

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Anthony McKinley (Applicant)
AND Eric Williams t/a Bladecutters Lawncare (Respondent)
REPRESENTATIVES John Anthony McKinley In person
Eric Williams In person
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 7 December 2004
DATE OF DETERMINATION 21 January 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] John McKinley seeks to recover holiday pay and final pay entitlements from Eric Williams.
[2] Mr Williams denies this claim. He says Mr McKinley was a contractor who was paid cash.

Background

[3] Mr McKinley started work with Mr Williams on his property maintenance round in November 1999. The terms and conditions of engagement were not in writing. Mr McKinley and Mr Williams agreed an hourly rate of \$11.00. Throughout his employment with Mr Williams Mr McKinley was paid \$440.00 cash per week. He worked an average of 40 hours per week Monday to Friday.

[4] Mr McKinley said he told Mr Williams at the outset of their relationship that he did not want any problems with the IRD and asked Mr Williams to take care of the tax. He said he could not remember discussing what sort of tax. Mr McKinley said he understood Mr Williams took the tax from his wages and the \$11.00 per hour he received was an "in the hand" rate.

[5] Mr Williams said he gave Mr McKinley a job when he needed one. He said he paid him \$440.00 per week cash in the hand and that no tax was paid on this amount. Mr Williams said he kept no records of these payments to Mr McKinley.

[6] In March 2000 Mr Williams presented Mr McKinley with the following documents for signature; a covering note requesting his IRD and bank account numbers and address, a declaration that Mr McKinley was a sub contractor "responsible for [his] own taxes, ACC, GST if redg" and an individual employment contract. Unsigned copies of these documents were made available to the Authority by Mr Williams. Mr Williams did not know why the documents characterised his

relationship with Mr McKinley as both an employee and a contractor. He said he prepared these documents because he wished to formalise his relationship with Mr McKinley

[7] Mr McKinley said he signed the documents and returned them to Mr Williams but did not follow it up because he was too busy. Mr Williams said the documents were never signed by Mr McKinley.

[8] Mr McKinley said he received two pay slips during his employment with Mr Williams but has been unable to locate these documents to produce them to the Authority. Mr Williams said no pay slips were ever issued to Mr McKinley. Mr Williams said he recalled Mr McKinley requesting pay slips on a number of occasions during his employment. Mr Williams told me he did not want to start issuing pay slips because that would mean tax would have to be paid.

[9] At Mr McKinley's request Mr Williams wrote to Mr McKinley's bank confirming his weekly earnings for the purposes of mortgage approval.

[10] Mr McKinley said he took three days annual leave during each year of his employment over the Christmas/New Year break. He says his requests for annual leave at other times of the year were declined and Mr Williams told him outstanding annual leave did not transfer to the following year. Mr Williams said he and Mr McKinley never discussed annual leave.

[11] Mr McKinley's employment with Mr Williams ended on 17 October 2003. Mr McKinley did not receive payment for his last week's work or holiday pay. Mr Williams has not challenged Mr McKinley's claim for final week's pay.

Determination

[12] I find Mr McKinley was employed by Mr Williams. Mr Williams directed Mr McKinley's work, provided the tools and paid him a regular weekly wage even when work was unable to be performed due to inclement weather.

[13] Mr Williams says he paid Mr McKinley cash and no deductions for tax were made. Mr McKinley says he understood the agreed hourly rate of \$11.00 was in the hand and Mr Williams would gross up the hourly rate to accommodate the tax component. I am not satisfied on the evidence received that Mr Williams and Mr McKinley agreed to an "under the table" arrangement for the purposes of avoiding tax obligations. Mr McKinley's conduct does not support such a finding; he repeatedly asked for pay slips and asked Mr Williams to write to the bank confirming his weekly earnings. Mr Williams' failure to keep wage and time records has disadvantaged Mr McKinley's ability to know how his wages were calculated during or subsequent to his employment and Mr Williams must now bear the consequences of his failure to comply with his legal obligations as an employer.

[15] I find Mr McKinley is entitled to holiday pay for the period of his employment less the 12 days taken. The Holidays Act 1981 (the relevant legislation during the period of Mr McKinley's employment with Mr Williams) entitles employees to three weeks annual leave for each year of employment. Holiday pay is calculated at 6% of gross annual earnings. In the absence of any wage and time records and based on the information received Mr McKinley's net annual earnings were \$22,880.00, 6% of which is \$1372.80. Mr McKinley was employed by Mr Williams for two weeks short of four years. Taking this into account Mr McKinley's holiday pay entitlement for the period of his employment with Mr Williams is \$5,438.40 less a total of 9 days annual leave of \$1056.00.

[16] **I order Mr William's to pay Mr McKinley \$4,382.40 net in outstanding holiday pay.**

[17] Mr McKinley's unchallenged evidence was he walked off the job at 9.45am on Friday 17 October 2003. He was not paid for the work performed during that week. Given the early morning walk off Mr McKinley is entitled to four days pay for the week ending 17 October 2003.

[18] I order Mr Williams to pay Mr McKinley \$352.00 net, four days wages for the week ending 17 October 2003.

Costs

[19] In pursuing his employment relationship problem to the Authority Mr McKinley has incurred the cost of the \$70.00 filing fee. I order Mr Williams to pay Mr McKinley \$70.00 by way of reimbursement of this fee.

Marija Urlich
Member of Employment Relations Authority