

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 59/09  
5140611

BETWEEN                      KONAN MICHAEL PAEWAI  
   WILLIAMS  
   Applicant

AND                                BALU AMARGALINGGAM  
   Respondent

Member of Authority:      P R Stapp

Representatives:            Mr Williams in person  
   Michael J Hay Counsel for Respondent

Investigation Meeting:     11 May 2009 at Wellington

Determination:              11 May 2009

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Williams is seeking the payment of outstanding wages, sick pay and holiday pay and says that his dismissal was unjustified.

[2] Mr Amargalinggam's statement in reply denied the claim and says that Mr Williams was a contractor.

**The Authority's investigation**

[3] During a telephone conference, held on 16 March 2009 with Mr Amargalinggam's representative and Mr Williams, arrangements were put in place for an investigation meeting to take place on notice. That notice was provided on 18 March 2009 for 11 May 2009. The parties were to produce relevant documents by 2 April 2009 and any statements by 21 April. The respondent did not comply.

[4] I considered mediation as the authority must under s 159 of the Act at the time the conference call took place. Prior to the telephone conference the parties had not been to mediation. The respondent has been reluctant to use mediation. I decided not to direct the parties to mediation with reasons provided in a minute. However, I suggested that the respondent could consider initiating mediation, and if it did so, I expected the applicant to co-operate.

[5] The respondent's representative informed the Authority on 6 May 2009 that the investigation meeting could not proceed, and asked for the investigation meeting to be adjourned. The respondent's representative suggested he would advise his client that the matters be resolved by using mediation to get an adjournment.

[6] The request was opposed by the applicant to avoid further delays. I declined the request for an adjournment and provided reasons for doing so in another minute.

[7] A further request was made at the outset of the investigation meeting for an adjournment to enable Mr Amargalinggam to be present. My reasons were that there had been plenty of time for Mr Amargalinggam to make arrangements to attend, despite any difficulties that existed in the communications between him and his Counsel. It was reasonable to expect Mr Amargalinggam to have arranged better contact details with his Counsel. Mr Amargalinggam has been represented throughout. I declined the request and the investigation meeting continued with Mr Amargalinggam's representative in attendance.

### **Issues**

[8] What was the nature of the parties' relationship?

[9] Is any money owed, and if so, how much?

[10] How did the employment end? Does Mr Williams have a personal grievance?

**The facts**

[11] Mr Williams claimed he was an employee, employed by Mr Amargalinggam trading as VGB Transport. He says he completed a tax deduction form using the "M" code. He did not think any arrangements had been put in place to account for GST. There is no information available on whose responsibility it was to make ACC deductions. There was no evidence of any invoices for payments. Mr Williams produced a signed off employment agreement. The employment commenced on 26 March 2007. Mr Williams was employed as a truck driver carrying out driving duties. There was provision in the agreement for a job description, the requirement to work 50 hours per week between the hours of 6am to 5pm daily, an annual performance review, the payment of a salary of \$43,637.36 and payment to be made weekly, holidays and leave entitlements, provision for restructuring and redundancy and termination of employment. Also, the agreement made provision for resolving employment relationship problems. The agreement made no provision for any contracting arrangements.

[12] Mr Williams was paid \$600 per week in his bank. Mr Williams says there was a verbal agreement made on 12 May 2007 that he would be paid \$750 per week. There is a record of that amount being deposited in his bank. From 23 April 2008 there was a further increase to \$870 per week and this recorded in the bank statements. Mr Williams thinks that tax deductions commenced from 8 May 2008.

[13] Indeed Mr Williams produced his bank statements to support salary payments being made to him on various dates and the changes made by Mr Amargalinggam. He also relied on the bank statements to establish the days he did not work for sick leave and public holidays and were deducted from his pay.

[14] Mr Amargalinggam's representative tabled a written statement from Mr Amargalinggam of his version of the events. He also provided a document from Mr Amargalinggam that requested Mr Williams to give notice of any absence to enable Mr Amargalinggam to arrange another driver. Mr Amargalinggam says that Mr Williams had warnings for being late and absent that impacted on the work. Mr Williams accepted that he took days off work that he says was to chase his wages that were not paid regularly on Thursdays.

[15] Mr Williams' says his employment ended because he was sent a text by Mr Amargalinggam that ended the relationship, and he denied abandoning his work.

### **Matters for determination on the issues**

[16] Mr Williams has to establish that he was an employee and whilst he has a strong claim to being an employee under the employment agreement, there are factors that give rise to some risk on his claim that I am required to assess. The factors will include who gave Mr Williams direction and supervised his work, Mr Williams' integration in the business and whether or not he was working on his own in business.

[17] Mr Williams says he is owed:

- Four weeks' holiday pay      \$3000
- Five days sick leave      \$750
- 11 days public holidays      \$1,650
- Remaining wages entitlement for his last 6 days at work      \$900
- Short payment of wages      \$2,572
- 1 month's pay (\$3,000) for unjustified dismissal.

[18] The summary of details and bank statements produced by Mr Williams helps him in his claim. However, any arrangements on the pay increases were not properly put in writing to be effective and binding on the parties under the employment agreement. This puts in some risk Mr William's claim for back pay on \$750 per week (\$2,572 above). This is because any variation for back pay had to be put in writing and signed for it to be effective and binding under the employment agreement.

[19] If Mr Williams is an employee there is an issue in regard to his entitlement for annual holiday pay to be properly calculated as he accepted he took one week's leave during his employment. The unexpired portion of his entitlement that was less than twelve months will need to be calculated at 8% on the relevant pay in the period. Finally his claim for the days he was not paid for sick leave and public holidays will need to be reconciled with the weekly payments that were less than his usual weekly pay.

[20] Mr Williams says he was dismissed when Mr Amargalinggam sent him a text ending the relationship. Mr Williams says that Mr Amargalinggam said: that he “*had had enough of being stuffed around and did not need him any more and he had got another driver*”. This coincided in a period where Mr Williams left town to go and look after his partner who had a collapsed lung and was in hospital. He says he informed Mr Amargalinggam, and Mr Amargalinggam told him to inform the operations manager and despatch manager, both of whom work for another company, and from whom Mr Williams got his delivery instructions from. Mr Williams says he did inform them. Mr Williams did not accept Mr Amargalinggam’s sequence of events in the last days when Mr Williams says he should have been paid. Mr Williams says he wanted to be paid and accepted that he visited Mr Amargalinggam three times in public to get his pay. He accepted that they had an issue about the return of the uniform, cell phone and where the truck keys had been put and he has his own version about how they behaved when he turned up to see Mr Amargalinggam. Mr Williams denied he abandoned his work and says he did inform Mr Amargalinggam of his absences to look after his partner.

#### **Next step and action required**

[21] At the conclusion of my interview with Mr Williams I agreed with Mr Amargalinggam’s representative that more information would be of assistance. I decided to adjourn to enable more information to be gathered, including any information relevant to Mr Amargalinggam and the two people referred to by Mr Williams about arrangements for deliveries and the work, what Mr Williams did in setting up the work and any documents on tax and deductions.

[22] I directed that Mr Amargalinggam could, if he wanted to, file his statement as an affidavit and obtain and produce any further documents within 21 days from today’s date. Mr Williams could reply in a further 7 days after that.

[23] In the meantime arrangements are to be made for both parties to attend mediation services to be provided by the Department of Labour on a mutually agreed date.

[24] The Authority's investigation is adjourned. I have requested the support officer to see the file on 17 June 2009, for any further action. If the matter requires me to continue, arrangements will be made for reconvening quickly.

[25] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority