

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 42
5388581

BETWEEN ALISON HOWARD
Applicant

A N D KENNETH MAX PAHL
Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
Respondent in Person

Investigation Meeting: 31 January 2013 at Auckland

Date of Determination: 5 February 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Ms Howard) alleges that she is owed unpaid wages and unpaid holiday pay by the respondent (Mr Pahl).

[2] Mr Pahl acknowledges the debt, challenges the quantum claimed but indicates that he was not the employer. He alleges that the employer was a company incorporated as Character Land NZ Limited (Character Land).

[3] The only question for the Authority in the present determination is the identity of the employer. Once that issue has been decided, the Authority will advise Ms Howard and the employer what further steps are required in order to dispose of the matter completely.

[4] The Authority convened an investigation meeting to deal with the present claim on 31 January 2013. The outcome of that investigation meeting was traversed in a Minute of the Authority dated 4 February 2013. In brief, Ms Howard maintained

that her employer was Mr Pahl while Mr Pahl maintained that the employer was always the company Character Land but he advised that the company was now in liquidation.

[5] As a consequence of that liquidation, if Ms Howard is found to be employed not by Mr Pahl but by Character Land then she will require the consent of the liquidator in order to proceed with her present claim, as framed.

[6] Mr Pahl accepted that there were wages and holiday pay arrears but did not accept Ms Howard's calculation of the sums owed. If Mr Pahl is found to be the employer, those admissions are helpful, as far as they go, but if Character Land is the employer then, given that Character Land is now in liquidation, Mr Pahl's evidence can be no more than persuasive.

[7] Because of the possibility that Ms Howard was, in truth, employed by Character Land, the Authority referred her, at the conclusion of the investigation meeting, to the liquidator and the Authority undertook to also contact the liquidator itself.

Issues

[8] The only issue for determination here is who the employer was and the Authority will undertake that inquiry by reference to the evidence available to it.

Who was the employer?

[9] The Authority is satisfied on the evidence before it that the employer was in fact Character Land.

[10] Ms Howard told the Authority that she dealt exclusively with Mr Pahl and believed him to be her employer. She said there was no employment agreement in writing and the only documentary evidence of the identity of the employer was that her bank statements contained the legend *N D Pahl* against the payments of wages that were made.

[11] Mr Pahl had a different view, although he did not express that view in his statement in reply and he did not take the opportunity to advance it at any point prior to the investigation meeting. Mr Pahl had not been involved in any of the Authority's process up to the investigation meeting itself with the exception of filing the statement

in reply. That statement in reply does not deny that he is or was the employer and accepts that money is owed but not at the quantum claimed by Ms Howard. The statement in reply also identifies that the failure to pay the monies owed is a function of the difficult trading environment.

[12] Notwithstanding the failure to raise the issue in the statement in reply, it was certainly raised fair and square by Mr Pahl during the investigation meeting when his evidence was plain that Ms Howard had always been employed by Character Land. Mr Pahl dealt with the contention that his family name appeared on Ms Howard's bank statement against previous wage lodgements by saying that he could not recall how that came about and thought it might have been something his bank had done.

[13] However, he undertook to provide to the Authority bank statements from Character Land's bank showing wage payments going out to Ms Howard. He has now done that and the Authority has had the opportunity to review that evidence so provided.

[14] It was plain there was no written employment agreement. It was equally clear that Ms Howard dealt with Mr Pahl exclusively but that does not prove that Mr Pahl was the employer. The reality of being employed by a limited liability company is that its actions can only ever be undertaken by a human actor (in this case Mr Pahl) and nothing can conclusively be taken from the fact that Ms Howard dealt exclusively with Mr Pahl.

[15] In the Authority's opinion, the fact that wage payments to Ms Howard came from Character Land's bank account is conclusive evidence that Character Land was Ms Howard's employer. The fact that Mr Pahl's family name is appended to the lodgement records in her bank statements tends to suggest the converse conclusion but the Authority is persuaded that the account from which the funds were paid is of dominant importance in concluding, in the present case, that the employer was Character Land rather than Mr Pahl.

[16] It would of course have been helpful if Character Land had provided Ms Howard with a written employment agreement, as the law requires. That would have put the matter beyond doubt. But in the result, and notwithstanding the default by Character Land in failing to provide a written employment agreement, the Authority is satisfied it can rest on the evidence it has.

[17] The explanation for Mr Pahl failing to raise the matter in his statement in reply may be function of the fact that the statement in reply was filed prior to the liquidation and at that point, Mr Pahl may have believed that the money could be paid from trading revenues. Once the liquidation was in place of course, trading ceased. It is also the case that lay people may not appreciate the importance of issues such as the identity of the employer, especially when, at the time the statement in reply was filed, Mr Pahl's focus may well have been on the repayment of the debt through trading surpluses rather than the legal position per se.

Determination

[18] For the reasons just advanced, the Authority is satisfied that Character Land employed Ms Howard, not Mr Pahl.

[19] It follows that in order for Ms Howard to proceed with her present claim, she will need the consent of the liquidator. To facilitate a consideration of that aspect, the Authority has already been in email contact with the liquidator, has suggested to Ms Howard that she contact the liquidator urgently, and will send a copy of this determination to the liquidator for his information.

James Crichton
Member of the Employment Relations Authority