

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 39
5356541

BETWEEN PHILLIP RUSSELL MORRIS
 Applicant

AND GERHARD THOMAS and
 LINDIE DE KLERK
 Respondents

Member of Authority: Philip Cheyne

Representatives: Phillip Morris, the Applicant in person
 Gerhard Thomas, the Respondent in person

Determination: 8 March 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Gerhard Thomas contacted WINZ looking for an employee and was introduced to Phillip Morris who at that time was unemployed. They met and Mr Morris began working for Mr Thomas immediately. No intended employment agreement was provided to Mr Thomas then or later. Mr Morris was paid sporadically. Eventually he terminated the employment because he could no longer afford not to be paid regularly or personally pay work related expenses for Mr Thomas's business.

[2] Mr Morris seeks arrears of wages and expenses.

No reply by the respondents

[3] The statement of problem was sent to Mr Thomas and Ms De Klerk at the address given by Mr Morris on 13 September 2011. Mr Thomas rang the Authority on 4 October 2011 to say that he had only just received the documents and would

send in a reply by courier. Nothing arrived at the Authority. The support officer rang and left a message for Mr Thomas on 4 November 2011. On 8 November 2011 Mr Thomas told the support officer that he had sent a statement in reply by courier. The next day Mr Thomas told the support officer that he would later ring with the tracking number. Nothing arrived and nothing further was heard from Mr Thomas.

[4] Later, the Authority served the notice of investigation meeting and a further copy of the statement of problem personally on Ms De Klerk. That prompted a response by email from Ms De Klerk to the effect that she was not a director of the business and could not understand why her name was included. In response the Authority pointed out that the claim was against her in her personal capacity and advised her that she needed to lodge a statement in reply if she wished to defend the matter.

[5] Mr Thomas contacted the Authority on 29 February 2012 to advise that he could not attend on 1 March 2012 at the scheduled starting time. It was agreed to defer commencement until 10.00am. I note that only Mr Thomas appeared at the investigation meeting shortly after the re-scheduled starting time. Despite the absence of a statement in reply I permitted Mr Thomas to give evidence in defence of the claim.

Issues

[6] Mr Morris says that his employer was Mr Thomas and Ms De Klerk jointly. He made the arrangements about the employment initially only with Mr Thomas. Mr Thomas and Ms De Klerk live together as a couple. Ms De Klerk worked as a property manager for a real estate firm. The business in which Mr Morris worked did maintenance work for rental properties. Ms De Klerk sent the work orders to *Thomas Construction and Maintenance*. Mr Morris told me that he did not really know about the extent of Ms De Klerk's involvement in this business except that he witnessed some discussions between her and Mr Thomas that seemed to suggest her involvement was as a business partner.

[7] I note that a company called *Thomas Joinery Limited* was formed on 29 July 2011. It was formed to purchase an unrelated existing business called *Traditional*

Kitchens. Ms De Klerk has 25 shares in the company and Mr Thomas has 75 shares and is the sole director. However, this company cannot be the employer of Mr Morris as it was formed after the employment commenced and there is nothing to indicate that Mr Morris agreed to transfer his existing employment to the company.

[8] Mr Thomas told me that Ms De Klerk was not involved as a business partner of *Thomas Construction and Maintenance* and that he alone personally employed Mr Morris. At this point there is no sufficient basis to disbelieve Mr Thomas. It follows that Mr Thomas alone was the employer of Mr Morris.

[9] There is no dispute that Mr Morris paid for various items used by the business for which he is entitled to be reimbursed. I accept the evidence of Mr Morris that each of the items listed in the annexure to the statement of problem were purchased by him for the business. Mr Thomas must pay Mr Morris \$511.57 to reimburse him for this expenditure.

[10] Mr Morris says that he worked a total of 234 hours from the week ending Friday 15 July 2011 until the week ending Friday 2 September 2011. Mr Thomas told me that he could not access any records. I see no reason to doubt Mr Morris's evidence so I find that he worked 234 hours as set out in the statement of problem.

[11] There is a disagreement about the appropriate rate of pay. Mr Morris says that he should be paid \$22.00 per hour as an appropriate rate for a person with the responsibilities of his position. However, he also says that he was never told what the rate of pay would be. Mr Thomas says that the rate payable was \$18.00 per hour. In the absence of evidence in support of Mr Morris's claim I must accept Mr Thomas's evidence about the rate of pay. It follows that Mr Morris should have been paid \$4,212.00 (gross) for his work which with proportionate holiday pay becomes \$4,548.96 (gross).

[12] Mr Morris received \$500.00 in cash and \$1,000.00 by direct credit into his bank account, a total of \$1,500.00 (gross). He is therefore entitled to a further \$3,048.96 (gross).

[13] Mr Morris used his own vehicle for the business and he is claiming \$50.00 per week for mileage. However, there was no agreement about any mileage allowance. The Authority does not have power to set a rate for the parties.

Orders

[14] Gerhard Thomas must pay Phillip Morris \$511.57 as reimbursement for expenses incurred on behalf of Mr Thomas's business.

[15] Gerhard Thomas must pay Phillip Morris \$3,048.96 (gross) as arrears of wages and holiday pay.

[16] These sums should have been paid to Mr Morris during the employment. Mr Morris is entitled to interest on these amounts, starting on 1 September 2011 until the sums are paid in full, at the rate of 5% per annum.

[17] Finally, Mr Thomas must pay Mr Morris \$71.56, being the lodgement fee paid for this matter.

Postscript

[18] During the investigation meeting Mr Thomas told me that there had been additional payments to Mr Morris and he promised to obtain bank records to demonstrate that. He agreed to do so by 4.00pm on Wednesday 7 March 2012. That time came and went without the Authority hearing further from Mr Thomas.

Philip Cheyne
Member of the Employment Relations Authority