

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 111  
5520417

BETWEEN INGRID KIM, LABOUR  
INSPECTOR  
Applicant

AND PRO-BUILD CANTERBURY  
LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Greg La Hood, Counsel for the Applicant  
Kim Jerard and Murray Withers, representatives for the  
Respondent.

Investigation meeting: 17 July 2015 at Christchurch

Submissions: From the Applicant orally at the investigation meeting  
and from the Respondent in writing received at the  
investigation meeting, although the respondent was not  
represented at the investigation meeting

Determination: 5 August 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. Barry McGreevy, Norman McRae and Michalis Michael were employees of Pro-Build Canterbury Limited.**
- B. Within 28 days of the date of this determination Pro-Build Canterbury Limited is to pay a total sum of \$43,003.43 gross to Ingrid Kim, Labour Inspector, made up of the following:**
- (i) for the benefit of Barry McGreevy \$14,218.18 gross in holiday pay, pay for working on public holidays and for**

**alternative holidays not taken; and**

**(ii) for the benefit of Norman McRae \$18,856.69 gross in holiday pay, and pay for working on public holidays; and**

**(iii) for the benefit of Michalis Michael \$8,783.20 gross in holiday pay, pay for working on public holidays and for alternative holidays not taken; and**

**(iv) for the costs associated with bringing these claims of \$1,145.36.**

**C. Within 28 days of the date of this determination Pro-Build Canterbury Limited is to pay a penalty of \$15,000 to the Employment Relations Authority for transfer to the Crown Account.**

### **Employment relationship problem**

[1] Ingrid Kim, Labour Inspector, brings these proceedings alleging Pro-Build Canterbury Limited's non-compliance with Holidays Act 2003 (Holidays Act) provisions on behalf of:

- Barry McGreevy, an Irish national in New Zealand working on working visas;
- Norman McRae, a New Zealand citizen; and
- Michalis Michael, a Cypriot national in New Zealand working on working visas.

[2] Ms Kim alleges that the three were employees when they worked for Pro-Build Canterbury Limited (Pro-Build). She claims that they were not paid:

- annual holiday pay,
- payment at time and a half for working on public holidays, or
- payment for alternative days in lieu of public holidays worked which were not taken as time off.

[3] Therefore, Ms Kim claims payment of holiday pay she says each of the applicants is owed on their behalf.

[4] Ms Kim also claims that Pro-Build should pay penalties for its breaches of its obligations under the Act, which include not keeping holiday and leave records.

[5] At the investigation meeting Ms Kim presented newly calculated holiday pay figures and also claimed sick leave pay for each applicant. I am unable to consider the claims for paid sick leave as they were not originally claimed and the respondent has not had an opportunity to respond to those claims. However, I am satisfied that it is just to consider the newly calculated amounts which are higher than those previously calculated because the difficulty in calculation of the applicant's entitlements was due to Pro-Build not keeping holiday and leave records and in not providing the timesheets as directed by the Authority within the timeframes directed for some of the time periods and not at all for other time periods.

[6] Mr McGreevy, Mr McRae and Mr Michalis support Ms Kim's application and gave written and oral sworn evidence at the investigation meeting.

[7] Pro-Build was not represented at the investigation meeting but supplied various statements and documentation during the process of the Labour Inspector's investigation and the Authority's process leading up to the investigation meeting on 17 July 2015. In addition, Kim Jerard, Pro-Build's sole director and shareholder, and Murray Withers, Pro-Build's representative, both sent emails to the Authority on the morning of 17 July 2015 after the investigation meeting began which were considered at the investigation meeting and have been taken into account by me in writing this determination.

[8] From those communications it appears that Pro-Build's position is that it did not keep holiday and leave records as it did not consider it was obliged to do so because it treated all of its workers as independent contractors.

[9] Pro-Build acknowledges that for some of its workers it completed individual employment agreements (IEAs) and prepared letters offering employment signed by Mr Jerard which it provided to the NZ Immigration Service for the purpose of obtaining working visas. Those workers included Mr McGreevy and Mr Michalis. However, Pro-Build says that subsequently it entered into agreements with its workers that they would be engaged at higher hourly rates than those set out in the IEAs and be independent contractors rather than employees. To that end Pro-Build only paid

schedular payments of tax to the IRD and did not make PAYE deductions. Pro-Build says that also for that reason it is not obliged to pay the workers any holiday pay entitlements as they were not employees.

[10] Pro-Build says that Mr McGreevy, Mr McRae and Mr Michael were paid more than they would have been paid as employees. Therefore, it asks that when any holiday pay calculations are made the Authority should take into account the higher wages already paid but only calculate the holiday pay on the lower hourly rates they would have been paid as employees. I understand Pro-Build to submit that those amounts paid in the hourly rates should then be off-set against anything owed for holiday pay.

[11] Pro-Build submits it always acted correctly and has done nothing wrong. Alternatively, or perhaps concurrently, it submits that while it may have been wrong to treat those workers on working visas as contractors it did so under advice it believed to be correct at the time and should not be penalised for following such advice.

### **Procedural history**

[12] This claim has had a long path to an investigation meeting. I set out that path here for completeness sake and to show that Pro-Build has had a full opportunity to participate in the investigation meeting but chose not to be represented at the meeting.

[13] The first application involving Pro-Build was made to the Authority on 26 September 2014 for compliance with an improvement notice issued by Ms Kim on 27 August 2014. Ms Kim claimed that Pro-Build had not complied with the improvement notice under which it was required to provide copies of employment agreements, wages and time records and holiday and leave records for all employees it had employed in the six years prior to 27 August 2014.

[14] Pro-Build filed a statement in reply to that application through Mr Withers, its business consultant, on 10 October 2014. Pro-Build had not lodged any objection to the improvement notice. It did not comply with it.

[15] In September 2014 Ms Kim lodged requests with Immigration NZ under the Privacy Act 1993 to receive copies of all employment agreements for people who had

made work visa applications reliant on existing employment with or offers of employment by Pro-Build. She received such information for a number of individuals, including Mr McGreevy and Mr Michael.

[16] On 24 September 2014 Ms Kim issued a further improvement notice requiring Pro-Build to undertake a full audit of the wages, time and leave records for five named individuals she believed to be migrant employees on work visas and to pay any arrears discovered through the audit process to be owed to those employees.

[17] Pro-Build was also required to similarly audit the records relating to all 14 employees she named in the improvement notice.

[18] Pro-Build was required to provide Ms Kim with the audit results for all of the employees, including calculations of how much was owed and proof of payments of the arrears in relation to annual holidays, public holidays and alternative holidays in lieu of public holidays worked. If Pro-Build was not able to contact any former employees who were owed money it needed to provide Ms Kim with proof of reasonable efforts to contact them.

[19] On 15 October 2014 Ms Kim and another Labour Inspector met with Mr Withers and explained to him what was required of his client by way of its statutory obligations towards its employees, and what the employees were entitled to as well as what the improvement notice of 24 September 2014 required of Pro-Build.

[20] Pro-Build did not comply with the improvement notice or lodge an objection to it. Through Mr Withers's correspondence with Ms Kim Pro-Build attempted to satisfy her by suggesting that it get a signed acknowledgement from its workers that they waived their holiday pay entitlements. Ms Kim clearly stated that was not acceptable as she was pursuing minimum statutory entitlements on behalf of the employees.

[21] On 5 November 2014 Mr Withers emailed Ms Kim stating he attached:

*copies of the contracts for the current workers ... These are in the course of being executed and signed and signed copies will be supplied to you. ... We are hopeful of full compliance within a fortnight and seek your further indulgence.*

[22] The contracts attached were entitled *contracts for services provided* and were not signed by either party.

[23] On 7 November 2014 Ms Kim lodged another application against Pro-Build in relation to 14 named workers that Ms Kim alleged were employees and on 11 November 2014 the Authority held a teleconference with Ms Kim and Mr Withers. The two applications were amalgamated so that they could be dealt with together. An investigation meeting was set down for 9 April 2015 and the date of 24 November 2014 was set for the filing of the statement in reply to the second application. Mr Withers was directed to provide any documents, including emails and diary notes recording employees' weekly hours worked by 9 December 2014.

[24] The documents directed to be provided by 9 December 2014 were not provided and Mr Withers entered into correspondence with Ms Kim about exactly what was sought, his understanding being that individual timesheets were required, which Pro-Build opposed.

