

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 596  
3147321

BETWEEN                      PAUL BRIAN MOONEY  
Applicant

AND                              JNCTN LIMITED  
Respondent

Member of Authority:      Geoff O’Sullivan

Representatives:            Scott Balloch and Ben Sheehan, counsel for the  
Applicant  
Viv d’Or, counsel for the Respondent

Investigation Meeting:      11 April 2022

Submissions and Other      Up to and including the 10th day of November 2022  
Information Received:

Date of Determination:      12 October 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Paul Mooney claims he has been disadvantaged in his employment with JNCTN Limited (JNCTN) because it did not pay him the agreed salary, nor did it pay him holiday pay entitlements for the period 1 July 2018 through to 31 July 2020. He claims:

- (a) Recovery of salary arrears from 1 June 2018 to 31 July 2020 totalling \$197,306.85;
- (b) Holiday entitlements for the same period totalling \$15,784.55;
- (c) \$20,000 compensation for humiliation, loss of dignity and injury to feelings;

- (d) Any other allowances owing under JNCTN's standard employment agreement;
- (e) Costs.

[2] JNCTN defends the claim, saying that Mr Mooney was a shareholder of JNCTN and was never an employee. It says he was engaged on a sweat equity basis and that his claim is essentially a shareholder issue and the Authority is not the correct legal forum to hear the case. It says that it has paid money to Mr Mooney from time to time, but these were shareholder payments.

### **The Authority's investigation**

[3] At the investigation meeting I heard evidence from Mr Mooney, Wayne Stemp, the Director and main shareholder of JNCTN, Dan Stemp, the Chief Customer Officer (CCO), Jonathan Neil, a Solutions Specialist, and Chris West, Chief Technology Officer. All evidence was received on oath.

[4] The following issues for determination arose, namely:

- (a) Was Mr Mooney at all material times an employee or was he working under some other arrangement as an independent contractor working for sweat equity in JNCTN?
- (b) If Mr Mooney is an employee, was he disadvantaged in his employment?
- (c) If Mr Mooney is an employee, what salary and holiday pay is he owed?
- (d) If Mr Mooney was disadvantaged in his employment, what remedies should flow?

[5] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. Further, whilst I have not referred to all the submissions made by the parties, I record I have fully considered them.

[6] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

## **Background**

[7] Mr Mooney over his working career has amassed significant experience across project and programme management, managing contracts, commercial relationships, service delivery, business unit management and sales and consulting, developed over a career spanning some 35 years whilst working in a variety of information and communication technology management and consulting roles. Throughout his working life, Mr Mooney has worked as an employee and an independent contractor.

[8] His evidence was that he was acutely aware of the differences between various types of working relationships, including non-employee roles such as working under a sweat equity arrangement.

[9] In June 2016, Mr Mooney accepted a role at Identitech NZ Limited (Identitech). Mr Stemp was the sole director and a shareholder of Identitech. Identitech and other associated companies carried on business producing plastic identity cards. An associated company was Junction Credential Management Limited (JCML). This was a joint venture company. There is no dispute, that Mr Mooney's relationship with Identitech was a commercial relationship with Mr Mooney being an independent contractor. In fact, Mr Mooney often provided services through his own trading entity, Boulcott Consulting Services.

[10] By February 2017, Mr Mooney was concerned that a number of invoices were outstanding. This led to him having discussions regarding sweat equity in exchange for time spent at Identitech. In this scenario, Mr Mooney explained that his contribution to the business would be recognised as developing an arrangement whereby he would devote his time and energy to the business without payment. However, the purpose of such an arrangement was the hope the business would develop into a profitable concern and his "sweat equity" would be recognised by an increasing shareholding.

[11] Mr Mooney agreed to this arrangement in respect of Identitech, although he was not offered a shareholding and nor did he become a shareholder in Identitech. Mr Mooney explained that the parties did not discuss a specific formula as to how sweat equity entitlements would be calculated. He said he trusted Mr Stemp because he had been a close personal friend of his for some eight to ten years.

[12] By September 2017, there was an acknowledgement that a new legal entity would need to be created in order to achieve further investment. Mr Mooney was aware that Identitech and JCML shareholders were unwilling to invest any further money into the current ventures. In order to receive further investment, a new legal entity would be needed.

[13] Mr Mooney, along with Mr Stemp and others, had a number of discussions regarding forming the new entity that from Mr Mooney's perspective, would be financially sustainable so that parties could be paid. It is at this stage that Mr Mooney says he commenced employment with JNCTN.

### **Mr Mooney's evidence**

[14] Mr Mooney says that on Friday 11 May 2018 a meeting was held attended by Mr Stemp, the CCO, Mr Neil, and himself. During this meeting, JNCTN Limited was to be incorporated as a new company. Mr Mooney says during this meeting, the parties discussed the structure of the company and it was agreed that Mr Stemp would be the Chief Executive Officer, and that Mr Mooney would be the General/Operations Manager. More significantly, Mr Mooney says it was agreed he would receive an initial salary of \$108,000 per annum or \$9,000 per month for his work.

[15] Mr Mooney is adamant that the payment of a salary, was one of the key reasons he made the decision to remain working with JNCTN. He said the fact that he had worked for some 24 months prior without income, had caused significant emotional and financial pressure. He said his intention in taking up the new position was because he would be paid on a regular basis. He could not carry on without receiving payment for the work he had been undertaking. Mr Mooney says that it was during this meeting that he verbally accepted Mr Stemp's offer of employment with JNCTN.

[16] When asked about the absence of a formal employment agreement, Mr Mooney stated that the focus was on developing software solutions and expanding the enterprise as quickly as possible. Administrative tasks were not a priority at the time. Mr Mooney said Mr Stemp fostered a high trust environment and he believed in the promises that had been made.

[17] Mr Mooney says that he was to be paid a salary of \$108,000 per annum. On 14 May 2018, he was sent an email attaching a share issue document (the 14 May 2018 share issue document), together with a cashflow spreadsheet which provided for a payment of \$9,000 per

month to PM (documents marked W, X and Y respectively). Mr Mooney said PM stood for “Paul Mooney”. The document also recorded a proposal in respect of shareholding allocations in JNCTN. Under this arrangement, Mr Mooney would receive 17 percent of the shares.

[18] Mr Mooney stated that when JNCTN was incorporated on 26 June 2018, the sweat equity arrangement he had with Identitech finished and he became an employee of JNCTN. Mr Mooney believed a 15 percent shareholding in JNCTN. He says he believed that this was “sweat equity” for his previous contribution to Identitech and had nothing to do with JNCTN.

[19] By September 2019, Mr Mooney says that Mr Stemp reported that investment prospects were positive and that soon JNCTN would have the cash reserves needed to grow. It was at this point Mr Mooney says he felt it was time to tidy up the employment administration as he was aware he had no employment agreement and suspected others would be in the same position. Accordingly, he approached Mr Stemp offering to help prepare employment agreements for those he believed were JNCTN’s employees, including himself.

[20] On 24 October 2019, Mr Mooney emailed Mr Stemp amongst other things advising that employment agreements would need to be drafted for Mr Stemp and others including himself.

[21] Mr Mooney says Mr Stemp responded confirming that employment agreements were needed. He relied on document EE attached to his brief. However, the email dated 24 October did not say employment agreements were to be drafted. It said:

Chris and Pete covered already? So just need to draft something up for you, me, Dan, Greg, Jo, Andrew?.

I’ll make a JNCTN Operations Team and add an HR folder (limited access).

[22] Mr Mooney’s evidence was that he received no payments from JNCTN in the 2018/2019 tax year. In the 2019/2020 tax year, he says he received what he believed to be salary payments totalling some \$12,000. These were received both from JNCTN and Identitech.

