

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 105/10
5146253

BETWEEN

WAYNE SMITH
Applicant

AND

IMPACT PILEDIVING
LIMITED AND AARON
PIRIMONA AND PETER
PIRIMONA Respondents

Member of Authority: P R Stapp

Representatives: Daniel Vincent and Sarah Sorsby for Applicant
Graeme Ogilvie for Respondents

Investigation Meeting: 18 May 2010

Determination: 28 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant has claimed he has not been paid annual leave, statutory holidays, bereavement leave and sick leave as entitled. He has claimed he was employed by Impact Pile Driving Limited (IPD) and Aaron and Peter Pirimona personally, before being dismissed by Peter Pirimona at a job in Karori.

[2] Mr Smith claimed that he was unjustifiably dismissed on 17 September 2008 when Peter Pirimona told him he was to "...*f...off then and not [to] come back*". Mr Peter Pirimona denied that claim.

[3] The three respondents denied employing Mr Smith. IPD (owned by Aaron Pirimona) and Peter Pirimona claim that Mr Smith was a contractor and not an

employee at any time. They deny they are jointly liable to pay Mr Smith. Mr Peter Pirimona has been bankrupt from 26 January 2009.

Issues

[4] Was Mr Smith employed by any of the respondents and if so was he an employee or a contractor? If he was an employee is he owed any annual leave, statutory holiday pay bereavement leave and sick leave, and from which respondent?

[5] If Mr Smith was employed was he dismissed by Mr Peter Pirimona? Did the latter tell him he was to “...f...off then and not [to] come back”?

[6] Did Mr Smith properly raise a personal grievance and put his employer on sufficient notice including making any claim for the employer to resolve?

[7] The respondents have claimed Mr Smith has not raised a personal grievance in time and they have not consented to the grievance being brought out of time, although I discovered that claims were raised against Impact Pile Driving Limited in a letter dated 1 November 2008. The issue is whether or not that letter extends to the Pirimonas personally?

[8] The respondents have declined to pay the remedies being sought by Mr Smith.

The facts and the Authority’s findings

What are the respondents’ roles?

[9] This is a complex web of relationships that has not been assisted by the parties failing to keep appropriate records.

[10] Mr Smith’s relationship with Peter Pirimona commenced in 2003 when he worked for a company owned by Peter Pirimona and Aaron Pirimona called *Wainui Excavators Limited* (from 2002 until 22 January 2004). There was no employment agreement but Mr Smith says he was a casual and then became full time. He was paid \$100 per day after tax.

[11] Wainui Excavators Limited (WEL) ceased trading and was struck off the Companies Register on 22 January 2004: Peter Pirimona continued to trade as a sole trader using the name *Wainui Excavators*. His son, Aaron Pirimona, embarked on work also as a sole trader and both of them worked on different jobs until IPD was registered on 30 March 2007, with Aaron Pirimona as the sole director and shareholder. Mr Smith continued to get paid for work that he undertook for Peter and Aaron Pirimona on different jobs. Mr Smith claimed that he was employed by IPD from 30 March 2007 when it was incorporated, but he claims the work he did was for both Peter and Aaron Pirimona personally. In 2008 Mr Smith's daily rate was increased to \$130 per day after tax by Aaron Pirimona. His tax was paid by Peter Pirimona and Aaron Pirimona from their drawings.

[12] I, therefore, conclude that Mr Smith was employed by *Wainui Excavators Limited* first, until the company was struck off.

[13] Secondly, his relationship continued with Mr Peter Pirimona trading as *Wainui Excavators* because Peter Pirimona paid him.

[14] It is only Mr Smith's word that there was a partnership between Messrs Peter and Aaron Pirimona after *Wainui Excavators Limited* was struck off, and that they were working together and used the same accounts from WEL, although it had been struck off. Mr Smith has not satisfied me that this meant they were operating in business together, in law. This could have meant some other arrangements existed in regard to them working on available jobs separately such as Peter Pirimona going to the landfill. However, once Impact Pile Driving Limited was registered Mr Aaron Pirimona was clearly in business on his own since he was the sole director and shareholder in that company. The Pirimonas denied the claim from Mr Smith that they were in partnership and used the same accounts. Some of Mr Smith's evidence is based on assumptions. Thus, I cannot conclude that there was any partnership on the existing evidence. The proof is not sufficient that they were trading together when they say they had separate work.

[15] I am satisfied that the above supports Aaron Pirimona being in business as a sole trader on his own too, and before Impact Pile Driving Limited was registered. I

accept that Aaron and Peter Pirimona were both sole traders with separate businesses for different types of work until Aaron Pirimona set up Impact Pile Driving Limited.

[16] I was informed that Mr Smith was paid by Aaron Pirimona on about five occasions and that Aaron Pirimona paid the tax from his own drawings. There is no information from either of them as to dates and time. From 30 March 2007 Aaron Pirimona was protected by the registered company. Mr Smith claimed first against IPD (1 November 2008) and the first SOP. He accepted that he knew IPD existed. On all other occasions Mr Smith was paid by Peter Pirimona personally. (This was before Peter Pirimona was adjudged bankrupt on 26 January 2009).

Contractor or employee

[17] The next question is whether Mr Smith was a contractor or an employee.

[18] There is no common ground between the parties on their intentions, and thus, this is not determinative of the relationship, I hold. Indeed, I hold that Mr Smith did not know or even care to address his employment status until after the events of 17 September when he visited a lawyer for advice. It had not crossed his mind before then for any reason. The claim from the Pirimonas that Mr Smith was a contractor appears for the first time in the defence in this matter. It must not have been addressed any earlier considering Mr Smith says he was always an employee. There were no written contracts between the parties at all to support the respondents' contention that Mr Smith worked for them as a labour only contractor. Messrs Peter and Aaron Pirimona did not keep any books and paid Mr Smith by cash and cheques without producing any cheque stubs to help reconcile the wage payments. Peter Pirimona and Aaron Pirimona paid Mr Smith's taxes out of their own drawings, which is unusual. The final pay included holiday pay that was paid by Aaron Pirimona upon receiving advice. He informed me that he did not give his advisor all the details at the time and his advisor was going into hospital at the same time.

[19] Peter Pirimona relied upon Mr Smith being able to leave work when he liked and indeed informed me that Mr Smith would often leave when it was raining. Mr Smith had his own stories to tell about Peter Pirimona's attitude to working in the rain. They denied each other's evidence on that. There were no other employees and

there is at least one example of a contracting arrangement with another person's company carrying out work for the Pirimonas. The difference was that Mr Clark seemed organised and set up as a contractor, and Mr Smith was not.

[20] Mr Smith says he was not in business on his own account. He says he had never been a contractor and had always worked for wages. He never invoiced for his payments. He filed his taxes. He produced a Work and Income document that he says was consistent with employment references after he was dismissed, and indeed the document refers to matters relating to being employed with an employer and signed off by Aaron Pirimona (since he was operating under IPD).

[21] I hold that Mr Smith's duties, driving and labouring do not help determine the relationship, except that there is no evidence of any contracting arrangement between the parties for a labour only contract.

[22] Mr Smith was paid over a regular period of time for work by Peter Pirimona and for much less time by Aaron Pirimona.

[23] I was informed by Messrs Aaron Pirimona and Frank Clark that Mr Smith apparently contracted to another business in Whanganui called Bests. They had no actual proof that this was the case. Indeed they did not know whether Mr Smith was actually paid for doing anything at Bests. Mr Smith denied their claims.

[24] I hold that Mr Smith was an employee because he was integrated in the business to work, including control over what he was required to do and when to do any work and who for. The relationship between father and son appears to be a convenience, but Aaron Pirimona's company IPD supports him operating a separate business. The Pirimonas also seemed to have an unclear arrangement with the use of assets, but I hold this alone is not determinative of the relationship and does not assist me. Mr Smith worked regular hours for Peter Pirimona and occasionally for Aaron Pirimona at Impact Pile Driving Limited. Also he clearly had to do what he was told, there were regular arrangements involving his work and there had been no reference to him as a contractor before 2008. There does not appear to have been any set arrangement around the use of the truck log book. This is the same as the way in

which the rest of the businesses were being run without proper books, I hold. I conclude Mr Smith was an employee in the work that he did.

Liability for the claims

[25] Who has the liability for the claims made by Mr Smith for his pay, holiday pay, sick leave and statutory holidays and any unjustified dismissal?

[26] I hold that Mr Smith considered Impact Pile Driving Limited was his employer when he filed his claim in the Employment Relations Authority. Later he filed an amended statement of problem citing Peter Pirimona and Aaron Pirimona personally. Also, the letter raising the personal grievance was sent to Impact Pile Driving Limited to the attention of Peter Pirimona and Aaron Pirimona without identifying them personally as the employer.

[27] The statement of problem does not specify any time and dates for the claims against Impact Pile Driving Limited. Thus, I am not in any position to require Impact Pile Driving Limited to pay Mr Smith.

[28] Given that Mr Smith was paid only five times by Impact Pile Driving Limited and that on all other occasions he was paid by Peter Pirimona and it was Peter Pirimona who sent him away on 17 September his claim can only be against Peter Pirimona.

[29] Mr Peter Pirimona is a bankrupt. His bankruptcy was adjudicated on 26 January 2009. Proceedings against Peter Pirimona must be halted under s 76 (1) of the Insolvency Act, which reads as follows:

Court proceedings are halted

76 ***Effect of adjudication on Court proceedings***

- (1) *On adjudication, all proceedings to recover any debt provable in the bankruptcy are halted.*
- (2) *However, on the application by any creditor or any other person interested in the bankruptcy, the Court may allow proceedings that have already begun before the date of adjudication to continue on the terms and conditions that the Court thinks appropriate.*

The dismissal on 17 September 2008

[30] The personal grievance is in time in so far as Impact Pile Driving Limited is concerned, but out of time for raising a personal grievance against the Pirimonas personally. Even being generous in regard to the letter raising the grievance against Peter Pirimona the matter would be halted under s 76 of the Insolvency Act because Mr Pirimona is bankrupt.

[31] Mr Smith claimed that Peter Pirimona dismissed him on 17 September 2008. This could only have been the case at the time as Mr Smith was working for Peter Pirimona at the time. Mr Smith has made claims that appear to be 'provable debts' in the bankruptcy in terms of s 76 of the Insolvency Act. This claim is halted pursuant to s 76 of the Insolvency Act.

[32] The matter is complicated by Aaron Pirimona's involvement. However, his involvement was consistent because he had occasionally engaged Mr Smith and paid him in the past. Furthermore Mr Smith contacted him and made a claim for a sum of \$4,500 to make the matter go away. The next contact involved Mr Smith claiming 3 weeks holiday pay to settle. As a result Aaron Pirimona on advice paid out Mr Smith what he thought he owed him in regard to holiday pay. This could support the claim against Aaron Pirimona that he was Mr Smith's employer except that Mr Smith acknowledged Aaron Pirimona paid him separately on different occasions and was not in charge of the work at Karori on 17 September and had his own company (IPD). I cannot take the matter any further.

Conclusion

[33] Mr Smith was at various times employed by Wainui Excavators Limited, Peter and or Aaron Pirimona on separate occasions in their separate businesses as sole traders and Impact Pile Driving Limited.

[34] Mr Smith was variously an employee for the respondents, not a contractor.

[35] The proceedings against Mr Peter Pirimona are halted under s 76 of the Insolvency Act.

[36] The claims for unpaid holiday pay, statutory holidays, sick leave and bereavement leave have not been sufficiently made out with any proof of the times and dates and details against Impact Pile Driving Limited. Aaron Pirimona is not jointly liable personally because his business was Impact Pile Driving Limited and he personally is not liable for debts incurred by the other respondents.

Costs

[37] Mr Smith is legally aided. Costs are reserved for submissions and replies in writing.

P R Stapp
Member of the Employment Relations Authority