

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 624
3274099

BETWEEN GURDEEP SIDHU
Applicant

AND JATINDER SINGH
Respondent

Member of Authority: Shane Kinley

Representatives: Nathan Santesso, advocate for the Applicant
Preeya Reddy, counsel for the Respondent¹

Investigation Meeting: On the papers

Submissions: Up to 25 July 2024

Determination: 17 October 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Gurdeep Sidhu has raised claims of failure to pay minimum wages, failure to pay wages, failure to provide holidays entitlements, failure to keep wage and time records and unjustified dismissal against Jatinder Singh.² These claims were originally raised against M Sandhu Limited (MSL) and Jatinder Singh as first and second respondents.

[2] Jatinder Singh's response is he was not and never was Gurdeep Sidhu's employer, and he says Gurdeep Sidhu was at all times employed by MSL.

¹ At a case management conference on 22 April 2024 Jatinder Singh was represented by Sarah Fraser. Subsequently Ms Reddy has been responsible for representing Jatinder Singh, including providing submissions on his behalf.

² Jatinder Singh's full name is used throughout this determination to distinguish him from Manwinder Singh, who provided evidence for Gurdeep Sidhu. As a consequence, I have chosen to also refer to Gurdeep Sidhu by his full name throughout.

The Authority's investigation and approach to preliminary issue

[3] At a case management conference on 22 April 2024, I discussed with the representatives how this matter should be investigated, given Gurdeep Sidhu's claims had originally been lodged against both MSL and Jatinder Singh, then were amended to name only Jatinder Singh personally as the employer.

[4] In light of the change of who was said to be Gurdeep Sidhu's employer, I directed (by agreement) a preliminary issue be investigated and determined of whether Gurdeep Sidhu was employed by Jatinder Singh.

[5] I advised the representatives should I determine Gurdeep Sidhu was not employed by Jatinder Singh, there would be no live claims before me and no jurisdiction for the Authority to consider this matter further.

[6] Should I determine Gurdeep Sidhu was employed by Jatinder Singh, I would then proceed to investigate and determine Gurdeep Sidhu's other claims of unjustified constructive dismissal, breaches of minimum employment standards and failure to provide wage and time records on request, and Jatinder Singh's position any personal grievances were raised out of time.

[7] The representatives agreed the preliminary issue should be investigated and determined on the papers, based on submissions and affidavit evidence. For the Authority's investigation written witness statements in affidavit form were lodged for Gurdeep Sidhu by himself and Manwinder Singh, and for Jatinder Singh by himself, Jagjit Singh, Phillipa Wright and Helen Routley. Representatives provided written submissions, which were presented sequentially by Gurdeep Sidhu's advocate then Jatinder Singh's counsel. A reply statement, which I have treated as submissions, was provided from Gurdeep Sidhu's advocate, with supporting evidence attached.

[8] As permitted by s 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. It has not recorded all evidence and submissions received.

Was Gurdeep Sidhu employed by Jatinder Singh?

Relevant law

[9] The Court, in relation to identifying who a worker was employed by, said in

Pilgrim v Attorney-General:³

There is some authority for the proposition that there is an onus on a worker to prove that a particular person or entity is their employer. I prefer to approach the s 6 inquiry on an objective basis, weighing the evidence to reach an informed assessment as to who, on the balance of probabilities, the employer is. Such an approach has the benefit of acknowledging the realities of working relationships and what are not infrequently very complex corporate structures, and aligns with the objectives of the Act — including to address the inherent inequality of power and having regard to the Court’s broad equity and good conscience jurisdiction. There is nothing in the wording of s 6 which, in my view, requires an onus to be read in. ...

Identifying the true employer is an intensely factual exercise. While it may be helpful to have regard to the way in which documentation purporting to record a working relationship is crafted, including the identified parties to the relationship and the way in which their capacity is described, it is well established that form and reality may diverge, particularly in employment relationships. It is reality which must be discerned. The unique features of this case reflect the need for realism when assessing the identity of the employer, if the statutory purpose is to be met rather than undermined.

[10] Following this approach, I proceed in this matter by applying the test in s 6 of the Act, the relevant provisions for this determination of which are set out below:

6 Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee** —
 - a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the Court or the Authority —
 - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship. ...

