

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 93
3000448

BETWEEN JUN HYUK SEO
Applicant

A N D GRANDVILLE COMMERCIALS
LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Applicant in person
No appearance for Respondent
Investigation Meeting: 31 March 2017
Submissions Received: At the investigation meeting
Date of Oral Determination: 31 March 2017
Date of Written Record: 31 March 2017

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Non-appearance by the respondent

[1] The applicant Jun Hyuk Seo (Mr Seo) filed his claim in the Authority on 2 December 2016. The respondent, Grandville Commercials Limited (Grandville or the Company), failed to file a statement of reply in this matter and failed to attend the investigation meeting. The sole director of Grandville Jun Ho Lee (Mr Lee) emailed the Authority regarding Mr Seo's claim on 21 December 2016. That email included an indication that the company's lawyer would be in contact in the New Year. No contact was received by the Authority from a lawyer on behalf of the company. I am

satisfied that Grandville was properly served with the statement of problem and notice of the investigation meeting.

[2] In those circumstances I proceeded to investigate the matter in the absence of Grandville.

Employment relationship problem

[3] Mr Seo initially claimed that he is owed outstanding wages, reimbursement for an expense which he incurred and holiday pay from Grandville for time when he worked for the company as a junior quantity surveyor.

[4] There is also a disagreement between the parties regarding the provision by the company of what appears to be a wrong tax code to the Inland Revenue Department and who is responsible for that. This code has now been corrected.

Investigation Meeting

[5] At the investigation meeting I heard evidence from Mr Seo. Under s 174E of the Employment Relations Act 2000 (The Act) I will not be referring to all the evidence which I have heard. I will be making findings in order to dispose of this matter as efficiently as possible.

[6] Mr Seo had to undertake his calculations without the benefit of pay slips or the like, as the company did not provide such documents to him. During the investigation meeting, on examining Mr Seo's calculations, it became clear that he had been paid all of his wages, with an overpayment of \$50.09 gross. Mr Seo's claim thus proceeded on the basis of unpaid holiday pay and reimbursement of an expense.

Employment agreement

[7] Mr Seo entered into an employment agreement with Grandville on 22 July 2016. The parties appear to have regarded it as a fixed term employment agreement. However, the agreement itself is less clear.

[8] There is a statement in the parties clause of the agreement of “3 Month Fixed Term”¹ but there is also a clause regarding the nature and term of the agreement, where the agreement is described as an individual agreement of ongoing and indefinite duration which will continue until either party terminates the agreement². In any event Mr Seo did not challenge the ending of his employment with Grandville.

[9] The employment agreement provided for a pay rate of \$18 per hour. The holidays clause specifies as follows:

The employee agrees that there is no additional holiday and leave entitlements. The employee’s hourly rate includes paid annual leave of four weeks per year after 12 months continuous employment with the employer, in accordance with the Holidays Act.³

[10] Mr Seo disputes that the rate which he was offered verbally included holiday pay as it was exactly \$18 per hour. He also considers that given the nature of the job which he carried out, the rate of \$18 per hour was much lower than the market rate, even without it having holiday pay included.

[11] Mr Seo signed the agreement but subsequently pursued the holiday pay issue with Mr Lee.

Holidays Act

[12] Under s 28 of the Holidays Act 2003 annual holiday pay may be paid with the employee’s pay as long as certain requirements in subs (1) are met. Leaving aside the issue of whether the proper interpretation of this agreement is that it is a fixed term one, Grandville must also to establish other requirements. One is that the annual pay was paid as an identifiable component of Mr Seo’s pay⁴. The evidence here was that the pay did not include an identifiable component and so s 28 cannot be relied on. There were no identifiable components set out in the employment agreement and Mr Seo did not receive pay slips setting out the components of payments.

[13] Without s 28 of the Holidays Act to rely on, Grandville owes Mr Seo holiday pay on top of his wages.

¹ Clause 1.1

² Clause 3.1

Subsequent agreement between the parties

[14] In the event that I am wrong regarding the Holidays Act, Mr Seo also argues that the employment agreement was varied so that holiday pay was to be paid on top of the hourly rate.

[15] After a couple of weeks working for Grandville Mr Seo asked Mr Lee to be paid the \$18 rate excluding holiday pay. Mr Lee verbally agreed that he would pay eight percent of the total sum which Mr Seo earned during his employment, with payment to be made after the fixed term employment agreement expired. Mr Seo asked for this in writing, which Mr Lee agreed to provide but said he would do it later. Mr Lee said that Mr Seo could trust Mr Lee as Mr Lee was an older brother (in the sense that term is used in Korean culture, rather than the two being biological brothers).

[16] During a conversation on 3 September 2016, the issue was discussed again, and Mr Lee said that he was too busy to do put something in writing but that do not worry, he would pay Mr Seo the amount. Mr Lee again resisted Mr Seo's subsequent attempt to put their agreement on holiday pay in writing.

[17] Mr Seo subsequently followed up with Mr Lee and Mr Lee responded by email on 21 September 2016 as follows:

Grandville commercials ltd will pay 8% holiday pay upon the end of your 3 month contract.

Kind regards

Jun

[18] I accept that the parties reached a verbal agreement that holiday pay would be paid on top of the \$18 hourly rate and that the company's agreement is also contained in the 21 September email. However, clause 14.1 of the employment agreement requires that variations to the agreement shall not be effective or binding unless in writing and signed by both parties.

³ Clause 8.1

⁴ S 28 (1)(c) of the Holidays Act 2003

[19] Mr Seo relies on *Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd*⁵. Although not an employment case, the English Court of Appeal considered a somewhat similar variation clause to the present one, as it required variations to a commercial agreement to be in a written signed document. The Court accepted that an oral agreement can be effective to vary a contract containing such a clause⁶.

[20] An alternative approach in this electronic age would be to regard the email with Mr Lee's name on it as sufficient as written and signed agreement for the purposes of clause 14.1 of the employment agreement.

[21] In conclusion Grandville agreed to vary the employment agreement to pay Mr Seo 8% holiday pay in addition to his hourly rate.

Mr Seo's claims

[22] Mr Seo's initial claim for unpaid wages was withdrawn once it became apparent that he had been paid all of his wages by Grandville.

[23] Mr Seo then claims for diesel which he paid for which went into the car of a client of the company's client, where Mr Seo's work was based. He produced a copy of the diesel receipt to the Authority. He got the purchase approved first by the client. Mr Seo was later told by Mr Lee and a senior Grandville quantity surveyor that Grandville has been reimbursed by the client for that amount. However, there is no proof that Mr Seo has been paid for this. He seeks reimbursement for \$59.79 for that purchase. Mr Seo has been unable to identify a payment of that amount from Grandville to himself.

[24] Under clause 7.3 of the employment agreement Mr Seo was entitled to be reimbursed by the company for all expenses reasonably and properly incurred in the performance of his duty. He should therefore be reimbursed for his purchase of the diesel.

[25] Mr Seo initially claimed \$816.48 gross for holiday pay, but on discovering at the investigation meeting that he had been overpaid on his wages by \$50.07, he reduced his holiday pay claim to \$766.41 gross. I am satisfied that Mr Seo is owed that amount in holiday pay.

⁵ [2016] EWCA Civ 396

Orders

[26] Within 14 days of the date of this determination Grandville Commercials Limited is ordered to pay to Mr Seo:

- (a) \$59.79 non-taxable as reimbursement of an expense;
- (b) \$766.41 gross as holiday pay; and
- (c) \$71.56 to reimburse Mr Seo's payment of the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority

⁶ Ibid at [113], [116] and [119]