[25] On 12 November 2014 Mr Withers' letter to Ms Kim notified her that:

- It did not hold any records in terms of the Holidays Act as Pro-Build understood its workers were all independent contractors;
- Pro-Build did not retain any copies of *contracts* and only had unsigned copies because the *contractor* retained the signed copy;
- It would get signed contracts for the current contractors to Ms Kim *shortly*.

[26] Pro-Build never supplied signed copies to Ms Kim or to the Authority.

[27] A further teleconference was arranged for 22 January 2015. Unfortunately Mr Withers was not contactable and I cancelled that teleconference.

[28] Instead a teleconference was arranged for 30 January 2015. Unfortunately Mr Withers was unavailable for that conference because of urgent personal circumstances, of which the Authority was not aware until after the call. During the telephone discussion Ms Kim advised that she wished to withdraw the second application and to lodge an amendment to the first statement of problem.

[29] On 22 February 2015 Ms Kim withdrew the first application and on 28 February 2015 the amended statement of problem was lodged.

[30] On 23 February 2015 Ms Kim emailed Mr Withers that she had heard that Pro-Build had been transferring assets to another company of which Mr Jerard is a director and that Mr Jerard was working on putting Pro-Build into liquidation. Mr Withers advised that he would take directions from Mr Jerard on that issue and get back to Ms Kim. If he did so the Authority was not copied into that correspondence.

[31] On 27 February 2015 I issued a minute noting that Pro-Build had failed to comply with directions of 12 November 2014 and 3 February 2015. I also directed that, despite the first application being withdrawn and an amended statement of problem lodged, Pro-Build was still required to produce copies of:

- Employment agreements; and
- All wage records; and
- All records of time worked; and
- All holiday records; and
- Any other documentation recording workers' remuneration.

[32] On 7 March 2015 Mr Withers sent a long email which amongst other things:

- Foreshadowed a potential counter-claim against Mr McRae;
- Said that Pro-Build had reinstated current employees' holiday and sick leave entitlements;
- Said that Pro-Build had calculated any potential back pay entitlement for working on public holidays and would pay that to past and current employees;
- Said that witness statements for Mr Jerard and Pro-Build's current manager, Tahu Hunter, were being prepared;
- Sought clarification that only the claims in relation to the three former employees for whom witness statements had been provided would be proceeding;
- Stated that if existing staff are making complaints *it is hard to maintain trust and confidence*;
- Alleged that the current workers had been put under improper pressure by the Department of Labour to make complaints; and

- Requested copies tax returns of for the relevant years completed and filed by Mr McGreevy, Mr McRae and Mr Michalis.

[33] Up until 6 March 2015 I considered that there had been insufficient information available for both parties to get the most out of mediation. I asked for another teleconference to be convened to discuss the possibility of mediation. As at 6 March 2015 the Labour Inspector's evidence including three witness statements and supporting documents had been filed and exchanged and the respondent's evidence was due to be filed on 13 March 2015.

[34] A teleconference was held on 13 March 2015 and I made the following directions:

- Because of the amended statement of problem the respondent was able lodge an amended statement in reply by 17 March and if it intended to file a counter-claim that must be filed by 17 March;
- The originals of the documents already directed, by then three times, to be supplied (timesheets etc.) must be supplied by 18 March;
- Mr McRae's IRD summaries of earnings must be supplied as soon as possible;
- The investigation meeting was adjourned until 7 May 2015;
- Mediation was impractical in all the circumstances, which included the delay by the respondent in the provision of information and the imminent departure overseas of one of the employees.

[35] Ms Kim accepted Pro-Build's assurances that it had properly reinstated holiday and sick leave entitlements for all current employees. Subsequently Ms Kim withdrew the claims in relation to the current employees. I note for completeness that Mr La Hood, on behalf of Ms Kim, vehemently denied that any inappropriate pressure had been put on current employees. Certainly Pro-Build did not offer any evidence of such pressure.

[36] Ms Kim supplied copies of Mr McRae's summaries of earnings on 17 March. Pro-Build delivered copies of a large number of timesheets to the Authority on 25 March 2015. However, there were no timesheets for June to August 2014 inclusive or for July to December 2012.