[11] When assessing employment status a broad approach is required, including consideration of any verbal and written agreement, control, integration in the business, who benefits from the work and whether the person claiming employment status was

³ [2023] NZEmpC 227 at [18] and [19].

really in business on their own account. This is reflected in the Supreme Court's judgement in *Bryson v Three Foot Six Ltd*, which stated:⁴

“All relevant matters” certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests.

[12] In this case I consider the relevant matters are intention of the parties, industry practice and other considerations, each of which are addressed below.

What was the intention of Gurdeep Sidhu and Jatinder Singh?

Submissions of the parties

[13] Submissions for Gurdeep Sidhu said the intention was “to have a hidden, unofficial employment relationship” with no records and payment in cash, with no mention of MSL. IRD records showing payments from MSL to Gurdeep Sidhu were said to be “connected with someone else’s income” and not “there at the outset of the employment, which is the crucial time when the contract would have been formed”.

[14] Submissions for Jatinder Singh said the onus of proving the identity of the employer rests with the employee, referring to *Colosimo v Parker*⁵ and *Wilson v Bruce Wilson Painting & Decorating Limited*⁶, and to be determined at the outset of employment.

[15] While it was acknowledged an employment agreement could not be obtained from MSL for Gurdeep Sidhu, a copy of an employment agreement between MSL and Manwinder Singh was provided, which was said to undermine his affidavit evidence he was employed on the same basis as Gurdeep Sidhu.

⁴ *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [32].

⁵ (2007) 8 NZELC 98,622 at [28].

⁶ [2014] NZEmpC 83 at [13].

[16] Submissions also pointed to evidence Jatinder Singh “could not have operated on the orchard in his personal capacity” as he was required to operate a company to employ all workers, and was audited in this regard, with employment agreements required to be sighted as part of the audit. Gurdeep Sidhu’s claim to not be aware of MSL was said to be “difficult to reconcile” with the IRD evidence he provided.

[17] Reply submissions for Gurdeep Sidhu questioned the employment agreement provided for Manwinder Singh and did not “accept that it is authentic”. Comments on the audits said they were “largely irrelevant” and not accompanied by any relevant evidence. IRD records were said to not reflect “the contract, the seasonal nature of the work ...rules on limits of work hours, the cash payments ... or the invoice provided by Phillipa Wright”. It was asserted “Jatinder [Singh] paid in cash because he wanted to keep the employment relationship hidden and unofficial”.

Analysis

[18] Gurdeep Sidhu says he provided Jatinder Singh his IRD number and passport but didn’t sign anything and wasn’t given a contract. He claims the only mention of a company was an orchard at which work was performed, not MSL. He provided bank records which do not show any payments being received from MSL. He claimed to have only received limited cash payments and to have not completed IRD forms for either Jatinder Singh or MSL, so it was unsurprising there was no clear match to payments IRD records say were made. Manwinder Singh’s evidence was his employment was on the same basis as Gurdeep Sidhu.

[19] Jatinder Singh says Gurdeep Sidhu and Manwinder Singh were employed by MSL, he provided Gurdeep Sidhu a seasonal contract and tax form, which were signed and returned, and Gurdeep Sidhu requested payment in cash, which he paid after deducting PAYE. Jatinder Singh further says he sold MSL in 2023 and has been unable to obtain records transferred to MSL’s new owners.⁷ He said however the copy of Manwinder Singh’s employment agreement which he had obtained “is typical of all employment agreements that I used for all staff. It clearly shows that [MSL] is the employer”.

⁷ A search of the Companies Register shows action commenced on 15 June 2023 to remove MSL from the Register, meaning it is unsurprising they have not responded to requests for records. Source: [Notice of Intention to Remove Companies From the Register - 2023-ds2455- New Zealand Gazette](#)

[20] An email from counsel for Jatinder Singh seeking information from the current owners of MSL was provided, with no reply said to have been received. No evidence was provided of alternative sources for information being sought, for example from the accountant who prepared MSL's annual returns during the period Jatinder Singh was MSL's owner and director.

[21] Supporting evidence was provided from Ms Wright, one of the owners of an orchard where work was performed by MSL's workers, and Ms Routley, who audited MSL's compliance with orchard contracting requirements. This evidence was about MSL's overall practices and no specific evidence was provided about Gurdeep Sidhu's employment.

[22] Ms Routley did however say:

I would have inspected [MSL's] employment agreements and related documents to ensure [MSL] was meeting it's lgegal [sic] obligations as an employer ... [MSL] met all the stringent requirements to be able to operate on an orchard which contracted to Zespri. These requirements meant that all employees had to have written agreements ...

[23] I do not consider it appropriate to make conclusions about who was intended to be Gurdeep Sidhu's employer be based upon non-specific information about what MSL's employment arrangements should have been. I do however return to this point in relation to industry practice at paragraphs [33] to [41] below.

[24] There are clearly two contradictory accounts in respect of the basis on which Gurdeep Sidhu's employment was arranged ie an unlawful cash-based relationship between Gurdeep Sidhu and Jatinder Singh, or a lawful cash-based relationship between Gurdeep Sidhu and MSL. The IRD records provided are essentially alleged to be fraudulent and bank records provided for Gurdeep Sidhu do not assist in this regard, as payment is accepted to have been made in cash, which is not in itself unlawful.

[25] I have some concern about the veracity of the IRD records given the pay rate in Manwinder Singh's employment agreement dated 2019 was \$19 per hour, while IRD monthly payments recorded to Gurdeep Sidhu ranged from \$2,500 to \$8,050. Jatinder Singh said he "processed PAYE myself and this was paid each month" and Gurdeep Sidhu "was paid correctly for all hours worked based on the timesheets he completed", although he did not directly attempt to reconcile the IRD records with these claims.

[26] The IRD records do however provide some support for Jatinder Singh's position he intended Gurdeep Sidhu be employed by MSL. MSL clearly paid PAYE in respect of earnings attributed to Gurdeep Sidhu, which is consistent with it being his employer. This is not determinative of the matter however as the Court has observed bank or IRD records may not always reflect the intention of the parties. For example, *Heritage Expeditions Ltd v Fraser* involved a situation where there were questions about which of two companies was the employer, with bank records and IRD showed one company paying the employee, consistent with it being their employer. Those records did not however establish the employee had, in the facts of that case, consented to one company becoming their employer, when they had been employed by the other associated company.⁸

[27] I also place no weight on an invoice provided by Ms Wright as it was for a period of approximately one month in 2021, well after Gurdeep Sidhu's employment ended.

[28] I do not consider it appropriate to place weight on the employment agreement provided for Manwinder Singh as evidence of what Gurdeep Sidhu's employment agreement said. No clear explanation was provided of how Manwinder Singh's employment agreement was sourced but other employment records could not be obtained.

[29] I am also unwilling to place weight on Manwinder Singh's evidence about his employment arrangements being the same as Gurdeep Sidhu's. Rather submissions in reply for Gurdeep Sidhu said "It is strange that there is a contract with [Manwinder Singh] starting from 2019. It is also strange that Jatinder [Singh] managed to obtain this contract and not [Gurdeep Sidhu's]". While the authenticity of this document was questioned, there was no direct denial from Manwinder Singh that the employment agreement provided was his or challenge to the signature and writing appearing to be the same as on his affidavit witness statement.

[30] This leaves no reliable documentary evidence which supports either parties' position about intention.

⁸ (2011) 9 NZELR 142 at [63].

Finding

[31] I consider there is insufficient reliable evidence to support either parties' assertions about whether Jatinder Singh or MSL was intended to be Gurdeep Sidhu's employer. There is certainly no irrefutable evidence showing a meeting of minds.

[32] This factor is neutral.

Industry practice

[33] The Amended Statement of Problem says Gurdeep Sidhu worked as a fruit picker. This appears consistent with MSL's role as a horticulture contracting firm and its acknowledged relationship as a labour contractor to KW Kiwi Limited, which Ms Wright co-owns with her husband.

Submissions of the parties

[34] Submissions for Jatinder Singh said he could not operate as a contractor to the orchard on a personal basis and contractors must be companies, as noted at paragraph [16] above. Copies of certificates showing MSL had been audited for this purpose were provided.

[35] Submissions in reply questioned the general nature of statements about and the credibility of the audits conducted by Ms Routley, and the lack of specific evidence related to Gurdeep Sidhu.

Analysis

[36] The horticulture industry has been subject to significant scrutiny in relation to employment practices over a reasonably extended period of time, including from the Labour Inspectorate, which has resulted in a number of enforcement actions being taken against contracting firms.⁹

[37] The horticulture industry has sought to ensure compliance with employment law requirements through greater scrutiny of contracting arrangements, including Zespri requiring contractors be certified prior to commencing work on orchards. Jatinder Singh

⁹ See for example *Labour Inspector v Gautam Rajan Kapur aka Kapoor and Ors* [2019] NZERA 454, *Labour Inspector v Raj Kiwi Limited and Rajasekar Chellappa* [2020] NZERA 493 and *Labour Inspector v Alam Horticulture (2017) Limited and Morshed Alam* [2024] NZERA 371.

and Ms Routley provided evidence MSL should have had employment agreements in place, based on audits Ms Routley undertook of MSL.

[38] In the context of the scrutiny employment practices in the horticulture industry face and the consequences for KW Kiwi of being found to engage contractors who do not comply with employment law, I consider it more likely than not MSL would have had employment agreements for its workers. I consider this provides some support for Gurdeep Sidhu being employed by MSL rather than Jatinder Singh.

[39] It is regrettable Jatinder Singh was unable to obtain records from the current owners of MSL. As noted at paragraph [20] above, evidence was provided of information being sought, but the current owners did not respond and there was no evidence of alternative sources of information being pursued, such as MSL's accountant at the time Jatinder Singh was MSL's owner and director.

[40] Had such records been obtained they could have provided strong support for Gurdeep Sidhu being employed by MSL rather than Jatinder Singh. In the absence of such records, I consider it appropriate to weight this factor as limited support for Gurdeep Sidhu being employed by MSL rather than Jatinder Singh.

Finding

[41] I find industry practice provides limited support for Gurdeep Sidhu being employed by MSL rather than Jatinder Singh.

Other considerations

Submissions of the parties

[42] Submissions for Gurdeep Sidhu said the real nature of the relationship was an illegal one, based on personal connections. Gurdeep Sidhu was said to be vulnerable "at the absolute mercy of Jatinder Singh ...[as] he did not have much time left on his visa was not in a position to decline the offer or insist on any kind of minimum employment standards or documentation".

[43] Submissions for Gurdeep Sidhu also said:

The arrangement was [Jatinder Singh's] idea not [Gurdeep Sidhu's]. If there is any doubt and the matter could fall either way, it should be interpreted in favor [sic] of the person who did not come up with this arrangement and who was not at the mercy of the person who was in control.

[44] These points were not directly addressed by submissions for Jatinder Singh.

Analysis

[45] Gurdeep Sidhu made broad statements about his working relationship being illegal and “every other worker there was also working illegally”. These are serious allegations though were made at a general level only. No documentary evidence was provided with the inference that because the relationship was said to be illegal there would not be any evidence.

[46] No authority was provided for the proposition of interpreting this matter in favour of Gurdeep Sidhu other than a general reference to a “Need to look at the objects of the Employment Relations Act as well. Specifically, section 3(a)(ii) acknowledging and addressing the inherent inequality of power in employment relationships.”

Finding

[47] While I acknowledge this object and the importance of addressing the inherent inequality of power in employment relationships, I am not convinced this supports a finding Gurdeep Sidhu was employed by Jatinder Singh rather than MSL.

Summary of outcome on the preliminary issue: Gurdeep Sidhu has not established he was employed by Jatinder Singh rather than MSL

[48] Standing back and considering all relevant matters as outlined above, I find Gurdeep Sidhu has not established he was employed by Jatinder Singh rather than MSL and consider it more likely than not he was employed by MSL.

[49] The strongest evidence in this matter was industry practice, which supported Gurdeep Sidhu being employed by MSL. Even this evidence was however limited and not specific to Gurdeep Sidhu’s employment, so I consider its weight to be limited.

Conclusion

[50] As I have found Gurdeep Sidhu has not established that he was employed by Jatinder Singh rather than M Sandhu Limited, I therefore do not have jurisdiction to consider further the other issues raised by Gurdeep Sidhu.

Costs

[51] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[52] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Jatinder Singh may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Gurdeep Sidhu will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[53] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.¹⁰ As this matter was investigated on the papers, my preliminary view is tariff costs based on half a day of hearing is appropriate.

Shane Kinley
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1