

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 374
5479420

BETWEEN OXANA KRUTILINA
 Applicant

A N D CBR ROOFING AND
 WATERPROOFING
 SOLUTIONS LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Nikolai Kharitonov, Director of the Respondent
 company

Investigation Meeting: 8 September 2014 at Auckland

Date of Determination: 8 September 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant, Ms Oxana Krutilina was an employee of the respondent, CBR Roofing and Waterproofing Solutions Limited (CBR Roofing).**
- B. CBR Roofing is ordered to pay Ms Krutilina \$2,335.08 gross being notice, annual leave and one day statutory holiday owing to her by CBR Roofing.**
- C. CBR Roofing is ordered to pay costs of \$71.56 to Ms Krutilina, being the Authority's filing fee.**

Failure to file a statement in reply

[1] The respondent, CBR Roofing failed to file a statement in reply despite being served with the statement of problem and despite receiving correspondence from the Authority. Mr Kharitonov, one of the directors and shareholders of CBR Roofing attended the investigation meeting this morning and sought to defend Ms Krutilina's claims.

[2] In the circumstances CBR Roofing was granted leave to defend Ms Krutilina's claim.

Employment Relationship Problem

[3] Ms Krutilina claims she was employed by CBR Roofing and is owed \$2,335.08 gross as follows:

- \$173.40 for a statutory holiday;
- \$510.00 being one weeks' notice when she resigned;
- \$1,651.68 being annual leave.

[4] CBR Roofing denies Ms Krutilina was an employee and denies that it owes her any money, it claims Ms Krutilina was engaged by it as a contractor.

Issues

[5] The first issue for determination by the Authority is whether an independent contractual relationship or an employment relationship existed between CBR Roofing and Ms Krutilina. If no employment relationship existed then the Authority has no jurisdiction to investigate Ms Krutilina's claim that she is owed monies by CBR Roofing for holidays and notice.

First Issue

Was Ms Krutilina an employee or an independent contractor?

[6] Whether Ms Krutilina was an employee or a contractor is to be determined under s.6 of the Employment Relations Act 2000 (the Act).

[7] Section 6 of the Act states:

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; ...*
- (2) *In deciding for the purposes of sub-section (1)(a) whether a person is employed by another person under a contract for 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 sub-section (2), the court or the Authority ...*
- (a) *must consider all relevant matters including any matters that indicate the intention of the persons; and*
- (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[8] The leading case on s.6 of the Act is *Bryson v. Three Foot Six Limited*¹. The Employment Court in *Poulter v. Antipodean Growers Limited*² summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions as para.[20] as follows:

- [1] *The Court must determine the real nature of the relationship.*
- [2] *The intention of the parties is still relevant but no longer decisive.*
- [3] *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
- [4] *The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the 'fundamental' test.*
- [5] *The 'fundamental' test examines whether a person performing the service is doing so on their own account.*
- [6] *Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.*

[9] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s.6 is for the Authority, or the Court to gain

¹ [2005] 3 NZLR 721

² [2010] NZEmpC 89

an overall impression of the underlying and true nature of the relationship between the parties.

[10] Mr Kharitonov and Mr Rjevski are the directors and shareholders of CBR Roofing. CBR Roofing carries out roofing and waterproofing services for various clients. It contracts the services of various sub-contractors who undertake roofing and waterproofing services on its behalf.

[11] In early 2013, Ms Krutilina, an immigrant to New Zealand was looking for work. Ms Krutilina and Mr Kharitonov and Mr Rjevski had a mutual acquaintance by the name of Olga. Olga told Ms Krutilina that CBR Roofing was looking for a person to work in its office, helping it with the filing of documents, sending out of invoices, and various other office work. Ms Krutilina made contact with CBR Roofing and was subsequently interviewed by Mr Kharitonov and Mr Rjevski. At the interview Ms Krutilina was told that they needed a person to help with office work, including making contact with suppliers, clients, payment of salaries, invoicing, office filing and paperwork.

[12] It was accepted by Mr Kharitonov at the Authority's investigation meeting that Ms Krutilina offered and accepted a wage of \$17.00 gross per hour. It was also accepted that there was no written employment agreement but that a verbal agreement was reached between the parties that Ms Krutilina would undertake office work for CBR Roofing at the rate of \$17 per hour. Where the parties differ is that Ms Krutilina says she understood she was an employee and Mr Kharitonov says she was not an employee, rather a contractor.

[13] Ms Krutilina initially worked a five day 40 hour a week in CBR Roofing's office. Ms Krutilina did not receive holiday or sick pay, but she understood she was entitled to such payments as she believed she was an employee. Ms Krutilina provided the Authority with one of her wage slips, which is entitled:

CBR Roofing and Waterproofing Solutions Ltd

Pay Advice Slip for the Pay Period Ended: 05/12/13

The Employee Tax Code is ME and Ms Krutilina's occupation is described Accounts Administrator.

[14] The pay slip shows Ms Krutilina's rate as being \$17 from which PAYE has been deducted and the nett amount direct credited into Ms Krutilina's ASB bank account. Ms Krutilina also provided the Authority with her ASB bank statements showing weekly payments of wages by CBR Roofing into her bank account.

[15] An Inland Revenue Department document provided by Ms Krutilina shows salary paid and PAYE deductions made by CBR Roofing on behalf of Ms Krutilina.

[16] It was accepted by Mr Kharitonov that Ms Krutilina worked in the office, even though he described her role as that of an office lady, whereas Ms Krutilina described her role as Office Administrator. Ms Krutilina undertook office duties and was the only person working in the office. CBR Roofing's contractors who Mr Kharitonov says also had PAYE deducted from their income, contracted their services to CBR Roofing undertaking roofing and waterproofing services. They too did not receive holiday pay or sick leave.

[17] Ms Krutilina was not paid over Christmas 2013 and when she returned to work in January 2014, her hours were reduced to 30 hours per week. From January 2014, Ms Krutilina worked from 30 hours a week from Monday to Thursday, at the rate of \$17 per hour. In May 2014, Ms Krutilina was asked not to return to work as CBR Roofing had encountered some financial difficulties. Ms Krutilina decided to resign and gave one weeks notice of resignation. Ms Krutilina was not paid notice nor was she paid for a statutory holiday and holiday pay. It was after Ms Krutilina sought these payments that CBR Roofing asserted that she was not an employee, she was a contractor, and she was not owed the monies sought by her.

[18] The overall impression from all of the facts in this matter, of the underlying and true nature of the relationship between CBR Roofing and Ms Krutilina is that their relationship was that of employer/employee. Ms Krutilina was instructed by either of the directors of CBR Roofing to undertake office work on a daily basis. Ms Krutilina submitted timesheets, not invoices, worked regular hours and was paid wages regularly from which PAYE was deducted. Payment of wages and the deduction of PAYE is an indicator of an employment relationship, as is the type of work carried out by Ms Krutilina. It is clear that Ms Krutilina was not in business on her own account and carried out instructions as issued by either of the directors of CBR Roofing.

[19] For the above reasons the preliminary issue of the status of Ms Krutilina is that she was an employee, not an independent contractor. Therefore, the Authority does have jurisdiction to deal with Ms Krutilina's claim against CBR Roofing that she is owed wages and holiday pay.

[20] Ms Krutilina provided details of the wages and holiday pay owed and I accept her evidence that she is owed \$2,335.08 gross by CBR Roofing.

Determination

[21] I order CBR Roofing to pay Ms Krutilina the sum of \$2,335.08 gross within 14 days of the date of this determination.

Costs

[22] Neither party was represented and so I make no order as to payment of legal costs. However, Ms Krutilina is entitled to be reimbursed the filing fee of \$71.56. I order CBR Roofing to pay Ms Krutilina the sum of \$71.56 within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority