

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 189
5520406

BETWEEN REINHARD GÜNTER KLUGE
Applicant

A N D JIM CROSBIE t/a OPERATIVE
BRICK & BLOCK
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
Respondent in person

Investigation Meeting: 11 November 2014 at Christchurch

Date of Determination: 21 November 2014

DETERMINATION OF THE AUTHORITY

- A Reinhard Kluge was an employee of Jim Crosbie.**
- B Jim Crosbie is ordered to pay to Reinhard Kluge:**
- (1) The sum of \$480 gross (less \$300 which Mr Reinhard has in writing authorised deduction of) being reimbursement of three days unpaid wages.**
 - (2) The sum of \$160 gross being one days lost wages.**
 - (3) The sum of \$903.60 gross being holiday pay.**
 - (4) Reimbursement of the filing fee in the sum of \$71.56.**

Employment relationship problem

[1] Reinhard Kluge says that he was dismissed from his employment with Jim Crosbie as a brick layer. He seeks holiday pay together with three days' unpaid wages and a further day's payment for his final day of work when he turned up to work but was sent home.

[2] Jim Crosbie says that Mr Kluge was a contractor and was not an employee. He does not accept that Mr Kluge is entitled to any holiday pay and further that Mr Kluge owes him money.

The issues

[3] These are the issues that the Authority is required to resolve:

- (a) Was Mr Kluge working as an independent contractor or an employee for Jim Crosbie? If Mr Kluge was not an employee of Jim Crosbie then the Authority has no jurisdiction to deal with his claim and the Disputes Tribunal would then be the appropriate forum;
- (b) If it is found that Mr Kluge was an employee is he owed wages for work undertaken and is he owed one further day's work on the basis that he says he presented for work but was sent away?
- (c) If it is found that Mr Kluge was an employee, then is he owed holiday pay?

Was Mr Kluge working as an independent contractor or an employee of Jim Crosbie?

[4] Section 6 of the Employment Relations Act 2000 (the Act) provides the meaning of employee and that section refers to, amongst other matters, the following:

- 6. *Meaning of employee*
 - (1) *In this Act, unless the context otherwise requires, employee –*
 - (a) *Means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
 - ...
 - (2) *In deciding whether for the purposes of subsection 1(a) whether a person is employed by another person under a*

contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them;

- (3) *For the purposes of subsection (2), the Court or Authority –*
- (a) *Must consider all relevant matters, including any matters that indicate the intention of the parties; and*
 - (b) *Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship ...*

[5] The leading case about the relevant matters to be considered is the Supreme Court judgment in *Bryson v. Three Foot Six Ltd* [2005] ERNZ 372.

[6] I have been guided by that judgment and have taken into account the matters considered appropriate in determining whether or not a person is an independent contractor or an employee.

Intention of the parties

[7] Mr Kluge had been working as a bricklayer for another company in Christchurch when his employment relationship with that company ended. He telephoned some other bricklaying organisations in the Yellow Pages looking for work. He spoke to Mr Crosbie as part of this exercise and an arrangement was made for the two of them to meet on 27 May 2014 at the New Brighton *Z Station*.

[8] Mr Kluge said that he explained he had been a structural mason in Germany and spoke to Mr Crosbie about his experience in Germany. He said that an hourly rate was discussed of \$20 and he was happy with that as he knew he was slow at undertaking brickwork but that he was thorough and could do other building work.

[9] Mr Crosbie said that he discussed with Mr Kluge taking him on on the basis that withholding tax would be deducted from the hourly rate and that Mr Kluge advised that he was happy to *give receipts or invoices*. Mr Crosbie said that he did not take on employees and only ever engaged contractors in his business. Mr Kluge did not agree the arrangement was he would not be a contractor. He said that he would not have accepted \$20 per hour if that had been the case. There was nothing in writing between the parties. For completeness there is no evidence to support Mr Kluge invoiced or gave receipts to Mr Crosbie for payments received during the period they worked together.

[10] On 28 May 2014 Mr Kluge commenced working for Mr Crosbie.

[11] Mr Crosbie in his evidence said it was clear during the discussion about withholding tax and Mr Kluge offering to provide receipts and/or invoices that he understood the nature of the relationship and there was a common intention about the nature of the relationship. Mr Kluge does not accept that conversation occurred in that way.

[12] I accept that it was in all likelihood Mr Crosbie's intention that Mr Kluge be engaged on the basis of a contract for service as a contractor but I could not be satisfied that that was a common intention. Mr Kluge said that he would not have accepted engagement on that basis. He said that the hourly rate of \$20 was not enough when the fact that there was no entitlement to paid holidays or sick days was considered.

[13] I move on to consider some other relevant matters. Section 6 of the Act makes it clear that the Authority is not to treat the way people describe the nature of their relationship as the end of the matter. It is important that the Authority consider the way the parties actually behaved in implementing the contract and how the relationship between them operated in practice.

Taxation

[14] The payment of withholding tax is a factor that supports a contractor relationship rather than an employment relationship. After his first pay on 5 June when he had not been there for a full fortnight Mr Kluge was thereafter paid the same amount each fortnight of \$1280 except on two occasions when he was paid \$1260. There were therefore only very minor fluctuations in payments made. That sort of payment arrangement is usually more consistent with employment.

Control

[15] Mr Kluge carried out work as instructed by Mr Crosbie at a series of homes in Christchurch starting about 8am and sometimes later in the mornings and finishing he said between 4 to 4.30pm. Mr Kluge accepted that he did finish earlier sometimes. Mr Crosbie said that it was more like a 2 to 3pm finish each day.

[16] Mr Kluge would undertake work at the same address for several days but there were occasions when he switched jobs during the day. Mr Crosbie was usually with Mr Kluge when he was working aside from when he undertook some small jobs on his own. Mr Crosbie is a Licensed Building Practitioner in Brick and Block Laying. He explained that he has to supervise or do certain restricted building work. Mr Kluge said

that Mr Crosbie would have a look at his finished work and on occasions he would notice that things had been missed or that there were more cracks that needed to be dealt with. I find that Mr Kluge was effectively supervised for much of the time.

[17] Mr Crosbie dealt directly with the Earthquake Commission about work that was required to be performed and the pricing for the jobs. Mr Kluge worked as and when instructed by Mr Crosbie. Although the evidence supports that Mr Kluge would finish early on some days, Mr Kluge described an arrangement where it was expected he would pick up occasional work on a Saturday to make the hours up to what he was paid. Early finishes occurred but only I find if authorised by Mr Crosbie. Mr Kluge did not consider he could choose whether to turn up for work or not and I do not find that the evidence supports that was an option.

[18] There was control over what work Mr Kluge did and when Mr Kluge did his work. I find that the factors under the control test favour an employment relationship or a contract of service more than a contracting relationship.

Integration

[19] This test involves consideration as to whether Mr Kluge was integrated into the business or whether his work was only accessory to the business. The work carried out by Mr Kluge was an integral part of the work that Mr Crosbie undertook in his brick/block business. Mr Kluge wore a company uniform and used the electrical tools that Mr Crosbie had. He did as a bricklayer have a split level, trowel, pencil and other hand tools which he did supply.

[20] I find that the factors under the integration test favour an employment relationship more than a contracting relationship.

Fundamental test

[21] I turn to whether there was evidence of Mr Kluge operating a business on his own account, the fundamental test. I accept as already set out that the form of taxation would support that of a contractor. Mr Kluge was not though paid by way of results and there was no evidence of any means to increase his income. Mr Kluge did not supply anything other than hand tools and did not hire anyone else to do the work for him. Although he had bricklaying skills, because he was not a licensed building practitioner, his work had to be supervised and signed off. Mr Kluge had had a long break from masonry work in

New Zealand when he owned and operated a furniture store business. He was registered for GST in that business but had only been an employee for brick laying after he ceased to operate the furniture business.

[22] He did not claim expenses and said that Mr Crosbie gave him \$60 towards petrol costs when he asked. Mr Crosbie says that he wants that sum back.

[23] I find that Mr Kluge was not in business on his own account and carried out his work under the instruction of Mr Crosbie.

Industry practice

[24] I accept that Mr Crosbie had engaged independent contractors. Some of these would clearly operate their own businesses and some may be labour only contractors. Others in the industry would engage contractors as well. There are also some who would employ staff. Mr Kluge was previously employed by a firm undertaking bricklaying.

[25] I am not in this case assisted greatly by industry practice.

Conclusion

[26] I am not satisfied that there was a common intention that Mr Kluge be engaged as a contractor rather than as an employee and therefore the focus has fallen on the way the relationship worked in practice. When I assess this relationship in terms of control, integration and particularly the fundamental test, I find that it supports that the real nature between Mr Kluge and Mr Crosbie was one of employment.

[27] Mr Kluge was an employee.

Is Mr Kluge owed payment for three days that he worked?

[28] There was no dispute Mr Kluge was owed money for working on Friday, 29 August and, Monday and Tuesday, 1 and 2 September 2014.

[29] Mrs Crosbie explained that payment had been overlooked. Further, that Mr Kluge owed them money in the sum of \$360 and this amount was increased at the investigation meeting to also include hours that Mr and Mrs Crosbie said Mr Kluge had been paid for but not worked. Mr Kluge did not accept that he owed the Crosbie's anything for those additional hours. There are no records and I note that the only amount referred to in the statement in reply as owed by Mr Kluge was \$360. Mr Kluge wrote in his statement of

problem that Mr Crosbie is entitled to subtract \$300 from the money he is owed. I accept that is written consent for the purposes of the Wages Protection Act 1983. The \$60 is in dispute and Mr Kluge says that he was given that amount in cash for reimbursement for petrol he used. I make no order for repayment of the \$60 in the circumstances that I accept as more likely his evidence about the purpose of that payment.

[30] Mr Kluge was paid for a 40 hour week at \$20 per hour. That equates to a daily rate of \$160 gross which multiplied by 3 days is \$480 gross.

[31] I find that Mr Kluge is owed the sum of \$480 gross being unpaid wages. In accordance with Mr Kluge's written authorisation \$300 may be deducted from that amount before payment.

[32] I order Jim Crosbie to pay to Reinhard Gunter the sum of \$480 gross being reimbursement of unpaid wages less \$300 which Mr Kluge has given written consent can be deducted.

Is Mr Kluge entitled to payment for 3 September 2014?

[33] There is a dispute about how the relationship ended. Mr Crosbie says that he was advised in the afternoon on 3 September 2014 that Mr Kluge had another job. Mr Kluge says that the relationship ended in the morning on Wednesday 3 September 2014. He said that on 2 September he had not answered his phone or responded to a text message from Mr Crosbie as he had a new phone and was unable to use it. When he arrived on 3 September at 7.30am for work, he said Mr Crosbie screamed at him for not answering the call and told him to go home. He said during the day he managed to get another job starting the following day and texted Mr Crosbie that he had.

[34] Mr Crosbie does not accept Mr Kluge's evidence that he sent him away on 3 September in the nature of a dismissal. Mr Kluge maintains that was the case but that he was fortunate enough to obtain a job that day and therefore does not seek any lost wages aside from payment for that one day. The ability to obtain employment very quickly shows the nature of the Christchurch job market for those involved in the construction industry.

[35] I have carefully considered the evidence of Mr Crosbie and Mr Kluge. Mr Crosbie provided the Authority with a text message later in the day on 3 September in which Mr Kluge advised amongst other things that he had obtained new employment. I

find it likely that that advice followed Mr Kluge having earlier attended at work and being sent away in the nature of a dismissal.

[36] Mr Kluge simply wants payment for that day. Having presented at work ready to undertake a day's work Mr Kluge is entitled to payment for that day in the sum of \$160 gross.

[37] I order Jim Crosbie to pay to Reinhard Gunter the sum of \$160 gross being one day's lost wages.

Holiday pay

[38] Mr Kluge is entitled to holiday pay as an employee. He confirmed he had not taken any holidays. Mr Kluge left his employment before he had worked for 12 months and is entitled to 8% of his gross earning. He provided income from IRD supporting gross earnings in the sum of \$11,295.00. 8% of that sum is \$903.60 gross.

[39] Mr Kluge is entitled to holiday pay in the sum of \$903.60 gross.

[40] I order Jim Crosbie to pay to Reinhard Gunter the sum of \$903.60 gross being holiday pay.

Costs

[41] Mr Kluge was not represented but is entitled to reimbursement of his filing fee in the sum of \$71.56 and I so order.

Helen Doyle
Member of the Employment Relations Authority