

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 16  
5464494

BETWEEN                      CHRIS WOODDIN  
   Applicant  
  
A N D                              WILLEM MEIJER  
   First Respondent  
  
   ANTHONY HELM  
   Second Respondent  
  
   STRUCTECH LIMITED  
   Third Respondent

Member of Authority:        M B Loftus  
  
Representatives:              Chrissy Gordon, Advocate for the Applicant  
   Willem Meijer and Anthony Helm on behalf of the  
   Respondents  
  
Investigation Meeting:        27 January 2015 at Christchurch  
  
Submissions Received:        At the investigation meeting  
  
Date of Determination:        12 February 2015

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     The applicant, Chris Wooddin, claims \$4,485.50 with respect to unpaid wages and holiday pay. He also claims he was constructively dismissed given the respondents' failure to pay his wages.

[2]     The response is Mr Wooddin is precluded from pursuing his claims as he was an independent contractor and not an employee. The respondents add they have paid all monies due which implies the constructive dismissal claim has no merit.

## Background

[3] Structech Limited (Structech) is a construction contracting company. It is owned and directed by Mr Meijer. For a short period, which included that during which Mr Wooddin performed work for the company, Mr Helm was also a director.

[4] Mr Wooddin is a digger operator. He was introduced to Messrs Meijer and Helm in late November or early December 2013. They were seeking the services of someone with Mr Wooddin's skills and the introduction was made by an ex-colleague of Mr Wooddin's who was, at the time, performing work for Structech as an independent contractor.

[5] The first meeting occurred at a work site. The parties agree they discussed an hourly rate of pay (\$30.00) and Mr Wooddin commenced working shortly thereafter. They disagree about a number of other facets of the discussion.

[6] About it Mr Helm says:

*The company was set up to use contractors and not PAYE employees. The company was certainly not in a position to take on permanent full time staff. We had a number of contractors working on various projects; they were all paid from their submitted invoices. ... From the outset we made it clear to him (Wooddin) that he could not be full time employed with Structech. We explained to him that the company was new and not in a position to take on permanent staff. Wooddin seemed happy with this and provided invoice for the works he performed.*

[7] Mr Wooddin has a different view. He says words such as *contractor or employee* were never mentioned and he had no reason to think he was anything other than an employee. He accepts he was initially advised *they couldn't take me on full time* but within a couple of days another worker left. That led to a further discussion at which he was promised a minimum of eight hours a day. He says he asked about an employment agreement and was told that would not be sorted until the New Year.

[8] He accepts he used an invoice form to advise the hours he worked. The first was sent around mid-December and records the hours claimed and an amount owing. Mr Wooddin denies it was a true invoice saying he used the form as it was all he had available when asked to record his hours by Mr Helm and given he had not been provided with timesheets. It was headed *I\*G\*F* which, he says, stood for *in good*

*faith* and reflected the informal nature of the arrangement. Mr Meijer says he considered IGF a trading name.

[9] The respondents say the residual invoices (four in total) were delivered simultaneously and after the relationship had broken down (eg: during the week 20 to 27 January). Of note is the fact they stipulated the amount of tax that should be deducted using a rate of 21%.

[10] Mr Wooddin does not agree the four documents were proffered simultaneously but accepts they were all produced during the week in which the relationship was coming to an end and when he was being asked by Structech to quantify his claims. He again says he used the invoice forms in the absence of anything else. He explains the tax rate by saying it was the level at which he was taxed by his previous employer and, in his mind, was simply a part of quantifying how much he thought he should receive.

[11] Mr Wooddin had become disenchanted early in the relationship. Payments were intermittent and made in cash with no supporting documentation. He says they were inevitably late and never sufficient to cover what he should have received. He subsequently found no tax had been deducted and forwarded to IRD which raised further complications. He soon sent the first of what became a significant number of emails asking for payment. These became more strident with the use of obscenities increasing as time passed.

[12] Things came to a head in mid-January when, according to Mr Wooddin, he concluded he could no longer continue working with inadequate pay. His last day on the job was 17 January though he continued to communicate with Structech in an attempt to resolve the issue. This led to a discussion with Mr Helm on or about 21 January at which Mr Wooddin claims the two agreed how much was outstanding.

[13] While the respondents agree the discussion occurred they disagree about the outcome. Mr Wooddin says the agreed amount was \$3,813.50 plus holiday pay and that is reflected in a text he sent on 21 January. He says there were various promises the money would be forthcoming but it failed to materialise. Mr Meijer says Mr Wooddin said he would be happy with \$1,015.00 and that was then paid.

[14] The failure to pay what Mr Wooddin believed to be the agreed amount led to a conclusion the respondents had no intention of complying with their agreement and

his need for payment left no choice but to leave and seek other work. In this he was initially assisted by Mr Helm who says he did so in order to facilitate the departure of someone who had become a nuisance. The help soon ceased when Mr Helm took exception to an email sent via his wife's phone about the lack of payment. The evidence would suggest Mr Helm then became quite negative when approached by Mr Wooddin's prospective employers and this delayed his attainment of a new job.

