

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 210/08
5119613

BETWEEN STEPHEN CLARKE
 Applicant

AND LANE ROBERTS
 First Respondent

L ROBERTS ENTERPRISES
LIMITED
Second Respondent

Member of Authority: R A Monaghan

Representatives: S Clarke, in person
 L Roberts, in person

Investigation Meeting: 16 June 2008

Determination: 17 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stephen Clarke raised a personal grievance in respect of an unjustified dismissal, but has since withdrawn that grievance. However he still seeks the payment of unpaid holiday pay and payment in respect of statutory holidays.

[2] It was common ground that Mr Clarke did not receive holiday pay or statutory holiday pay. The issue arising from the claim is whether Mr Roberts was an employee or a contractor.

[3] Mr Clarke was head chef at the River View Restaurant (also known as the Riverview Corridor bar and restaurant), a bar and restaurant owned and operated by L Roberts Enterprises Limited. Lane Roberts is the company's sole director and

shareholder. There is also an issue concerning whether Mr Roberts or his company was the employer.

Employee or contractor

[4] Mr Clarke had just sold a restaurant business near Mr Roberts'. Mr Roberts was seeking to sell the River View Restaurant, too, and hoped to sell it to Mr Clarke. Mr Clarke was initially interested in the prospect. Over a drink at the bar, the two agreed that Mr Clarke would come to work as head chef at the River View Restaurant. Although Mr Clarke knew the business was for sale the arrangement was otherwise open ended.

[5] The parties agreed Mr Clark would be paid \$20 an hour 'in the hand'. They did not discuss whether the arrangement would be one of employee and employer or principal and contractor. Neither has subsequently paid tax on Mr Clarke's earnings.

[6] The parties also agreed that Mr Clarke would work from Wednesday to Sunday inclusive, being the restaurant's opening hours. Mr Clarke was expected to start work in time to complete preparation by the time the restaurant opened for the evening, and not to leave until there were no more customers. Accordingly there was a degree of flexibility in the start and finish times, but the position was essentially full time. The duties were those usually expected of a head chef in a restaurant of that type. Mr Clark did not carry out other work on his own account anywhere else.

[7] There was no written agreement between the parties.

[8] Applying the tests for the existence of an employment relationship, I find that Mr Clarke was fully integrated into Mr Roberts' restaurant business and could not be said to be in business for himself. He was an employee.

Identity of the employer

[9] L Roberts Enterprises Limited was the vehicle through which the River View Restaurant operated. It held the lease for the restaurant's premises and either leased

or owned the stock and equipment. It also paid the wages for the staff. Finally it received and accounted for the income from the restaurant. There was no basis on which to attribute employer status to Mr Roberts in his personal capacity.

[10] Accordingly I find L Roberts Enterprises Limited was the employer party.

Holiday pay

[11] Under s 23 of the Holidays Act 2003 Mr Clarke is entitled to holiday pay calculated at 8% of his gross earnings for the period of his employment.

[12] Mr Clarke's employment started on or about 1 August 2007. It ended on 25 February 2008. He was employed for 30 weeks and did not receive any paid leave. There was some fluctuation in the number of hours he worked per week, but the parties agreed at the investigation meeting to an average of 30 hours.

[13] Accordingly the calculation of holiday pay owed is:

$$[30 \text{ weeks} \times 30 \text{ hours} \times \$20/\text{hour}] \times 8\% = \$1,440 \text{ (nett)}$$

Payment for statutory holidays

[14] The restaurant did not open on statutory holidays, so Mr Clarke's claim is for payment in respect of statutory holidays not worked, but which would otherwise have been working days.

[15] The relevant daily pay for those holidays is:

$$30 \text{ hours}/5 \text{ days} \times \$20/\text{hour} = \$120 \text{ (nett)}$$

[16] There were 6 such holidays The total amount of statutory holiday pay owed is:

$$6 \times \$120 = \$720 \text{ (nett)}$$

Summary of orders

[17] R Lane Enterprises Limited is ordered to pay to Mr Clarke:

- (a) \$1,440 (nett) as holiday pay;
- (b) \$720 (nett) as statutory holiday pay; plus
- (c) \$70 in respect of the Authority's filing fee.

R A Monaghan

Member of the Employment Relations Authority