

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 196
3002512

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS INNOVATION
 AND EMPLOYMENT
 Applicant

A N D CHEAP DEALS ON WHEELS
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Sarah Blick, Counsel for Applicant
 Ray Harris, Advocate for Respondent

Investigation Meeting: 22 and 23 May 2017 at Hamilton

Submissions Received: 30 May 2017 and letter on 16 June 2017 from Applicant
 9 June 2017 from Respondent

Date of Determination: 4 July 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Cheap Deals on Wheels Limited (CDWL) has breached various provisions of the Employment Relations Act 2000 (ERA), Holidays Act 2003 (HA), and Minimum Wage Act 1983 (MWA).**
- B. Mr Suraj Sharma was employed by CDWL, he was not an independent contractor.**
- C. Within 28 days of the date of this determination, CDWL must pay the Authority, for subsequent payment into a Crown bank**

account, a total of \$15,000 in penalties for its breaches of the ERA, HA and MWA in respect of Mr Suraj Sharma.

D. \$5,000 of the total amount of penalties awarded (\$15,000) is to be paid by the Authority to the Labour Inspector for the use of Mr Suraj Sharma pursuant to s.136(2) of the ERA.

E. Costs are reserved.

Employment relationship problem

[1] The Labour Inspector has brought various claims against CDWL arising out of its employment obligations in respect of Mr Suraj Sharma who says he was employed by CDWL.

[2] Alleged breaches of employment obligations to Mr Suraj Sharma by CDWL include:

- Not providing, or producing, when sought by the Labour Inspector, a written employment agreement;
- Not keeping compliant wages and time records, or not producing, when sought by the Labour Inspector, wages and time records;
- Not keeping, or producing, when sought by the Labour Inspector, holiday and leave records;
- Failing to pay 8% of his gross earnings as annual holiday pay since he started his employment, upon termination of his employment;
- Failing to pay annual holiday pay in the pay that related to his final period of employment.

[3] The Labour Inspector says these failures by CDWL breach the ERA, the MWA, and the HA and seeks penalties.

[4] CDWL says Mr Suraj Sharma was not its employee, but rather an independent contractor. In those circumstances, CDWL says employment legislation does not apply and the Authority has no jurisdiction to investigate Mr Suraj Sharma's issues.

[5] In the event the Authority determines Mr Suraj Sharma was an employee, CDWL accepts it has breached some of its employment obligations to him but says these are explicable and any penalties awarded should be reduced accordingly.

Investigation Meeting

[6] As permitted by s.174E of the ERA, this determination has not set out all the evidence received. The determination states findings and relevant facts and legal issues and makes conclusions in order to efficiently dispose of the matters.

[7] The investigation of the matters in respect of both CDWL and Direct Auto Importers (NZ) Limited (DAIL), the respondent in another matter (3002511) and heard contemporaneously, took two full days in the Authority.

[8] For the Authority's investigation in respect of CDWL the Labour Inspector filed a witness statement as did Mr Suraj Sharma. CDWL's director, Mr Vishal Sharma also filed a witness statement.

[9] Each witness affirmed or swore on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information, and did so.

Relevant Facts

Cheap Deals on Wheels Limited (CDWL)

[10] Mr Vishaal Kumar Sharma is the sole director and shareholder of CDWL. CDWL was incorporated on 26 June 2007 under the name of Supercheap Batteries Limited. On 11 October 2013, the name was changed to Motortech Auto Repairs Limited. CDWL adopted its current name on 3 July 2014¹.

[11] CDWL is one of a number of companies involved in the operation of a used car sales yard based at 88-92 Avalon Drive, Hamilton (the car yard). The Authority investigated claims brought by the Labour Inspector against DAIL contemporaneously with this claim². The way in which CDWL and DAIL operate is described in that determination at paras [10] to [15].

¹ Companies Office records, 4 May 2017

² *Labour Inspector v Direct Auto Importers (NZ) Ltd* [2017] NZERA Auckland 195

Complaint to Labour Inspector

[12] On 22 January 2016, Mr Suraj Sharma complained to the Labour Inspector. Mr Suraj Sharma said CDWL owed him wages and holiday pay.

[13] The Labour Inspector visited CDWL at the car yard on 27 January 2016.

[14] During this site visit, the Labour Inspector asked Mr Vishaal Sharma for a list of CDWL and DAIL's employees and access to the time, wages and holiday records, including employment agreements. Mr Vishaal Sharma did not provide the records requested in respect of CDWL nor did he provide a list of employees. A notice to produce wages, time, holiday and leave records was subsequently served on Mr Vishaal Sharma by the Labour Inspector.

[15] The Labour Inspector talked with employees of CDWL and DAIL and took notes of his visit. Mr Vishaal Sharma denied that Mr Suraj Sharma had ever worked at CDWL.

[16] Following the visit, Mr Suraj Sharma provided the Labour Inspector with a copy of a letter of offer of employment by CDWL and a copy of a written individual employment agreement with CDWL. The letter of offer and employment agreement were both dated 4 October 2015 and were signed on 19 October 2015.

[17] The employment agreement stated that Mr Suraj Sharma was employed fulltime as Assistant Manager at the rate of \$17 an hour. Hours of work were a minimum of 35 to 40 hours a week. A job description was attached. After receiving these documents, Mr Vishaal Sharma was asked for more information by the Labour Inspector. The Labour Inspector then produced a report of his conclusions³.

[18] The Labour Inspector's report concluded that Mr Suraj Sharma was an employee, not an independent contractor and that CDWL had breached its employment obligations to him.

The issues

[19] The issues for determination are:

- (a) Was Mr Suraj Sharma employed by CDWL?

³ Labour Inspector's Investigation Report, 1 November 2016

- (b) If Mr Suraj Sharma was employed by CDWL, did it fail to meet minimum employment standards?
- (c) If minimum employment standards were breached, should penalties be imposed on CDWL and in what amount?

First Issue

Was Mr Suraj Sharma employed by CDWL?

[20] The Labour Inspector says following his investigation he concluded that Mr Suraj Sharma was employed by CDWL and was not an independent contractor to it as CDWL claimed.

[21] CDWL says Mr Suraj Sharma was not employed by it, he was an independent contractor on a “retainer plus” commission.

[22] CDWL and the Labour Inspector agree that Mr Suraj Sharma worked at the car yard from October to December 2015. Mr Suraj Sharma accepted an offer of employment by CDWL as an Assistant Manager and signed an employment agreement on 19 October 2015.

[23] CDWL says the written employment agreement was not signed and returned to it by Suraj Sharma. It says this was because Mr Suraj Sharma needed it for his visa application. CDWL says it did not see a copy of the signed employment agreement until after the Labour Inspector filed the current proceeding in the Authority. CDWL says Mr Suraj Sharma did not provide it with a signed copy of the employment agreement. In any event, CDWL says the offer of employment and the agreement to employ Mr Suraj Sharma were conditional on him having a valid visa enabling him to work in New Zealand.

Interview for role at CDWL

[24] Mr Suraj Sharma says he held a one-year open job Search Work visa to work in New Zealand which was valid at the time he says he was employed by CDWL. Mr Suraj Sharma says he was introduced to Mr Vishaal Sharma’s father, Prem (Kumar), by his friend Preet. Preet was the assistant manager for CDWL at the time and worked at the car yard. Preet was about to travel to India and wanted Mr Suraj Sharma to cover her position while she was away.

[25] Mr Suraj Sharma says he drove to the car yard on 4 October 2015 to meet with Prem about the assistant manager job. Mr Suraj Sharma says he discussed the job with Prem, told him his work visa was to expire in a few months and was told not to worry. Mr Suraj Sharma says he agreed with Prem he would be employed by CDWL as the assistant manager on \$17 an hour. According to Mr Suraj Sharma, it was agreed that he would start work immediately and would be paid a retainer and commission. Once his visa to work for CDWL was completed, Prem told Mr Suraj Sharma he would reimburse him for any entitlements owing under the employment agreement.

Hours of work and duties

[26] Mr Suraj Sharma says he worked at the car yard from Monday to Friday, from 8.30am to 6pm and on Sundays 9am to 5pm each week. He told the Authority that Prem gave him his hours of work and what tasks were expected of him each day. Mr Suraj Sharma says he maintained the car yard, supervised a mechanic, two groomers and sometimes a painter. Mr Suraj Sharma attended to listing cars for sale on 'Trade Me', kept records of cars ready for sale and those needing to be serviced by a mechanic. Mr Suraj Sharma says he did not have the freedom to come and go, he was required to work 6 days a week as instructed by Prem.

[27] Mr Suraj Sharma says he decided to leave CDWL in early December 2015 in order to sort out his visa.

Car industry

[28] Mr Vishaal Sharma talked about the car industry and that those sales staff who were engaged by CDWL on a "retainer plus" were not regarded as employees and so did not get the usual benefits that employees did. Mr Vishaal Sharma regarded sales consultants on a commission basis as independent sales agents who were responsible for their own tax. Mr Suraj Sharma was regarded as an independent contractor as he was on a commission plus arrangement with CDWL.

The law

[29] I refer to the law regarding s.6 of the ERA and the meaning of an employee set out in the Authority's contemporaneous determination regarding DAIL⁴.

[30] The same principles and law apply in this case to determine if Mr Suraj Sharma was an employee of or an independent contractor to CDWL.

Control Test

[31] Mr Suraj Sharma was, in my view, subject to a high degree of control. Mr Suraj Sharma says he reported to Prem who gave him instructions about what he was to do. Mr Suraj Sharma opened the car yard, checked cars, registrations, repairs, purchased parts and tyres, and updated TradeMe accounts. Mr Suraj Sharma said he was offered and accepted employment by CDWL as an assistant manager and he signed a written employment agreement. Mr Suraj Sharma says he understood he was employed by CDWL. His intention was to be employed by CDWL. Mr Suraj Sharma worked six days a week and had Saturdays off each week. Mr Suraj Sharma also said that if he made any mistakes, he had to account to Prem who required him to rectify them. Mr Suraj Sharma also received memoranda from Mr Vishaal Sharma setting out duties and instructions. These memoranda were the same as those received by Mr Akram who the Authority has found was employed by DAIL⁵.

Integration Test

[32] As mentioned above, it was Mr Suraj Sharma's role to ensure the car yard was maintained, cars were checked for registration, mechanical defects were repaired and cars were advertised on TradeMe and sold. I accept the submissions made on behalf of the Labour Inspector that these duties were integral to CDWL's business. Without having these duties performed by Mr Suraj Sharma, CDWL would not be able to operate its car sales business.

Fundamental Test

[33] Mr Suraj Sharma accepted what he thought was an offer of employment. Mr Suraj Sharma expected the payments made to him would have PAYE tax deducted. Mr Suraj Sharma did not issue GST invoices for services rendered to

⁴ *Labour Inspector v Direct Auto Importers (NZ) Ltd* [2017] NZERA Auckland 195

⁵ *Ibid* para [58]

CDWL, and he was not requested to issue such invoices. Mr Vishaal Sharma claimed that Mr Suraj Sharma was a sales consultant, working for a retainer and commission. Mr Vishaal Sharma denied there was an employment relationship.

[34] Mr Vishaal Sharma's evidence was not credible. Mr Vishaal Sharma was asked why, when the Labour Inspector visited the car yard in January 2016, he was told by him that "*Mr Suraj Sharma had never been an employee and had not worked for any of his companies*"⁶. The Labour Inspector brought a charge against Mr Vishaal Sharma under s 235(1) of the ERA for "*obstructing, delaying, hindering or deceiving a Labour Inspector in the course of his duties without reasonable cause*". Mr Vishaal Sharma pleaded guilty to the charge. The sentencing notes of Judge Perkins⁷, records a series of questions by the Judge to the Labour Inspector in relation to Mr Vishaal Sharma's statement that Mr Suraj Sharma had never worked for any of his companies. The following questions were put by the Judge to the Labour Inspector:

- Q. Okay, so that's your file for Suraj Sharma?
A. It's the file, the complaint file, yes.
Q. And the answer
"This person has never worked for me"
and so you questioned him
"Do you know him?"
Because that was your first question.
"Do you know him?"
A. Correct
Q. *"Yes he was a friend of Preet."*
And then you talked about who Preet is and then
Q. *"Question-Suraj's claimed he has worked as an employee for you. Are you sure he had never done any work for any of your companies?"*
A. *"Answer- "Yes. He has not worked here. He had visited here to help Preet, that's all."*

[35] It was clear at the Authority's investigation that Mr Vishaal Sharma accepted that Mr Suraj Sharma had worked for one of his companies but that the work was done as an independent contractor, not an employee. Mr Suraj Sharma's evidence appears to have changed from that given to the Labour Inspector and the Court. This goes to Mr Vishaal Sharma's credibility.

⁶ Labour Inspector's Report 1 November 2016

⁷ [2016] NZEmpC 151 at para.7

[36] I accept the submissions made on behalf of the Labour Inspector that Mr Suraj Sharma's income was not linked to the profits or losses of CDWL. He took no financial risk, he did not invest any of his own funds into the business, he was paid a retainer and commission on sales and this was on the basis that he was to be reimbursed when he had sorted out his visa.

Overall impression

[37] As with Mr Akram's status with DAIL there were some features of Mr Suraj Sharma's relationship with CDWL that appeared to be that of an independent contract relationship. However, there were significantly more features, in my view, to indicate the relationship was that of employment.

[38] From the evidence, the overall impression gained by me of the underlying and true nature of the relationship between Mr Suraj Sharma and CDWL was that it was one of employment.

[39] It must follow that CDWL owed obligations to Mr Suraj Sharma as his employer as under the ERA, HA and MWA.

Conditional employment agreement

[40] Mr Vishaal Sharma says that if the Authority determines that the relationship between Mr Suraj Sharma and CDWL is that of employment, it was conditional on him having a valid work visa.

[41] Mr Suraj Sharma held a valid work visa from 12 December 2014 to 12 December 2015 which entitled him to work for any employer in New Zealand. Therefore, the condition had been met. In any event, in my view Mr Suraj Sharma's visa status did not change the fact that he was employed by CDWL. That was the true nature of the relationship and that is how it operated in practice.

Second Issue

If Mr Suraj Sharma was employed by CDWL, did it fail to meet minimum employment standards?

[42] The Labour Inspector claims the following breaches by CDWL in respect of Mr Suraj Sharma.

Section 229(1) of the ERA

[43] Under s.229(1) of the ERA, the Labour Inspector has power to require the production of an employment agreement in writing together with other employment documents.

[44] On 29 January 2016, the Labour Inspector visited CDWL and DAIL. During the visit Mr Vishaal Sharma was asked by the Labour Inspector to produce employment agreements and other employment related documents to him. Mr Vishaal Sharma informed the Labour Inspector that all employees at the car yard were employed by DAIL and that CDWL did not employ anyone. The Labour Inspector enquired more about Mr Suraj Sharma and was told by Mr Vishaal Sharma that he had *“never been an employee and had not worked for any of his companies”*. On 29 January 2016, following the visit the Labour Inspector served a notice on Mr Vishaal Sharma seeking information with regard to employees including Mr Suraj Sharma and employment documents in relation to him⁸.

[45] Mr Vishaal Sharma responded to the request on 11 February 2016. In that letter, Mr Vishaal Sharma stated that Mr Suraj Sharma *“was finally offered an employment offer with the company but for reasons unknown he did not take up the offer”*. Mr Vishaal Sharma did not provide the Labour Inspector with a copy of any employment records for Mr Suraj Sharma. Nor did he mention in his letter that there was a signed written employment agreement between Mr Suraj Sharma and CDWL. Subsequently, CDWL has claimed that Mr Suraj Sharma took the only written employment agreement in order to progress his visa application.

[46] Section 229(1) of the ERA states:

Every employer who, without reasonable cause, fails to comply with any requirement made of that employer under subs.(1)(c) or subs.(1)(d) is liable in an action brought by a Labour Inspector to a penalty under this act imposed by the Authority.

[47] It is my view that CDWL, without reasonable excuse, failed to provide Suraj Sharma’s employment agreement to the Labour Inspector.

⁸ Labour Inspector’s Report 1 November 2016

Did CDWL fail to keep records of hours Mr Suraj Sharma worked each day and other details as required by s.8A of MWA?

[48] CDWL accepts that if Mr Suraj Sharma is found to be an employee, it has breached s.8A of the MWA. The reasons for doing so will be taken into account by me when I consider penalties.

Section 81 of the HA

[49] Section 81 of the HA imposes an obligation on an employer to keep holiday and leave records. CDWL accepts that if Mr Suraj Sharma is found to have been an employee it has breached s.81 of the HA. The reasons and any matters in mitigation will be considered by me when assessing penalties.

Failing to pay annual holiday pay to Mr Suraj Sharma upon termination of his employment in accordance with s.23(2) and s.27(2) of the HA.

[50] CDWL accepts that if Mr Suraj Sharma was its employee it has breached s.23(2) or s.27(2) of the HA and failed to pay 8% of the gross holiday pay to him.

[51] CDWL is in breach of s.23(2) and s.27(2) of the HA. The Labour Inspector has been unable to calculate holiday pay owing to Mr Suraj Sharma and has not sought an order from the Authority except for penalties in respect of this breach.

Third Issue

If minimum employment standards were breached, should penalties be imposed on CDWL and in what amount?

[52] This jurisdiction is set out in the Authority's determination in the *Labour Inspector v DAIL*⁹.

Step 1

Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalizable breach. Consider whether global penalties should apply, whether at all or some stages of this stepped approach

[53] The Labour Inspector seeks the imposition of penalties as follows¹⁰:

⁹ [2017] NZERA Auckland 195 at para [78]
¹⁰ Statement of problem para.3

1. Section 229(3) of the ERA, for failing to comply with a requirement by the Labour Inspector to produce an agreement in writing for Suraj Sharma under s.229(1)(c) of the ERA;
2. Section 10(1) of MWA, for breaching s.8A of the MWA, in not keeping a compliant wages and time record relating to Suraj Sharma, or s.229(3) of the ERA for, without reasonable cause, failing to comply with a requirement by the Labour Inspector to produce wages and time records under s.229(1) of the ERA;
3. Section 75 of the HA, for breaching s.81 of the HA, in failing to keep holiday and leave records, or s.229(3) of the ERA, for, without reasonable cause, failing to comply with a requirement by the Labour Inspector to produce holiday and leave records pursuant to s.229(1) of the ERA;
4. Section 75 of the HA, for breaching s.23(2) of the HA, in failing to pay Suraj Sharma 8% of his gross earnings since the commencement of employment as annual holiday pay, upon termination of employment;
5. Section 75 of the HA, for breaching s.27(2) of the HA, in failing to pay annual holiday pay in the pay that related to Suraj Sharma's final period of employment.

[54] There is a total of five breaches in respect of Mr Suraj Sharma, totalling a maximum of \$100,000 in available penalties.

[55] The Labour Inspector acknowledges it is permissible to consider the s.8A MWA breaches and s.81 HA breaches as part of a consistent pattern of breach of a particular statutory requirement. The Labour Inspector also considers that ss.23 and 27 can be considered as a single course of conduct constituting one breach.

[56] Following globalising there are three breaches in respect of Mr Suraj Sharma, totalling a maximum of \$60,000 in penalties available.

Step 2:

Assess the severity of the breach in each case to establish a provisional penalties starting point and consider both aggravating and mitigating features

[57] I refer to the Authority's determination in *DAIL*¹¹ which sets out the relevant sections of *Preet*¹² that apply to step 2. CDWL has accepted the majority of its breaches in respect of Mr Suraj Sharma in the event the Authority finds that he was its employee. CDWL states that there was a misapprehension of the law and it was

¹¹ [2017] NZERA Auckland 195

¹² [2016] NZEmpC 143

always of the view that Mr Suraj Sharma was a contractor and that therefore minimum employment standards legislation did not apply to it.

[58] Mr Vishaal Sharma made misleading statements to the Labour Inspector about Mr Suraj Sharma ever working at CDWL. Following the Labour Inspector's site visit, an offer of employment and an employment agreement were both provided by Mr Suraj Sharma to the Labour Inspector. It was following this disclosure that Mr Vishaal Sharma stated that any employment by Mr Suraj Sharma would have been conditional on his visa being a valid one.

[59] Appendix 1 sets out the percentage of maximum penalties I consider apply in this case. Following reduction, the provisional penalty amounts to \$17,100 at this step.

Step 3

Consider the means and ability of the person in breach to pay the provisional penalty arrived at in step 2

[60] There was limited financial information provided to the Authority in relation to the means and ability of CDWL to pay any penalties. Without financial accounts and information, it is difficult for the Authority to assess CDWL's ability to pay.

Step 4

Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances

[61] The Court in *Preet* said the penalties imposed should be proportionate to the amount of money unlawfully withheld¹³. The Labour Inspector has been unable to calculate holiday pay owing. However, the period of employment was a short period and the holiday pay owing to Mr Suraj Sharma would not be a large amount. At this point in the process provisional penalties stand at \$17,000.

[62] In all the circumstances of this case and as in *DAIL*¹⁴, it is appropriate that a proportionate penalty be imposed. The provisional penalty is \$15,000. This represents one-quarter of the global penalties of \$60,000 that could have been awarded.

¹³ Ibid at [190]

¹⁴ Ibid [2017] NZERA Auckland 195

[63] The penalties of \$15,000 are to be paid by CDWL to the Authority, for transfer to a Crown bank account, within 28 days of the date of this determination.

[64] Mr Suraj Sharma did not receive holiday pay due to him. Because of the lack of records, the Labour Inspector was unable to calculate holiday pay owing. In that case I consider it is appropriate for some of the penalty amount should be for Mr Suraj Sharma's benefit.

[65] \$5,000 of the total amount of penalties of \$15,000 awarded is to be paid by the Authority to the Labour Inspector for the use of Mr Suraj Sharma pursuant to s.136(2) of the ERA.

Costs

[66] Costs are reserved. The Labour Inspector has 14 days from the date of this determination to file a memorandum as to costs. CDWL has 14 days from receiving the memorandum as to costs to file its memorandum as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority

APPENDIX 1

CHEAP DEALS ON WHEELS LIMITED		
<i>Step 1: Nature and number of breaches – potential maximum penalties (following globalisation)</i>		
Suraj Sharma		
s.229 ERA	\$ 20,000	\$20,000
s.8A MWA(globalised)	\$ 20,000	\$20,000
s.81 HA (breaches globalised) and similar breach of s8A MWA globalised)	\$ 20,000	
s.23, s27 HA (2 breaches globalised)	\$40,000	\$ 20,000
	Subtotal	\$ 60,000
<i>Step 2(a): Aggravating factors as a proportion of maxima in Step 1</i>		
Suraj Sharma		
s229 ERA	20%	\$ 4,000
s.8A MWA	50%	\$ 10,000
s.81 HA (as above)		
s.23 & 27 HA	20%	\$ 4,000

	Subtotal	\$ 18,000
<i>Step 2(b): Ameliorating factors (reducing aggravating factors subtotal)</i>		
less 5% of above	Subtotal	\$17,100
<i>Step 3: Respondents financial circumstances</i>		
No evidence provided	Subtotal	
<i>Step 4: Proportionality</i>		
Reduce modestly	Total	\$ 15,000