

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Julian Bettridge of Dargaville (Applicant)

AND David Whitehead trading as Kauri Coast Honey and David
and Yvette and Edward Whitehead Trust (Respondents)

REPRESENTATIVES Applicant in person
No appearance for respondents

MEMBER OF AUTHORITY Robin Arthur

INVESTIGATION MEETING 13 March 2007

DATE OF DETERMINATION 5 April 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant seeks an order for the payment of \$435.75. He says the sum is owed by his former employer as compensation for lost earnings in the first week following a work-related accident.

[2] The former employer filed a statement in reply by fax on 29 May 2006 but has effectively refused to participate in or respond to the further steps provided for under the Employment Relations Act 2000 ("the ER Act") to resolve such employment relationship problems.

[3] The position of the former employer appears to be that the applicant's injury was not genuine, that whatever entitlement the applicant had was paid and that, in any event, the Employment Relations Authority does not have jurisdiction to deal with an employee's entitlement under the Injury Prevention, Rehabilitation, and Compensation Act 2001 ("the IPRC Act").

[4] The former employer refused to attend mediation so this matter was set down for an investigation meeting some ten months after the applicant had filed his statement of problem. Despite notification no representative of the employer attended the investigation meeting held in Whangarei. The applicant attended and answered questions under oath.

[5] The issues to be resolved include:

- (i) Does the Authority have jurisdiction to consider the applicant's claim?
- (ii) Who is the employer?
- (iii) Was the employer properly notified and given an opportunity to participate in the investigation meeting?
- (iv) What was the applicant entitled to receive?
- (v) What orders, if any, are needed in this matter?

Does the Authority have jurisdiction?

[6] I am satisfied that the Authority has jurisdiction to consider the applicant's claim as a wage recovery action under s131 of the ER Act. It concerns payment of the entitlement under s97 of the IPRC Act to 80 per cent of lost earnings in the first week following a work-related

injury. The Authority's exclusive jurisdiction of employment relationship problems includes recovery of wages under s131 of the ER Act. Section 99 of the IPRC Act states that first week compensation is "wages" for the purposes of s131 of the ER Act.

Who is the employer?

[7] The applicant was employed to work in the employer's honey production business. Contrary to the requirements of s65 of the Act, he did not have a written employment agreement. One purpose of the written agreement is to clearly identify the contracting parties, including the correct legal entity of the employer.

[8] The applicant's evidence was that he was employed by David Whitehead. The applicant's statement of problem identified the employer as the "David & Yvette & Edward Whitehead Trust" but named the "physical business" as Kauri Coast Honey. In an attached letter he referred to Kauri Coast Honey and Natures Buzz as operating in conjunction with the named Trust. He says he was paid cash cheques by Mr Whitehead but given payslips naming the employer as "Goldenflow (Trust)".

[9] The only documented reference to the Trust before me is a copy of an IRD record of the applicant's income for the 12 months to 6 October 2006. It is an entity at least known to the IRD as having made payments to the applicant in that period.

[10] A website of Kauri Coast Honey and Nature's Buzz businesses identify the "chief executive officer" as David Whitehead. Pictures on the website show that Nature's Buzz in a brand of manuka honey which can be purchased in small domestic tubs or in commercial 330 kg drums. The text states that the Kauri Coast Honey business has been in the honey industry for more than 50 years. However the site does not identify any legal entity – either an individual or registered company – behind this trading name.

[11] The employer's statement in reply was lodged by fax. The fax bears a sender identification stamp with the words: "Kauria (sic) Coast Honey". The address for service gives Mr Whitehead's name with the post box address of Kauri Coast Honey. In the space for the respondent's names at the head of the statement Mr Whitehead has deleted the name of the trust, leaving only the name of Kauri Coast Honey and its physical address.

[12] Elsewhere in the public record Kauri Coast Honey is identified as the trading name of Mr Whitehead. The New Zealand Food Safety Authority's register of export approved premises refers to "*David Vernon Whitehead a sole trader trading as Kauri Coast Honey*".

[13] On the basis of this information I am satisfied that David Whitehead trading as Kauri Coast Honey was in fact the employer of the applicant and should be joined under s221 of the ER Act as a respondent in this matter.

Notification of the employer

[14] Despite referral of this matter to mediation, and then direction under s159 of ER Act, Mr Whitehead would not attend mediation and the Mediation Service referred the matter back to the Authority. The Mediation Service reported that Mr Whitehead was not prepared to attend mediation because he felt the matter was to do with ACC and not employment relations.

[15] A further minute was sent to the parties explaining why the issue was one that the Authority had jurisdiction to deal with and that the Authority would now investigate and determine the matter.

