

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Sean Andrew Roche (Applicant)
AND Damen Churches and Gavin Churches (Respondent)
REPRESENTATIVES Richard Roche, advocate for the applicant
Gavin Churches, advocate for the respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 31 January 2006
DATE OF DETERMINATION 20 April 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant was employed as a labourer by the respondent and secured this position through Youthworks, a service operated by the Canterbury Development Corporation. The applicant says he left his employment on 5 July 2005 without giving notice. He claims he has not been paid his holiday pay and that his final week's wages have been withheld. His and others attempts to secure payment have foundered.

[2] The respondent has not sent a statement in reply but Mr Gavin Churches attended the hearing primarily to explain that while he operated the cheque book, the employer was actually a company called All Weather Roofing and Plastering Limited. Mr Churches stated he was, and is not, a director, nor is he a shareholder of the company. The Companies Office search confirms Mr Damen Churches as the sole director and principle shareholder in the company.

The background

[3] Having received the statement of problem which cited *Damon and Gavin Churches* as the employer, the support officer duly forwarded a copy to the address of the respondents given on the statement of problem. The courier pack was returned to the Authority's Christchurch office on 22 November 2005 marked *Home vacant*.

[4] Having considered the situation, I requested that the support officer speak to Mr Robin Anker at Youthworks to determine whom he dealt with in placing the applicant with the respondent. The support officer was told that all Mr Anker's dealings had been with Gavin Churches.

[5] Accordingly, I instructed the support officer to send a notice of direction to Gavin Churches and to have service of the document effected by Baycorp. That agency eventually managed to serve Gavin Churches with the documents despite his attempt to flee. As noted above, Gavin Churches attended the investigation meeting but only to plead his lack of liability and to rail against his being served at or within two kilometres of his workplace.

[6] For the record there is no written employment agreement between the parties.

The investigation meeting

[7] The meeting was relatively brief. The Authority was satisfied that the applicant has a justified claim for unpaid wages and holiday pay.

[8] Following the investigation meeting I issued a notice of direction and requested the support officer to serve it on the company's registered office at a Christchurch chartered accountants premises. That courier pack was also returned on 15 February 2006 with a slip advising that *All Weather Roofing and Plastering Ltd is no longer a client. We do not have a forwarding address for them.*

[9] Having been satisfied that the Authority has met its obligations under the appropriate regulations I have proceeded to determine the matter. In the event that the company wishes to be heard following the issuing of the determination the Authority will require a formal application to re-open the investigation.

Discussion and analysis

[10] As noted above, no written employment agreement was signed between the parties. Section 65 of the Employment Relations Act 2000 sets out the terms and conditions of employment where no collective agreement applies. The section states:

- (1) *The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer-*
 - (a) *must be in writing; and*
 - (b) *may contain such terms and conditions as the employee and employer think fit.*

- (2) *However, the individual employment agreement-*
 - (a) *must include-*
 - (i) *the names of the employee and employer concerned; and*
 - (ii) *a description of the work to be performed by the employee; and*
 - (iii) *an indication of where the employee is to perform the work; and*
 - (iv) *an indication of the arrangements relating to the times the employee is to work; and*
 - (v) *the wages or salary payable to the employee; and*
 - (vi) *a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised; and*
 - (b) *must not contain anything-*
 - (i) *contrary to law; or*

(ii) *inconsistent with this Act.*

[11] Because the respondents have not met obligations under this section of the Act it is difficult to determine whether the applicant was aware that his employer was not Damen and Gavin Churches, but a limited liability company with a paid up capital of \$100. A written agreement would have put the issue beyond doubt.

[12] Sean's evidence to the Authority was that his wages were paid to him in cash as he had no bank account, so a wages cheque carrying a company's name or a direct credit to a bank account identifying the depositor was not available to the applicant nor to the Authority.

[13] This job was the applicant's first and his inexperience of commercial matters, in all probability, led to his belief that it was Damen and Gavin Churches who employed him. The reality is that it was Damen who paid his wages and who was to all intents and purposes his boss, and Gavin Churches who authorised the payment of wages and who refused to pay the applicant his final week's wages and outstanding holiday pay. In determining the matter I have applied the rule of undisclosed principal.

The determination

[14] I find that the respondent's breach of section 65 of the Act gave rise to the applicant's genuine belief that he was employed by the two brothers, and that he became aware of the company's existence and its significance only when it was used to resist his formal claim in the Authority.

[15] Sean was paid \$330.00 gross per week for a total of 33 hours.

[16] The applicant commenced employment on 5 December 2004 and left on 5 August 2005. This is a period of 34 weeks which when multiplied by \$330.00 gives a sum of \$11,200.00 gross.

[17] Calculating the holiday pay owing to him at the time of his resignation \$11,200.00 multiplied by 6 per cent gives a sum of \$673.20 gross.

[18] To that is to be added the sum of \$330.00 gross which are the wages due to the applicant for his last week of work.

[19] The total therefore payable to the applicant is \$1,003.20 gross.

[20] I find, in equity and good conscience, Mr Damen Churches and Mr Gavin Churches are jointly and severally liable for the payments set out above.

[21] I also think it just in the circumstances that the above named parties pay the applicant the sum of \$70 which was the expense to which he was put to lodge this matter with the Authority.

Orders

[22] I order Mr Damen Churches and Mr Gavin Churches to pay the applicant wages in the sum of \$330.00 gross.

[23] I order Mr Damen Churches and Mr Gavin Churches to pay the applicant holiday pay in the sum of \$673.20 gross.

[24] I order Mr Damen Churches and Mr Gavin Churches to pay the applicant the sum of \$70 without deduction being the lodgement fee for putting his claim before the Authority.

Paul Montgomery
Member of Employment Relations Authority