

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 52
5353007

BETWEEN PARAMJIT KAUR
Applicant

AND SRI GURU SINGH SABHA
AUCKLAND
INCORPORATED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Harnek Singh and Verpal Singh for the Respondent

Investigation Meeting: 1 February 2012

Determination: 13 February 2012

DETERMINATION OF THE AUTHORITY

- A. Paramjit Kaur was an employee at the time Sri Guru Singh Sabha Auckland Incorporated terminated her role in its school.**
- B. Ms Kaur may proceed with her personal grievance application and the parties are directed to mediation to address her employment relationship problem.**

Employment relationship problem

[1] This determination concerns the preliminary jurisdictional issue of whether Paramjit Kaur worked as a volunteer or as an employee at the Punjabi Saturday School operated by Sri Guru Singh Sabha Auckland Incorporated (the Sabha) at its gurdwara (a Sikh place of worship) in Shirley Road, Papatoetoe.

[2] The school, held between 2 and 5pm each Saturday, provided education about

Punjabi language and culture and the Sikh religion. Its pupils were the children of families who attended the gurdwara.

[3] Paramjit Kaur lodged a personal grievance application against the Sabha after she was removed from her role as a teacher and administrator at the school. She said she was unjustifiably dismissed because she wrote a letter protesting about harassment of her at work. She said this harassment occurred because her husband was involved in a dispute about financial and property interests of the Sabha.

[4] The Sabha does not dispute that it terminated its relationship with Ms Kaur through her role at the school. Its statement in reply said “*she was relieved of the duties as she had changed the school curriculum without consulting the Executive Committee and on being asked to explain her actions refused to be accountable to the Executive Committee*”. However the Sabha insists it was entitled to act in this way as there was no contract of service with Ms Kaur. It said her work throughout was done as “*a volunteer who claimed an allowance for the voluntary work of teaching the Punjabi language*”.

The investigation

[5] For the purpose of determining whether Paramjit Kaur’s role at the school was as a volunteer or as an employee, I was provided with written statements from Paramjit Kaur, the Sabha’s convenor or president Harnek Singh, Sikh theologian Verpal Singh, and Daljit Singh JP, a Sikh community representative involved with a number of other gurdwara in Auckland. I heard additional oral evidence from each of those witnesses and from Paramjit Kaur’s husband, Ravinder Singh, and from Harmander Singh, who is also a member of the gurdwara in Shirley Road. The evidence of each witness was taken under affirmation. Witnesses and the Authority had the assistance of an interpreter who translated some questions and answers between the Punjabi and English languages.

[6] As permitted by s174 of the Employment Relations Act 2000 (the Act), this determination has not recorded all evidence and submissions received but has stated findings of fact and law and expressed conclusions on matters requiring determination. The Authority’s findings were made on the civil standard of the

balance of probabilities, assessing the evidence to determine what is more likely than not to have happened.

The law

[7] The Authority may only hear Paramjit Kaur's claim of unjustified dismissal by the Society if she was an employee at the time of her alleged dismissal in July 2011. That is because s102 of the Act allows only employees to pursue personal grievances.

[8] Section 6 of the Act provides the following directions to the Authority in considering whether a person is an employee or a volunteer:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, employee—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

...

(c) excludes a volunteer who—

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer; and

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the Court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[9] Case law suggests office holders in religious organisations – such as priests and ministers in Christian churches – are not employees although there may be a contract of service if the person is performing administrative or teaching duties for an ancillary church organisation.¹ Documentation between the parties in such cases may support the existence of an employment relationship.² What the parties intended may change during the course of their working relationship.³

¹ See *Brookers Employment Law* ER 6.06(3) citing *Mabon v Conference of the Methodist Church of New Zealand* [1998] 2 ERNZ 440 (CA) and *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* [1995] 1 ERNZ 672 (EC).

² *Ibid*, citing *Neonakis v Greek Orthodox Community of Wellington & Suburbs (Inc)* 1992 2 ERNZ 494.

³ *A Mark Publishing New Zealand Limited v Kendal* CEC 34/95, 14 August 1995.

[10] A contract of service – that is an employment agreement – is created only where the parties have a common intention to enter into a legal obligation.⁴ Whether a common intention can be read into an arrangement between the parties is to be determined from the evidence of what they said, wrote and did at the time of or before or after that arrangement was made. In *Inspector of Awards and Agreements v Religious Society of Friends (Quakers) Wellington Monthly Meeting* the Court found a woman who entered into “a loose arrangement” with the Quakers’ committee to manage a boarding house on a voluntary basis in return for free lodging, some food, telephone and electricity was not an employee.⁵ No wages were paid.

[11] In another case involving a volunteer working for a religious organisation, without wages but receiving food and accommodation, the New South Wales Court of Appeal found the work was not done in consideration or in return for those benefits. It said “*one was never intended to be, and was never seen to be, the price or quid pro quo for the other*”.⁶

The arrangement

[12] In 2004 the secretary of the gurdwara asked Paramjit Kaur to assist with the school. She had a masters degree in Punjabi and agreed to help.

[13] In her evidence to the Authority Paramjit Kaur agreed she began the role as a volunteer, undertaking teaching and administrative duties, and receiving no payment.

[14] The arrangement regarding payment changed in 2009 but the parties disagree as to the reason for this. Ms Kaur said she did not ask for payment but that started after Harnek Singh told her the Sabha committee had allocated money in its annual budget in order to help raise the standard of the school. However Harnek Singh said payments to Paramjit Kaur started in response to a request from her. He showed the Authority a Minute book of the Sabha committee which included a resolution recorded at a meeting on 23 August 2009. The resolution was written in the Punjabi script and was translated at the Authority investigation as follows:

⁴ *MacGillivray v Jones (t/a Tahuna Camp Store)* [1992] 2 ERNZ 382, 394

⁵ [1984] ACJ 409.

⁶ *Teen Ranch Pty Ltd v Brown* 919950 87 IR 308 cited in *McCulloch v Director General of the Department of Social Welfare* [2000] 1 ERNZ 467.

Sister Paramjit Kaur (school teacher) who was working volunteer has demanded salary and to give it has been passed.

[15] PAYE records produced by the Sabha show that for most of the months between September 2009 and July 2011 Paramjit Kaur was paid the amount of either \$117 or \$156 each month. Harnek Singh said the first payment was made in August 2009. There is one gap of two months in 2009 during a period Paramjit Kaur visited India and a gap of three months in 2010 for which no records were provided.

[16] The payment amount varied according to the number of days Paramjit Kaur worked at the school each month but were typically for 9 or 12 hours a month, equating to three or four days a month. The rate of pay was \$13 an hour. Three other people also taught classes at the school on Saturdays and were paid on the same basis.

[17] Parents paid the Sabha a fee of around \$50 for each child attending the school. The school operated under a curriculum approved by the Sabha. According to the evidence of Harnek Singh, the decision by representatives of the Sabha committee to end Paramjit Kaur's role in the school followed a dispute over whether she had introduced books for use in the school that were not consistent with Sikh philosophy and had done so without consulting the committee.

Role as employee

[18] I was satisfied the evidence available to the Authority, objectively assessed, confirmed Paramjit Kaur was an employee of the Sabha from August 2009 until her dismissal in July 2011. I reached that conclusion not on the basis of the parties' subjective assertions but because I found the available objective evidence showed it was more likely than not that the parties had a mutual intention to create legal obligations and there was sufficient certainty regarding the terms of the relationship.

[19] The intention to create legal relations was established by the following three factors:

(i) the committee resolution to pay Paramjit Kaur

[20] Paramjit Kaur began her work at the school as a volunteer but her request for

payment and the committee's agreement to do so transformed the relationship into one that was for hire and reward. By that request and agreement – in terms of the language used in s6 of the Act – she ceased to be a volunteer who did not expect reward for her work and who received no reward. Rather she became someone who worked for hire and reward.

(ii) deduction of PAYE from her payment

[21] The gurdwara followed the practice of a gurdwara set up in Otahuhu in the 1990s of deducting tax on a PAYE basis from payments made to people doing work for the gurdwara or Sabha. From the evidence of Harnek Singh and Daljit Singh I understand that practice began at the Otahuhu gurdwara on the advice of a member of that gurdwara who worked for Inland Revenue. The Shirley Road gurdwara followed the same practice after it was set up. Documents produced by the Sabha showed PAYE was deducted from payments made not only to Paramjit Kaur and others working as teachers at the school but also from payments made to Sikh preachers visiting from India. Those preachers, as well as being provided with food and accommodation, were paid a stipend from which PAYE tax was deducted.

[22] The deduction of PAYE from payments made to Paramjit Kaur – made at the Sabha's instigation and in line with its usual practice and without objection from her – suggested both parties understood, once those payments began, that the appropriate type of tax deduction was the one that applied to an employee.

(iii) practice at other gurdwara

[23] I accept the evidence of Daljit Singh – based on his experience and involvement in the governance of the gurdwaras at Otahuhu, Avondale and Takanini – that Saturday schools were a common feature of each gurdwara and those teaching at them were regarded as employees. He said other gurdwara provided written employment agreements to those teachers, as he understood that was required by law.

[24] My finding regarding employment status relates to the specific and relatively specialised role of teachers in the Saturday school. It does not apply generally to other truly voluntary work that adherents might do as *sewa* or voluntary service in

other activities at the gurdwara, such as preparing food for the congregation following ceremonies. It is a distinction I am satisfied is clear from the case law about other religious organisations – such as the Quaker and New South Wales cases referred to earlier. It does not mean, for example, that someone who prepares flowers, stacks chairs or serves refreshments at a church, temple, synagogue, mosque or gurdwara is, by those acts alone an employee. An important distinction is the absence of an agreed payment as existed in this case. While Paramjit Kaur may have begun working at the school as *sewa* that changed after she asked for and the Sabha agreed to pay her for that work. From that point the work – while it still retained an element of service to her faith community – was also done in consideration or return for the benefit of the wage. The payment was intended to be the *quid pro quo* for the teaching work.

[25] The actual amount of the payment is also significant. Harnek Singh and Verpal Singh variously described the money paid to Paramjit Kaur as “*petrol money*” and an “*honorarium*”. However the amount paid was more than what might be expected to offset travel expenses. The hourly rate of \$13 paid was above the statutory minimum wage applicable at the time, supporting a conclusion it was wages.

[26] I am also satisfied the evidence showed there was sufficient certainty of terms to find that the wage bargain and the requirements for certain duties to be performed amounted to a contract of service.

[27] Paramjit Kaur was paid only for the days she worked. If she was not able to attend the school on a particular day, she had to inform other teachers in advance so arrangements could be made to cover her class. It was the Sabha’s position that she was required to teach a curriculum and use only materials approved by its committee – and her failure to do so was the reason for ending her role at the school. Taken together the pay-for-work bargain and the requirement to perform her duties to standards set by the Sabha amount, I find, to a contract for service. Consequently the elements of the definition of an employee at s6(1)(a) of the Act are met.

Other evidence

[28] In reaching this conclusion I have not ignored other evidence from the Sabha witnesses alleging Paramjit Kaur had other motives for maintaining she was an

employee and pursuing a personal grievance.

[29] During the investigation meeting I heard around four hours of oral evidence that canvassed a much wider context to the dispute. The Sabha's contention – expressed in the evidence of Harnek Singh and Verpal Singh – was that the matter before the Authority really concerned family and religious issues rather than an employment dispute. This included a dispute concerning loans made by Paramjit Kaur's husband and brother to a company associated with the gurdwara (since paid back) and differing views on the administration of the Sabha, including how the gurdwara's property should be used or sold. Harnek Singh also alleged Paramjit Kaur was associated with a group that "*promoted schism within the Sikh religion*".

[30] While some aspects of the wider dispute may be relevant should the Authority have to determine Paramjit Kaur's personal grievance, they had no direct bearing on the objective analysis necessary to determine the preliminary issue of whether she was a volunteer or employee in her role at the school.

Direction to mediation

The parties are now directed to attend mediation to address Paramjit Kaur's employment relationship problem: s159 of the Act. I indicated to the parties at the conclusion of the investigation meeting that, in the event of a finding that Paramjit Kaur was an employee, such a direction would be made. If the matter is not resolved in mediation Paramjit Kaur is directed to promptly notify the Authority as to whether she wishes to proceed with an investigation of her personal grievance application.

Costs

[31] Costs are reserved. Neither party was represented by legal counsel.

Robin Arthur
Member of the Employment Relations Authority