[15] Mr Wooddin resigned by text on 27 January.

### **Determination**

[16] There are possibly four issues to be determined. They are:

- (a) What was the nature of the relationship between Mr Wooddin and the respondents - employee or contractor;
- (b) If Mr Wooddin was an employee the other three issues must be addressed. They are:
  - a. Who employed him: Mr Meijer, Mr Helm or Structech?
  - b. Are wages owing? and
  - c. Was Mr Wooddin was constructively dismissal?

[17] As already said the prime defense to Mr Wooddin's claims is the Authority lacks jurisdiction to consider them as he was a contractor.

[18] *Under s 6(2) of the Employment Relations Act 2000 the Court [read Authority] must determine the real nature of the relationship between the parties and in doing so must consider all relevant matters including those that indicate the intention of the parties. The real nature of the relationship can be ascertained by applying the tests of control, integration, and the fundamental test of whether a person performing the services is doing so on their own account. Industry practice may also be relevant.*<sup>1</sup>

[19] Mr Wooddin was approached by a friend and asked if he was available for work. He said yes and a meeting was arranged with Messrs Meijer and Helm. It took place on a worksite and Mr Wooddin commenced almost immediately.

---

<sup>1</sup> *Kiwikiwi v Maori Television Service*, AC 55/07, 2 November 2007, Judge Shaw at [2]

[20] Mr Wooddin says there was no discussion about the nature of the relationship before he commenced. He considered himself an employee and was not disavowed of this notion when he asked for an employment agreement and was told it would take some time to produce. Mr Wooddin contrasted the situation to a previous experience as a contractor when the nature of the arrangement was made abundantly clear. He added the need to address issues such as accounts, tax and ACC ensured he would not enter into such an arrangement again.

[21] Mr Meijer agrees there was an initial discussion about the availability of work and the pay rate. When questioned he accepted the issue of contractor or employee was not discussed. He accepts there was no documentation and did not respond to the claim Mr Wooddin was promised an employment agreement in the new year.

[22] Given this evidence I cannot be satisfied there was a common intention Mr Wooddin be engaged as a contractor. I therefore move to a consideration of the other tests: control, integration, the fundamental test and whether Mr Wooddin carried on business on his own account.

### *Control*

[23] Mr Wooddin says he received regular instructions regarding the work to be performed and this often occurred by text. Stuctech says Mr Wooddin could do what he wanted when he wanted and raises a specific example where he decided to redo some work with which he was dissatisfied.

[24] Mr Wooddin accepts the last accusation saying the work was so unsatisfactory Structech would have been required it be repaired. He denies he could work when he chose.

[25] A key factor in determining the extent of control are the text messages which contain instructions about things such as where Mr Wooddin was to work, who he was to work with and what he was to do. There are also examples of text messages specifying when a job was to be performed so it would align with other arrangements made by Structech concerning, for example, the delivery concrete or the availability of others.

[26] I find the factors considered under the control test favour a conclusion the relationship between Mr Wooddin and the respondents was one of employment.

***Integration***

[27] This test involves a consideration of the extent to which Mr Wooddin was integrated within the business. While Mr Wooddin provided some hand tools the evidence is substantial tools or piece of plant were provided by Structech. The text messages contain examples of Mr Wooddin asking that equipment be made available.

[28] There is also the fact the work Mr Wooddin was performing was integral to the completion of Structech's contracts and not ancillary support.

[29] Again the evidence favours a conclusion this was an employment relationship.

***Fundament test***

[30] As already said there can be no assistance from indicators such as tax as none (be it PAYE or withholding tax) was deducted and forwarded to the IRD. I also see little in the fact Mr Wooddin used an *invoice* to specify his hours in the December instance. The documents were completed somewhat haphazardly and lacked the detail normally seen in a proper invoice. Furthermore Mr Wooddin's explanation he used these forms in the absence of another option withstood scrutiny and the use of *invoices* is not a dissimilar situation from that considered by the Court in *Kiwikiwi*. I find the identification of the tax rate in the later invoices inconsequential given Mr Wooddin's evidence and Mr Meijers acceptance he was demanding the a quantification of the claim.

[31] There is then Ms Gordon's argument regarding Judge Shaw's finding in *Kiwikiwi*. At paragraph 47 she noted:

*The absence of a written agreement is critical ... If an organisation is entering into an agreement with an independent entity it is to be reasonably expected that such an agreement would be formalised in writing to acknowledge and name the contractor and to set the parameters of the contractual arrangements being entered into.*

[32] There is no such documentation. Indeed I noted the fact the respondents claimed, more than once, various assertions could be supported by documentary evidence yet produced absolutely nothing.

[33] There is also Mr Meijers assertion he thought Mr Wooddin was performing work on his own account. Again there was no evidence tendered in support and Mr Wooddin's denials were unequivocal and undisturbed.

[34] Finally I note industry practice which could see someone performing Mr Wooddin's work as either a contractor or an employee. It does not assist.

***Conclusion re employee or contractor***

[35] I am not satisfied there was a common intention Mr Wooddin be engaged as a labour only contractor rather than an employee. The way the relationship worked in terms of control and integration suggest employment, as do the issues addressed when considering the fundamental test. The evidence suggests Mr Wooddin was an employee and I so hold.

***Consideration of the questions raised in 16[b] to [d] above***

[36] The conclusion Mr Wooddin was an employee gives rise to the question of who employed him. He cites three possibilities - Mr Meijer, Mr Helm or Structech.

[37] In giving evidence he claims he thought he was employed by Messrs Meijer and Helm personally and was unaware Structech existed. When questioned it became apparent he never thought about the issue and had become aware of Structech if not before commencement shortly thereafter. The first invoice records its existence.

[38] The respondents contend the answer was always Structech and having considered the evidence I concur. The respondent's evidence on this issue was assertive as opposed to the uncertainty expressed by Mr Wooddin and it would be nonsense for two directors to take personal liability when they had the protection of a limited liability company.

[39] I find Mr Wooddin was employed by Structech.

[40] The next question is whether or not Mr Wooddin is owed wages. The answer is yes.

[41] Section 132 of the Employment Relations Act 2000 provides that where there is a claim for the recovery of monies the employee may call evidence to (a) show a failure to comply with s.130 and (b) that it prejudiced his or her ability to accurately

quantify the claim (s.132(1)). No time and wage records have been produced nor were any other records of payments made to Mr Wooddin which might have been expected even if he had been a contractor. The lack of documentation means there is absolutely no evidence the claimed monies have, as claimed by the respondents, been paid. Indeed the content of the text messages would strongly suggest otherwise.

[42] There can be no doubt s.130 has not been complied with. Similarly there is no doubt Mr Wooddin sought the records. His text messages confirm that and show nothing was provided. That left Mr Wooddin with no option but to estimate his loss. Given s.132 and the absence of any evidence which undermines his calculations I accept the claim of \$4,485.50 which covers the period to 17 January 2014 and includes holiday pay.

[43] Finally I must address whether or not Mr Wooddin was constructively dismissed.

[44] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*<sup>2</sup> the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- c. A breach of duty by the employer causes an employee to resign.

[45] There must be a causal link between the employers conduct and the tendering of the resignation<sup>3</sup> and the possibility of a resignation should be evident.

[46] Mr Wooddin says he was forced to resign by his employer's failure to pay wages. The resulting financial burden was insurmountable and forced him to leave.

[47] At its simplest an employment agreement sees the exchange of labour for remuneration. A failure by the employer to pay said remuneration goes to the very heart of the arrangement and must be considered a fundamental breach of duty.

---

<sup>2</sup> (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

<sup>3</sup> *Z v A* [1993] 2 ERNZ 469

[48] Mr Wooddin's claim this forced him to leave is uncontested and I accept his assertions. Similarly I accept his departure should have been foreseeable. Possible departure and the rationale were well heralded in the text messages that passed between himself, Mr Meijer and Mr Helm.

[49] I conclude Mr Wooddin was constructively dismissed. That the dismissal was unjustified follows as no justification was tendered. The defence focused solely on the argument Mr Wooddin was a contractor.

[50] The conclusion Mr Wooddin was unjustifiably dismissed raises the question of remedies. Mr Wooddin sought lost wages and compensation pursuant to s.123(1)(c)(i) of the Act. Compensation of \$8,000 was initially claimed but by the time of submission this increased to \$15,000.

[51] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum lost or three months ordinary time remuneration. Mr Wooddin's started with a new employer on 3 March 2014 which limits his claim. He also correctly says that while he resigned on 27 January he stopped working on the 17<sup>th</sup> due to the lack of payment. The claim therefore amounts to six weeks (\$7,200) which, given s.128(2), is payable.

[52] Turning to the claim for compensation. Virtually all supporting *evidence* was tendered in submission. That is not acceptable. Mr Wooddin's comments, which were brief, were limited to the effect of Mr Helm's decision to undermine his (Wooddin's) job applications. I accept hurt must emanate from that but the evidence (or lack thereof) can only justify a minimal amount. I consider \$1,000 appropriate.

[53] The conclusion remedies accrue means I must, as required by s.124 of the Act, address whether or not Mr Wooddin contributed to the situation in which he found himself. While Structech made a number of negative observations in its Statement in Reply it did not pursue the allegations and offered little or no supporting evidence. I therefore conclude there is no rationale for considering a reduction for contribution.

### **Conclusion and Orders**

[54] For the above reasons I conclude Mr Wooddin:

- a. Was an employee;

- b. His employer was Structech Limited. The claims against the first and second respondents are therefore dismissed;
- c. There are outstanding wages still to be paid; and
- d. He has a personal grievance as he was unjustifiably dismissed.

[55] As a result the respondent, Structech Limited, is ordered to pay the applicant, Chris Wooddin, the following:

- i. \$4,485.50 (four thousand, four hundred and eighty five dollars and fifty cents) gross for unpaid wages and holiday pay; and
- ii. \$7,200.00 (seven thousand, two hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
- iii. A further \$1,000.00 (one thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[56] The above payments are to be made no later than 4.00pm Wednesday 11 March 2015.

[57] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority