

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 241
5535834

BETWEEN PAUL MALCOLM HAYES
Applicant

A N D ANDREW MAXWELL STONE
Respondent

Member of Authority: Rachel Larmer

Representatives: Bridget Wood, Counsel for the Applicant
Steven Barter, Counsel for the Respondent

Investigation Meeting: 07 July 2015 at Auckland

Submissions: 08 July 2015 from Respondent
10 July 2015 from Applicant
10 July 2015 from Respondent
20 July 2015 from Applicant
20 July 2015 from Respondent

Date of Determination: 11 August 2015

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Stone Management Services Limited (Stone Management) employed Mr Paul Hayes under a written individual employment agreement to work as the Marketing and Communications Manager for Zusu Limited (Zusu). Mr Hayes was initially provided with a draft copy of the proposed individual employment agreement dated 18 December 2013 which identified Zusu as his employer, not Stone Management.

[2] The offer letter dated 18 December 2013 was on Zusu letterhead and was signed by Andrew Stone as General Manager of Zusu. The offer stated that it would remain open for Mr Hayes to accept up until 31 January 2014.

[3] Mr Hayes made a number of handwritten amendments to the proposed employment agreement and returned it to Mr Stone. Mr Hayes was subsequently

provided with an amended proposed employment agreement (the amended agreement) which took into account the issues he had raised. The amended agreement also changed the name of the employer identified in the amended agreement from Zusu to Stone Management.

[4] The amended agreement naming Stone Management as the employer was signed by the parties on 31 December 2013. Mr Stone signed as General Manager “*for and on behalf of*” of Stone Management.

[5] The employment agreement signed by the parties identified the position as “*Marketing and Communications Manager*”. It was mutually agreed that Mr Hayes would be providing his Marketing and Communications Manager services for the benefit of Zusu. Mr Hayes started work on 17 February 2014.

[6] On 17 April 2014 Mr Stone advised Mr Hayes that his employment was being terminated under the 90 day trial period provision set out in clause 4 of the amended agreement. Mr Hayes’ dismissal was confirmed by letter dated 22 April 2014 signed by Mr Stone.

[7] Mr Hayes filed a Statement of Problem with the Authority on 23 December 2014 which named Mr Stone as respondent and which identified the following claims:

- (a) Failure to keep/produce accurate time and wage records and to provide them upon request.
- (b) Breach of employment agreement, namely:
 - (i) failure to purchase shares from Mr Hayes upon termination of his employment as required by clause 4.5 of the agreement;
 - (ii) failure to pay Mr Hayes for 07 April in circumstances where Mr Hayes claims he was directed not to attend work;
 - (iii) failure to pay Mr Hayes his full salary;
 - (iv) failure to pay Mr Hayes salary payments on the appointed payday as identified in clause 16 of the employment agreement;and

- (v) failure to pay Mr Hayes' PAYE and KiwiSaver employer contributions.
- (c) Breach of good faith, including the obligation to be communicative and responsive.

[8] There are a number of entities that Mr Stone is associated with that are relevant to these proceedings:

- a. Zusu Limited (In Liquidation) – Mr Stone is director, the four shareholders are:
 - i. SRN Trustee Company Ltd (director Shaun Nixon and Shareholder Mr Nixon and Leanne Cate);
 - ii. Stone Family Corporate Trustee Ltd – action is underway to remove from Company Register (director Andrew Stone and Shareholder Andrew Stone and Laurel Stone)
 - iii. Gregory Currie and Wayne Coutts;
 - iv. P & T Hayes Trustee Ltd (Directors Paul and Trudy Hayes and Shareholder Paul and Trudy Hayes).
- b. Stone Family Corporate Trustee Ltd (Director Andrew Stone and shareholder Andrew and Laurel Stone);
- c. Stone Management Services Ltd – struck off 18 August 2014 (Director Andrew Stone and shareholder Andrew Stone);
- d. Senior Holdings Limited – Director Andrew Stone and shareholders Stone Family Corporate Trustee Ltd and SRN Trustee Company Limited.

[9] Mr Hayes claims that Stone Management was a “*shell company*” which held or holds no assets so he has no ability to recover any potential remedies from that entity. Mr Hayes submits that his employment was “*exclusively controlled*” by Mr Stone in his personal capacity so Mr Hayes claims Mr Stone was in fact his employer personally not Stone Management. Mr Stone disputes that.

[10] Mr Stone says that Mr Hayes was employed by the limited liability legal entity Stone Management and that Mr Hayes was well aware of that. Mr Stone claims that Mr Hayes is only seeking to pursue him personally because Stone Management has been struck off and de-registered from the Companies Office register.

[11] Mr Hayes, upon commencing employment, made a personal investment in Zusu through his family trust (the trustee company being P & T Hayes Corporate Trustee (Hayes' Family Trust)).

[12] The Hayes Family Trust purchased a 5% shareholding in Zusu from the Stone Family Corporate Trustee Limited (the Stone Family Trust) for a purchase price of \$50,000. Mr Hayes transferred this amount from his personal bank account to Mr Stone's personal bank account.

[13] Mr Hayes claims he is entitled to recover this \$50,000 from Mr Stone personally under clause 4.5 of the amended agreement. Mr Hayes claims that Mr Stone breached the amended employment agreement by not repaying \$50,000 to Mr Hayes when his employment ended.

[14] Clause 4.5 of the amended employment agreement states:

In the event that the employment of the employee is terminated by either party during the 90 day trial period any equity acquired by the employee will be sold to the employer at purchase price plus interest accrued at the ANZ floating rate plus 2.5% p.a.

[15] When Mr Hayes' employment was terminated he sought to invoke clause 4.5 of the agreement, but has not yet recovered that money.

[16] The Hayes Family Trust and the Stone Family Trust entered into a Letter of Intent which records the Hayes Family Trust's purchase of a 5% shareholding in Zusu. The Letter of Intent records that if no Shareholders Agreement was executed by Zusu by 01 April 2014 the purchase would become null and void and any equity acquired by the purchasing party would be sold back at purchase price plus interest.

[17] A Shareholders Agreement was not executed by 01 April 2014 or subsequently. The \$50,000 share purchase price has not been repaid to Mr Hayes or the Hayes Family Trust.

Issues

[18] The issues for determination:

- (a) Were the parties in an employment relationship?
- (b) If not, does the Authority have jurisdiction to investigate the claims in Mr Hayes' Statement of Problem?
- (c) If Mr Stone was or is deemed to have personally been Mr Hayes' employer then:
 - a. Did Mr Stone fail to keep accurate wage and time records and/or produce them upon request?
 - b. Is Mr Hayes owed wage arrears?
 - c. Did Mr Stone breach Mr Hayes' employment agreement in respect of the five matters identified by Mr Hayes?
 - d. Did Mr Stone breach good faith requirements?
- (d) If Mr Stone has breached good faith and/or the employment agreement, should penalties be imposed?
- (e) If so, should some or all of any penalties that may be imposed be paid to Mr Hayes?
- (f) What if any costs should be awarded?

Were the parties in an employment relationship?

[19] An employment relationship is defined in s.5 of the Employment Relations Act 2000 (the Act) as meaning any of the employment relationships specified in s.4(2) of the Act.

[20] The material provision is section 4(2)(a) of the Act which refers to an employment relationship between an employer and an employee. An employer is defined in s.5 of the Act as a person employing any employee. An employee is defined in s.6 of the Act.

[21] The material provision in s.6 of the Act is s.6(1)(a) which defines an employee as “*any person of any age employed by an employer to do work for hire or reward under a contract of service.*” (my emphasis)

[22] Mr Stone claims there was no contractual relationship between him personally and Mr Hayes because Mr Hayes was employed by Stone Management. Mr Stone says the only contractual arrangement Mr Hayes entered into was with Stone Management.

[23] The Authority’s initial inquiry is therefore into whether or not Mr Hayes had entered into a contract of service with Mr Stone personally.

[24] In determining whether a person is employed by another person under a contract of service, the Authority is required to determine the “*real nature of the relationship*”¹ between them. In doing so the Authority is required to consider all relevant matters, including the parties’ intentions, but is not to treat as determinative any statement by the parties describing the nature of their relationship.²

[25] Section 6 of the Act is not limited to determining issues of status only, but may be reverted to where the identity of an employer is in issue.

[26] Mr Hayes bears the onus of establishing on the balance of probabilities that he and Mr Stone had entered into a contract of service and were therefore in an employment relationship. This is to be objectively assessed by considering who an independent but knowledgeable observer would have identified as Mr Hayes’ employer in all of the circumstances that were known to the parties at the time the amended employment agreement was entered into.

Elements of contract formation

[27] The standard legal elements essential for the formation of a contract, namely offer, acceptance, certainty of terms, mutual intention to create legal relations, and

¹ Section 6(2) of the Act

² Section 6(3) of the Act

consideration all apply to a determination of whether or not a contract of service existed between the parties.

[28] These contract formation elements either need to be present or need to be reasonably (objectively) implied. It is only appropriate to imply a contract if there are words and conduct which suggests that the express contractual arrangements originally in place do not reflect the real relationship between the parties.

[29] In such a case I would expect to see that the relationship status initially agreed upon by the parties at the outset had changed materially by mutual agreement to create a different legal relationship.

[30] The necessary elements of contract formation are to be assessed from the parties' overt conduct rather than by reference to their expressed intentions, particularly intentions that are raised subsequent to the ending of the relationship, as is the case here.

[31] An assessment of whether there was a mutual intention to create contractual relations between the parties requires an objective assessment of the state of affairs between the parties. It does not relate to an uncommunicated subjective motive or intention of the parties.

[32] I find that the necessary elements for contract formation do not exist between the parties. I find that Mr Stone did not make an offer of employment in his personal capacity which was capable of being accepted by Mr Hayes.

[33] The offer of employment was initially made by Zusu and subsequent communications between the parties mutually changed that by agreeing that Mr Hayes would be employed by Stone Management. All of the necessary elements of contract formation exist in relation to a contract of service existing between Stone Management and Mr Hayes.

[34] The change in the employer named in the amended agreement shows there was clearly a deliberate decision that was mutually agreed upon at the outset of the relationship to create a legally binding relationship between Mr Hayes and Stone Management. I find that there was no subsequent mutual agreement to change that contractual arrangement or relationship.

[35] I do not accept Mr Hayes' evidence that he was pressured into agreeing to be employed by Stone Management. Mr Hayes was provided with a draft proposed employment agreement and advised of his right to take advice before accepting the offer of employment.

[36] Mr Stone's evidence was that he discussed the matter with a friend who was a solicitor and with his brother who was a Chartered Accountant. Both of whom advised Mr Hayes that because Stone Management did not own any assets he would "*lose too many employment rights by agreeing*" to employment by that entity. Nevertheless, Mr Hayes still elected to accept the offer of employment by Stone Management.

[37] I do not accept Mr Hayes' claim that he had insufficient time to take advice. The parties signed the amended agreement on 31 December 2013. This records that Mr Hayes' appointment was intended to take effect from 01 March 2014 (although he arranged to start work earlier than that on 17 February 2014).

[38] Mr Hayes did not ask for more time to take advice nor did he express any concern at the time that he felt pressured into signing the amended agreement which named Stone Management as his employer. If there was any pressure I consider it came from Mr Hayes who was keen to accept the offer of employment and who wanted to start work as soon as possible.

[39] I find that the evidence supports a mutually agreed intention that Stone Management would employ Mr Hayes;

- a. Stone Management is named on the cover page of the employment agreement.
- b. Stone Management is named as a party in the "*Parties*" section of the employment agreement.
- c. Stone Management is named as the "*Employer*" in the definitions clause in the employment agreement.
- d. Mr Stone was recorded as having signed "*for and on behalf of*" Stone Management as its General Manager.

- e. Stone Management was expressly referred to in the Schedule 6 bonus provisions.

[40] Clause 35 of the employment agreement contained an “*Employee’s Certificate*” in which Mr Hayes acknowledged and declared that he had read and understood the terms and conditions of employment, had been provided with a copy of the proposed employment agreement and attached schedules, had been advised of his right to seek independent advice, and had had a reasonable opportunity to do so.

[41] I find that Mr Hayes subsequently acted consistently with a belief that Stone Management was his employer.

[42] Mr Hayes’ solicitor wrote to Mr Stone in his capacity as director of the Stone Family Trust and as a director of Stone Management on 21 May 2014. Amongst other concerns, this letter referred to employment issues. It stated:

Mr Hayes was employed by Stone Management Services as a Marketing and Communications Manager ...

In our view, there are several factors which give to a personal grievance claim and/or penalty claim against Stone Management Services, under the Employment Relations Act 2000 ...

Our client has grounds to raise a personal grievance and seek compensation for the breaches by Stone Management Services and also penalties against Stone Management Services for its liability in relation to those breaches.

[43] I consider this letter makes it clear by referring to Stone Management as the employer and by raising personal grievances and other employment matters in respect of breaches by Stone Management, that Mr Hayes considered Stone Management to be his employer. There was no mention of Mr Stone having personally employed Mr Hayes.

[44] Mr Hayes’ solicitor wrote to Nixon Cate about the debt owed by the Stone Family Trust/Stone Management. It referred to the employment agreement which was signed on behalf of “*Stone Management*” and to the termination of Mr Hayes’ “*employment with Zusu Limited*”.

[45] This letter asked Mr Stone, in his capacity as representative of both the Stone Family Trust and Stone Management to sign an Admission of Claim relating to the

moneys which the Stone Family Trust and Stone Management were alleged to owe Mr Hayes and his Family Trust.

[46] The Admission of Claim form drafted by Mr Hayes' solicitors referred to Stone Management and Stone Family Trust and to an Admission of Claim being entered into by those entities not by Mr Stone personally.

[47] The proposed Admission of Claim form states: "*Stone Management Services and the Stone Family Corporate Trustee Limited ("the defendants") entered into agreements in relation to the plaintiff's employment with Stone Management Services Limited ("the employment agreement") [...]. There was an area for Mr Stone to sign "on behalf of Stone Management Services Limited and on behalf of the Stone Family Corporate Trustee Limited".*

[48] As it turned out, Mr Stone did not sign this document. However I consider that it provides evidence that Mr Hayes' and his solicitor considered that Mr Stone's involvement was in his capacity as a director of the Stone Family Trust and Stone Management rather than as someone who had personally employed Mr Hayes.

[49] Mr Hayes' solicitor wrote another letter to Mr Stone on 14 July 2014 which was addressed to Stone Management. This again referred to:

The employment agreement entered into between our client and his employer Stone Management Services Limited. Mr Hayes was employed by Stone Management Services as a Marketing and Communications Manager ...

The terms and conditions of Mr Hayes' employment are set out within the individual employment agreement signed and dated 31 December 2013. ...

We hereby formally raise a personal grievance on behalf of our client against Stone Management Services, under the Employment Relations Act 2000.

[50] I find that this communication identifies Stone Management as the employer and the amended agreement signed by the parties on 31 December as setting out the terms and conditions of Mr Hayes' employment. There was no suggestion that these terms and conditions had changed or been varied by mutual agreement. If that was in fact the case I would have expected Mr Hayes and his solicitors to have raised it at that point.

[51] A settlement proposal was also made which referred to Stone Management throughout as “*the employer*” and to obligations that Stone Management as the employer owed under “*the employment agreement*” referring to the agreement signed by the parties on 31 December 2013. The settlement proposals involved Stone Management as Mr Hayes’ employer, not Mr Stone personally.

[52] On 17 April 2014 Mr Hayes wrote to Mr Stone referring to “*the termination of my employment as Marketing and Communications Manager at Zusu Limited (For Stone Management Services)*”. This also supports my view that Mr Hayes always understood that Stone Management (not Mr Stone personally) was his employer.

[53] I find that the written employment agreement created a contract of service and therefore an employment relationship between Mr Hayes and Stone Management. I consider that there is no objective evidence that reasonably supports the existence of a contract of service between Mr Hayes and Mr Stone personally. I therefore find they were not in an employment relationship as defined in s.4(2) of the Act.

Does the Authority have jurisdiction to investigate the claims in Mr Hayes’ Statement of Problem?

[54] All of the claims Mr Hayes has identified in his Statement of Problem require the parties to be in an employment relationship. I find that there was no employment relationship between the parties to these proceedings. Therefore the Authority does not have jurisdiction to investigate the claims identified by Mr Hayes in his Statement of Problem.

[55] Mr Hayes submits that the Authority should “*lift the corporate veil*” and affix personal liability to Mr Stone for Stone Management’s acts/omissions. I decline to do so.

[56] The law recognises that individuals may elect to use a limited liability entity such as a registered company to enter into contractual relations. In which case there is a legal assumption that the use of a limited liability entity means that liability is limited to that particular legal entity.

[57] The employment institutions take a cautious approach to interfering with long established law on corporate separateness by piercing the corporate veil. The law

enables a person to set up a legal entity or structure that complies with the requirements of New Zealand law to employ staff.

[58] Mr Hayes had an opportunity to take legal advice before entering into an employment relationship with Stone Management. The parties had specific discussions around the legal identity of Mr Hayes' employer and why it was to be Stone Management and not Zusu or some other person such as Mr Stone personally.

[59] Mr Hayes had been given advice to the effect that employment by Stone Management was not a good idea because it may reduce his employment rights. However notwithstanding that he elected to proceed anyway.

[60] Mr Hayes had more than enough time (with a proposed start date of 01 March 2014) within which to take advice and make up his mind about such matters. He made a conscious decision to proceed whilst being aware of the potential risk in doing so.

[61] Another difficulty Mr Hayes faces when seeking to have Stone Management's corporate veil pierced by the Authority is that legal entity has been struck off the Companies register – so it no longer exists. Nor is it a party to these proceedings.

[62] I therefore consider that there is no longer a legal entity than can have its veil pierced, even if the Authority was minded to do so. Accordingly Mr Hayes' application to pierce Stone Management's corporate veil in order to fix personal liability on Mr Stone does not succeed.

Costs

[63] Mr Stone as the successful party is entitled to a contribution towards his actual costs. The parties are encouraged to resolve costs by agreement. However if that is not possible then Mr Stone has 14 days within which to file costs submissions. Mr Hayes has 7 days within which to respond with Mr Stone having a further 3 working days within which to file a reply.

[64] This timetable will be strictly enforced so any departure from it requires the prior leave of the Authority.

[65] The Authority is likely to adopt its usual notional daily tariff based approach to costs so the parties are invited to identify any factors which they says warrant adjustments being made to the notional daily tariff of \$3,500.

Rachel Larmer
Member of the Employment Relations Authority