

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 103
5340255

BETWEEN ALEXANDER REED
 THOMSON
 Applicant

A N D KSG CORP LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Stephanie Moses, Advocate for Applicant
 Karl Gill, Advocate for Respondent

Investigation Meeting: 7 July 2011

Date of Determination: 15 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Alexander Reed Thomson was employed by KSG Corp Limited (KSG) as a part-time cleaner at Countdown Blenheim. He was party to a written part-time fixed term employment agreement and worked 3 hours each day from Monday to Friday between 4.00am and 7.00am cleaning at the supermarket. He was paid \$15.00 per hour.

[2] On 13 December 2009 Mr Thomson gave two weeks written notice as required under his employment agreement and the last day that he would have worked but for Christmas Day was 25 December 2009.

[3] Mr Thomson said that he did not get a response from KSG to his written resignation but continued to work as usual undertaking his cleaning. The hours he worked over his notice period were sent in the normal way by his supervisor Sora Cowles to KSG for payment. Mr Thomson was paid for working three hours on

Monday 14 December 2009 but did not receive payment for the other days he worked and he was not paid his holiday pay.

[4] Mr Thomson went to see Ms Moses at the Marlborough Community Law Centre. Ms Moses wrote to KSG on two occasions, on 12 January and 1 February 2010, requesting payment for Mr Thomson. She recorded in a third letter to KSG dated 23 February 2010 that on 16 February 2010 someone telephoned her from KSG and advised that KSG had lost the contract to clean Countdown Blenheim on 14 December 2009 and that therefore KSG were not required to pay Mr Thomson for the hours he worked for the remainder of his notice period or holiday pay.

[5] Ms Moses referred the matter to a Labour Inspector in Palmerston North as that was the place where KSG had its registered office.

[6] On 16 February 2011 the Labour Inspector wrote to Mr Thomson and advised that because there was a dispute about Mr Thomson's employer that would need to be determined by the Employment Relations Authority.

[7] A statement of problem was duly lodged on Mr Thomson's behalf with the Employment Relations Authority. KSG lodged a statement in reply that was received by the Authority on 27 April 2011. KSG said in its reply that it had fulfilled all its obligations to Mr Thomson up to 14 December 2009 after which time Mr Thomson was then employed by another employer as KSG had suddenly lost its contract and he should look to that employer for payment.

[8] The Authority held two telephone conferences with Ms Moses and Karl Gill the Managing Director of KSG Limited. The first telephone conference was on 13 May 2011. There was a discussion about the claim and it was agreed that Mr Gill would make some enquiries to see if Mr Thomson could simply be paid what he was owed for working after 14 December 2009 and holiday pay. Mr Gill also agreed that the company would pay holiday pay owing to Mr Thomson up to 14 December 2009 and that he would provide some other information to Ms Moses about who took over the contract. A further telephone conference was scheduled for 30 May 2011 in the event that the matter could not be resolved.

[9] On 30 May 2011 the Authority was advised that the matter had not resolved although holiday pay had been paid up to 14 December 2009. An investigation meeting date was set by agreement for 7 July 2011 in Blenheim and a timetable was advised to the parties for an exchange of statements of evidence.

[10] The Authority received statement of evidence from Mr Thomson, Mr Gill and Jason Aylward who was Manager for KSG for the South Island stores but now owns his own cleaning business. Mr Gill indicated in his statement that there was nothing more that he could add by being present at the investigation meeting but that he could be available by telephone. There was therefore no attendance at the investigation meeting by any person on behalf of KSG. The Authority heard evidence from Mr Thomson.

[11] Given the nature of the problem, the statements from Mr Gill and Mr Aylward and the considerable amount of documentation the Authority did not consider telephone contact with Mr Gill would assist it in investigating and determining this employment relationship problem. Mr Aylward did not attend at the investigation meeting.

[12] Mr Thomson confirmed that his claim was for \$437.40 gross made up as follows:

- Unpaid wages for hours worked from 15 – 18 December 2009 being 12 x \$15 = \$180.00.
- Unpaid wages for hours worked from 21 – 24 December 2009 being 12 x \$15.00 = \$180.00.
- Payment for Christmas day as a day Mr Thomson would have worked but for it being a statutory holiday being 3 x \$15.00 in the sum of \$45.00.
- Holiday pay on the above gross amounts being 8% of \$405 = \$32.40.

[13] There was no dispute as to the amounts claimed. I accept that Mr Thomson is owed wages for working for nine days including payment for one statutory day that he would otherwise have worked and holiday pay on gross pay for what he should have received over that period.

[14] The issue for the Authority is who employed Mr Thomson whilst he was working out his notice.

Who employed Mr Thomson after 14 December 2009?