[16] When a Support Officer of the Authority contacted Mr Whitehead to make arrangements for a directions conference, Mr Whitehead said that the Authority had no jurisdiction, that he was not interested, and terminated the telephone call.

[17] An investigation meeting date was set and a Notice of Investigation Meeting issued. Copies of the notice were sent by Courier Post and marked for Mr Whitehead's attention at a post box given as the address for service in the statement in reply, and to the physical address of the Kauri Coast Honey business, and to an address given as Mr Whitehead's home address in the telephone directory. Each copy was returned marked Return to Sender.

[18] The Support Officer then arranged for the applicant to effect personal service of the notice of investigation meeting. The applicant subsequently advised the Authority in writing that he had served the notice by handing it to Mr Whitehead on the premises of Kauri Coast Honey in Dargaville at 12.34 pm on 26 January 2007.

[19] On this basis I am satisfied that the employer was properly notified of the investigation meeting and had adequate opportunity to prepare for the meeting or advise of any impediment to attending.

[20] The notice for the investigation meeting on this matter, in the form prescribed by the relevant regulations, clearly states that if the respondent does not attend the meeting, the Authority may without obtaining further information issue a determination in favour of the applicant.

The applicant's entitlement

[21] The applicant injured his back lifting boxes at Kauri Coast Honey on 21 March 2006. ACC accepted his injury was work-related. He provided medical certificates advising that he was unfit to work from 21 March to 29 March 2006.

[22] The applicant had another job that he worked weekends. His entitlement to compensation for earnings lost in his first week of incapacity included earnings from his second job. Under s98 of the IPRC Act his lost earnings were the aggregate of all the earnings in the 7 days immediately before the commencement of the incapacity, whether or not they were payable by the employer where the injury occurred. He was entitled to be paid 80 per cent of that amount.

[23] Section 97(3) provides a rebuttable presumption that the earnings lost are the difference between the claimant's earnings in the seven days before the incapacity and in the first week of the incapacity.

[24] In framing his claim the applicant has applied a notional amount of earnings that he would have earned if he had been able to work in the week of the incapacity. However that is lower than what he in fact earned in the seven days prior to his incapacity. He has then based his claim on an average of these two amounts resulting in a lower amount than he appears to be entitled to under s97(3).

[25] The applicant's evidence, which was not rebutted, was that he earned \$885.62 working for the respondent in the seven days prior to the incapacity and a further \$200 from his weekend job. From that total of \$1085.62 he is entitled to a payment of 80 per cent of that amount, that is \$868.49. He did not do any paid work in the week in question, so there is no offsetting required for any actual income.

[26] The respondent paid the applicant only \$265.69 for the first week of lost earnings. On the evidence available to me I am satisfied that the amount it should have paid was \$868.49, leaving a shortfall of \$602.80 to which the applicant remains entitled.

[27] In the statement of reply Mr Whitehead suggests that the applicant was in fact not incapacitated by his injury but Mr Whitehead has done nothing to substantiate that allegation. If the employer wanted to contest why ACC accepted the injury was covered, there were means open to do so but there is no evidence that this was done. Having failed to do so, the employer cannot unilaterally override the decision of ACC, the opinion of the doctors who provided two medical certificates, and the provisions of the IPRC Act.

Orders

[28] Accordingly, under s131 of the ER Act, I order that the respondents pay to the applicant the amount of \$602.80 (less any applicable PAYE) in payment of his entitlement to compensation for loss of earnings under the IPRC Act.

[29] At the investigation meeting the applicant also asked that he be awarded interest on any amount found to be due to him. In light of the employer's prolonged breach of clear statutory duties, I consider this is an appropriate circumstance for interest to be awarded at the maximum rate permitted under clause 11 of Schedule 2 of the ER Act. The applicant is awarded interest on the amount due to him for the period of six months prior to this determination at the rate of 9.91 per cent. **The respondents are ordered to pay to the applicant the further sum of \$29.86 in interest on the amount due to him up to the date of this determination and an additional 16 cents a day from the date of this determination until the date that payment of the amount due is made in full.**

[30] The applicant is also entitled to reimbursement of his filing fee. **The respondents are ordered to pay to the applicant the further amount of \$70.** The applicant represented himself in this matter so there is no order for legal costs.

[31] Because of the failure of the employer to meet the statutory obligation to provide a written employment agreement, there has been some doubt as to the correct legal entity of the employer. **To ensure that the applicant is not further disadvantaged by this breach of statutory obligation by his employer, I order that the named respondents are joint and severally liable for the amounts ordered to be paid to the applicant.**

Robin Arthur
Member of Employment Relations Authority