

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA**

[2024] NZERA 755
3298199

BETWEEN	DANIEL RYAN Applicant
AND	PLAYMAKER LABS LIMITED Respondent

Member of Authority:	Davinnia Tan
Representatives:	Applicant in person No appearance for the Respondent
Investigation Meeting:	27 November 2024 (in Wellington and via AVL)
Submissions received:	None received
Determination:	17 December 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Ryan’s claim is that he was employed by Playmaker Labs Limited (PLL) as a Senior Software Developer and is due outstanding wages and holiday pay for the period from 11 January 2023 to 6 September 2023, for 540 hours of unpaid employment. The amount sought is \$29,079.00 of his wages and \$3,709.85 of holiday pay; a total of \$32,788.85.

The Authority’s investigation

Process leading up to the investigation meeting

[2] PLL has to date, not participated in the Authority’s proceedings. Its representative, Peter Andrew Dowell, has not attended any of the scheduled case

management conferences (CMC) or attended the investigation meeting in person or through the audio-visual link.

[3] Following receipt of Mr Ryan's Statement of Problem on 17 May 2024, the Authority couriered a copy of the Statement of Problem to PPL's registered address as set out on the New Zealand Companies Register. The Authority also sought a Statement in Reply within 14 days upon receipt of the Statement of Problem. The Authority received confirmation it was delivered on 31 May 2024 at 11:54AM. PLL did not provide a Statement in Reply.

[4] On 21 June 2024, another letter was sent to PLL stating the Statement in Reply was overdue and that the matter was now allocated to a Member who would advise the next step in the process. The matter was allocated to Member Szeto who scheduled a case management conference. Notices of the scheduled case conference was sent to both PLL's registered address and its director's address as set out on the New Zealand Companies Register. The Authority received confirmation of its delivery on 10 July 2024. The case management conference took place on 26 July 2024. There was no attendance on behalf of PLL.

[5] As set out in Member Szeto's notice of direction dated 26 July 2024, PLL's sole Director Peter Andrew Dowell was couriered the notice of the scheduled CMC; the Authority Officer telephoned the number the Authority had on file for Mr Dowell, but there was no answer.

[6] Member Szeto directed the parties to mediation and set an investigation meeting date down for 20 November 2024. Mediation Services advised the Authority that Mr Dowell failed to respond back to its communications:

I have made several attempts to contact the respondent Peter Dowell and Peter's last communication to us was on 11 September.

Unfortunately, to date no further communication from the respondent Mr. Dowell, Playmaker Labs Limited regarding dates to schedule this mediation.

[7] Consequently Member Szeto's notice of direction of 26 July 2024 directing parties to mediation was not complied with. The matter was then subsequently transferred to me for hearing of the matter.

[8] Following receipt of a separate application (number 3306240), the Authority was aware of an email address for Mr Dowell in August 2024, by which he was communicating with the Authority and the applicant on that other matter. That email was subsequently used to send communications from the Authority to Mr Dowell for this matter. On 26 August 2024, the Authority forwarded all documentation to him from the Authority. This included Member Szeto's notice of direction of 26 July 2024. The email address was also provided to Mediation Services on 26 August 2024.

[9] On 13 September 2024, Mediation Services contacted the Authority (copying Mr Dowell and the other parties in the email) to advise that Mr Dowell told them he was not in a position to attend mediation until two weeks' time. On 2 October 2024, I instructed the Authority Officer to email parties advising that the investigation meeting would proceed if mediation did not take place.

[10] On 23 October 2024, Mediation Services contacted the Authority and advised:

Kia ora koutou,

I have made several attempts to contact the respondent Peter Dowell and Peter's last communication to us was on 11 September.

Unfortunately, to date no further communication from the respondent Mr. Dowell, Playmaker Labs Limited regarding dates to schedule this mediation.

I also informed the respondent of their obligations in complying with the Notice of Direction, that mediation be held before or on 19 November.

[11] Unfortunately, Mr Dowell never responded to Mediation Services. Consequently, the next step in the process as outlined in Member Szeto's notice of direction was for the matter to proceed to an investigation meeting.

[12] Having reviewed application 3306240, I considered there was merit to have Mr Ryan's application joined together with that matter for an investigation meeting and sought to seek the parties' comment before proceeding. This application was originally set down for 20 November 2024. The Authority Officer sent an email to Mr Ryan, the applicant in application 3306240, and Mr Dowell on 6 November 2024, advising of this and a request to hear both matters together either on 20 November 2024 or 27 November 2024.¹

¹ 20 November 2024 had been the original date for the investigation meeting for this application; and 27 November 2024 was the date set down for an investigation meeting for application 3306240.

[13] Mr Ryan and the applicant on application 3306240 replied separately by email and agreed to have the matter heard together on 27 November 2024. Mr Dowell did not respond to the Authority on this point.

[14] On 6 November 2024, Mr Dowell emailed the Authority but only addressed his email to the applicant on application 3306240 is as follows:

My understanding was that both you and ... worked with ... under the banner of "Oasis" which was looking to provide services and potential IP to the playmaker business so there was no individual contracts agreed to the start

I questioned who Oasis was but never really got a clear answer as it wasn't a registered company

A spreadsheet of hours was produced which also included work from a previous job that was down in relation to a maori organisation

Please provide you view on Oasis roll and how that worked & the expectation that both you and Jesse had on relation to your involvement

Thanks & regards

Peter

[15] I convened another case management conference with all the parties together including the applicant on application 3306240 to clarify the process ahead for the investigation meeting now scheduled for 27 November 2024. The case management conference was scheduled for 21 November 2024 and communicated via email to the parties (including Mr Dowell). Mr Dowell did not attend despite being in receipt of the notice. As noted above, he had been communicating with the Authority but never directed his communications on the Authority's processes, nor did he request to have the case conference rescheduled or tender apologies for non-attendance.

[16] As set out in my notice of direction of 21 November 2024, the purpose of the case management conference was to discuss the reasons for seeking to join the applications under s 221 of the Employment Relations Act 2000 (the Act) and explained that this was due to the potential overlap of evidence in both applications, and considered the substantial merits and equities of the case warranted the matters be joined. I also explained that this did not necessarily mean both applications would result in the same outcome. Mr Ryan and the applicant on application 3306240 acknowledged what had been discussed. My notice of direction was issued that day to all parties, detailing what had been discussed including the procedure for the investigation meeting for 27 November 2024.

[17] On 26 November 2024 at 5:03PM, the Authority received an email from Mr Dowell stating:

Hello ...

I am in the middle of a structure deal that will like mean the survival of the company and as such happy to deal directly with Dan on this matter

I'm going to need another 2 weeks so I can work through processes with the potential partners

Hence I think we should postpone the call accordingly

[18] As this email was received outside office hours, I did not receive notice of the email until after the investigation meeting concluded. I consider that as he had not heard back from the Authority Officer and had the AVL link she previously provided to him for the investigation meeting, he had every opportunity throughout the day of 27 November 2024 to join in by AVL to request an adjournment of proceedings had he required one, or to have contacted Mr Ryan directly. I note as an aside apart from this one email, all other emails from Mr Dowell had included Mr Ryan and Ms Squires as recipients.

[19] For the avoidance of doubt, I consider that all notices, letters, emails and documents were properly served on PLL in accordance with regulation 16(3) of the Employment Relations Authority Regulations 2000. In reaching this view, I have taken into account Mr Dowell's communications and conduct with the Authority since Mr Ryan's application was lodged with the Authority. This shows that Mr Dowell has had opportunity to participate in the Authority's proceedings in accordance with its directions, but chose not to do so. Mr Dowell has been selective with his communications, choosing to respond to certain emails and ignoring others where a response was expressly required. This includes his non-compliance with the direction to mediation by ignoring Mediation Services' communications, non-attendance in all case conferences, refusal to provide a Statement in Reply, and his non-attendance at the investigation meeting.

Investigation meeting

[20] There were three witnesses in attendance. Two of whom (one attended by audio visual link) were witnesses for the applicant on application 3306240. The witness for Mr Ryan was Stephen Press who attended in person.

[21] All witnesses (including Mr Ryan) answered questions under oath or affirmation from me.

[22] All material from the parties was fully considered. However as permitted by s 174E the Act, this determination has not recorded all evidence and submissions received.

The issues

[23] The issues requiring investigation and determination were:

- (a) Was Mr Ryan an employee or a contractor of PLL?
- (b) If he was an employee, is he owed wages and holiday pay from PLL?

Was Mr Ryan an employee and if so, are there any wages outstanding?

[24] Mr Ryan stated that he was employed as a senior developer, got paid a salary, worked in PLL's offices, and worked 7.5 hours every day up to 37.5 hours per week. This was his employment agreement with PLL. He applied for leave like an employee, and his work for PLL was not him conducting his own business or working for himself.

[25] As part of his evidence, Mr Ryan provided an employment agreement with the company name "Pricemaker Limited" on it and Mr Ryan's name at the bottom. It was signed on behalf of Pricemaker Limited by John Quinlivan and dated 17 January 2018, but was unsigned by Mr Ryan. Schedule A to this unsigned agreement stated the following, in addition to a description of the job responsibilities:

Position Description

Job Title: Software Developer

Reports to: Head of Development

...

Location: Wellington

[26] Schedule B of the agreement stated an annual salary of \$95,000 pa gross which would be paid fortnightly into the nominated account, including giving the "employee" the option of joining KiwiSaver, and the application of the Holidays Act 2003, and the provision of tools and equipment to undertake the role.

[27] Schedule C of the agreement had a heading “Employment Relationship Problem Resolution”. The content of the schedule set out the process should an employment relationship problem arose

[28] When asked why the employment agreement stated Pricemaker Limited as his employer, Mr Ryan stated there was a change in the business name from Pricemaker Limited to PLL when PLL bought Pricemaker Limited around 2018, but this was the only version of the employment agreement he could find, noting there had been other iterations following the change of the business name to PLL. Mr Ryan’s evidence was that he was not able to access PLL’s internal operating systems (including the payroll system) and copies of their formal personnel records were no longer accessible. On the companies register, I note that Mr Dowell is the director of both companies and PLL is currently listed as the sole shareholder of Pricemaker Limited.

[29] Mr Ryan was able to provide some copies of old payslips, titled “Pay Slip” which set out payments made by PLL to Mr Ryan, including the amount of leave he had, deductions for KiwSaver, PAYE, gross pay, and amounts credited into his bank account. The payslips were provide for the period ending 23 March 2022 for the amount \$2,372.04; and period ending 9 March 2022 for the amount \$2,372.03.

[30] Mr Ryan further provided a spreadsheet which he obtained from PLL’s then Chief Executive Officer Erin Walshe on 25 October 2024, which set out details of Mr Ryan’s fortnightly pay including categories: “staff”; “hours paid”, “gross taxable pay”, “gross pay”, “PAYE”, “KiwSaver”, “Total Deductions” and “Net Pay”. Significantly, at the bottom of the spreadsheet, it set out the following:

TOTAL Hours Actual	1080
Less TOTAL Paid	540
Hours Unpaid	540
Rate \$53.85	Value \$29,079.00

[31] This followed an email from Mr Walshe to Mr Ryan (also dated 25 October 2024) stating:

...Further to our conversation earlier this week, please refer to the below.

I was the CEO of Playmaker Labs Limited until September 2023. Although I no longer have access to the payroll system I did keep a record of outstandings for staff in case there was an opportunity to claw some or all of it back, eventually.

[...] I can only disclose to you what I have recorded as your unpaid salary and no other former employees without their express permission...

[32] Mr Walshe further noted that the total PLL owed to staff is \$375,337.23 and that the total owed to Mr Ryan, to include Holiday Pay, was “32,788.85”.

[33] Mr Ryan also provided a copy of a text message (dated on or around 25 October 2024) from John Quinlivan (who had signed the employment agreement referred to above on behalf of Pricemaker Limited) stating:

Dan’s pay:
Back Pay Owed –
\$29,079
Holidays - \$3,609.85
Total - \$32,788.85

[34] Mr Ryan also produced copies of his bank statements during the period 15 December 2022 to 25 August 2023 which shows payments made by PLL and which PLL referenced as “salary”. These were consistent throughout the period for which Mr Ryan claims to have been employed by PLL.

[35] Mr Ryan stated that although he initially received a consistent salary per fortnight, this changed from around late 2022 due to PLL’s financial difficulty. He said that because of this, he and two other senior developers agreed to work part time three days a week so the company could recover. Mr Ryan said he would work his normal hours per day which were 7.5 hours for each of those three days, which were then increased to four days a week. His salary was pro rata-ed to reflect this, but he did not receive a new employment agreement.

[36] However Mr Ryan said that in November 2022, PLL lost a major client and by January 2023, he and other senior developers would receive partial pays which was less than their hours worked. He said that they were told the pay would depend on Mr Dowell’s other business, the Angus Inn (which recently went into liquidation). What Mr Ryan got paid each fortnight became irregular payments as it would depend on Mr Dowell being able to put money in, and it was not by mutual agreement. This is why by September 2023, Mr Ryan left PLL. I asked why he did not leave sooner, and Mr Ryan said it was because he and others were always persuaded that the business would turn around. He felt loyal to the company having worked there since its former structure

in 2017 and he believed the company would recover. Mr Ryan stated he would often get “updates” about the company and so he believed things would change. Mr Ryan stated that the partial payments did not match the hours he worked which is reflected in Mr Walshe’s spreadsheet confirming total unpaid hours were 540 hours during this period from January 2023 to when Mr Ryan left on 6 September 2023.

[37] Mr Press who gave evidence as a witness, stated that he too was owed money by PLL. He recalled that payment was often delayed despite being advised payments would be made fortnightly. Mr Press stated that on an ad hoc basis he would be asked how much would be needed to cover his mortgage and that would be the amount he would be paid. Occasionally he would be paid “top ups” where PLL could. Mr Press noted that he had been a freelancer in a previous life and he understood the difference between being an independent contractor versus an employee. He stated that in this context, he and Mr Ryan were employees who were owed unpaid wages.

[38] I asked Mr Ryan about shares he had in PLL. According to the annual return filed by PLL on 11 October 2024 with the Companies Register, PLL had 80 shareholders which included Mr Ryan (as holding 42477 shares out of a total of 6,0277,555 shares in PLL or 0.07% of the total shares). On 1 November 2024, Mr Dowell emailed the Authority, copying in Mr Ryan. In this email Mr Dowell wrote: “I have personally gifted Daniel approximately 45000 shares in the company so not sure what he is expecting in outstanding wages.”

[39] Mr Ryan stated that when he was at PLL these were “gifted” but had no value and were “worth nothing” and unrelated to the wages owing. Mr Ryan stated the shares were not to substitute his salary and there was never any agreement to shares replacing his wages.

Analysis

Was Mr Ryan an employee of PLL?

[40] In assessing whether a person is an employee, s 6(2) of the Act requires the Authority to determine the real nature of the relationship. Such assessment informs consideration of whether the relevant person is employed do work for hire or reward under a contract of service.² All relevant matters must be considered, including those

² Employment Relations Act 200, s6(1).

indicating the intention of the parties.³ However, any statements describing the nature of their relationship are not determinative.⁴

[41] Section 6 of the Act requires that the Authority consider all relevant matters. In *Bryson v Three Foot Six Ltd* Blanchard J commented on what “all relevant matters” includes, and referred also to the relevant common law tests as to the assessment of whether a person is an employee:⁵

All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his own account (the fundamental test), which were important determinants of the relationship at common law....

[42] In *Leota v Parcel Express Limited*⁶, the Court stated:

An employee works for the employer, and the employer’s business, to enable the employer’s interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[43] Having reviewed the evidence, I have no doubt that Mr Ryan was an employee of PLL, as defined under s 6 of the Act. Mr Ryan has provided ample evidence that his relationship with PLL was one of genuine employment. This included the following:

- a. An individual employment agreement, although unsigned; which was a boilerplate agreement with standard terms and conditions that would govern a typical employment arrangement, including an annual salary

³ Employment Relations Act 2000, s6(3)(a).

⁴ Employment Relations Act 2000, s6(3)(b).

⁵ *Bryson v Three Foot Six Limited (No 2)* [2005] NZSC 34, at [32], Blanchard J on behalf of the Court.

⁶ *Leota v Parcel Express Limited* [2020] NZEmpC 61.

of \$95,000.00 and clearly described job description and conditions relating to employee entitlements;

- b. PLL paid Mr Ryan a salary which was described as such on Mr Ryan's bank account;
- c. Copies of payslips provided indicate he was paid and taxed as an employee and not a contractor;
- d. Confirmation by the former chief executive that Mr Ryan had employment entitlements and evidence that Mr Ryan was taxed as an employee; and had KiwiSaver contributions by PLL;
- e. He worked regular hours and in PLL's offices; and
- f. Had no business of his own.

[44] I find this evidence unequivocal that Mr Ryan worked for PLL as its employee as defined under s 6 of the Act. Mr Ryan was under the control and direction of PLL and enabled PLL's interests to be met. The evidence is clear that at no point was Mr Ryan working on his own account in pursuit of gains for his own entrepreneurial enterprise.

Wages owing

[45] Mr Ryan has relied on evidence provided by the former chief executive officer, Mr Walshe, of PLL of wages owing, including the unsigned employment agreement which set out his annual salary of \$95,000.00 and past pay slips from PLL and his personal bank statements.

[46] The bank statements provided were for the period 15 December 2022 to 11 September 2023. Apart from the fortnightly payments of 15 December 2022 and 29 December 2022 of \$2,369.78 each, all other salary payments made by PLL were of inconsistent one-off amounts ranging from \$293.24 to \$2,115.23, which were paid sometimes four days apart. Mr Ryan stated that this was due to PLL not being able to pay his normal salary on a fortnightly basis and therefore the one-off payments were "top ups" as a way to pay staff what PLL could.

[47] During the investigation meeting, Mr Ryan had difficulty reconciling the financials against the spreadsheet which Mr Walshe provided him in order to quantify an accurate amount. I do not fault him for this, as the responsibility to keep a wages and time record lies with the employer. However, Mr Ryan considers that the spreadsheet

provided by Mr Walshe is the closest to what Mr Ryan considers is accurate as to the amount he believes he is owed by PLL.

[48] On this point, I note that s 132 of the Act sets out the following:

1. Where any claim is brought before the Authority under [section 131](#) to recover wages or other money payable to an employee, the employee may call evidence to show that—
 - (a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and
 - (b) that failure prejudiced the employee’s ability to bring an accurate claim under [section 131](#).

2. Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—
 - (a) the wages actually paid to the employee, including overtime rate payments, and penalty rate payments;
 - (b) the hours, days, and time worked by the employee;
 - (c) the district in which the employee worked for each hour and day (*see* [section 135](#) of the Fair Pay Agreements Act 2022).

[49] As PLL did not engage or respond to Mr Ryan’s claims, pursuant to s 132(2), I accept the claims made by Mr Ryan in respect of the outstanding wages owing to him. I accept that during the period of 11 January 2023 to 6 September 2023 he had worked 1040 hours, but was only paid for 540 hours, leaving another 540 unpaid. According to Mr Walshe’s spreadsheet of salary owing, Mr Ryan is owed a sum of \$32,788.85.

[50] The total outstanding arrears owed to Mr Ryan is **\$32,788.85** calculated as follows:

- Total wages for 540 hours (for the period 11 January 2023 to 6 September 2023) of \$29,079.00
- Leave and holiday pay owing of \$3,709.85.

[51] I find that PLL has not complied with its statutory obligations and it is appropriate to make an order that PLL pay Mr Ryan **\$32,788.85**.

[52] As Mr Ryan secured new employment following his departure from PLL and began this role within a few days after leaving PLL, there is no entitlement to additional loss of wages on top of what is owed to him.

Orders

[53] I order Playmaker Labs Limited to pay Daniel Ryan, within 28 working days, **\$32,788.85** in arrears of wages (including annual holiday pay and statutory holiday entitlements); and **\$71.55** for the filing fee incurred.

Costs

[54] As neither party was represented, there is no cost award.

Davinnia Tan
Member of the Employment Relations Authority