

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 322/10
5296401

BETWEEN NEVILLE GRAHAM
 CHARLES REED
 Applicant

AND ARMY SURPLUS
 DISPOSALS LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Mr Reed in person
 Mr Roland Doyle, director, for Respondent

Investigation Meeting: 30 June 2010

Determination: 13 July 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Reed has come to the Authority with a claim for arrears of wages and holiday pay. Mr Reed claims to have been employed by the respondent from 2006 until December 2009. He said he resigned when Mr Doyle made an unfounded accusation of theft against him, and that he was never paid his final two weeks wages (\$1,000.00 in total) and outstanding holiday pay (\$3,620.00).

[2] Mr Doyle says that Mr Reed's employment actually ended in September 2009 after which time he was an independent contractor who was to receive a flat \$500.00 per week cash with commission "*on some sales*" although it does not appear that he ever did receive any commission. Mr Doyle explained that the change was a response to the fact that the company was facing liquidation and had no other staff remaining besides Mr Reed. The alleged change in status was not documented in any way.

[3] Mr Doyle says he withheld one week's payment, not two, and believed he was justified because he was sure Mr Reed had stolen from him. As for the holiday pay, Mr Doyle does not dispute that \$3,620.00 was outstanding as at September 2009. He says that between then and December 2009 the respondent permitted Mr Reed to keep proceeds from the sale of scrap metal and storage tanks. He said the proceeds totalled \$2,700.00 and so exceeded what the holiday pay would have come to after tax.

[4] Mr Reed does not dispute that from September onwards he agreed to be paid \$500.00 "*all inclusive*" and in cash. He said this was equivalent in value to his former net pay anyway. However he disputes agreeing to become an independent contractor. As for the holiday pay, he told me he "*absolutely denied*" either that there was an agreement that he keep the proceeds of any sales or that he did so. He said someone was always present when he received cash payments from customers, receipts were placed in the tin kept for that purpose and sales recorded "in the orange book." He noted that Mr Doyle had this book with him at the investigation meeting. Mr Doyle declined to produce it to the Authority.

Issues

[5] At the investigation meeting I summarised the issues as follows:

- i. whether Mr Doyle could establish that he did pay Mr Reed \$2,700 net thereby meeting the respondent's outstanding holiday pay obligations;
- ii. whether Mr Reed was an employee in the period September-December and so whether his claim for arrears is within the Authority's jurisdiction, and
- iii. if it is, whether the respondent owes him one week's pay or two.

[6] Mr Doyle reiterated that he believed he could prove that Mr Reed had received the \$2,700.00 and sought more time to produce further evidence of this. I advised that I would give him a period of ten days in which to furnish it to the Authority. That

period has now elapsed and I have heard nothing from him. I proceed therefore to determine the matter.

Determination

[7] By operating its business on a cash basis, without documentation, the respondent has put itself in a vulnerable position. In the absence of wage and time records or other firm evidence to support Mr Doyle's assertions I cannot be satisfied that the company has met its holiday pay obligations.

[8] I am also unable to accept that Mr Reed's status was properly changed from employee to contractor. It appeared from what both witnesses said that Mr Reed continued to work in much the same way as he always had, and was paid (from his point of view) the same as he always had been, for the same number of hours. These circumstances do not indicate a change from employee to contractor.

[9] On the third and final issue only do I find for the respondent. Mr Reed did not explain how two weeks wages came to be owing when he had been paid each week in cash. I am not satisfied that an order can be made for more than one week's wages.

Summary

[10] **The respondent, Army Surplus Disposals Limited is ordered to pay to Mr Reed the following sums:**

- i. holiday pay of \$3,620.40 gross, and**
- ii. arrears of wages of \$500.00 net.**

Yvonne Oldfield

Member of the Employment Relations Authority