[15] Mr Thomson used to undertake the cleaning at Blenheim Countdown as an employee of Spotless. On 25 August 2009 he received notice from Spotless that another cleaning company called OCS would provide the cleaning services as of 20 September 2009. He was given information about an election to transfer to OCS and indicated that he would agree to the transfer.

[16] On Friday 18 September 2009 he was contacted by someone from KSG asking if he was interested in transferring his employment to them. Mr Thomson advised that he was interested and he was interviewed at the Manhattan Dairy in Blenheim by two representatives from KSG on Sunday 20 September 2009 and it was agreed that he would start work the following day. He was provided with a copy of an employment agreement at some stage during his first week that he signed and returned. Mr Thomson said based on his previous experience he took a photocopy of the employment agreement before he sent it back and was therefore able to provide that to the Authority.

[17] Aside from a few days at the start of employment Mr Thomson never saw anyone from KSG and he has never met Mr Gill. Although he described that as a *bit unusual* in his experience he carried on working and there were no difficulties with his payments until the last two weeks.

[18] After Mr Thomson gave notice of his resignation and was working out his two weeks he said that a man came into the store and said told him that he was *Warren the other worker*. Mr Gill in his statement of evidence pointed out the words used in Mr Thomson's statement of problem *someone said they were taking over the cleaning*. I accept that there could have been an exchange of that nature. Mr Thomson recalled Warren came into the Countdown supermarket on a couple of other occasions whilst he was working out his notice although not staying for long. Mr Thomson was clear that he was never informed by Warren that he was Mr Thomson's new employer and Warren took no details from Mr Thomson.

Mr Thomson did let Warren know that he was working out his notice. For his part all that Mr Thomson knew about Warren was his first name. Mr Thomson said that Warren was wearing a singlet, boots and track pants and he did not consider that to be the usual attire of a manager or potential employer.

[19] Mr Gill and Mr Aylward suggested in their statements of evidence that telephone calls had been made to Mr Thomson advising him of the change of employer by someone from KSG. Mr Thomson categorically denies that any such call was made to him. Mr Thomson said that neither of the two telephone numbers in the Telecom account attached to Mr Gill's statement and circled were his. Ms Moses said that the second number circled in the Telecom account was a number supplied to her by Mr Gill following a telephone conference with the Authority as the number of a person who could have been Mr Thomson's employer and therefore responsible for payment to him for his last two weeks work.

[20] Mr Thomson said that no-one from KSG contacted him about any change of employer and Mr Thomson said that he would not have wanted to transfer his employment in any event as he was simply working out his notice.

Conclusion

[21] There was no evidence that Mr Thomson's employment was terminated in accordance with his employment agreement with KSG. There was no evidence to support that the man *Warren* ever offered Mr Thomson employment and that Mr Thomson agreed to such employment. The questions that Mr Gill puts as requiring to be considered by the Authority do not address these fundamental matters but rather are commercial matters about which Mr Thomson had no knowledge and control. Mr Thomson I find was not advised that his employer was no longer KSG and he did not agree to a change to his employer in December 2009 during his notice period from KSG to a man called *Warren*.

[22] Mr Gill referred both in telephone conferences and in his statements of evidence to it being unfair to have to pay money when KSG was not paid for Mr Thomson's work because it suddenly lost its contract to clean Countdown Blenheim. KSG had an employment agreement with Mr Thomson. It had obligations

to treat him fairly in accordance with that employment agreement. Such fairness would have involved talking to Mr Thomson and advising him that KSG had lost the contract. I am not satisfied anyone from KSG ever talked to Mr Thomson about what had occurred and therefore in accordance with his written notice of resignation Mr Thomson continued to work his notice out. Mr Thomson I find remained employed by KSG as he did so and KSG was therefore his employer and responsible for payment for work performed during the notice period.

Determination

[23] I find in conclusion that Mr Thomson was employed by KSG whilst he worked out his two week notice period. KSG is liable for the payment to Mr Thomson for his unpaid wages, payment for one statutory holiday and holiday pay.

Orders

[24] I order that KSG Corp Limited pay \$437.40 gross to Alexander Reed Thomson for the following:

- Unpaid Wages \$360.00 gross
- Payment for Statutory Day \$45.00 gross
- Holiday Pay of \$32.40 gross

Interest

[25] It is fair in the circumstances of this case that there be an award of interest on the sum of \$437.40 gross that Mr Thomson should have been paid. I find that interest should run from the date Ms Moses sent her first letter to KSG on 12 January 2010 seeking payment.

[26] I order interest be payable on the sum of \$437.40 gross from 12 January 2010 until the date of payment at the rate of 5% being the rate prescribed under section 87 (3) of the Judicature Act 1908.

Costs

[27] Mr Thomson is entitled to reimbursement for his filing fee of \$71.56 and I so order.

Helen Doyle
Member of the Employment Relations Authority