

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 695
3075292

BETWEEN SITARAM MUKKAMALA
Applicant

AND SAVJOT SINGH
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person
Respondent in person

Investigation Meeting: 29 November 2019

Submissions and further 2 December 2019 from the Respondent
Information Received:

Date of Determination: 6 December 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sitaram Mukkamala alleges he was employed as a Telecommunications Technician by Savjot Singh. He claims that during his employment he was unjustifiably disadvantaged and was not paid all of his wage entitlements. Mr Singh denies this. He maintains that at all material times Mr Singh was employed by Savman Solutions Limited (the Company), who undertook fibre installations as a sub-contractor to Chorus.

[2] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues

necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[3] The issues requiring investigation and determination were:

- a. Was Mr Mukkamala employed by Mr Singh?
- b. If Mr Mukkamala was employed by Mr Singh then:
 - i. Are any wage arrears owing to him?
 - ii. Did he suffer an unjustified disadvantage to his employment?
- c. If Mr Mukkamala suffered an unjustified disadvantage, should Mr Singh be ordered to pay him compensation under s 123(1)(c)(1) of the Employment Relations Act?
- d. If any remedies are awarded, should they be reduced, under s124 of the Act, for blameworthy conduct by the Applicant that contributed to the situation giving rise to his personal grievance?

Issue One: Who was Mr Mukkamal's employer?

The law

[4] The principles that apply when determining the correct identity of an employer have been considered by the Court in a number of cases.¹ The principles that have been applied by those cases can be summarised as follows.

- a. Section 5 of the Act defines an “employer” as “a person employing any employee or employees”. In determining whether any person is employed by another person under a contract of service, the Authority must determine the real nature of the relationship.²

¹ For example, *Fuimaono & Anor v Houia* [2017] NZEmpC 63, *Wilson v Bruce Wilson Painting & Decorating Limited* [2014] NZEmpC 83at [13] and *Colosimo v Parker* (2007) 8 NZELC 98,622.

² Employment Relations Act 2000, s 6; *McDonald v Ontrack Infrastructure Ltd* [2010] ERNZ 223 at[52].

- b. The onus of proving the identity of the employer rests on the employee where the employer puts that fact in issue.
- c. The standard of proof is on the balance of probabilities.
- d. The question of who was the employer must be determined at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change.³

[5] Having objectively assessed the employment relationship, I confirm the preliminary indication provided to the parties. Namely, I find that an independent but knowledgeable observer would have said the employer at the outset of the employment was the Company and not Mr Singh personally. There was no evidence of any mutual agreement to any change of employer.

[6] I am fortified in this finding by the following evidence:

- a. Mr Mukkamala said that he applied for employment after reading an advertisement on Seek. He said the advertisement identified the Company as the employer. He said that after applying for the role he was contacted by Mr Singh who identified himself as the director of the Company. He acknowledged he was aware that Mr Singh was hiring him on behalf of the Company.
- b. Two days prior to signing the intended employment agreement (IEA), Mr Mukkamala was emailed a copy of the IEA from the Company's email address. The letter came from the Company and was signed by Mr Singh as the director of the Company. The IEA identified the Company as Mr Singh's employer.
- c. Mr Mukkamala said he reviewed the IEA and, before signing it, raised concerns about particular clauses with Mr Singh. He said that although he noted the employer was recorded as the Company, he did not request any change to this. This was despite the letter of offer advising him to raise

³ *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451 at [22].

“anything you are unclear about, disagree with or wish to discuss about the agreement or about the position”.

- d. Prior to commencing work, Mr Mukkamala applied for a work visa to enable him to work for the Company. At Mr Mukkamala’s request, Mr Singh completed an Employer Supplementary Form that he then provided to Mr Mukkamala for filing with Immigration New Zealand (INZ). Mr Mukkamala said he read this form carefully before filing it. The information that accompanied the form advised that it was to be completed and signed by “a person who has authority to make representations and enter into agreements on the employer’s behalf”. The business identified in the document, and for which details were provided including the Company’s business number and details of the Company’s operations, was the Company. Mr Singh was listed as the person completing the form and his position was listed as director. A copy of Mr Mukkamala’s IEA accompanied this form.
- e. Other documents identified the Company as Mr Mukkamala’s employer such as the IRD summary of earnings and payslips that were provided to Mr Mukkamala during his employment. His bank statements also identified his wages as being paid by “Savman Soluti”.

[7] Having concluded there was no employment relationship between Mr Mukkamala and Mr Singh the Authority has no jurisdiction to investigate Mr Mukkamala’s other claims.

Costs

[8] Neither party was represented at the investigation meeting. However, Mr Singh said he had incurred legal costs in obtaining advice on the preparation of his Statement in Reply. Having considered the invoice provided by Mr Singh I make no award of costs. The invoice that was provided included costs for work undertaken by Mr Singh’s lawyer that were unrelated to the present proceedings. I am not satisfied the remainder of the invoice warrants an award of costs, especially as it appears at least part of this related to attendances after the Authority’s investigation.

Outcome

[9] The overall outcome is:

- a. Mr Mukkamala was not employed by Mr Singh. His claim is dismissed.
- b. There is no award of costs.

Jenni-Maree Trotman
Member of the Employment Relations Authority