

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 207
5454408

BETWEEN EVA BELLEY (LABOUR
INSPECTOR)
Applicant

A N D VERNEY CONSTRUCTION
LIMITED
First Respondent

DAVID VERNEY
Second Respondent

Member of Authority: Helen Doyle

Representatives: Angela Graham, Counsel for Applicant
No appearance for first and second Respondent

Investigation Meeting: at Christchurch

Submissions Received: from Applicant on the day

Date of Determination: 8 December 2014

DETERMINATION OF THE AUTHORITY

- A James Hayes and Alex McClelland were in an employment relationship with Verney Construction Limited.**
- B The claim against David Verney is dismissed.**
- C Verney Construction Limited is ordered to pay to James Hayes and Alex McClelland the sums of \$309.60 and \$584.59 respectively.**
- D Interest is payable on those amounts at the rate of 5% from 28 May 2014 until payment is made.**
- E There is no order made for compliance.**

- F Verney Construction Limited is ordered to pay a penalty of \$2000 to the Authority who will pay to the Crown.**
- G Verney Construction Limited is ordered to reimburse the Labour Inspector for the filing fee in the sum of \$71.56 and pay witness expenses in the sum of \$25.00.**

Employment relationship problem

[1] The Labour Inspector, Eva Belley says that the employer of Alex McClelland and James Hayes did not supply employment agreements, time, wage and holiday records despite multiple requests and a notice requiring production of wages, time and holiday records under s 229 (c) of the Employment Relations Act 2000 (the Act) dated 22 May 2014.

[2] Ms Belley says that initially without the records she was unable to properly investigate complaints made by the former employees and determine if their employer was complying with obligations under the Employment Relations Act 2000 (the Act) and Minimum Wage Act 1983.

[3] There was some limited disclosure of documents following a telephone conference with the Authority, Ms Belley and Mr Verney on 19 September 2014 and Ms Belley has now been able to calculate money owing to the two employees.

[4] Ms Belley named both Verney Construction Limited (Verney Construction) and David Verney as respondents but in her evidence said that she concluded that the employer is the company Verney Construction. The Authority will therefore need to determine whether the claim is properly against Mr Verney as second respondent.

[5] Ms Belley seeks the following:

- (a) That the Authority order Verney Construction to pay to Mr Hayes the sum of \$309.60 and to Mr McClelland the sum of \$584.59 under s 6 of the Minimum Wage Act 1983 and s 23 of the Holidays Act 2003;
- (b) That interest be payable on the above sums;

- (c) An order that that Verney Construction provide all wage, time, holiday and leave records to her or alternatively order compilation under s 232 of the Act;
- (d) That the Authority order Verney Construction provide evidence that it is paying all current employees at least at the level of the minimum wage under s 6 of the Minimum Wage Act 1983 and if not order evidence of payment of arrears
- (e) That the Authority under s.135 of the Act order Verney Construction to pay a penalty under s 229(d) of the Act for failing to provide all relevant wage, time, holiday and leave records;
- (f) That the Authority under s 165 of the Act order Verney Construction to pay to the applicant costs and expenses.

[6] Mr Verney took part in two telephone conferences with the Authority. Neither the first nor the second respondent lodged a statement in reply. After a telephone conference on 19 September 2014 at which the Authority had directed Mr Verney to lodge and serve further documents, a generic employment agreement and a contract was supplied together with some invoices in Mr McClelland's and Mr Hayes' name. Although requested there was no further information provided for any other employees of Verney Construction.

[7] Mr Verney attended at a further telephone conference on 10 October 2014 with the Authority and Ms Belley. The date for the investigation meeting was discussed and agreed during the telephone conference. A slightly later start time was agreed to assist Mr Verney with travel.

[8] Mr Verney had been communicating with the support officer by email and the support officer proceeded to serve the notice of direction and investigation notice by email to Mr Verney and Ms Belley. I am satisfied from an electronic printout that the email was delivered on 10 October 2014 at 2.07pm to Mr Verney who is the sole director of Verney Construction. Mr Verney was served with a copy of the investigation meeting notice and the notice of direction by email.

[9] I have then considered whether that was adequate service on Verney Construction. I find that it was. Verney Construction had never lodged a statement in

reply and therefore it was not strictly entitled to receive the notice of the investigation meeting although its sole director was served¹. Further Mr Verney as sole director of Verney Construction was aware of and had agreed to the investigation meeting date on the 10 October telephone conference with the Authority. The directions notice from that conference referred to him as both the second respondent and a director of the first respondent and I find service on him was sufficient.

The issues

[10] There are several issues for determination but it is sensible to start with whether Alex McClelland and James Hayes were employed or engaged as independent contractors. Ms Belley properly considered this as an issue because Mr Hayes had supplied to Ms Belley on behalf of Mr McClelland by email dated 23 July 2014 two invoices prepared by Mr Verney showing payments made into Mr McClelland's bank account. They showed a labour rate on a day rate of \$150 per day and a withholding tax rate of 30%. The order of issues therefore is as follows:

- (a) Were Alex McClelland and James Hayes employees or independent contractors?
- (b) If Mr McClelland and Mr Hayes were employees, were they employed by the first respondent or the second respondent?
- (c) Was there a breach of s 229 (d) of the Act, ss. 23 and 81 of the Holidays Act 2003 and s 6 of the Minimum Wage Act 1983?
- (d) Are Mr McClelland and Mr Hayes owed arrears under s 6 of the Minimum Wage Act 1983 and s 23 of the Holidays Act 2003?
- (e) If arrears are owed should there be an award of interest on that money?
- (f) What requests were made for records by the Labour Inspector and what was the response to those requests?
- (g) Should there be an order for compliance as requested by the Labour Inspector for provision of all wage, time, holiday and leave records and should there be an order made requiring records from Verney

¹ Hagfish NZ Limited v Dae Hyung Choi [2014] NZEmpC 170 at [12]

Construction that it is paying all current employees at least the minimum wage under s 6 of the Minimum Wage Act 1983;

- (h) Should the Authority award a penalty under s 229(d) of the Act for the failure to provide all relevant wages, time, holiday and leave records as requested by the Labour Inspector?
- (i) Costs and expenses.

Were Alex McClelland and James Hayes employees or independent contractors?

[11] The Authority only heard evidence from Mr Hayes and Ms Belley. Ms Belley concluded that Mr McClelland had commenced his employment on 14 February and Mr Hayes on 18 February 2014. After that with the exception of one day on 6 March 2014 when Mr McClelland attended a wedding I accept Mr Hayes and Mr McClelland worked identical hours and days and finished their employment at the same time on 10 March 2014.

[12] There are a number of matters for the Authority to consider in determining whether a person was an employee or engaged as a contractor.

[13] The starting point is section 6 of the Act which provides the meaning of employee. For current purposes that section refers to, amongst other matters, the following:

6. ***Meaning of Employee***

- (1) *In this Act unless the context otherwise requires, **employee** –*
 - (a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and ...*
- (2) *In deciding for the purposes of subsection 1(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them;*
- (3) *For the purposes of sub-section (2), the court or Authority –*
 - (a) *must consider all relevant matters, including any matters that indicate the intention of the parties; and*
 - (b) *Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship ...*

[14] The leading case about relevant matters to be considered under s 6 is the Supreme Court judgment in *Bryson v. Three Foot Six Limited*². I am guided by that judgment and have taken into account the matters considered appropriate in determining whether or not a person is an independent contractor or an employee.

Intention of the parties

[15] Mr Hayes was looking for work and Mr Verney's contact details were passed to him by a friend at his church. He then met Mr Verney on site at a property in Addington Christchurch on 17 February 2014. Mr Hayes understood from Mr Verney that the work the business undertook was that of foundations and pre-concreting. It was discussed that Mr Hayes would commence work the following day on 18 February 2014. Mr Hayes said that there was no discussion about the nature of the relationship before he commenced working. He said that the only discussion with Mr Verney was about the type of work he would be required to undertake and the hours of work.

[16] Mr Hayes says it was not until the first or second day of employment when there was a discussion about payment. Mr Hayes recalls Mr Verney advising there were two options for payment, one was a daily rate but the amount was undisclosed or a square metre rate. He said there was no discussion about tax or ACC payments.

[17] Mr Verney supplied both a pro forma employment agreement and contract agreement when asked by the Authority to provide records to Ms Belley. Ms Belley checked with Mr Hayes as part of her investigation whether one of these agreements had been supplied to him by Mr Verney. Mr Hayes confirmed both to Ms Belley, and in evidence to the Authority, that they had not been. I accept that there was no written agreement given to Mr Hayes.

[18] Mr Hayes said that he tried to talk from time to time with Mr Verney about the rates or payments but only received vague answers. He said that after he had commenced work Mr Verney asked for bank account details and an IRD number and although Mr Hayes was hoping to get paid on a weekly basis. It was not until 3 March 2014 when the first of three payments were paid to his bank account. On 5 March Mr Hayes was paid a further \$500 and on 11 March another \$200.

² [2005] ERNZ 372

[19] After Mr Hayes resigned he advised Mr Verney that he would be laying a complaint with the Labour Inspectorate and on 2 April 2014 a further payment of \$1,051.00 was made into his account.

[20] I am not satisfied that there was a common intention at the commencement of the relationship that Mr Hayes would be engaged as a contractor. Mr Hayes contrasted in his evidence situations when he has been engaged as a labour only contractor as opposed to an employee. He said he had understood on those occasions that was the nature of the relationship and had signed an agreement that he was a contractor but that was not the situation with Mr Verney or Verney Construction where in the absence of anything being said he simply concluded he was an employee.

[21] I am not satisfied that there was a common intention about the nature of the relationship so I intend to move to consider the other tests of control, integration and whether Mr Hayes and Mr McClelland carried on business on his own account, the fundamental test.

Control

[22] Mr Hayes said that that each morning he and Mr McClelland would meet Mr Verney where he was living in Christchurch between 6-7 am depending on what they had been told by Mr Verney the day before. They would pick up one other person who Mr Hayes regarded as an employee on the way to the particular site.

[23] The work undertaken was in the nature of pre-concreting tasks and included levelling the ground, erecting and securing boxing and deconstructing boxing once the concrete had been poured and had set. Mr Hayes said that he and Mr McClelland undertook the same tasks and Mr Verney was supervising and managing the work as well as undertaking work himself. I find Mr Hayes work was supervised and he was instructed what to do on site.

[24] The tools and other equipment necessary to undertake the work were supplied by Mr Verney.

[25] I find that the factors under the control test do favour an employment relationship more than a contracting relationship for Mr Hayes and also for Mr McClelland who I find was carrying out the same work.

Integration

[26] This test involves consideration as to whether Mr Hayes and Mr McClelland were integrated into the business or not. Mr Hayes in his evidence said that the tools and gear were supplied by his employer and that he wore a uniform. I find the factors under the integration test favour an employment relationship more than a contracting relationship.

Fundament test

[27] As already set out the form of taxation that was provided on the invoices would support that of a contractor but there is a real possibility having looked at Mr Hayes IRD summary of earnings that although deducted tax was not paid to the Inland Revenue Department. There was no evidence to support that Mr Hayes or Mr McClelland carried on business on their own account and rather than they carried out business under the instruction of Mr Verney.

Conclusion

[28] I did not hear from Mr McClelland and in those circumstances I have had careful regard to the documentation. I note that on the two invoices Mr McClelland was given by Mr Verney withholding tax is deducted at a rate of 30% which is incorrect. The hourly rate in those invoices is a daily rate of \$150. The invoices that Mr Verney supplied after the Authority requested records for Mr McClelland show a lower daily rate of \$140 but withholding tax at the correct rate of 20%. The main and perhaps only factor in support of a contracting arrangement is invoices Mr Verney prepared himself and the method of taxation. The inconsistencies in the records mean little weight if any can be placed on them about the nature of the relationship. I have placed weight on the fact that in initial conversations with Ms Belley, Mr Verney never suggested Mr Hayes or Mr McClelland were other than employees. He subsequently though provided her with two different sorts of pro forma agreements for a contractor and an employee. There is no reason to conclude that Mr McClelland's situation and his relationship with Verney Construction and Mr Verney was different to Mr Hayes.

[29] I am not satisfied there was a common intention that Mr Hayes or Mr McClelland were engaged as labour only contractors rather than employees. The way the relationship worked in practice in terms of control, integration and

particularly the fundamental test I find supports that the real nature of the relationship when working for either Verney Construction Limited and/or Mr Verney was one of employment. I find that Mr Hayes and Mr McClelland were employees.

If Mr Hayes and Mr McClelland were employees were they employed by Verney Construction Limited or David Verney?

[30] Ms Belley said she had concluded that the employer was Verney Construction. Both Mr Hayes and Mr McClelland had been paid by Verney Construction and that although they initially believed they had been employed by a different company called Reliable Foundation Limited due to the fact that they were wearing their uniforms, by the time of the initial complaint, Mr Hayes was sure that his employer was Verney Construction.

[31] I find the claim should properly be against Verney Construction Limited and not David Verney. The claim against Mr Verney is dismissed.

Are Mr Hayes and Mr McClelland owed arrears under s 6 of the Minimum Wage Act 1983 and s 23 of the Holidays Act 2003?

[32] Ms Belley has calculated whether there are arrears owing to Mr Hayes and Mr McClelland for breaches of s 6 of the Minimum Wage Act 1983 and s 23 of the Holidays Act 2003. In doing so Ms Belley has taken into account Mr Verney's email on 25 September 2014 advising of a later commencement of employment date for Mr Hayes. She has appropriately I find relied on the higher daily rate for Mr McClelland from the invoices he was actually given.

[33] I am satisfied with Ms Belley's thorough and careful calculations that Mr Hayes is owed the sum of \$309.60 and Mr McClelland the sum of \$584.59.

[34] I order Verney Construction Limited to pay to Eva Belley, Labour Inspector for the use of James Hayes the sum of \$309.60 for arrears under s 6 of the Minimum Wage Act 1983 and under s 23 of the Holidays Act 2003.

[35] I order Verney Construction Limited to pay to Eva Belley, Labour Inspector for the use of Alex McClelland the sum of \$584.59 for arrears under s 6 of the Minimum Wages Act 1983 and under s 23 of the Holidays Act 2003.

Interest

[36] In any matter involving the recovery of money under clause 11(1) of Schedule 2 of the Act, the Authority may if it thinks fit order interest payable at the rate prescribed under s.87(3) of the Judicature Act 1908.

[37] I find that it is appropriate to order interest payable in this case. Interest is payable on the amounts due to the two employees from the end of the period of 3 working days stipulated in the notice requiring production of wage, time and holiday records. The notice was dated 22 May 2014 which is a Thursday and compliance was therefore required by 28 May 2014. 28 May 2014 is the date from which interest is payable.

[38] I order Verney Construction Limited to pay interest to James Hayes and Alex McClelland on the respective sums of \$309.60 and \$584.59 at the rate of 5% from 28 May 2014 until payment is made.

Orders for compliance

[39] Ms Belley wanted an order that Verney Construction provide wage, time, holiday and leave records for all of its employees. Ms Belley has now been able to calculate arrears for Mr Hayes and Mr McClelland and there is no point in ordering compliance for their records. It is not clear I find if Verney Construction still has any other employees or how many it previously had. Mr Hayes said that a third worker at the time he was employed was seemingly content with the situation and said that he was happy with what he was paid.

[40] Ms Belley said that there is now a new company called Verney Contracting Limited but that company is not a party to the proceedings and no orders can be made against it.

[41] I am not satisfied it is appropriate in the circumstances to make orders for compliance or to order evidence that all employees of Verney Construction are being paid at least the minimum wage and if not order provision of evidence of payment of any arrears.

Penalty

[42] Ms Belley seeks a penalty under s 135 of the Act for a breach of s 229 (d) of the Act to supply wage, time, holiday and leave records.

[43] Ms Graham submitted that the penalty awarded should be at the higher end.

[44] The Employment Court in *Xu v McIntosh*³ provides some guidance as to what to consider when imposing a penalty. It is important to start with the purpose of a penalty which is to punish for some wrongdoing. In this case that is the failure to supply records which the Labour Inspector was entitled to request for employees. The Act provides for a penalty in those circumstances.

[45] It must be recognised that not all failures to provide records are equally reprehensible. The first question from *Xu*⁴ that the Employment Court said should be asked is how much harm the breach has occasioned. The Authority should also consider how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.

[46] Ms Belley requested wage, time and holiday records and Mr Verney did not comply with the request or the written notice in May. In July however Ms Belley became aware of a possibility that the relationship was something other than employment and Mr Verney supplied some further invoices and two pro forma agreements.

[47] There was harm occasioned when there was no compliance with a request to produce records because Ms Belley was unable to properly ascertain if the complainants were employees or not, and, if they were employees their rate of pay and whether they had been paid in accordance with the Minimum Wage Act and the Holidays Act. It is important to let Verney Construction know that records should be provided promptly when a Labour Inspector requests them. If Mr Verney believed the relationship as other than employment then he should have given that explanation promptly.

[48] I then turn to whether the breach was inadvertent or flagrant and deliberate. Mr McClelland had been paid under an invoice albeit prepared by Mr Verney with

³ [2004] 2 ERNZ 448 at [47] – [48]

⁴ *Xu* at [47]

withholding tax deducted at an incorrect amount. There was some evidence of a component of a contracting relationship with the invoices. There was a preliminary threshold issue as to whether Mr Hayes and Mr McClelland and indeed any other worker were contractors or employees. That has to be taken into account in whether to impose a penalty and if so at what level. I could not discount a possibility that the breach in failing to provide records was in part due to a misguided view that the relationship between Verney Construction and its workers was not employment and therefore there were no records. When it got to the point that the Authority became involved I suspect there was some panic on Mr Verney's part to provide something.

[49] I find in conclusion that there should be a penalty awarded but that it should reflect the circumstances that there was an issue about whether the relationship was an employment or contracting one. It is not a situation that calls for a penalty at the higher range. There is no evidence to support this was other than a first time breach. In all the circumstances I award a penalty in the sum of \$2000.

[50] I order Verney Construction Limited to pay a penalty of \$2000 to the Authority to be paid by the Authority into a Crown Bank account.

Costs and expenses

[51] There is no claim for costs by the Labour Inspector other than reimbursement of the filing fee of \$71.56. Witness expenses are claimed for Mr Hayes under clause 6 of schedule 2 of the Act according to the scales prescribed by the Witnesses and Interpreters Fees Regulations 1974 under the Criminal Procedure Act 2011. Expenses are to be awarded for Mr Hayes attendance in the sum of \$25 as the matter was not in excess of three hours and I am not satisfied that a full day off work was required.

[52] Verney Construction Limited is ordered to reimburse the filing fee of \$71.56 and pay witness expenses in the sum of \$25.00.

Helen Doyle
Member of the Employment Relations Authority