

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 61
5396894

BETWEEN

MICHAEL KELVYN
DONOVAN
Applicant

A N D

EURO BUILDERS LIMITED
Respondent

Member of Authority: Christine Hickey
Representatives: Applicant in person
No appearance for the respondent
Investigation meeting: 19 March 2013 at Christchurch
Date of Determination: 22 March 2013

DETERMINATION OF THE AUTHORITY

- A. Euro Builders Limited is to pay Michael Donovan \$208.00 owed in wages.**
- B. Euro Builders Limited is to pay Michael Donovan \$260.00 in holiday pay.**
- C. Euro Builders Limited is to pay Michael Donovan interest on the above sums in the amount of 5% for the period from 1 October 2012 until the amounts are paid in full.**
- D. Euro Builders Limited is to reimburse Michael Donovan \$71.56 for the Authority's application fee.**

Employment relationship problem

[1] Michael Donovan responded to an ad seeking experienced carpenters, hammer hands and labourers. He was interviewed by Allan Windvogel, the director of Euro

Builder Ltd., and was engaged to start working on 10 July 2012. No employment agreement was provided.

[2] On 18 July 2012 he was paid \$776.00 net for the week ended 15 July 2012 for 48.5 hours at a rate of \$20.00 per hour. The pay slip shows that tax of \$194.00 was deducted.

[3] Mr Donovan worked 57 hours in the week ending 22 July 2012. On 25 July he was paid \$904.00 net. He did not receive a pay slip. He also worked 57 hours in the week ending 29 July 2012. Mr Donovan resigned from Euro Builders at the end of that week. He was paid \$696.00 on 1 August 2012. He did not receive a pay slip.

[4] Mr Donovan claims that he was an employee and was under-paid for his final week. He also claims that he was not paid any holiday pay. He bought a high visibility vest from Euro Builders while working for the company which he has retained. He wishes to receive a receipt for the vest. He wants the pay slips for weeks two and three and wants to make sure that the tax that was deducted by Euro Builders will be paid to the IRD. He wished to be reimbursed for the Authority filing fee of \$71.56.

[5] Euro Builders says in the Statement in Reply that Mr Donovan was a contractor and not an employee. It says his rate of pay was \$15.00 per hour and that he had agreed to work for one month, but did not do so. It says that Mr Donovan was accidentally paid at the higher rate of \$20.00 per hour for the first two weeks. Euro Builders deducted what it considered had been overpaid from the third week's wages and understands it was entitled to do so.

Issues

[6] The Authority needs to determine the following issues:

- (a) Was Mr Donovan an independent contractor or an employee?
- (b) If he was an employee is he owed any pay for work done?
- (c) If he was an employee how much holiday pay is he owed?
- (d) Has PAYE been paid on his behalf to the IRD?

- (e) Should he be supplied with a receipt for the high visibility jacket he purchased?
- (f) Should Euro Builders supply the two missing pay slips?
- (g) Should Euro Builders pay interest on any money it owes Mr Donovan?
- (h) Should he be reimbursed for the Authority application fee?

Determination

[7] Mr Windvogel took part in a telephone conference on 13 November 2012. The Authority's notice of direction informed the respondent that if it wished to lodge a counterclaim it should do so within reasonable time to allow the counterclaim to be dealt with as part of the investigation meeting. The investigation meeting date was set as 19 March 2013. The Authority also directed the applicant to provide any statements of evidence by 12 February 2013. The respondent was directed to provide statements of evidence to the Authority by 26 February 2013.

[8] Mr Donovan provided his evidence to the Authority on 11 February 2013. Mr Donovan's evidence is that on 11 February 2013 he served his statement of evidence on the respondent by delivering it by hand into the letterbox at 92 Middleton Road, which is the respondent's address for service. However, that evidence was returned to him with an indication that it was returned to New Zealand Post because the respondent was *no longer at this address*.

[9] On 28 February 2013 the Authority Support Officer emailed Mr Donovan's statement of evidence and documents to the company's email address, addressed to Mr Windvogel. Mr Windvogel was informed that the respondent's witness statements were overdue but was given a further seven days to lodge the company's statements and documents. However, no evidence was received from the respondent. No counter-claim has been made.