[23] In the 2020/2021 tax year, he received further payments of some \$44,000 which he believed to be salary payments.

[24] In terms of how the alleged employment relationship operated, Mr Mooney’s evidence was that JNCTN had flexible working hours, but employees were expected to be available during office hours on Monday through Friday. He says if he wished to take a day off he was

required to check his commitments for the day and communicate his whereabouts to the rest of the team. He says he did not work on public holidays or weekends.

[25] Mr Mooney explained that JNCTN operated much like a new age technology company in Silicon Valley. He explained it had a flexible work policy and the focus was on completing deliverables rather than hours spent in the office. He says that he did not choose what work he would do but rather his responsibilities were set by Mr Stemp who had asked him to carry out work such as researching new privacy laws, or others would ask him to assist on tasks they were undertaking. He had no authority to spend money or enter into any financial or commercial transactions on behalf of JNCTN.

[26] He says that all work he carried out was for JNCTN's sole benefit. He did not work for any other entities during this time but says this was because he believed his duty of good faith as an employee was to JNCTN.

[27] Mr Mooney used his own laptop and mobile phone but says that the modest usage did not add to the cost of his plan. He did not request or receive reimbursement. When in the office he had his own allocated desk and used the company's printing network infrastructure. He never issued invoices for his services and he says he was required to be in the office full time, although this was disputed by Mr Stemp.

[28] Mr Mooney says he decided to leave JNCTN because he felt its prospects looked positive and the time was right for him to leave. He said he felt it was time for a change and that his departure would be a positive change. He advised the team he had decided to resign and that his last day would be the end of July 2020, which in effect was three months' notice..

[29] On 31 July 2020 he met with Mr Stemp and advised that a payment of \$15,000 would cover the outstanding 2020/2021 tax year salary but suggested this be reduced to \$14,270 to keep the accountants happy. Amongst other payments he also requested clarification of salary for the 2018/2019 year and the 2019/2020 year. There appears little dispute that Mr Stemp agreed to some of the payments, however it is fair to say never on the basis of Mr Mooney being an employee.

[30] Because of a lack of response regarding the payments, Mr Mooney filed his personal grievance on 21 October 2020. Apart from credit card costs of some \$4,974.52, Mr Mooney claimed a total sum of \$208,947.55. Document VV attached to his evidence set out his

calculation of how he arrived at that figure. Essentially, he claimed a total gross salary of \$245,321.81 to which he added 8 percent holiday pay before deducting payments he had received of some \$56,000.

### **Evidence of Wayne Stemp**

[31] Mr Stemp gave evidence as the Director and major shareholder of JNCTN. He was steadfast in his view that Mr Mooney had never been an employee of JNCTN and accordingly, any dispute between the parties was a shareholder matter. Mr Stemp says that it was untrue that he approached Mr Mooney about a role. He says in 2016, Mr Mooney approached him saying he was impressed with what was happening at Identitech and wanted to join that company. He says Mr Mooney told him he was used to being a government contractor, was not fussed about money because he was semi-retired, and had a mortgage free house and savings. Identitech had no money to pay employees or contractors and accordingly, was only in a sweat equity arrangement. It is common ground that Mr Mooney agreed to a sweat equity arrangement with Identitech.

#### *Inception meeting*

[32] Mr Stemp states that as he had done with IdentiTech, the understanding with Mr Mooney was that if there were spare cash, he would be paid for. He rejects absolutely that there was ever an “inception meeting” as such regarding JNCTN. He says that JNCTN lacked funds and forward sales at the time, so could never have been in a position where it could offer an employee role under that sort of circumstance. Again, Mr Stemp says that as he did with Identitech, he promised Mr Mooney shares in return for sweat equity and he honoured that promise.

[33] Mr Stemp pointed out that Mr Mooney fully understood what sweat equity meant and referred to a document he wrote in July 2016 where he stated: <sup>1</sup>

Sweat equity can take several forms ranging from; deferred wages, unpaid hours, interest free loans, resources loaned to the organisation ... The General Manager is developing an approach that considers all form of “sweat equity” and appropriately recognises the tremendous support we have had from everyone involved to get us to the opportunity crossroads we find ourselves at.

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<sup>1</sup> Attachment 1.

[34] In respect of JNCTN, Mr Stemp said he was very clear that there were multiple conversations over a span of 18 months about creating and incorporating JNCTN and this included discussions on 11 May 2018. Mr Stemp says there was no inception meeting, and no employment relationship with Mr Mooney started at that date. The sweat equity arrangement already in place simply continued on with the new entity.

[35] Mr Stemp was adamant that he never offered Mr Mooney an employment package. He says if he had, he would have ensured there was an employment agreement, asked for Mr Mooney's IRD number, filled out the appropriate forms and instigated KiwiSaver. He says none of these things happened. Further, he said as Mr Mooney was well known to him, if he had offered him employment, there is no way that Mr Mooney would have carried on without an agreement being provided and proper payments made.

[36] Mr Stemp says there was no fiscal facility enabling JNCTN to offer Mr Mooney payment for employment. That could only ever happen after JNCTN had received investor funds and had a healthy cashflow. This did not occur whilst Mr Mooney was with the company.

[37] Mr Stemp was clear that the only discussions about payment, was in respect of shareholder funds when possible. He confirms he agreed with Mr Mooney that payments would be made when money was available. He notes that along with Mr Mooney's 15 percent shareholding, the majority of shares were owned by the two of them.

[38] Mr Stemp notes that Mr Mooney used his credit card to pay Identitech and JNCTN invoices for which he was reimbursed. He says the company records (Attachment 2) and FINDEX who processed wages, have confirmed that no PAYE or wage salary payments or KiwiSaver forms were filled in or paid in Mr Mooney's name at IRD.

[39] Mr Stemp commented that he was not an expert in employment law and could easily have been guilty of using interchangeable terms, such as employment agreement, contract, wages, salary, when referring to shareholding funds whilst talking to Mr Mooney but says that any wrong use of terms, did not make Mr Mooney an employee. Mr Stemp was adamant that there had never been an employee/employer relationship in existence.

[40] Mr Stemp's evidence was that JNCTN operated in a small, open office. No one worked set hours or was even expected to be in the office. He said everyone had a job to do and they

did it. The primary purpose was to work towards a common goal to complete saleable software. They believed they were to be world leaders in their field, and everything was geared to achieve that. Mr Stemp says he never discussed salary arrears with Mr Mooney. He accepts the documents contained a reference to a salary of \$120,000 recorded for a general manager, but says this was just part of a fluid living document that was designed to show how things may look in the future rather than now. It was a document prepared to encourage investment in JNCTN.

[41] Mr Stemp's evidence was confirmed to the extent it could be by the CCO and Mr Neill. Both confirmed Mr Stemp's evidence that no offer of employment was made at the "inception meeting", nor was Mr Mooney offered a role and salary as an employee. Mr West is the Chief Technology Officer of JNCTN. His evidence was that he commenced his role in February 2019, and only he and one other person were employees. He states it was his understanding that Mr Mooney held a large shareholding in JNCTN and was focused on building the company up. He viewed the way Mr Mooney conducted himself and has approached the company as being more than a shareholder and certainly not as an employee.

### **Discussion and analysis**

[42] In Mr Mooney's case, analysis and discussion starts with addressing the status issue as to whether or not he was an employee of JNCTN. The court in *Leota v Parcel Express Limited* said:<sup>2</sup>

An employee works for the employer, and the employer's business, to enable the employer's interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[43] Mr Mooney's role with Identitech was clearly a role he undertook in pursuit of gains for his own enterprise. He was building up sweat equity so he could receive shares and hopefully obtain an interest in that company by providing labour.

[44] Section 6 of the Employment Relations Act 2000 (the Act) is the starting point. It provides that under these circumstances, the Authority's task is to determine the real nature of the relationship, in this case between Mr Mooney and JNCTN. The Court noted in *Leota* at [6]:

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<sup>2</sup> *Leota v Parcel Express Limited* [2020] NZEmpC 61.

As s 6(3) makes clear, the mutual intention of the parties (if it can be ascertained) will be relevant to undertaking that task, as will be the way in which the parties have labelled their relationship. But what is equally clear from the express wording of s 6(3)(a) and (b), is that neither intention nor the labelling are determinative; both are pieces of a larger s 6(2) real-nature-of-the-relationship puzzle. If it were otherwise, the underlying purpose of s 6, in particular, and the objectives of the legislation more generally, would be undermined.

*Was there any clear description of Mr Mooney's status, either as an employer or an independent contractor (providing sweat equity)?*

[45] Mr Mooney, as his evidence made clear, was familiar with the concept of an employment relationship, an independent contractor relationship, and working for sweat equity. He was experienced in all three of those relationships. Immediately prior to working with JNCTN, Mr Mooney had been working as both an independent contractor and providing sweat equity. If Mr Mooney was an employee, then this change in status would have occurred at the 14 May meeting.

[46] The evidence produced does not disclose a clear intention as to the form of a relationship between the parties. Mr Mooney's evidence was that having gone for so long with uncertain income, he had no interest entering into a further sweat equity arrangement with JNCTN. The difficulty with his evidence is that on one level that seems to be precisely what he did. This can be ascertained by the fact that he essentially went for his entire time with JNCTN with little pay. Not only did he not receive the salary he says was agreed to, he did not receive regular payments. It is difficult to understand why a sophisticated operator as Mr Mooney clearly is, would have gone for so long without rectifying the position.

[47] Whilst not fatal to his argument that he was an employee, Mr Mooney had no written employment agreement. There had been no discussions regarding KiwiSaver. There were no discussions regarding holidays. Mr Mooney was being paid in lump sums and infrequently. He was not submitting invoices, which leads to the inevitable conclusion that he was working under a sweat equity arrangement. He received shares in the company and there is no doubt he was providing an extremely valuable service from which JNCTN profited.

[48] I note there are references to different forms of working relationships, including employment. However, the evidence indicates that during the time Mr Mooney was with JNCTN, it was unlikely that the intention was he be an employee. As noted earlier, he was well versed in the different forms of working arrangements, including the sweat equity

arrangement. He would have been aware that JNCTN would not at least initially have had the money it would have needed to fund an employment relationship with him. Immediately prior to the incorporation of JNCTN, Mr Mooney accepts he was not an employee. His evidence therefore is that his status changed on 14 May 2018.

[49] I accept that there were difficulties between Mr Mooney and JNCTN and it is difficult to escape the conclusion that he believes the terms of whatever agreement he had with JNCTN were not being honoured. He did not believe that Mr Stemp, on behalf of JNCTN, was honouring his commitment. The fact that there was no written employment agreement, the fact that Mr Mooney was not being paid on a regular basis, and the fact that there was no KiwiSaver arrangement and no PAYE deductions, is not necessarily the end of the matter. However, these are factors pointing away from the conclusion that an employment relationship existed.

*What control did JNCTN exert over the way Mr Mooney carried out his tasks?*

[50] There is difference of view between Mr Mooney and JNCTN. However, the evidence does suggest that no one was working set hours. Everyone had a job to do, including Mr Mooney, and they did it. There was a common goal of completing saleable software and Mr Mooney was aware of JNCTN's cash flow. Mr Mooney noted that Mr Stemp had given undertakings as to payments. These seemed to be in the future when JNCTN had the money to pay them. This arrangement is not indicative of an employment relationship.

