IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 69
5468668

	BETWEEN	SHAUN CHARLTON Applicant
	A N D	SOUTHLAND LIGHTWEIGHT CONCRETE LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Ashley-Jayne Lodge, Counsel for the Applicant Respondent not represented
Investigation Meeting:	22 May 2015 at Invercargill
Submissions Received:	22 May 2015 from the Applicant
Date of Determination:	28 May 2015

DETERMINATION OF THE AUTHORITY

A. Mr Charlton was an employee, and not an independent contractor, during the entirety of his working relationship with the respondent.

B. The respondent is ordered to pay arrears of wages to Mr Charlton in the net sum of $10,619.30, together with interest calculated as provided for in this determination.

C. Costs are reserved.

Employment relationship problem

[1] Mr Charlton claims that the respondent company owes him wages in the net sum of $10,619.30. Mr Charlton also asserts that, although he was an employee of the respondent between 2008 and November 2012, Mr Andrew Scobie, the director and

owner of the respondent company, has informed the Inland Revenue Department (IRD) that Mr Charlton was an independent contractor, and not an employee, during the tax years 2011-2013. Accordingly, the IRD has requested Mr Charlton to account to it for income tax on wage payments which Mr Charlton has received from the respondent company both while working for the respondent company, and afterwards.

[2] The respondent company has failed to respond substantively in any way to the claims raised by Mr Charlton, not having lodged a statement in reply, nor having taken part in the Authority's case management conference call. No one turned up at the investigation meeting to represent the respondent company.

[3] I am satisfied that sufficient steps have been taken to reasonably alert the respondent company to both the existence of Mr Charlton's claim and the date, venue and time of the Authority's investigation meeting. The respondent company is a registered company and the Companies Office website records an address for service, which has remained unchanged throughout these proceedings, up to and including the date of the Authority's investigation meeting on 22 May 2015. Both the Authority and Ms Lodge have taken steps to communicate with Mr Scobie both by post and by mobile telephone but he has never responded.

[4] The notice of investigation meeting which was sent to Mr Scobie by CourierPost on 29 April 2015, addressed to the respondent company's registered office for service, stated plainly that, if the respondent did not attend the investigation meeting, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant.

[5] Accordingly, this determination is issued on the basis of the evidence given by Mr Charlton, his wife, Ainslie Templeton, and his former colleague, Jason Holder, all of which I found credible and which I accept in the absence of any contrary evidence from the respondent.

The issues

[6] There are two issues that the Authority must investigate:

(a) the employment status of Mr Charlton during the period he worked for the respondent company; and

(b) if Mr Charlton was an employee during that period, whether he is owed unpaid wages by the respondent company.

Mr Charlton's employment status

[7] This issue is in question because of the position that Mr Charlton says the IRD is taking, apparently based on Mr Scobie's representations to it. Of course, in addition, if Mr Charlton was not an employee during the period for which he says he is owed unpaid wages, the Authority would not have the jurisdiction to investigate that claim.

[8] There were three stages to the relationship between Mr Charlton and the respondent company as follows:

a. The period prior to Mr Charlton entering into negotiations with Mr Scobie about him and Mr Holder becoming independent contractors (period A);

b. The period during which the negotiations took place (period B); and

c. The period after which the negotiations had broken down, until Mr Charlton resigned (period C).

[9] The concept of "employee" is defined in s.6 of the Employment Relations Act 2000 (the Act) as follows:

> ***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*
> *(b) includes—*
> *(i) a homeworker; or*
> *(ii) a person intending to work; but*
> *(c) excludes a volunteer who—*
> *(i) does not expect to be rewarded for work to be performed as a volunteer; and*
> *(ii) receives no reward for work performed as a volunteer; and*
> *(d) excludes, in relation to a film production, any of the following persons:*
> *(i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:*

> *(ii) a person engaged in film production work in any other capacity.*
>
> *(1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.*
>
> *(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 subsection (2), the court or the Authority—*
>
> *(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*
>
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*
>
> *(4) Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008 or the Sharemilking Agreements Act 1937.*
>
> *(5) The court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—*
>
> *(a) employees under this Act; or*
>
> *(b) employees or workers within the meaning of any of the Acts specified in section 223(1).*
>
> *(6) The court must not make an order under subsection (5) in relation to a person unless—*
>
> *(a) the person—*
>
> *(i) is the applicant; or*
>
> *(ii) has consented in writing to another person applying for the order; and*
>
> *(b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.*

[10] In deciding for the purposes of s.6(1)(a) of the Act whether Mr Charlton was employed by the respondent company under a contract of service or a contract for services, it is helpful to have regard to the factors identified by the Supreme Court in *Bryson v. Three Foot Six Ltd* [2005] NZSC 34; namely:

(a) The written and oral terms of the contract which will usually contain indications of the common intention concerning the status of the relationship;

(b) Any divergence from those terms and conditions in practice;

(c) The way in which the parties have actually behaved in implementing their contract;

(d) Features of control and integration and whether the contracted person has been effectively working on his or her own account (known respectively as the control, integration and fundamental tests).

Brief account of the events leading to the dispute

Period A

[11] Mr Charlton was employed by the respondent company in 2008 to install Hebel autoclaved aerated concrete into new homes. Mr Charlton was not given a written employment agreement but was paid wages of $20 per hour, plus 8% holiday pay, working Tuesday to Friday and the occasional Saturday. His usual hours of work were 7.30am to 5pm.

[12] Mr Charlton would keep a note of his hours on a weekly basis and he would be paid wages net of PAYE deductions directly into his bank account on a weekly basis. The Authority saw evidence of these net payments into Mr Charlton's bank account from 20 May 2009.

[13] Mr Charlton's evidence is that he was told by Mr Scobie where the work was and what to do. He also had to wear work clothing bearing the respondent company's logo and was provided with a work vehicle. Although not many tools were used in the installation of the Hebel concrete, such that were used were either provided by the respondent company to Mr Charlton or, if Mr Charlton purchased them himself, the cost was reimbursed to him.

[14] It appears that there is no dispute that, during period A, Mr Charlton was an employee of the respondent company.

Period B

[15] In late 2009, Mr Scobie approached Mr Charlton and his colleague, Mr Holder, and asked them if they wanted to provide their labour to him on an independent contractor basis. Mr Charlton's evidence is that he and Mr Holder considered that they should try it on a trial basis, and set about taking legal advice. The Authority saw evidence of a letter to the respondent company dated 11 February 2010 from lawyers acting for Mr Charlton and Mr Holder which commented on the terms of *install agreements* that the respondent company had provided to Mr Charlton

and Mr Holder. Although this letter is headed up *J & S Installers Limited*, it is the evidence of Mr Charlton that he and Mr Holder did not form a company. A search of the on-line Companies Office register confirms that there is no company registered in that name.

[16] Mr Charlton says that he and Mr Holder carried out two jobs in January 2010 during the period of the negotiations. The Authority saw copies of two one page agreements in respect of these two installation jobs which seemed to have been issued by the respondent company, although they could have been the standard terms of Hebel (The respondent company is, it is understood, a franchisee of Hebel). These agreements were dated 14 and 20 January 2010 and were expressed to be between Southland Lightweight Concrete Limited, Multi Tec, Mr Charlton and Mr Holder. It is understood that Multi Tec is the name of another business of Mr Scobie.

[17] Mr Charlton says that he and Mr Holder invoiced the respondent company for these two jobs and were paid for them and that Mr Charlton accounted to the IRD for tax on the income received for those two jobs. Mr Charlton confirmed that he and Mr Holder were not GST registered while carrying out those two jobs.

[18] It was the evidence of both Mr Charlton and Mr Holder that the arrangements between them and the respondent company during period B, while they were carrying out the two installation jobs, were the same as when they were employees. The only difference was that, instead of being paid wages, they received a gross payment upon which they accounted for tax (having issued invoices), and that they may have worked longer hours on the two jobs than usual in order to get them done more quickly. Otherwise, there was no difference, including that they continued to wear work clothing bearing the name of the respondent company.

[19] The Authority also saw a copy of an email dated 25 February 2010 from Ms Templeton to the lawyers representing Mr Charlton and Mr Holder stating that they were not going ahead with the contracting arrangements with the respondent company because Mr Scobie did not agree to the terms of a draft agreement that the lawyers had produced on their behalf.

[20] It is Mr Charlton's evidence, confirmed by Mr Holder, that shortly after Mr Scobie had said that he could not agree to the terms suggested by their lawyers,

Mr Charlton and Mr Holder asked if they could revert to being employees again. Mr Charlton and Mr Holder say that Mr Scobie agreed to this.

Period C

[21] The Authority saw a copy of a document headed *Individual Casual Employment Agreement* that was stated to be made on 12 April 2010. Although the employer is stated to be Andrew Scobie, this contract appears to cover the same role carried out by Mr Charlton as he was carrying out during period A. The position description in the document states that the scope of Mr Charlton's duties would be *consistent with those of a Hebel Clad installer* and that the hours of work were from 8am to 5pm Monday to Friday. The wages were to be paid at $22 per hour and holiday was to accrue at the rate of 8% of gross taxable remuneration. Under the terms of the agreement Mr Charlton was entitled to sick leave and bereavement leave and the agreement had clauses dealing with employment relationship problems and an employee protection clause. Mr Charlton says he did not sign the agreement, probably because it stated that he was to be a casual employee.

[22] Mr Charlton's evidence was that there was very little difference in respect of the arrangements he had had with the respondent company in period C compared with the arrangements he had in period A. However, by now, Mr Scobie had sold the work vehicle and Mr Charlton was using his own (although still using the company's trailer) but was being reimbursed for diesel that he used and was being paid a higher hourly rate. He was still wearing the respondent company's logo on his work clothing and his work hours were following the same pattern as during period A.

[23] In addition, Mr Charlton had his accommodation and meals paid for when he was required to work out of town. Mr Charlton's evidence was that, whilst he could not recall if he had any sick leave while working for the respondent company, he did take holiday which he had to ask permission to take. He also was clear in his evidence that he would not have been able to refuse work that he was told to carry out, and could not have sent someone else along to stand in for him as a substitute. Although his hours fluctuated from week to week, and therefore so did his income, he did not have any other paid employment save once when he spent around three days installing a fence.

[24] It is Mr Charlton's evidence that, around mid-2011, the payment of his wages became irregular and Mr Scobie stopped giving him payslips. Instead, he began receiving lump sum payments on account of wages which continued until Mr Charlton resigned in November 2012. Some payments were received on an irregular basis after his resignation.

Was Mr Charlton an employee or an independent contractor?

Period A

[25] It would appear that Mr Scobie accepts that Mr Charlton was an employee of the respondent company during period A, given that PAYE was paid on Mr Charlton's wages during that period. I will therefore not enquire any further into Mr Charlton's status during period A. However, Mr Scobie has apparently told the IRD that he regards Mr Charlton as having become an independent contractor from around December 2009, and remained so until Mr Charlton's employment ended in November 2012 (periods B and C).

Period B

[26] When I consider the nature of the relationship between the parties during the negotiations, there appear to be only two differences in the arrangement compared with those prior to the negotiations starting. First, Mr Charlton and Mr Holder submitted an invoice for two jobs that were carried out and Mr Charlton believes that he worked longer hours so that the two jobs could be completed more quickly. He said that all other aspects of the arrangement remained exactly the same. I have no reason to disbelieve Mr Charlton in this respect.

[27] Whilst the submitting of an invoice for work carried out tends to suggest that the relationship was one of independent contractor, when I apply the usual tests to the remainder of the arrangements, they strongly lead me to conclude that Mr Charlton remained an employee of the respondent company during period B.

[28] Briefly, Mr Charlton had to work where he was told to work, and to do so on the days when he was told to do so. Mr Charlton continued to wear the branded clothing supplied by the respondent company and, as far as I understand it, continued to use the vehicle provided by it. This evidence when taken together suggests to me

that Mr Scobie's company remained in control of Mr Charlton and that Mr Charlton remained integrated into the business of the respondent company.

[29] Therefore, in applying the control and integration tests, both suggest that Mr Charlton remained an employee during the period of the negotiations. This is reinforced by the fact that Mr Charlton did not form his own company and only had a casual partnership with Mr Holder.

[30] Furthermore, during this period, no agreement was ever reached between Mr Charlton and Mr Holder on the one hand and Mr Scobie on the other as to the terms on which the independent contractor relationship was to work. I am therefore satisfied that Mr Charlton cannot have become an independent contractor when he was unable to agree the terms of the change with Mr Scobie.

[31] In conclusion, I am satisfied that, although Mr Charlton carried out two jobs with Mr Holder at the end of which he submitted an invoice, in law Mr Charlton remained an employee of the respondent company during period B.

Period C

[32] With respect to the final part of the relationship with Mr Scobie's company, I accept the uncontested evidence of Mr Charlton that Mr Scobie agreed that he would *"revert"* to becoming an employee again after the negotiations broke down. In reality, there was no reversion as I have concluded that Mr Charlton remained an employee in any event during period B.

[33] In any event, Mr Scobie agreed that Mr Charlton would be an employee after the negotiations had broken down and gave him the written terms of what was called a casual employment agreement. Given that it was entirely clear which days and hours Mr Charlton was to work, even in the face of the so-called casual employment agreement, I do not accept that the relationship was one of casual employment.

[34] In addition, when I consider the reality of the relationship between Mr Charlton and the respondent company during period C, the respondent company retained and exercised control over Mr Charlton, Mr Charlton remained fully integrated into the operations of the respondent and Mr Charlton took on no financial risk himself.

[35] In conclusion, I am satisfied that Mr Charlton was an employee and not an independent contractor during period C.

Conclusion

[36] Having examined the reality of the relationship between the parties from its commencement to its conclusion, I am satisfied on the balance of probabilities that Mr Charlton remained an employee of the respondent company throughout, including the period when they were negotiating about him becoming an independent contractor. I find that Mr Charlton never became an independent contractor in law for any part of that relationship.

Unpaid wages

[37] Sections 131 and 132 of the Act provide as follows:

> ***131 Arrears***
> *(1) Where—*
>
> *(a) there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement or a contract of apprenticeship; or*
>
> *(b) any payments of any such wages or other money has been made at a rate lower than that legally payable,—*
>
> *the whole or any part, as the case may require, of any such wages or other money may be recovered by the employee by action commenced in the prescribed manner in the Authority.*
>
> *(1A) The Authority may order payment of the wages or other money to the employee by instalments, but only if the financial position of the employer requires it.*
>
> *(2) Subsection (1) applies despite the acceptance by the employee of any payment at a lower rate or any express or implied agreement to the contrary.*
>
> *(3) Subsection (1) does not affect any other remedies for the recovery of wages or other money payable by an employer to any employee under an employment agreement or a contract of apprenticeship.*
>
> ***132 Failure to keep or produce records***
> *(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:*
> *(b) the hours, days, and time worked by the employee.*
>
> *(3) A defendant may not use as evidence any wages and time record that would be inadmissible under section 232(3).*

[38] The respondent company has provided no wages and time records to the Authority in respect of Mr Charlton's employment and so I must rely on the records kept by Mr Charlton and his wife. These records are detailed and appear to have been meticulously kept. They record not only the hours worked by Mr Charlton every week from 23 January 2012 through to the week starting 12 November 2012, but they also show the expenses incurred by Mr Charlton during that period in the course of his employment and the sums received by him.

[39] The only detailed records missing are for the period prior to 23 January 2012, although Mr Charlton's records do indicate that, up to that date, he was owed the net sum of $1,090. The evidence of Ms Templeton was that they had kept records prior to January 2012 and had recorded the brought forward figure of $1,090 onto subsequent records. Unfortunately, she could not find the original records for the period up to 23 January 2012.

[40] In light of the detailed records that Mr Charlton and Ms Templeton have kept, and which the Authority has seen, for the period from 23 January 2012, on the balance of probabilities I am satisfied that the net figure owing up to that date did amount to $1,090.

[41] Ms Templeton's records showed that Mr Charlton had earned a total of $34,474 before deductions for PAYE, up to the end of the week commencing 12 November 2012. In addition, Mr Charlton had incurred expenses in the sum of $1,973.03.

[42] Ms Templeton's records also show that Mr Charlton received a total of $22,600 in 13 lump sum payments between 30 April 2012 and 25 September 2014. I treat these receipts as net sums, as Mr Charlton remained an employee throughout his working relationship with the respondent company.

[43] Including the brought forward figure of $1,090 owed to Mr Charlton, Ms Templeton's calculations show a total net amount still owing to Mr Charlton by the respondent company in the sum of $10,619.30. I am satisfied that this is an accurate calculation of the net wages owing to Mr Charlton by the respondent company. This net sum is therefore to be paid to Mr Charlton by the respondent company, and it is to gross up this amount, and to account to the IRD for tax due.

Interest

[44] Mr Charlton seeks the payment of interest on the sum owing at what his counsel refers to as the prescribed rate of 7.5%.

[45] Clause 11 of Schedule 2 of the Act provides as follows:

> ***11 Power to award interest***
> *(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.*
>
> *(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.*
>
> *(3) Subclause (1) does not authorise the giving of interest upon interest.*

[46] Section 87(3) of the Judicature Act 1908 provides that the term *the prescribed rate* means the rate of 7.5% per annum, *or such other rate as may from time to time be prescribed for the purposes of this section by the Governor-General by Order-in-Council*. Clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 prescribes for the purposes of s.87 of the Judicature Act 1908 the rate of 5% per annum. Therefore, the correct rate of interest is 5% and not 7.5% as submitted.

[47] However, I do accept the other submissions of counsel in respect of whether interest should be awarded on the sums owed to Mr Charlton. I accept the evidence of Mr Charlton and Ms Templeton that they have been chasing payment of the sum owed to Mr Charlton for some considerable time. Whilst the respondent company has obviously taken some steps to pay the outstanding wages, it has paid only $800

towards the debt since 15 October 2013. Furthermore, Mr Scobie has been aware of Mr Charlton's claim before the Authority but the respondent has taken no steps to reduce or pay off the wages owed. In addition, Mr Scobie has not denied the money is owed, nor explained why the respondent has not paid it.

Orders

[48] I therefore order as follows:

(a) The respondent shall pay to Mr Charlton the net sum of $10,619.30 in unpaid wages (the Arrears); and

(b) The respondent shall gross up this net sum and account to the IRD for the tax due; and

(c) The respondent is to pay interest to Mr Charlton calculated at the rate of 5% per annum on the whole of the Arrears, the accrual of interest commencing from Monday, 19 November 2012, and continuing to accrue on the Arrears (or any balance remaining unpaid) until the Arrears have been paid in full.

Costs

[49] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them but, in the absence of such agreement being reached within 14 days of the date of this determination, Mr Charlton may seek an order from the Authority that the respondent make a contribution to his costs by serving and lodging a memorandum of counsel within a further 14 days. The respondent shall then have a further 14 days within which to serve and lodged a written reply, after which the Authority shall issue a costs determination having considered the parties' submissions on the papers.

David Appleton
Member of the Employment Relations Authority