

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 94/07
5049391

BETWEEN STEPHEN JOHN SMALL,
 CHANEL SAVEA, RAPHEAL
 MAAKA, ISAAC JOHN
 GORDON, BEN PATRICK
 COLBERT and JOSHUA
 BRUCE SIO
 Applicants

AND ALLIED SECURITY
 WELLINGTON LIMITED
 First Respondent

AND THE CONSULTANCY
 GROUP NZ LIMITED
 (previously known as ALLIED
 SECURITY CHRISTCHURCH
 LIMITED)
 Second Respondent

Member of Authority: James Crichton

Representatives: Rebecca Frost, Counsel for Applicants
 No appearance by Respondents

Investigation Meeting: 11 July 2007 at Nelson

Determination: 11 July 2007

ORAL DETERMINATION OF THE AUTHORITY

Introduction

[1] At the conclusion of the investigation meeting, I advised it was my intention to issue an oral decision and I did so. This determination records the substance of that oral decision.

The respondents' engagement

[2] Neither respondent was represented at the investigation meeting. I needed to satisfy myself, before proceeding with the investigation meeting, that all proper steps had been taken to advise the respondents of the nature of the applicants' claim and the right of both respondents to participate fully in the investigation meeting and the process leading up to it.

[3] I am satisfied that the Authority has taken all proper steps to engage with the respondents and that the respondents have made an affirmative decision not to participate for their own reasons.

[4] I reach this conclusion because I am satisfied that the extensive process that the Authority's senior support officer undertook to alert the respondents to the applicants' claim had the effect of ensuring that the respondents knew perfectly well the nature and extent of the claim and when and where the investigation meeting to consider it was to be held.

[5] Further, the representative of the respondents initially undertook to participate in a telephone conference which was a precursor to the investigation meeting but then was not actually available at the appointed time. At the commencement of the time set down for the investigation meeting, I asked the senior support officer to contact a representative of the respondents and he did so, speaking with Mr Damian Black by cellphone. Mr Black is a director of the first respondent and for all practical purposes is the representative of the respondents who the Authority has dealt with. During this telephone discussion at 9.30am on 11 July 2007, Mr Black told the Authority's senior support officer that "*I have nothing to do with that company*" and then Mr Black terminated the conversation.

[6] In fact, Mr Black is mistaken. The first respondent is still registered with the Companies Office, Mr Black still appears on the Companies Office file as a director and so far as the Companies Office is concerned, a return was filed in respect of the first respondent as recently as 9 May 2007.

[7] During the preliminaries to the investigation meeting, the Authority received various items of correspondence from Mr Black making a variety of allegations which, at best, must be seen as disingenuous. Certainly, I need to say that Mr Black's observations have not been helpful to me in reaching a decision in this matter.

[8] Amongst other things, Mr Black alleged that he had nothing to do with either respondent. As I have already noted, Mr Black is in fact a director of the first respondent. Mr Black alleged that he had never met any of the applicants so far as he was aware. The three applicants who gave evidence at the investigation meeting on behalf of the applicants as a whole all satisfied me that they had in fact met with Mr Black personally and that Mr Black had provided them with the training which they required before entering into their obligations to the employer.

[9] Mr Black also alleged that Allied Security Wellington Limited (the first respondent) had “*no connection with these employees or this case*”. Given that one of the applicants in the present case put into evidence a wage slip and other relevant documentation indicating that the employer of that individual was Allied Security Wellington Limited, that statement by Mr Black must, of necessity, be taken with some degree of skepticism.

Employment relationship problem

[10] The applicants allege that they are owed unpaid wages, unpaid holiday pay and costs of and incidental to this claim and that those various amounts are owed to them either by the first respondent or by the second respondent.

[11] I am satisfied, on the balance of probabilities, that the applicants were, at the relevant time, all employed by the first respondent, Allied Security Wellington Limited. I am particularly drawn to this conclusion by the producing to the Authority of a wage slip referring to Allied Security Wellington Limited as employer and Stephen John Small as employee. It seems to me to follow that in respect of the period of employment which this wage slip covers, Mr Small was plainly employed by Allied Security Wellington Limited.

[12] It seems unlikely that Mr Small was employed by a different company immediately before or after the application of this wage slip, particularly when that document is viewed in conjunction with another document which was produced by Mr Small which appears to be a document generated either by the Inland Revenue Department or alternatively a document generated for the Inland Revenue Department. Either way, this document refers to Mr Small as the employee and the employer as Allied Security Wellington Limited and attaches a schedule of earnings pertaining to the employment relationship between those two named parties.

[13] In questioning Mr Small and the other two applicants who attended to give evidence at the investigation meeting, namely Mr Gordon and Mr Maaku, I satisfied myself that the only employment relationship that the applicants believed they had was with a company they understood was called Allied Security Wellington Limited.

[14] Each of the applicants who gave evidence indicated to me that they had all signed an individual employment agreement and although they were never given a copy of that agreement (despite being promised it), their recollection was that that agreement was between them and Allied Security Wellington Limited. Indeed, all of the applicants who gave evidence indicated that “*everything they did was through Allied Security Wellington Limited*”.

[15] Some of the applicants who gave evidence at the investigation meeting approached the head doorman at a Nelson venue called the Grumpy Mole and as a consequence of that approach, were subsequently invited to a training day which was provided by Mr Damian Black.

[16] Because most of the applicants had other jobs as well as this engagement, they each advised the employer of the nights they were available to work and a roster was prepared based on that information. In my view, their employment with Allied Security Wellington Limited could best be characterised as permanent part-time with no fixed hours, rather than strictly casual.

[17] Each of the applicants commenced their employment on New Year’s Eve 2005 and worked for the employer without incident until the receipt by each of them of an undated letter, which has been put into evidence, signed by Mr Damian Black as general manager but on plain paper without letterhead. I am satisfied on the balance of probabilities that this letter was received by the applicants on Wednesday, 17 May 2006.

[18] The thrust of this undated letter signed by Mr Black is that work for the upcoming weekend is not available “*due to unforeseen circumstances*”. The letter continues that the firm with which the employer had its contract had failed to make payments but that “*this company (the employer) will guarantee all wages to our loyal staff*”. The recipients were encouraged to “*treat this weekend (that is the weekend 19 to 21 May 2006) as a weekend off work until this issue is resolved*”. The evidence I

heard was that the applicants never heard from Mr Black again. I accept that evidence as truthful.

[19] Subsequently, the applicant Mr Maaku rang Damian Black and asked about the outstanding payment. Mr Maaku gave evidence that Mr Black promised that payment would be forthcoming although it never was.

[20] I am satisfied on the balance of probabilities that Allied Security Wellington Limited was the employer of the applicants from the point at which they were engaged on New Year's Eve 2005 down to the receipt by each of them of the undated letter to which I have just referred which I hold was received by them on Wednesday, 17 May 2006.

[21] The next question for determination is whether the applicants have made out their claim for the actual quantum of unpaid wages and holiday pay. In that regard, each applicant has presented to the Authority a timesheet for the period that they say they were not paid for. The evidence before the Authority suggests that the period in question for each of the applicants is the three days 11, 12 and 13 May 2006 during which total period, each of the applicants worked a different span of hours.

[22] I have considered the timesheets that have been supplied to me and am satisfied that each of them properly identifies the amount claimed by each of the applicants and I accept the oral testimony of the three applicants who I heard in person that those amounts are in fact the amounts that are due and owing to them.

[23] I am also satisfied that, by reason of the unsatisfactory way in which the employment came to an end, the applicants are entitled to be paid holiday pay and because the applicants have not been able to calculate that appropriately, I have agreed with counsel for the applicants that such a calculation should now be done.

Determination

[24] I am satisfied, on the balance of probabilities, that Allied Security Wellington Limited employed each and every one of the applicants from New Year's Eve 2005 down to May 2006 and that in consequence, the unpaid wages which I find are due and owing to the applicants is owed to them by Allied Security Wellington Limited.

[25] I am also satisfied that the sums claimed by each of the applicants are properly claimed and that the following arrears of wages are due to the respective named applicants by Allied Security Wellington Limited:

Stephen John Small is owed \$257.40 gross

Joshua Bruce Sio is owed \$59.40 gross

Chanel Savea is owed \$128.70 gross

Rapheal Maaka is owed \$72.60 gross

Isaac John Gordon is owed \$145.20 gross

Ben Patrick Colbert is owed \$39.60 gross

[26] In addition, Stephen John Small is owed \$216.96 in unpaid holiday pay.

[27] Each of the other applicants is also owed an amount of holiday pay by Allied Security Wellington Limited. Leave is reserved for the other applicants to come back to the Authority with the appropriate calculation of holiday pay and a supplementary Determination will be issued.

[28] Interest at 7% per annum will be applied to the outstanding amounts from 17 May 2006 down to the date of payment.

[29] Allied Security Wellington Limited is also to pay Mr Small the filing fee of \$70.

[30] I am satisfied that this is a case where it is appropriate to deal with the matter of costs without referring it back to the parties for them to negotiate and seek to arrive at an acceptable figure. Given the various defaults by Allied Security Wellington Limited, it is appropriate to apply solicitor/client costs and in that regard I direct that Allied Security Wellington Limited is to pay to Bamford Law the sum of \$1,600 as a contribution to the costs of the applicants in recovering their unpaid wages.

Summary

[31] The orders that I have made in respect of the resolution of this employment relationship problem are as follows:

(a) Arrears of wages:

Stephen John Small	\$257.40 gross
Joshua Bruce Sio	\$59.40 gross
Chanel Savea	\$128.70 gross
Rapheal Maaka	\$72.60 gross
Isaac John Gordon	\$145.20 gross
Ben Patrick Colbert	\$39.60 gross

- (b) holiday pay for Stephen John Small in the sum of \$216.96
- (b) The holiday pay in regard to the other applicants is to be calculated and leave is reserved for the applicants to revert to the Authority so that a supplementary Determination can issue;
- (c) Interest on each of the applicants' arrears of wages and holiday pay amounts calculated at 7% per annum from 17 May 2006 to the date of payment;
- (d) \$70 filing fee paid by Mr Small;
- (e) A contribution to the legal costs of the applicants in the sum of \$1,600 to be paid to Bamford Law, P O Box 730, Nelson, attention Ms Frost.

James Crichton
Member of the Employment Relations Authority