IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 174/10
5278401

BETWEEN	LISA ASHTON and MATT STEVENTON Applicants
A N D	ROSS VITICULTURE LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	No appearance for Applicants save on the papers Tracy Ross for Respondent
Investigation Meeting:	26 August 2010 at Blenheim
Determination:	2 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (the applicants) claim that they were unjustifiably dismissed from their employment as pruners and not paid the minimum wage during their employment. The respondent (Ross Viticulture) denies the applicants were unjustifiably dismissed and contends that any wages due have already been paid.

[2] The applicants were employed for a period towards the end of 2008 and the beginning of 2009 by Ross Viticulture and were offered work again by the same employer as pruners in May 2009. Neither of the applicants had experience in pruning, but Ross Viticulture indicated that over a week most staff *get up to speed* in order to meet the contract rate. The work offered was casual employment; that is workers called in for work as and when required, depending on the extent of the contracts held and operating for Ross Viticulture. With one exception I will deal with shortly, it is common ground that the first week was to be paid at the minimum hourly rate and thereafter, assuming the new pruners had achieved the appropriate measure of

skill and speed, they would be remunerated on a piece rate of $1 per plant. The exception, on which there is dispute, is the appropriate payment for the first day. Payment for the first day is claimed by the applicants but denied by Ross Viticulture on the basis that the agreement was that the purpose of the first day is orientation and that is unpaid. On this point, I prefer the evidence of Ross Viticulture and take the claim for the first day no further in consequence.

[3] In fact, the hours worked on the first day of work, 18 May 2009, were minimal because of inclement weather causing staff to be sent home. The second, third and fourth days' hours are in dispute. On each of those days, the applicants' evidence is that they worked a longer span of hours than Ross Viticulture has recorded. I am satisfied on the evidence before the Authority that the evidence of Ross Viticulture is to be preferred. I am satisfied that its evidence on the hours worked is to be preferred over the evidence of the applicants who, as I noted in the entituling, were not physically present at the investigation meeting although they filed statements of evidence in support of their respective positions. Ms Ross told me her own attendances at the area where the applicants worked enabled her to be very clear about when they started and finished.

[4] Both of the applicants worked Monday, 18 May 2009 down to and including 20 May 2009 but only the applicant Matt Steventon worked Thursday, 21 May 2009. On that day, Mr Steventon was spoken to by Ross Viticulture. He was told that his speed and accuracy of work was unacceptable and that he would not be offered further work by Ross Viticulture because both his quality was unsatisfactory and his speed of work was such as to preclude him earning the minimum wage once he went onto piece rate payments.

[5] The evidence for Ross Viticulture on this point was simply that had the company not acted, the vine grower could have complained about the quality of the workmanship provided which would have impacted on the whole contract and potentially put over 30 staff out of work. Similarly, Ross Viticulture could not allow a situation to develop where a continuing employee was, through the slowness of his or her work, not achieving the minimum wage equivalent.

[6] Ross Viticulture endeavoured to facilitate the applicant Mr Steventon speaking by telephone to the other applicant, Ms Ashton, who on that day (Thursday, 21 May 2009) had not attended at work because she was ill. Ross Viticulture wanted

Mr Steventon to contact Ms Ashton by telephone and to that end Ross Viticulture had provided him with its cellphone to endeavour to make contact with Ms Ashton. Despite Ms Ashton not being present, Ross Viticulture wished to convey to her the same intelligence that it had to Mr Steventon, namely that it was not able to continue offering her employment as a pruner either and for the same reasons. Ross Viticulture had assessed the work of both the applicants during the week in question and had formed the view that neither would produce acceptable enough work quickly enough to be sustainable employees in that role.

[7] When it was not possible for Mr Steventon to contact Ms Ashton by telephone, Mr Steventon elected to leave the employment and walk home, turning down a ride from Ross Viticulture in the process. Subsequently, there was a telephone discussion between Ross Viticulture and Ms Ashton about the termination of the employment. Correspondence passed between the parties and there were various efforts to mediate the employment relationship problem but without success. The applicants called on the Labour Inspectorate for assistance and the Labour Inspector was able to promptly engage with Ross Viticulture and agree payment of the minimum wage for both applicants for the period of the employment on the employer's record of the hours actually worked. The issue of the remaining hours remained unresolved (although as I have already noted, I prefer the evidence of Ross Viticulture to that of the applicants and so I am not persuaded that anything is due in respect of unpaid wages). The remaining claim relates to the allegation that the applicants were unjustifiably dismissed from their employment and that is the only issue now for determination by the Authority.

[8] In reviewing the factual matrix, I was greatly assisted by discussing the breakdown of this employment relationship with the Labour Inspector who dealt with the applicants claim for unpaid wages.

Were the applicants unjustifiably dismissed?

[9] I am satisfied on the balance of probabilities that the applicants were not unjustifiably dismissed from their employment. In truth I am satisfied this was no dismissal at all, simply a notification that further work would not be offered to these casual employees because the necessary skills had not been demonstrated. I consider that Ross Viticulture had an obligation to protect the applicants from engaging in work for which they were plainly not suited and that allowing them to enter into a

piece work situation where they could not make a viable living (and not achieve a minimum wage) would be of no assistance to the applicants themselves nor achieve the business needs of Ross Viticulture. This is particularly so when the standard of work being produced by the applicants was such as to potentially jeopardise Ross Viticulture's contract with that vine grower. The terms and conditions of the employment, as offered, were clear and required the achievement of certain defined standards by the end of the first week. Those standards were simply not met and accordingly it was available to Ross Viticulture to indicate to the applicants that further work would not be offered.

Determination

[10] I am satisfied that the applicants have no claim against Ross Viticulture Limited.

Costs

[11] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority