

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN David and Mary Josephine Ashwell (Applicants)

AND Rongo Kuia Clayton (Respondent)

REPRESENTATIVES M Bell for the Applicants
Rongo Kuia Clayton in person

MEMBER OF AUTHORITY R A Monaghan

DATE OF DETERMINATION 7 February 2007

DETERMINATION OF THE AUTHORITY

[1] The determination of the Authority in **David and Mary Josephine Ashwell v Clayton**, 5 November 2004, CA 49A/04 (“the 5 November determination”), concerned an application to reopen an investigation which had led to the determination in **Clayton v David and Mary Josephine Ashwell** 27 April 2004, CA 49/04 (“the 27 April determination”). In the 5 November determination I declined to reopen the investigation into the justification for Ms Clayton’s dismissal but reopened the investigation into whether the Ashwells were Ms Clayton’s employers in their personal capacity, or whether their company, Agrilube Holdings Limited (“Agrilube”), was the employer.

[2] The Ashwells filed a challenge to the 5 November determination in the Employment Court. The challenge has not been heard, but I have been asked in any event to proceed to investigate and determine the identity of the employer.

[3] I sought further material on the point from the parties, and have determined the matter on the papers.

[4] Finally, I record that Agrilube Holdings Limited has been removed from the register of companies.

Determination

[5] The background to the employment relationship was set out in the 27 April determination. The determination also canvassed the evidence then available and bearing on the identity of the employer. I do not repeat that evidence here.

[6] Agrilube Holdings was the owner and operator of the fish and chip shop business where Ms Clayton was working in the period up to and including the date of her dismissal. Accounting and taxation information is consistent with the proposition that Agrilube Holdings was Ms Clayton’s employer. Otherwise the business was small and Ms Clayton was already working there when Agrilube Holdings took it over. The takeover involved relatively little formality.

[7] A recent decision of the Employment Court in **Colosimo & Anor v Parker**¹ contains a useful summary of the law concerning the identity of the employer when the alternatives are a company, or an individual who in many cases is a director of the company. The court found that the onus of proving the individual is the employer, rather than the company, lies with the employee, and the standard of proof is on the balance of probabilities.² As for the approach to be taken when, as here, an employee asserts a lack of awareness that the company in question was the employer, the court said the real issue is whether the individual said to be the employer has held him or herself out to be the employer.³

[8] There might be room for debate about the precise role of the onus and standard of proof in matters before the Employment Relations Authority. The fact remains, however, that at the end of an investigation the Authority has before it a body of evidence from which it must make findings of fact before applying the law to those facts. It must take a principled approach to that task. Here, it is appropriate to consider whether there is evidence that Mr and Mrs Ashwell held themselves out as the employer to Ms Clayton, and whether, on the evidence, it is more probable than not that they were the employer.

[9] Ms Clayton's evidence was based in part on the fact that it was Mr and Mrs Ashwell with whom she had discussions about her employment, but more than that is required to establish that they held themselves out as the employer. First, there were no direct representations to that effect. Overall, it is necessary to show that the Ashwells took steps to separate themselves from the company – for example by paying wages from their personal accounts and generating employment-related documentation in their own names rather than the company's. There was no evidence of that kind.

[10] In concluding there is no evidence that Mr and Mrs Ashwell held themselves out as the employer I give some weight to the fact that Ms Clayton herself recognised the possibility that a company was her employer. She did so in her response to the discussions with the Ashwells concerning a written employment agreement, and in citing Agrilube Holdings as the employer when this problem was first filed.

[11] Overall, such evidence as there was indicates it was more likely than not that Agrilube Holdings was the employer. I find accordingly.

Costs

[12] Costs remain reserved. If the parties seek a determination from the Authority they are to file and exchange memoranda within 28 days of the date of this determination.

[13] The Ashwells are warned that I will require particularly persuasive argument in support of any request for an order for costs in their favour. By his reaction to the Authority's requirements in relation to his application for an adjournment of the original mediation and investigation meetings, Mr Ashwell brought on himself and his wife any need for further litigation.

¹ 6 December 2006, AC 68/06

² At [28]

³ At [30]

R A Monaghan
Member of Employment Relations Authority