[10] The investigation meeting took place on 19 March 2013. It was due to begin at 9.30am. However the respondent was not represented. The Authority waited in case the respondent's representative was running late. Section 173(2) of the Employment Relations Act and clause 12 of Schedule 2 of the Act allow me to proceed to investigate a matter in the absence of a party. At 9.41am, I proceeded to

investigate Mr Donovan's problem in the absence of any representative of the respondent. I heard affirmed evidence for Mr Donovan and asked him questions. The investigation meeting concluded at 10 a.m.

Was Mr Donovan an independent contractor or an employee?

[11] The respondent says that the applicant was at all times a contractor and not an employee. It says that contractors are not eligible for holiday pay. It also says that because Mr Donovan was a contractor, it did not need to furnish him with payslips.

[12] Section 6 of the Employment Relations Act defines an employee to mean any person employed by an employer to do work for hire or reward under a contract of service. The Authority is required, in deciding whether a person is employed by another person under a contract for service, to determine the real nature of the relationship between them. The Authority must consider all relevant matters including any matters that indicate the intention of the people involved. The Authority cannot treat as determinative matter any statement by the parties that describes the nature of their relationship. However, in this case because there is no written employment agreement there is no mutually agreed description of the nature of the relationship.

[13] Mr Donovan says he was transported to the work site by the company, provided with tools, told what hours he was needed for and his work was supervised by Mr Windvogel or his son, Kyle Windvogel.

[14] Mr Donovan says there was never any discussion that he would be required to work as an independent contractor. He did not invoice Euro Builders for the hours he worked. Instead he was asked to text the respondent's administrator the hours he had worked. He was also asked to supply her with his IRD number and date of birth.

[15] It is important to establish whether Mr Donovan was an independent contractor or an employee because if Mr Donovan was not an employee, the Authority does not have jurisdiction to deal with his employment relationship problem.

[16] Despite the short-term nature of Mr Donovan's engagement with Euro Builders I conclude that he was an employee for the following reasons:

- (a) He did not pay his own tax. That conclusion is supported by the provision of his IRD number to the respondent and that tax was withheld from each of the three pays.
- (b) On 3 December 2012 the IRD wrote to Mr Donovan with details of his income from employment for the period 1 April 2012 to 31 October 2012. PAYE tax had been deducted from his income from five different employers over that time¹.
- (c) He did not supply invoices to Euro Builders but notified it by text message of the hours he had worked.
- (d) He was not working on his own account.
- (e) The respondent controlled and closely supervised Mr Donovan's work and set his hours of work.
- (f) The respondent transported Mr Donovan to and from the work site.
- (g) The respondent required Mr Donovan to be identifiable as a member of Euro Builder's team by wearing the same high visibility vest as the other employees.

Is Mr Donovan owed any pay?

[17] The respondent asserts that it was entitled to recover an amount out of the third week's pay which it says was an overpayment to Mr Donovan. The amount apparently overpaid has not been quantified but the respondent says that Mr Donovan should only ever have been paid \$15 per hour.

[18] Section 4 of the Wages Protection Act 1983 provides that except in two specified circumstances when wages are payable to an employee an employer must pay the entire amount to the employee without any deduction. The exceptions are:

- (a) When there is written consent from a worker to make a deduction, or a written request from a worker to make a deduction²; and

¹ The IRD has not received any PAYE deducted by the respondent.

² Section 5(1)

- (b) When there has been an overpayment to a worker an employer may recover that overpayment only after specified notice has been given to the worker, generally no later than the next pay day, that the employer intends to recover the overpayment. In addition, the employer must show that it was not reasonably practicable for the employer to avoid making the overpayment³.

[19] Mr Donovan says that he did not give written permission or make a written request to the respondent to make a deduction or to recover the alleged overpayments from his third pay. In addition, there is no evidence from the respondent that it was not reasonably practicable for it to avoid making the alleged overpayments. Nor is there any evidence that the respondent gave Mr Donovan the kind of notice it would have been required to give under s. 6 of the Wages Protection Act. Therefore, I consider that the respondent was prevented by the provisions of that Act from recovering the alleged overpayment.

[20] Mr Donovan says that Mr Windvogel told him at the interview that his minimum pay would be \$15.00 per hour but that he would see how his work was before he settled on a pay rate. Because he received \$20 per hour for his first two weeks he says he was entitled to consider that Mr Windvogel was pleased with his work and had set his pay at \$20 per hour. He says he worked in the second and third week with that expectation.

[21] Mr Donovan requested his pay slips for the second and third weeks but they were not supplied by the respondent. I consider Mr Donovan's request to have been a request for the wages and time records related to his employment that the respondent was liable to keep under s. 130(1) and to produce upon an employee's request under s.130(2) of the Employment Relations Act 2000.

[22] Section 132(1) of the Act allows me to accept Mr Donovan's evidence that the respondent failed to produce a wages and time record and that failure prejudiced his claim to bring an accurate claim for wage arrears. Section 132(2) allows me to accept Mr Donovan's evidence to prove the wages that were paid to him and the hours, days and times worked by him.

³ Section 6

[23] I heard affirmed oral evidence from Mr Donovan about the hours he worked in the second and third weeks. I accept that in each week he worked for 57 hours. He says that he was paid correctly for the first and second weeks (\$776 and \$904) and I accept his evidence. In the third week he was only paid \$696 net.

[24] I rely on s.132 of the Employment Relations Act that allows me to accept all Mr Donovan's claims of the wages actually paid to him and the hours he worked. The amount paid to Mr Donovan for the third week should have been the same as that paid in the second week. Therefore Mr Donovan was underpaid by \$208 net.

How much holiday pay is Mr Donovan owed?

[25] Mr Donovan worked for a total of 162.5 hours, over which he earned \$3250.00 gross. Given that I have found Mr Donovan to have been an employee he is entitled to 8% of his gross earnings to be paid as holiday pay⁴. Therefore, Mr Donovan should have been paid \$260.00 in holiday pay ($\$3250.00 \times 8\% = \260.00)

Has PAYE been paid on his behalf to the IRD?

[26] It is clear from the IRD letter that as at 3 December 2012 the respondent had not paid any of the PAYE it deducted from Mr Donovan's wages. He is concerned about that. I do not have any power to order the respondent to pay the PAYE on Mr Donovan's behalf. That is a matter for the IRD to pursue with the respondent if it chooses to do so.

Can I order Euro Builders to supply Mr Donovan with a receipt?

[27] Mr Donovan bought a high visibility vest from the respondent for which he says he paid cash. He did not get a receipt. He has retained the vest. I do not consider that there is any disadvantage to Mr Donovan in not having a receipt. His evidence was that he was an employee. Therefore, he is not able to claim any work related expenses against his tax. In any event I do not consider that I have the jurisdiction to order that a receipt be produced.

⁴ Section 23(2) of the Holidays Act 2003.

Should Euro Builders supply the two missing wage slips?

[28] Having determined how much Mr Donovan was owed and made orders for his unpaid wages and holiday pay there is no longer any purpose in having the pay slips supplied to him.

Should Euro Builders pay interest on the amounts owed?

[29] Clause 11 of Schedule 2 of the Employment Relations Act gives the Authority power to award interest in matters involving the recovery of money at the rate prescribed under section 87(3) of the Judicature Act 1908. The prescribed rate is currently 5% per annum.

[30] Mr Donovan has not had the use of the money that is owed to him by Euro Builders for some months now. I consider that it fair that the respondent pay interest at 5% per annum on the unpaid wages and holiday from 1 October 2012, the date that the application was filed in the Authority to the date that the amounts are paid in full.

Costs

[31] Euro Builders must reimburse Mr Donovan for the fee of \$71.56 he paid to file his application with the Authority. Mr Donovan represented himself so there is no issue as to costs.

Christine Hickey
Member of the Employment Relations Authority