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## Momeny v Sunset Entertainment Limited AA338/10 (Auckland) [2010] NZERA 657 (28 July 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 338/10 5278069

BETWEEN SAM MOMENY

Applicant

AND SUNSET ENTERTAINMENT

LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Yvonne Oldfield

Mr Momeny in person No appearance for Respondent

27. July 2010

28. July 2010

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] Mr Momeny has lodged with the Authority a claim for arrears of wages, pay in lieu of notice and holiday pay all of which he says remained outstanding when his employment with the Respondent (Sunset Entertainment) ended after just three weeks. At the Authority investigation meeting he advised that he also considered that he had been unjustifiably dismissed. That aspect of his employment relationship problem was not particularised in his application to the Authority and for that reason it is not possible for me to proceed to determine it. This determination disposes only of Mr Momeny's claims for arrears, pay in lieu of notice and holiday pay.

[2] Should Mr Momeny wish to pursue a personal grievance of unjustified dismissal an amended statement of problem, setting out full details of the claim, would be required from him so that the Respondent may be put properly on notice of the allegations against it.

#### Issues

[3] On behalf of the Respondent one of its directors, Megan McCabe, supplied a statement in reply in which it was asserted that Mr Momeny was claiming for hours he did not work, including lunch breaks and times when he was drinking in the Respondent's bar, or when he came in late. The Respondent denied that it owed Mr Momeny anything. The issues for determination are therefore what Mr Momeny was entitled to, what he was paid, and whether there is any shortfall between the two.

[4] A copy of a written employment agreement was attached to the statement in reply. According to an accompanying

statement from Ms McCabe, the Respondent had presented this to Mr Momeny when he was employed and he had signed shortly after that. Ms Momeny confirmed that this was correct. Notwithstanding this, a document attached to the Statement in Reply bore the following statement: *"this person ...was not an employee, he did do some work as a contractor and was paid."* This is the only reference to any issue about Mr Momeny's employment status. It is not supported by any of the other material provided by the Respondent (including pay records and timesheets) and I therefore proceed on the basis that Mr Momeny was an employee and falls within the Authority's jurisdiction.

### **Non-appearance by Respondent**

[5] The parties to this matter attended mediation in December 2009 but were unsuccessful in resolving the issues between them. On 8 April 2010 I conducted a conference call which was attended by Mr Momeny and Ms McCabe. The following timetable was agreed:

- i. The Respondent was to supply Mr Momeny's wage and time records to the Authority by 30 April 2010;
  - ii. After receipt of those records the applicant had until 28 May 2010 to clarify and quantify his claim;
  - iii. Once the claim had been clarified and quantified the Respondent had until 25 June 2010 to respond, and
- iv. The investigation meeting would take place on 27 July 2010.

[6] The first and second steps of this timetable were completed as agreed. Then on 22 June the Respondent's accountant, Ms Bleser, emailed the Authority advising that it would not be possible for the response to be provided by 25 June "for health reasons" (although Ms Bleser did not say whose health was the issue.) Ms Bleser requested that the timetable be amended and indicated that the Respondent wanted the investigation meeting deferred.

[7] Ms Bleser and the Authority support officer then exchanged a series of emails which confirmed that the Respondent wanted the investigation meeting deferred but did not explain why. On my instructions the support officer attempted to set up a conference call for late June or early July to discuss the request for rescheduling however Ms Bleser said that this was not possible as the "involved party" was "currently overseas." I instructed the support officer to advise that Sunset Entertainment's response would be accepted late but that the investigation meeting could not be adjourned on the basis of what the Respondent had advised so far.

[8] On 2 July Ms Bleser emailed the Authority advising that the Respondent hoped to provide a statement by 16 July. It did not however do so. A subsequent email from her dated 12 July indicated that the Respondent was still seeking an adjournment but again, no reasons were given nor was any indication given of availability for a telephone conference so that the matter could be discussed. The support officer emailed Ms Bleser one last time on 16 July asking for more information and urging Ms Bleser to contact the Authority on Monday July 19. Nothing resulted.

[9] Mr Momeny attended the investigation meeting at the appointed time. There was no appearance for the Respondent. The Authority support officer telephoned Ms Bleser who advised she was not authorised to come on behalf of the Respondent and did not expect the directors to attend. Given the circumstances, I proceeded to take evidence from Mr Momeny in the Respondent's absence. I now determine the matter on the basis of that evidence as well as the statement of problem, statement in reply and other documentation attached to those statements.

[10] Mr Momeny told me he began work as entertainment and promotions manager of the Respondent's bar and restaurant business on 25 May 2009. Part B of the written employment agreement identified Mr Momeny's position as being full time "events promoter." It also included the following:

#### ***"Trial period***

*The trial period is for the first two weeks after commencement date. Notice required during trial period: one day*

#### ***Notice of termination***

*The period of notice required (other than during the trial period) is at least two weeks."*

[11] A commencement date of "25/5" had been crossed out and both "1/6" and "25/5/09" written in after this. Under the heading "Remuneration" was recorded:

*"Hourly Wage rate \$25 per hour @ 40 hour."*

[12] Below this "*Commencing salary \$1,000.00*" had been crossed out. Mr Momeny noted, correctly, that he had not initialled any of the changes on this page. Nor had the Respondent. Mr Momeny told me he had understood that he was on a salary of \$1,000.00 per week.

[13] Mr Momeny's pay records (supplied by the Respondent) show that his first pay period (for which he received a full \$1,000.00 gross) was the week ending 31 May 2009. The pay records also record that he received \$1,000 gross for the period ended 7 June. For the period ended 14 June he was not paid at all however he received a payment of \$662.50 gross in the pay

period ended 21 June. Other material provided by the Respondent confirms that the payment made in the week ending 21 June was in fact for work performed in the week ending 14 June.

[14] At the Authority investigation meeting Mr Momeny agreed that he received the payments shown in the pay records. He told me that he worked full time from 25

May until dismissed on 14 June with one day's notice. This is consistent with the pay records and other information from the Respondent. Mr Momeny claimed to have worked at least forty hours in his final week. He has confirmed that he seeks the shortfall in that week's pay, pay in lieu of notice, and holiday pay at 8%.

### **Determination**

[15] Although the respondent has challenged the assertion that Mr Momeny worked a full week in his last week of work, it did not attend the investigation meeting to support its position with evidence. I therefore accept Mr Momeny's evidence that he completed a full week.

[16] Because Mr Momeny was employed beyond the completion of the two week trial period set out in Part B of his agreement, he was entitled to two weeks notice of termination. His evidence is that he was dismissed on 14 June with only one day's notice. There being no evidence to the contrary, I conclude that he is entitled to two weeks pay in lieu of notice.

[17] The pay records confirm Mr Momeny's assertion that he was not paid holiday pay.

[18] Mr Momeny has therefore established that he is entitled to the following:

Balance of final week's pay	\$337.50 gross
Two weeks' pay in lieu of notice	\$2,000.00 gross
Holiday pay (@ 8% of total earnings)	\$400.00 gross
<b>Total</b>	<b>\$2,737.50 gross</b>

[19] **Sunset Entertainment Limited is therefore ordered to pay to Mr Momeny the sum of \$2,737.50 gross.**

Yvonne Oldfield

Member of the Employment Relations Authority

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