

are no outstanding wages or holiday pay entitlements and King & Co opposes the s.114(3) application.

Non-appearance of the Respondent

[4] King & Co was neither present nor represented at the investigation meeting. That raised the question of whether or not I proceed in its absence.

[5] There is no doubt King & Co is aware of the investigation. Its sole director and major shareholder, Paul King, has had a number of conversations with one of the Authority's support officers. He has, more than once, advised he had what he considered greater priorities and was unlikely to attend. That is what has occurred and there has been no adjournment application.

[6] The notice of investigation meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.

[7] I am satisfied King & Co is aware of the investigation meeting and the consequences of non-attendance yet opted not to attend. I therefore chose to proceed.

Background

[8] King & Co is a transport operator. It was incorporated on 5 March 2012 with Mr King holding 95% of the shares. At the time Mr King approached two others and asked they hold some of the remaining shares. Mr Zyskowski, who was known to Mr King as a former colleague, was one of those approached and was allocated one share. King & Co, via the Statement in Reply, says this was because Mr King understood it was required to have more than the two shareholders originally planned (himself and his partner, Phyllis Knight).

[9] Around September 2012, Mr Zyskowski approached Mr King about the possibility of employment as a driver. About the discussion, Mr Zyskowski says:

... Paul told me that he wanted to pay me \$900.00 per week plus 33c on the dollar for every kilometre over 10,000.00kms. Paul told me that Kiwisaver and medical insurance being added to the offer.

I responded that I "wanted a decent wage" and I said to him let's cut to the chase, I need \$1,100 in the hand per week.

[10] Mr Zyskowski commenced on 1 October 2012 and was engaged to drive between Christchurch and Invercargill. On his first day he and Mr King signed an individual employment agreement. It clearly states the relationship is one of employer/employee and contains all the provisions one would normally expect in such an agreement. These include annual leave and public holiday clauses. Contained in an attached schedule is a remuneration provision. It says:

\$2200 paid every two weeks the first pay being on the 16th October 2012 into a bank account nominated by the employee.

[11] King & Co goes on to say, via the Statement in Reply, that within a fortnight Mr King and Ms Knight:

... spoke to their accountant who advised them that the employment agreement was null and void because the applicant was a shareholder. It was explained that the applicant and the other shareholders would receive drawings and the company would pay their tax at the end of the year.

The King/Knights explained this to the applicant and he said he would need to speak to other people about it. The applicant subsequently advised the King/Knights that he had spoken to some people at Progressive (His former employer Progressive Enterprises) and they had confirmed that what the respondent was doing was correct. The respondent understood the applicant had agreed to be paid a shareholder salary and continued to pay him on this basis.

[12] Mr Zyskowski denies such a conversation occurred or that he consulted former colleagues at Progressive Enterprises. He denies the employment agreement was rescinded, altered or replaced with another arrangement.

[13] Mr Zyskowski goes on to say the arrangement continued without problem into the new year and he received the agreed \$2,200 net fortnightly. He says the first intimation something was amiss occurred when he applied for leave in March 2013. He says Mr King told him “*I don’t pay holiday pay*”. He says he was concerned but did not directly challenge the response as he did not wish to “*rock the boat*”. King & Co agrees the conversation took place and adds it explained Mr Zyskowski was not entitled to holiday pay as he was a shareholder.

[14] While Mr Zyskowski took no direct action he sought advice from various sources. This led to various discussions with King & Co. The result was an agreement Mr Zyskowski would be paid an hourly wage and sell his one share to

Mr King for 50 cents. This arrangement took effect as of 1 October 2013 and King & Co accepts Mr Zyskowski then became an employee entitled to holidays and KiwiSaver.

[15] Around November 2013 Mainfreight Limited approached King & Co and asked if it would operate a temporary run for approximately six weeks with Mr Zyskowski as the driver.

[16] The parties agreed though there are two versions of the resulting document. One, provided by King & Co, does not contain a provision that appears in the version provided by Mr Zyskowski. It states he would return to his original Christchurch/Invercargill run when the temporary arrangement ceased on 24 December 2013.

[17] King & Co has a different view about the cessation date and says the arrangement with Mainfreight was extended to mid-January 2014. It says Mr Zyskowski simply ceased performing the task as of the original cessation date which created losses that are the subject of a counterclaim.

[18] Mr Zyskowski says he ceased the run on the agreed date and then expected to return to his original run. He says King & Co did not allow this and only offered limited work. He says he was unable to survive on the reduced earnings and this forced his resignation in early January 2014. He had a replacement job in a fortnight.

[19] The resignation is now the subject of a constructive dismissal claim though Mr Zyskowski concedes King & Co was not notified of the claim until after the expiry of the 90 day period, hence the s.114(3) claim.

Determination

[20] The first and most important question is whether or not Mr Zyskowski was an employee between 1 October 2012 and 30 September 2013.

[21] It is well established a shareholder can also be an employee¹ though most of the cases deal with scenarios in which the alleged employee is also a significant or majority shareholder. That is not the case here with Mr Zyskowski being a very minor shareholder.

¹ *Lee v. Lee's Air Farming Ltd* [1961] NZLR 325 (PC)

[22] There can be little doubt the parties initially intended Mr Zyskowski be an employee. That is his unchallenged evidence and it is consistent with the content and tenor of the employment agreement the parties signed on his first day (1 October 2012). It is also consistent with King & Co's statement in reply which says the nature of the arrangement was only questioned after commencement and it was then an alteration occurred.

[23] I therefore hold that Mr Zyskowski was initially employed. The question is whether or not the arrangement subsequently altered.

[24] Mr Zyskowski says no, there was no discussion. Mr King says there was. On this, I must prefer Mr Zyskowski's evidence. He attended the investigation and his assertions withstood questioning. On the other hand King & Co was not present and has offered no evidence to support its claim there was a change.

