

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011]NZERA Auckland 353
5327164

BETWEEN SARABJIT SINGH
AND SILVER OAKS GROUP
LIMITED

Member of Authority: Yvonne Oldfield
Representatives: Victor Raman for applicant
Greg Wilson for respondent
Investigation meetings 4 April 2011, 3 June 2011
Determination: 9 August 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] At the time Mr Singh's employment relationship problem was first lodged, in November 2010, he was employed by the respondent as a chef. His claims were that his salary had not been paid in full and also that he was owed annual leave and payment for public holidays and/or days in lieu of public holidays worked.

[2] The parties entered into a written employment agreement at or near the commencement of Mr Singh's employment in late December 2006. The agreed rate of pay was \$17.00 per hour. Schedule 1 of that employment agreement contains the following:

“(a) The position is a full time one and the employee's ordinary hours are 40 hours per week;

(b) The employee will be required to work beyond the ordinary hours on any day, including weekends and public holidays, as is necessary to carry out the duties and responsibilities of the position. The parties agree that the salary recorded in this contract is fair compensation for the ordinary hours which the employee will be

required to work. No additional or overtime payment will be payable to the employee.”

[3] Mr Singh believes these provisions entitled him to be paid for a minimum of 40 hours each week. Pay records provided to the Authority show that sometimes he was paid for 40 hours, sometimes for fewer than 40 hours and (occasionally) for more than 40 hours.

[4] Mr Wilson does not dispute that the contract provides for full time work. However he told the Authority that Mr Singh was unavailable for full time work during 2007 because his wife was seriously ill. He says that on 28 February 2008 Mr Singh wrote to the respondent seeking to be paid as an hourly worker. The note in question was provided to the Authority and Mr Singh agreed that he wrote it. He said he made this request in the hope that it would be of net benefit to him. This was because he understood he was paid for hours worked when they were less than 40, but that his wages were capped at 40 hours a week in weeks when he worked more than that.

[5] Mr Singh also agreed that there had been a time when as a result of his wife's illness he had worked around the need to look after her and his small children. However he says this was not until 2008. I record that Mr Singh provided a medical certificate from his wife's doctor which supported his recollection of the timing of his wife's illness. For this reason I accept his assertion on that point.

[6] At no time was there a formal written variation to the employment agreement.

[7] In mid 2010 the parties discussed the question of Mr Singh returning to set full time work but were unable to agree on what shifts were to be worked. The existing arrangements therefore continued. The inability to agree about this appears to be what triggered the lodging of the employment relationship problem.

[8] Mr Wilson provided an analysis (to late 2010) of the public holidays Mr Singh had taken as paid holidays and those which he had worked. Mr Wilson acknowledged that lieu days and/or statutory loading were owed in respect of some statutory days worked, along with payment for one public holiday which was not worked, but fell on

a normal day of work for Mr Singh. By his calculation, over the whole employment, a total of 52 hours were now owed.

[9] As for annual holidays, Mr Wilson told the Authority that to the best of his knowledge (payroll management being outsourced) the outstanding balance shown on Mr Singh's payslip each week was correct.

[10] Early in 2011 the respondent counterclaimed damages in relation to alleged overpayment of wages. This totalled 137 hours over the four years of employment.

[11] In May 2011, after returning from a week of annual leave (that had been arranged with his immediate manager) Mr Singh learnt that he had not been paid for the leave. He was told that the respondent planned to offset the holiday pay that would otherwise have been payable from what the respondent claimed was owed in damages for the alleged overpayment.

[12] Mr Singh felt unable to continue to work in these circumstances. When he had failed to report for work for several shifts he was advised by the respondent that he was dismissed. He did not receive any holiday pay.

[13] Mr Singh's position is that he was constructively dismissed when he was first told he would not receive his holiday pay. He has amended his claim in the Authority to include a claim for unjustified dismissal.

Issues

[14] When the employment relationship problem was first lodged Mr Raman informed the Authority that his client suspected his wages were incorrect even if he were to be paid as an hourly worker. He reserved his client's position as to whether he would pursue a further alternative claim on that basis. During the Authority's second investigation meeting Mr Raman advised that while Mr Singh was still concerned about what he considered to be discrepancies in his pay, that claim was not being pursued.

[15] The issues for determination are therefore:

- i. Whether Mr Singh was entitled to be paid for a minimum of 40 hours per week (regardless of hours actually worked) and if so what arrears are owed;
- ii. Whether the respondent is entitled to damages for any overpayment to Mr Singh;
- iii. Whether annual and/or public holiday entitlements remain outstanding and if so, what arrears are owed in respect of those entitlements, and
- iv. Whether Mr Singh was constructively dismissed as a result of the respondent's decision not to pay holiday pay and if so, what remedies are appropriate.

(i) Claim for arrears of weekly wage

[16] Mr Raman submits for Mr Singh that there was no contractual provision requiring him to work a minimum of 40 hours a week. Under the terms of the employment agreement, therefore, he says he was entitled to be paid a minimum of 40 hours each week - regardless of the hours worked.

“The employment contract describes the applicant’s work duties to be a full time basis with ordinary hours of work anticipated as being 40 hours per week.

Full time work is further defined by the contract as varying from being simply 40 hours per week in that the contract specifically calls for the applicant to potentially work additional hours without additional pay.

The principal of reciprocity in contract allows the applicant to deem that “full time work” can also be somewhat less than 40 hours per week, at the set pay, just as working somewhat more than 40 hours per week is contemplated by the contract as constituting full time work. It would be inequitable for the employee to be deemed to fulfil his contractual obligations only by working 40 hours per week or slightly more, rather than also slightly less than 40 hours per week...”

[17] I am satisfied that the contract provides for full time work and that Mr Singh was entitled, upon commencing employment, to be paid for a minimum of 40 hours per week. I am also satisfied however that this provision was varied by agreement in

February 2008. Mr Singh is entitled to be paid the shortfall in wages but only up until the variation was agreed.

[18] Between the start of Mr Singh's employment and the time of the agreed variation was a period of 61 weeks. At 40 hours a week this comes to a total of 2440 hours payable. The pay records show that he was in fact paid for 2298. He is therefore now entitled to the difference: 142 hours at the agreed rate of pay (\$17.00 per hour) that is \$2,414.00.

(ii) Counterclaim for damages

[19] Mr Wilson told the Authority that the Respondent's payroll was outsourced to "*Mantrack*." He said data from the time clock was automatically sent to Mantrack. After processing that information Mantrack would provide the Respondent with a daily report of the hours worked by staff. The Respondent's management then made manual adjustments (if required) before payroll was processed. Such changes might be necessary if, for example, a worker forgot to clock in or out.

[20] After Mr Singh lodged his employment relationship problem, Mr Wilson sourced Mr Singh's original clock records and conducted a day by day analysis of the hours Mr Singh worked for the entire period of his employment. After comparing these to Mr Singh's pay records he provided the Authority with a detailed schedule setting out alleged under and over payments week by week to show that there was a net overpayment of 137 hours over four years.

[21] Effectively what Mr Wilson is doing is asking the Authority to reverse any manual adjustments which have been made by his managers over the course of Mr Singh's employment. He was unable to give me any basis for his assertion that the original payments were wrong. He did not personally manage Mr Singh and had no first hand knowledge of what hours Mr Singh worked at the times in question.

[22] Having heard no reason why the Respondent's managers might have got it wrong over the years I am unable to find that the payments were incorrect. The counterclaim fails.

(iii) Annual and public holidays

[23] During the investigation meeting Mr Singh acknowledged that since he had not kept an independent record of all the days he had worked he was not able to dispute what was recorded on his payslips in relation to public holidays worked. After reviewing his payslips and the other pay records which were provided he expressed a view that the running balance of lieu days owed (recorded on his final payslip as 25 hours) could be short by as much as four days. This would bring the balance up to a similar figure to that calculated by Mr Wilson to be outstanding in respect of public holidays/days in lieu (52 hours.)

[24] I am satisfied therefore that the running balance for “lieu days” (as recorded on Mr Singh’s payslip at the end of his employment) should be increased to 52 hours. At \$17.00 per hour this gives an outstanding payment of \$884.00.

[25] The balance of annual holidays showing in the payslip for Mr Singh’s final week of work was 111.37 hours. This is a running balance updated at each pay period. I heard nothing from either party to indicate a basis for a finding that it was incorrect. I therefore record that the holiday pay owed at the end of the employment was \$1,893.29.

(iv) Alleged constructive dismissal

[26] It was clearly a breach of the employment agreement for Mr Wilson to decline to pay holiday pay for leave which had been approved and taken. In circumstances where the parties were already engaged in a formal dispute resolution process it was a sufficiently serious breach as to bring the relationship to an end. There can be no question that this was a unjustified constructive dismissal.

[27] It was argued for Mr Singh that the wage and holiday pay claims amounted to disadvantage grievances as well as arrears claims. In response to an assertion by the respondent that the grievances had not been raised within 90 days it was argued that if that were found to be so, then he should be given leave to raise the grievances out of time. Since no question of disadvantage would arise unless one or more of the arrears

claim succeeded I advised the parties that I would determine that question first and defer determination of the 90 day issue.

[28] The claim for outstanding wages and public holidays/days in lieu has been partially successful and a personal grievance has been established in relation to the constructive dismissal. Any grievance arising in relation to the underpayment is part and parcel of the same employment relationship problem and is now subsumed into the more serious grievance relating to the unjustified dismissal. It is therefore unnecessary to determine whether a separate disadvantage grievance was raised within 90 days.

[29] Mr Singh claims compensation for the effects of his unjustified dismissal. Mr Singh did not give extensive evidence about the effects of the dismissal but what he did say was convincing. He clearly felt very aggrieved at the way his employment ended. I am satisfied that an order should be made to compensate for the hurt and humiliation Mr Singh experienced as a result of this employment relationship problem. I set this at \$8,000.00. Given the circumstances I make no reduction for contributory conduct.

Summary of orders

[30] The respondent is ordered to pay the following sums to Mr Singh:

- i. \$2,414.00 arrears of wages;
- ii. \$884.00 payment for public holidays/days in lieu;
- iii. \$1,893.29 holiday pay, and
- iv. \$8,000.00 compensation pursuant to s.123 (c) (i).

Yvonne Oldfield

Member of the Employment Relations Authority

