness statements.

[16] The first of these witnesses was Mr Ash Prasad. He told the Authority he could not recall how much of the time Mr Julian was at the workshop but agreed that Mr Julian did auto electrical work for the respondent's customers so that they would have a "*one stop shop.*" He said Mr Julian sometimes "*talked to the customers*" and got paid directly; at other times the company charged customers a total bill and then Mr Julian was paid cash.

[17] Another employee, Mr Kumar, stated that Mr Julian was in the workshop "*most weeks.*" Mr Kumar said he worked Saturday as part of a normal week but could

not recall whether Mr Julian did too. He said he had seen Mr Prasad give money to Mr Julian although he did not know what this was for. In his witness statement Mr Kumar said that he understood Mr Julian to be self employed but when I asked him to tell me more about this he said that Mr Julian had told him that he wanted to start his own business but he could not remember Mr Julian discussing his current arrangements at all.

[18] A Mr Roshan, who worked at the respondent's workshop from the late afternoon each day, stated that he had seen Mr Julian there but because he worked in the evenings himself, he was not in a position to say whether Mr Julian was there during the day.

[19] Finally I heard from a customer who said Mr Julian had worked on his vehicle on two occasions. The first time Mr Julian had done the work at the respondent's workshop. This witness stated that he had "*gone through Ash [Prasad]*" to arrange this job. He had not discussed payment with Mr Julian. He said he complained to Mr Prasad about Mr Julian's work and did not pay for the work because it was not up to standard.

[20] Mr Julian did auto electrical work for this customer on a second occasion, when the work was performed elsewhere. It appears that this occurred after the end of November 2009. According to the customer, it was Mr Prasad who put him in touch with Mr Julian.

[21] Mr Reddy continued to assert that Mr Julian was in business entirely on his own account, although he agreed that he was not charged for the use of the workshop.

[22] Mr Reddy stated that the hourly charge out rate for a mechanic was \$60.00 plus GST. This compared to hourly pay rates for mechanics of \$16.00-\$18.00 per hour. He said he had no idea of the hourly rates for an auto electrician.

[23] I have set out the evidence in some detail in order to show how little of it supported the respondent's position. Contrary to what Mr Reddy had initially maintained, the evidence was that the respondent did employ staff (Mr Harris for

one.) It also indicated that Mr Julian worked out of the respondent's workshop, full time, on the vehicles of the respondent's customers.

[24] If this had indeed been on his own account, as Mr Reddy asserted, it would be unlikely that he would not have charged Mr Julian for the use of the workshop (especially given that the margin between pay and charge out rates for auto electrical work is likely to be similar to that for mechanical work.)

[25] Overall the evidence did not support the contention that Mr Julian performed work as a sub contractor to Mr Prasad, to anyone else, or on his own account. It appears that Mr Julian worked directly for the respondent, full time, from July to November 2009. I conclude that at that time there was an employment relationship between the parties. Mr Julian's wage claim is within the jurisdiction of the Authority.

(ii) The terms of employment

[26] Mr Julian is a fully qualified auto electrician and also has some skill in mechanical repairs. He told me that at his previous job (as an auto electrician) he had been paid \$18.50 per hour and when he started with the respondent on 10 July 2010 he and Mr Reddy agreed that he would be full time and would be paid \$20.00 per hour. He said his agreed start time was 8.00 am and he worked as long as he was needed each day, primarily on auto electrical work but also, where necessary, doing some mechanical repairs.

[27] I accept that Mr Julian was employed as a full time auto electrician/mechanic on an hourly rate of \$20.00.

(iii) Outstanding wages and holiday pay

[28] Mr Julian told the Authority that he worked until about 6.00 pm or later each day. From the third week of employment, when he first raised the issue of short payment, he began to keep a record of his hours of work. He said his schedule of lost earnings (which was compiled with the help of his father) was based on this record. Mr Julian acknowledged that he took some sick days, this being the reason why he did

not always claim a full week's wages, but said that he had no absences in the first few weeks before he started keeping a record.

[29] The claim made in Appendix 1 is that Mr Julian worked 9.5 hours per day. This is consistent with a working day which ran from 8.00am to 6.00pm with half an hour for lunch and with the recollections of other witnesses, at least for the days from Monday to Friday. Although there was less evidence to support the assertion that these hours were worked on Saturdays, I consider that the variability in the hours claimed in the schedule demonstrates that Mr Julian has attempted to make it as accurate as possible.

[30] I accept that the hours worked, and the payments made, were as set out in the schedule. It follows that Mr Julian is entitled to the full amount of arrears claimed.

Summary of orders

[31] The respondent, Glen Eden Mechanical and Tyres 2005 Limited, is ordered to pay to Mr Julian the following sums:

- i. \$10,616.32 gross arrears of wages;
- ii. \$285.00 gross (payment for Labour day worked), and
- iii. \$1,352.80 gross (8% annual holiday pay.)

Yvonne Oldfield

Member of the Employment Relations Authority

Appendix 1.

**Pay Calculations for:
Royce Julian**

**Employer:
Glen Eden Mechanical & Tyres Limited**

\$20.00 per Hour
9.5 Hour per Day
6 Days a week
\$1,140.00 Per week

Week Ending	Gross Wages	Pay with tax	Nett pay recieved
17/07/09	\$1,140.00	\$875.95	\$700.00
24/07/09	\$1,140.00	\$617.22	\$500.00
31/07/09	\$1,140.00	\$423.17	\$350.00
7/08/09	\$1,140.00	\$487.85	\$400.00
14/08/09	\$1,045.00	\$116.55	\$100.00
21/08/09	\$1,140.00	\$384.36	\$320.00
28/08/09	\$570.00	\$319.68	\$270.00
4/09/09	\$1,140.00	\$358.49	\$300.00
11/09/09	\$1,140.00	\$487.85	\$400.00
18/09/09	\$950.00	\$116.55	\$100.00
25/09/09	\$570.00	\$293.81	\$250.00
2/10/09	\$1,140.00	\$358.49	\$300.00
9/10/09	Sick		
16/10/09	\$950.00	\$487.85	\$400.00
23/10/09	\$950.00	\$293.81	\$250.00
30/10/09	\$950.00	\$93.24	\$80.00
6/11/09	\$950.00	\$293.81	\$250.00
10/11/09	\$570.00		
Totals	\$16,625.00	\$6,008.68	\$4,970.00

27/10/09 Labour day pay owed	
Time & 1/2	\$95.00
Day in Lieu	\$190.00
Total	\$285.00

Wage owed	16,625.00
Public Holiday	285.00
Total Gross Earnings	16,910.00
Less Wages Paid	6,008.68
Total	10,901.32
X 8% holiday pay (\$16,910.00)	1,352.80
Total	12,254.12
Total outstanding	12,254.12