[51] As an experienced operator, it is difficult to see why Mr Mooney would have carried on working for JNCTN for such a significant period of time without regular payments if he considered himself an employee. Further, as Mr Mooney says in his evidence, he had worked in a sweat equity situation with Identitech but decided when he joined JNCTN, he needed a regular income and the protections afforded in an employment relationship.

[52] He acknowledges receiving a 15 percent shareholding in JNCTN but says that was in consideration for time spent in sweat equity at IDentiTech. With respect, it is difficult to make sense of such a statement. Mr Mooney did not explain why it would be JNCTN would reward him for time spent working for a different entity. This is especially so in considering Mr Stemp's evidence that it was a sweat equity arrangement. In such a case, one would have expected to see JNCTN reward Mr Mooney with a shareholding, which it did.

[53] Whilst it is obvious from the evidence, there was an understanding regarding roles and payment, that does not make it an employment relationship. Payments made to Mr Mooney along the way were made without any tax deduction, and indeed without the submission of a tax invoice by Mr Mooney. This supports a conclusion that Mr Mooney had continued to operate under a sweat equity arrangement during his time with JNCTN.

[54] When he was explaining why he may have used terms such as “employment agreement”, “contract”, “wages” and “salary” interchangeably, Mr Stemp stated he had a lack of expertise in employment relationships. This point was contested by Mr Mooney, who said Mr Stemp was well versed in employment relationships and processes. This, however, cuts both ways. If both parties were well versed in employment relationships and other arrangements as they say, then that begs the question as to why there was not proper documentation of the relationship put in place.

### **Conclusion**

[55] Mr Mooney is not an employee. He has acted throughout his time with JNCTN as if he were in a sweat equity arrangement as opposed to an employment relationship. This is indicated by the following:

- (a) Mr Mooney is a sophisticated businessman, aware of the different forms of working relationships. Immediately prior to starting with JNCTN he had been in a sweat equity arrangement with Identitech. I accept that Mr Mooney says that the working arrangement did not suit him. However, as indicated by the fact that there was no employment agreement in writing, there had been no discussions regarding KiwiSaver, no PAYE was deducted from any of the payments made, and he received a 15 percent shareholding in JNCTN, all leads to a conclusion that the relationship was not one of employer and employee.
- (b) Mr Mooney did not receive regular payments. When he commenced his engagement with JNCTN he must have been aware that the company had no money to pay for senior employees at the level he says JNCTN had agreed to pay him.
- (c) Mr Mooney does not appear to have been accountable to JNCTN and provided his own equipment. It seems he did not need to have permission before taking leave if he wished to take it. Rather, there is no doubt that all those involved

were working towards one common goal, namely, getting a tech startup company off the ground in the hope in the future it would provide a source of income.

- (d) Mr Mooney received his 15 percent shareholding in JNCTN. Although he says this was to recognise sweat equity he had earned for Identitech, it does not make sense. If that had been the case, then surely he would have received shares in Identitech. Instead however, he received shares in JNCTN which is in keeping with the sort of arrangement outlined by Mr Stemp.

[56] As noted in *Leota*, whether Mr Mooney was an employee or not is an intensely fact-specific enquiry. Mr Mooney's position can be distinguished from that of Mr Leota, in that he was a sophisticated operator with vast experience, who had worked in and was aware of, all sorts of working relationships including the sweat equity model. There was not a high level of control over Mr Mooney's work. He seems to have had flexibility to change his work days and take time off without consultation. And considering the fundamental or economic reality, he had an ability to cultivate new and existing customers or undertake other work if he wished, although that may have impacted negatively on his working arrangement with Mr Stemp.

[57] I conclude therefore, that the relationship between JNCTN and Mr Mooney was not an employment relationship. It follows that the Authority has no jurisdiction to deal with any claim Mr Mooney may have in respect of unpaid monies. He would need to pursue those in a different forum.

### **Costs**

[58] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, JNCTN may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Mooney would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[59] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>3</sup>

Geoff O'Sullivan  
Member of the Employment Relations Authority

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<sup>3</sup> [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)