[25] There are also other concerns about the veracity of King & Co's assertions. For example it is claimed the employment agreement was drawn up prior to Mr Zyskowski becoming a shareholder and was later nullified by the acquisition of the share (letter King & Co to Cameron & Co dated 22 January 2014). That is clearly incorrect. The shareholder arrangement predated the employment arrangement by over six months.

[26] There is then the issue of the agreement with Mainfreight for the temporary run. King & Co's version, which does not have content crucial to the dismissal claim, is photocopied. Mr Zyskowski's version was supported by production of the original on Mainfreight letterhead.

[27] In summary I conclude the evidence clearly establishes the arrangement, as originally entered into, was one of employment. The claim that subsequently altered is unsupported and I therefore conclude Mr Zyskowski remained an employee throughout the period in question (1 October 2012 to 30 September 2013).

[28] That conclusion means the claims for outstanding wages, holiday pay and Kiwisaver must be addressed as Mr Zyskowski would, as an employee, be entitled to these.

[29] The wage claim arises as Mr Zyskowski says he agreed a net payment. His evidence is that while he received the agreed amount no PAYE was deducted and no

monies (including Kiwisaver contribution or ACC levies) were forwarded to the Inland Revenue Department. He seeks the difference between the net sum paid and the gross payable on that amount.

[30] King & Co accepts it and Mr Zyskowski agreed he be paid \$1,100 in the hand.² It also agrees no tax has been paid though there is recognition King & Co was responsible irrespective of how he was engaged.³ Finally, and while there is acceptance this has not occurred, the reasons offered as to why were undermined by a lack of supporting evidence and the determination Mr Zyskowski was an employee.

[31] Similarly it is accepted Mr Zyskowski did not receive holiday pay or Kiwisaver though there is no explanation as to why this did not occur after the date upon which King & Co accept he was so entitled (1 October 2013). Again, the rationale for the failures prior to 1 October 2013 are undermined by the lack of evidence and the conclusion Mr Zyskowski was an employee.

[32] 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 the failure to comply with s.130 and (b) that it prejudiced his or her ability to accurately quantify the claim (s.132(1)).

[33] There is no time and wage record and Mr Zyskowski commented on the difficulties this caused. To address the question of what might be owing he sought the assistance of an accountant and has provided those estimations as the basis of the claim. He claims the following:

- a. \$16,489.20 being the difference between the gross sum agreed and the net sum paid;
- b. \$5,895.13 being unpaid annual holidays; and
- c. \$3,117.51 being unpaid statutory holidays.

[34] Given section 132 and the evidence I accept those calculations.

[35] There has been no attempt to calculate the deficiency regarding Kiwisaver contributions. That said Mr Zyskowski should have been enrolled automatically and

² Statement in Reply at paragraph 2.12

³ Statement in Reply at paragraph 2.20

thought he had.⁴ King & Co should then have contributed 2% of gross earnings prior to 31 March 2013 and 3% thereafter. I calculate the amount payable as \$2,112.60.⁵

[36] Finally there was an application I order King & Co pay the penalties so far imposed on Mr Zyskowski by the Inland Revenue Department. After some discussion about jurisdiction and whether or not I have the ability to do so Ms Boniface and I agreed this claim should be held in abeyance pending a reaction to the determination from Inland Revenue.

[37] Turning now to the s.114(3) application. Mr Zyskowski claims he was constructively dismissed yet accepts he did not raise the claim within the 90 days specified in s.114(1) of the Act.

[38] Section 114(3) provides that where an employee fails to raise the grievance in 90 days and the employer refuses to accept late notification s/he may seek the Authority's leave for the claim to proceed.

[39] On receiving such an application the Authority may grant leave if it:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and*
- (b) considers it just to do so...⁶*

[40] Section 115 requires, for example, an attempt to pursue the grievance that was not acted upon by another or exceptional circumstances that precluded the applicant from raising or progressing the claim within the stipulated 90 days.

[41] Mr Zyskowski accepts that while his lawyer suggested he may have a grievance he focussed on the pay and taxation issues. He did nothing to investigate or progress the grievance claim until after the expiry of the 90 days.

[42] Even with the liberal interpretation of what constitutes exceptional circumstances applied today I have to conclude his efforts were inadequate. There is no evidence of any attempt to have the grievance raised within time and no evidence of an impediment other than the distraction of the pay issues.

⁴ Section 10 of the Kiwisaver Act 2006

⁵ Section 101D(4) of the Kiwisaver Act 2006

⁶ Section 114(4) of the ERA

[43] There is, I conclude, no evidence of exceptional circumstances and for that reason the s.114(3) application is declined.

Conclusion and orders

[44] For the above reasons I conclude Mr Zyskowski was an employee of the respondent, King & Co (2012) Limited, from the time of commencement on 1 October 2012 through till his resignation in January 2014.

[45] As a result I order the respondent, King & Co (2012) Limited, pay Mr Zyskowski:

- a. \$16,489.20 (sixteen thousand, four hundred and eighty nine dollars and twenty cents) being the difference between gross salary agreed and the net sum actually paid; and
- b. A further \$5,895.13 (five thousand, eight hundred and ninety five dollars and thirteen cents) gross being unpaid annual holidays; and
- c. A further \$3,117.51 (three thousand, one hundred and seventeen dollars and fifty one cents) gross being unpaid statutory holidays; and
- d. A further \$2,112.60 (two thousand, one hundred and twelve dollars and sixty cents) being outstanding Kiwisaver contributions payable by King & Co.

[46] Mr Zyskowski's application he be allowed to advance a personal grievance not raised within the 90 days required by s.114(1) of the Act is declined.

[47] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority