

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 34
3021011

BETWEEN DYLAN HUGHES
Applicant

A N D KIWI INK CONSTRUCTION
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
No appearance by or for the Respondent

Investigation Meeting: 31 January 2018 at Auckland

Date of Determination: 31 January 2018

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Non-appearance of respondent

[1] Kiwi Ink Construction Limited (Kiwi Ink) failed to file a statement in reply to the statement of problem, and also failed to attend the investigation meeting today. I am satisfied that Kiwi Ink was properly served with the statement of problem and subsequent correspondence from the Employment Relations Authority together with a Notice of Investigation Meeting.

[2] The applicant, Mr Dylan Hughes, attempted for a number of months to have a mediation with the directors of Kiwi Ink, Mr George Paul Ropiha and Ms Kiri Goldsmith, but they refused to engage, therefore no mediation occurred.

[3] The statement of problem was served on Kiwi Ink by Mr Hughes personally. He handed the documents to Mr Ropiha at Kiwi Ink's registered office at 2/270 St Heliers Bay Road, St Heliers, Auckland 1071. The Authority has also received

email communications from the directors of Kiwi Ink prior to the investigation meeting today.

Investigation meeting

[4] Being satisfied that Kiwi Ink was properly served with the proceedings and Notice of Investigation Meeting, I proceeded to investigate the issues as to whether or not Mr Hughes was employed by Kiwi Ink, or was a contractor to it, and whether he is owed unpaid wages, holiday pay and a deduction made from his wages by Kiwi Ink for petrol which he says was not authorised by him.

[5] I conducted my investigation in the absence of Mr Ropiha, Ms Goldsmith, or any other representative from Kiwi Ink as they failed to appear.

[6] Mr Hughes affirmed at the investigation meeting that his evidence was true and correct as set out in his statement of problem.

[7] As allowed under s.174 of the Employment Relations Act 2000 (the Act) this determination does not set out all of the evidence. Relevant facts and legal issues are set out along with the Authority's conclusions.

Employment relationship problem

[8] Mr Hughes has a background in sales and marketing. In August 2016 Mr Hughes returned to New Zealand from extended overseas travel. He and his fiancée moved to Hamilton for a period of time where they had accommodation provided. Mr Hughes began some temporary labouring work during this period of time.

[9] In 2017, Mr Hughes's fiancée obtained a permanent full time position in Auckland. They moved to Auckland.

[10] Mr Hughes obtained further temporary employment, this time at Livingstone Building New Zealand Limited (Livingston), doing labouring work.

[11] It was during his time at Livingstone that he met Mr Ropiha. Mr Ropiha's company, Kiwi Ink, had a building contract at the same site at which Mr Hughes was working.

[12] When Kiwi Ink's contract at that site came to an end, Mr Ropiha invited Mr Hughes to work for him. As Mr Ropiha was offering more money, Mr Hughes agreed to work for Kiwi Ink. This was in June 2017.

[13] Before starting his engagement with Kiwi Ink., Mr Hughes met with Mr Ropiha to talk about the work that was being offered. Mr Hughes confirmed with Mr Ropiha what his hourly rate would be, confirmed that he would be employed by Kiwi Ink and that PAYE would be deducted from his wages. Mr Ropiha agreed that Mr Hughes would be employed by Kiwi Ink at the rate of \$27 an hour. Mr Ropiha filled out the relevant tax forms and asked Mr Hughes to sign them, which Mr Hughes did.

[14] Mr Hughes was not provided with an employment agreement, although he asked for one on a number of occasions. Mr Hughes was paid weekly by Kiwi Ink from June 2017 until 2 August 2017.

[15] When Mr Hughes received payslips a week after payments were made into his bank account, and after seeing the first payslip, he queried Mr Ropiha about why the payslip stated there was GST in addition to his hourly rate and that withholding tax was being deducted. Mr Ropiha told him that he would sort the matter out. The matter was not sorted out and Mr Hughes continued asking Mr Ropiha to resolve the matter and to provide him with an employment agreement. When Mr Hughes continued to ask about his employment agreement and PAYE being deducted from his wages, Mr Ropiha became increasingly angry and aggressive.

[16] On 31 July 2017, Mr Hughes received an email from Ms Goldsmith which claimed he was a contractor. This was the first time this claim had been made to Mr Hughes by Kiwi Ink.

[17] This email stated that Kiwi Ink would not be placing Mr Hughes on an "employee salary". The email stated: "Again, please cease texting Paul demands and simply call him. You do not have the groundings (sic) to make demands, we are not exactly in a position where we "need" you and do not appreciate you appearing to make things look difficult." A couple of days later, Mr Hughes was told by Mr Ropiha not to come back to work.

[18] Mr Hughes says he has never been paid for the final three days of his employment by Kiwi Ink, namely for 26, 27 and 28 July 2017. Mr Hughes seeks payment for those three days together with \$50 which was deducted by Mr Ropiha for

petrol and not authorised by Mr Hughes, together with the Authority's filing fee of \$71.56. In addition, Mr Hughes seeks holiday pay at the rate of 8% under the Holidays Act 2003 for holiday pay which he was never paid by Kiwi Ink.

Determination

[19] Having heard the evidence, I consider that Mr Hughes was employed by Kiwi Ink. The concept of employee is defined in s.6 of the Act. Section 6(2) states:

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.

[20] Mr Hughes's evidence is that his understanding of his relationship with Kiwi Ink was that he was to be employed and he informed Mr Ropiha of this. Mr Hughes regularly disputed the payslips and asked why PAYE was not being deducted from his wages and asked for an employment agreement.

[21] Mr Hughes worked at the direction of Mr Ropiha each day, going to work sites that he was directed to work at and working in the region of eight to nine hours a day solely for Kiwi Ink. Kiwi Ink provided Mr Hughes with the tools that were required for him to perform his duties for it.

[22] In all the circumstances, and in the absence of any evidence to the contrary, I consider that Mr Hughes was an employee and, as such, I have jurisdiction to deal with his claims.

Orders

[23] I consider Kiwi Ink owes Mr Hughes the unpaid wages claimed by him. I order Kiwi Ink to pay Mr Hughes for the three days he worked for it and for which he was not paid, namely 26, 27 and 28 July 2017. Mr Hughes says he is owed for 28 hours in total at the rate of \$27 an hour. This amounts to \$756 gross.

[24] Kiwi Ink is ordered to pay Mr Hughes the sum of \$756 gross within 14 days of the date of this determination.

[25] Mr Hughes earned a total of \$9,031.50 gross during the course of his employment by Kiwi Ink. Mr Hughes is entitled to holiday pay on that amount. Holiday pay at the rate of 8% amounts to \$722.52 gross

[26] I order Kiwi Ink to pay Mr Hughes the sum of \$722.52 gross in holiday pay within 14 days of the date of this determination.

[27] In addition, I order Kiwi Ink to reimburse Mr Hughes the sum of \$50 being a deduction supposedly for petrol which was never authorised by Mr Hughes. This payment is to be made within 14 days of the date of this determination.

Costs

[28] Mr Hughes was not represented. However, Mr Hughes is entitled to reimbursement of the filing fee of \$71.56. This amount is to be paid within 14 days of the date of this determination.

[29] In summary, Kiwi Ink is to pay Mr Hughes within 14 days of the date of this determination the sum of \$1528.52 gross for unpaid wages, holiday pay and the unauthorised deduction for petrol plus the filing fee of \$71.56.

Anna Fitzgibbon
Member of the Employment Relations Authority