[37] The two Pro-Build witness statements were not provided as at 8 April and a further notice of direction was issued stating:

- Pro-Build must bring the originals of the timesheets to the investigation meeting;
- Pro-Build must supply timesheets for Mr McRae, Mr McGreevy and Mr Michael for June to August 2014 inclusive by 17 April 2015;
- Pro-Build must supply its witness statements and evidence of its payments to Mr McRae for the period July to December 2012 inclusive by 17 April;
- Ms Kim should supply copies of Mr McRae's bank statements for the period July to December 2012 inclusive by 17 April;
- The three former employees should attend the investigation meeting.

[38] On 16 April Pro-Build supplied two witness statements. In Tahu Hunter's statement he referred to an attached document that was apparently signed by the current employees and showed that all leave issues were settled with them. However, the document was not attached.

[39] No other documents that Pro-Build was directed to file by 17 April 2015 were filed.

[40] On 28 April Ms Kim requested the Authority's permission to summons the three former workers as witnesses. Mr Withers objected to the witnesses being summoned. However, summonses were issued on 29 April 2015.

[41] On 6 May 2015, the day before the investigation meeting was due to proceed, Mr Withers notified the Authority that Mr Jerard was very ill and unable to attend the meeting. The meeting was adjourned.

[42] On 8 May 2015 I held another teleconference at which the date of 17 July 2015 was set for the investigation meeting. Pro-Build was directed to provide the document referred to in Tahu Hunter's statement by 15 May 2015 and to provide time and wages records for the period July to December 2012 by 29 May 2015.

[43] Those documents were not provided.

[44] On 15 July Mr Withers emailed the Authority and the Labour Inspector notifying that there is an IRD petition to wind up Pro-Build and put it into liquidation. Mr Jerard considered that there was little point in proceeding with the Labour Inspector's application. I declined to cancel the investigation meeting.

[45] The following day Mr Withers notified the Authority that he was no longer instructed to act on Pro-Build's behalf and that Mr Jerard would not attend the investigation meeting. I notified both parties that the investigation meeting would proceed. Mr Withers acknowledged that Mr Jerard was aware that the meeting would proceed in his absence.

[46] Clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) sets out the Authority's power to proceed if any party fails to attend. I proceeded to conduct the investigation meeting in the absence of any representation for Pro-Build.

[47] At the investigation meeting I heard sworn or affirmed evidence from Ms Kim, Mr McRae, Mr McGreevy and Mr Michael. I also read out the two emails received on 17 July, from Mr Withers and Mr Jerard, and gave the witnesses an opportunity to respond to allegations made in those emails.

### **Issues**

[48] The Authority needs to determine the following issues:

- (i) Was Barry McGreevy an employee?
- (ii) Was Norman McRae an employee?
- (iii) Was Michalis Michael an employee?
- (iv) If they were employees what holiday pay entitlements, including for annual leave, public holiday and alternative holidays, do they have?
- (v) Should interest be paid on any outstanding amounts?
- (vi) Did Pro-Build breach any of its obligations under sections 16, 27, 49, 50, 55, 56 and 60 of the Holidays Act 2003?
- (vii) If so, should any penalties be imposed on Pro-Build and in what amount?
- (viii) Should the filing fee be reimbursed to the Labour Inspector, witness expenses and Ms Kim's legal costs be paid by Pro-Build?

## Determination

*Were the workers employees?*

[49] The first issue I need to determine is whether or not the three workers fall within the definition in s.6(1)(a) of the Act 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*.

[50] The law requires the Authority to determine the real nature of the relationship between the parties.<sup>1</sup> This requires me to consider all relevant matters including any that indicate the parties' intentions.<sup>2</sup> However, I cannot treat any statement by the parties describing their relationship as determinative.<sup>3</sup>

[51] The Labour Inspector bears the onus of establishing on the balance of probabilities that three workers were employees.

[52] The leading case is *Bryson v Three Foot Six Limited (No.2)*<sup>4</sup> in which the Supreme Court endorsed Judge Shaw of the Employment Court's decision. All relevant matters that need to be considered in assessing the real nature of the relationship include:

- The written and oral terms of the contract between the parties.
- Any divergence from or supplementation of those terms and conditions.
- How the relationship operated in practice.
- Features of control and integration.
- Whether the contracted person has been effectively working on his or her own account; the fundamental test.
- Industry practice.

## Barry McGreevy

*What did the parties intend?*

[53] In the absence of a written agreement from the beginning of the relationship evidencing a common intention I need to examine the actions of the parties to see if

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<sup>1</sup> Section 6(2) of the Act.

<sup>2</sup> Section 6(3)(a)

<sup>3</sup> Section 6(3)(b)

<sup>4</sup> [2005] ERNZ 372 (SC)

they disclose any evidence of what kind of relationship the parties were in. It is important to examine what the parties intended at the beginning of the relationship and whether their practice changed over time to amount to a variation from what they had originally intended.

[54] Mr McGreevy came to New Zealand in October 2012 on a working holiday visa under the Ireland Working Holiday Scheme. He initially worked for an employment agency where he met a worker for Pro-Build who offered him work with Pro-Build. In late November 2012 he began working for Pro-Build as a carpenter for \$30 per hour. He was told that Mr Jerard was the boss but he first met Mr Jerard about two weeks after he began work. He was not given a written employment agreement.

[55] Mr McGreevy understood that the terms of his working holiday visa meant he had to be engaged as an employee and could not be self-employed. He says that he told Mr Jerard those were his visa terms when he first met him. There was no written contract between the parties at that stage.

[56] In October 2013 Mr McGreevy applied for a work visa to allow him to stay in New Zealand and keep working for Pro-Build. On 22 October 2013 Mr McGreevy signed a letter offering him employment with Pro-Build as a carpenter earning \$35 per hour:

***Remuneration***

*We offer you \$35 per hour on a contract basis.*

[57] The letter was also signed by Mr Jerard. The letter of offer referred to an attached *contract of employment*. The letter was viewed by Immigration NZ as part of the process of granting a work visa to Mr McGreevy.

[58] At least by 22 October 2013 both parties agreed in writing that Mr McGreevy was an employee of Pro-Build and that is what they both represented to Immigration NZ.

[59] In late 2013 Pro-Build prepared documents that it knew would be submitted to Immigration NZ in support of Mr McGreevy obtaining a work visa to allow him to work exclusively for Pro-Build. The wording of the remuneration section of the letter of offer is ambiguous as it refers to being a per hour payment *on a contract basis*.

However, I am satisfied that ambiguity is overcome by the balance of the letter of offer which refers to an *offer of employment* and the *attached contract of employment* which I am satisfied is the document entitled *Individual Employment Agreement between an Employer and an Employee* signed on 19 December 2013.

[60] On 19 December 2013 Mr Jerard and Mr McGreevy signed an individual employment agreement (IEA) at an hourly rate of \$28 per hour. I am satisfied from Mr McRae's evidence that he prepared the draft IEA for Mr McGreevy and put in the hourly rate that he understood was the market rate. Although both Mr McGreevy and Mr Jerard signed the IEA showing a pay rate of \$28 per hour the time sheet records supplied by Pro-Build show that Mr McGreevy's rate of pay was never as low as \$28 per hour. Instead his pay rate was \$30 per hour to begin with and went up to \$35 per hour.

[61] However, Pro-Build says that after it entered into that documentation it had a further oral agreement with Mr McGreevy that instead he would be an independent contractor. Mr McGreevy denies any other agreements and says he was always an employee.

[62] Mr McGreevy had a week of sick leave in 2013 for which he was paid by Pro-Build. This is consistent with him being an employee and not an independent contractor.

[63] The available documents tend to show that Mr McGreevy was an employee. However, how the parties describe themselves is not determinative and I need to examine the real nature of the relationship with reference to the control and integration tests and also ask whether fundamentally Mr McGreevy was in business for himself.

#### *Control test*

[64] The control test involves an assessment of whether Pro-Build had the right to control Mr McGreevy's work and, if so, to what extent it did so in practice.

[65] Mr McGreevy is highly experienced in the construction industry and after a time acted as a foreman for Pro-Build on various sites, particularly when foundations were being laid. Mr McGreevy was directed as to what jobs and sites he was to work

on either by Mr Jerard or more commonly by Mr McRae, who acted as project manager, on a daily basis. He was required to complete daily timesheets and he handed those to Mr McRae every week.

[66] Mr McGreevy was reimbursed by Pro-Build for petrol and dumping expenses he incurred while working for Pro-Build.

[67] I am satisfied that Pro-Build had control over Mr McGreevy's time and work in a way that is indicative of an employer/employee relationship.

*Integration test*

[68] The integration test involves an assessment of the extent to which Mr McGreevy was integrated into Pro-Build's business.

[69] Mr McGreevy worked 40 hours or more Monday to Friday and some Saturdays for Pro-Build. He did not do any other paid work.

[70] Mr McGreevy used a van supplied by Pro-Build for work.

[71] All work that Mr McGreevy did was a part of Pro-Build's business and I am satisfied that he was integrated into Pro-Build's business at all times he worked for Pro-Build.

*Fundamental test*

[72] I need to stand back and assess whether Mr McGreevy acted more as if he was in business for himself or more as if he was an employee.

[73] Pro-Build did not pay PAYE to the IRD on Mr McGreevy's earnings. It paid schedular tax instead. Mr McGreevy was not registered for GST as he would have been required to be if he was an independent contractor because he earned over \$60,000 per year. He did not render invoices to Pro-Build, as an independent contractor was likely to do, but was required by Pro-Build to put in weekly timesheets, which is more common for an employee.

[74] Mr McGreevy resigned from Pro-build in July 2014. He was very surprised when in October 2014 he received an invoice from ACC for \$3,098.12 relating to the period he worked for Pro-Build. The invoice indicated it was to be paid personally by

him. ACC calculated what he owed based on the schedular payments made by Pro-Build to the IRD. Mr McGreevy's evidence is that after he started working for his new employer and received pay slips he realised that the employer had responsibility for deducting ACC levies from his pay. He does not consider that he should be personally liable to pay the ACC invoice for the time he worked for Pro-Build. An employer has obligations to pay a portion of ACC levies for its employees and to deduct the employee's share of the levy before paying the employee.

[75] Mr McGreevy has not submitted tax returns to the IRD at the end of the tax years and has not claimed any expenses against his income tax.

[76] Mr McGreevy was not entitled to engage any workers and delegate any of his tasks or duties to them. He did not take on any financial risk or have the chance to make a profit on work done for Pro-Build over and above his hourly rate.

[77] While working for Pro-Build Mr McGreevy did not act as if he was in business for himself. He acted as if he was an employee at all times, as he always understood himself to be.

*Conclusion on Mr McGreevy's employment status*

[78] Mr McGreevy was an employee of Pro-Build both before and after the letter of offer of employment dated 22 October 2013. Therefore, I need to consider what, if any, holiday pay of various types he is entitled to be paid.

**Norman McRae**

*What did the parties intend?*

[79] There was no written employment agreement between the parties at any time. In the absence of a written agreement evidencing a common intention I need to examine the actions of the parties to see if they disclose any evidence of what kind of relationship the parties were in. It is important to examine what the parties intended at the beginning of the relationship and whether their practice changed over time to amount to a variation from what they had originally intended.

[80] Mr McRae says that he advertised that he was available for work as a carpenter in a local newspaper in either April or May 2012. Mr Jerard contacted him and they arranged to meet at Pro-Build's office. He says that he was asked to start

work the following Monday at a rate of \$35 per hour and was told that he may be asked to *run the day to day business* for Mr Jerard, although at that stage he had no idea of what company he would be working for.

[81] Mr McRae says that prior to placing the ad looking for work he had been self-employed for periods of time but had decided he preferred to work as an employee which is what he intended to be when he agreed to work for Mr Jerard.

[82] Mr McRae says that he received one pay slip towards the end of 2012 which had Pro-Build Canterbury written on it.

[83] Mr McRae was, from time to time, reimbursed for expenses, such as digger hire and fuel, he incurred for his work for Pro-Build.

[84] I am satisfied that the parties' pattern of dealing was more indicative of an employment relationship.

*Control test*

[85] The control test involves an assessment of whether Pro-Build had the right to control Mr McRae's work and, if so, to what extent it did so in practice.

[86] Mr McRae says that for about the first three months he was required to go to Mr Jerard's house in West Melton each day and would be told which site to work on. After the first few months Mr Jerard would phone Mr McRae every morning to instruct him what work to do each day. Mr McRae is a very experienced carpenter and has had experience managing projects and teams of employees.

[87] Mr McRae says he worked on the tools for the first six or so months. After that he became a project manager and managed the work and the employees on Pro-Build's work sites. His work remained directed by Mr Jerard.

[88] Mr McRae was required to fill in weekly timesheets and to write which site he worked at each day.

[89] I am satisfied that Pro-Build had control over Mr McRae's time and work in a way that is indicative of an employer/employee relationship.

*Integration test*

[90] The integration test involves an assessment of the extent to which Mr McRae was integrated into Pro-Build's business.

[91] Mr McRae worked fulltime for Pro-Build on projects for Pro-Build's major clients, Hawkins and Fletchers. Mr McRae was not entitled to engage any workers himself and delegate any of his tasks or duties to them. He did not take on any financial risk or have the chance to make a profit on work done for Pro-Build over and above his hourly rate.

[92] Mr McRae was instructed by Mr Jerard to draft IEAs for some existing employees of Pro-Build, such as Mr McGreevy and Mr Michael. However, he did not personally engage any workers or sign those agreements on behalf of Pro-Build. Mr Jerard signed the IEAs and letters of offer of employment.

[93] All work that Mr McRae did was a part of Pro-Build's business and I am satisfied that he was integrated into Pro-Build's business at all times he worked for Pro-Build.

*Fundamental test*

[94] I need to stand back and assess whether Mr McRae acted more as if he was in business for himself or more as if he was an employee.

[95] Mr Jerard's email of 17 July 2015 stated:

*He knew and understood he was being paid on a contract basis. ...  
Why would someone with Mr McRae's experience in life and maturity work for someone for nearly three years and not mention the fact that they thought that they were due holiday pay etc. It defies logic.  
Perhaps Mr McRae should also be asked why he abandoned his employment with no notice or courtesy shown what so ever.*

[96] Mr Jerard's reference to Mr McRae having *abandoned his employment*, seems to clash with his view Mr McRae was *being paid on a contract basis*.

[97] I asked Mr McRae to respond to Mr Jerard's email. He said that he resigned because of the extremely rude way Mr Jerard spoke to him one day.

[98] Mr McRae also said that at one stage he *vaguely wondered* if he was being treated as a contractor. However, he says that he did not render invoices to Pro-Build but was required to complete timesheets, which is more common for an employee than an independent contractor. He was aware that at least one other worker did render GST invoices to Pro-Build. Mr McRae says he was never asked to render invoices but to complete timesheets.

[99] Mr McRae had been registered for GST when he was self-employed. He was not registered for GST while working for Pro-Build. He was aware that if he was an independent contractor he would have to be registered for GST as he earned more than \$60,000 per year.

[100] Mr McRae said he concluded he was an employee and not a contractor because of the way he was treated at Pro-Build, including being required to complete timesheets and not render invoices.

[101] Pro-Build did not pay PAYE to the IRD on Mr McRae's earnings. It paid schedular tax instead. However, Mr McRae was not aware of this until after he resigned from Pro-Build. Mr McRae's evidence is that he did not submit tax returns to the IRD at the end of the tax years and has not claimed any expenses against his income tax for the period he worked for Pro-Build.

[102] While working for Pro-Build Mr McRae did not act as if he was in business for himself. He acted as if he was an employee at all times, as he always understood himself to be.

#### *Conclusion on Mr McRae's employment status*

[103] Mr McRae was an employee of Pro-Build. Therefore, I need to consider what, if any, holiday pay of various types he is entitled to be paid.

#### **Michalis Michael**

##### *What did the parties intend?*

[104] It is important to examine what the parties intended at the beginning of the relationship and whether their practice changed over time to amount to a variation from what they had originally intended.

[105] Mr Michael is a painter, plasterer and Gib fixer who was working in New Zealand on a working visa. He was introduced to Mr Jerard by Mr McGreevy. He was interviewed by Mr Jerard and offered work. Mr Jerard offered to pay the application fee for a variation of Mr Michael's working visa to allow him to work for Pro-Build.

[106] Mr Michael says that he ensured that Pro-Build would pay him a higher hourly rate than he was earning with his previous employer. Since he already had work he knew he was in a strong position to negotiate a favourable hourly rate.

[107] It is his evidence that he and Mr Jerard met on 3 September 2013 when Mr Jerard presented him with one copy of an employment agreement to sign and a letter of offer of employment. His memory is that the employment agreement stated he would be paid \$36.00 per hour and he signed that on the last page. The typed letter of offer did not contain the hourly rate so Mr Jerard hand-wrote that on the second page as \$36.00 per hour. Mr Jerard took the copy of the employment agreement with him and told Mr Michael that would be submitted to Immigration New Zealand.

[108] I have seen a copy of the letter of offer dated 2 September 2013 which was signed by Mr Michael and Mr Jerard on 3 September 2013 and states *hourly rate \$36-00 hr.*

[109] A further letter of offer of employment was completed by Mr Jerard for Mr Michael on 20 January 2014 for work to commence on 3 February 2014. That was for the purpose of obtaining a further working visa for Mr Michael. Another employment agreement was entered into on 20 January 2014, signed by Mr Jerard and Mr Michael, for work to begin on 3 February 2014.

[110] The individual employment agreement that I have seen says that Mr Michael's hourly rate was \$25.00 per hour. Mr Michael denies that he ever signed an agreement saying that he would be paid \$25.00 per hour. I am satisfied that Mr Michael was always paid an hourly rate of \$36.00.

[111] All the documentation entered into by the parties evidences an intention that Mr Michael would be an employee.

[112] However, Pro-Build says that it intended Mr Michael to be an independent contractor. It says that Mr Michael:

*was always paid on a contract basis, with a profit sharing arrangement. Why would I do this for an employee*

[113] The problem with Mr Jerard's argument that because Mr Michael was on a profit sharing arrangement he could not be an employee is that any reference to profit sharing is in the letter of offer of employment entered into on 3 September 2013 that Pro-Build submitted to Immigration NZ to get a working visa for Mr Michael. That clearly represents the relationship as one of employment. The letter says that in addition to \$36 per hour:

*Any work which Michael brings to the company from his own contacts, will be priced by the company on an open book policy and profit from that work will be split on a 50/50% basis, after costs.*

[114] Mr Michael's evidence was that he was never paid any profit share and was always only paid \$36 per hour. The existence of a profit sharing arrangement does not necessarily tell against an employment relationship; an employee could be eligible to receive a share of profits in specified circumstances.

[115] How the parties describe their relationship is not determinative and I need to examine the real nature of the relationship with reference to the control and integration tests and to ask whether fundamentally Mr Michael was in business for himself.

#### *Control test*

[116] The control test involves an assessment of whether Pro-Build had the right to control Mr Michael's work and, if so, to what extent it did so in practice.

[117] Mr Michael worked full-time under Mr Jerard's direction on Pro-Build's projects. He worked 10-12 hour days on Mondays to Fridays and on many weekends. Mr Michael is a senior and experienced painter and plasterer and worked without constant supervision but his daily work was checked by Mr Jerard's son, Damian Jerard.

[118] Mr Michael says that he was required to and did give timesheets to Mr Damian Jerard recording his daily work every couple of weeks or occasionally was required to deliver them to Mr Jerard at his West Melton office.

[119] Mr Jerard would also meet with him to:

*provide me with scopes, discuss the costs for upcoming jobs, and to analyse the number of hours required to complete the jobs that were assigned to me.*

[120] The indications of control are more in line with an employment relationship.

*Integration test*

[121] The integration test involves an assessment of the extent to which Mr Michael was integrated into Pro-Build's business.

[122] Mr Michael drove a van supplied by Pro-Build which contained materials supplied by Pro-Build.

[123] He worked full-time for Pro-Build's clients.

[124] I am satisfied that all the work Mr Michael did he did as a part of Pro-Build's business and that he was integrated into Pro-Build's business.

*Fundamental test*

[125] I need to stand back and assess whether Mr Michael acted more as if he was in business for himself or more as if he was an employee.

[126] Mr Michael did not render invoices to Pro-Build but was required to complete timesheets, which is more common for an employee than an independent contractor.

[127] At times Mr Michael supervised other workers but they were engaged by Pro-Build and not by him personally. Mr Michael was not entitled to engage any workers and delegate his work to them. He did not take on any financial risk or make a profit on work done for Pro-Build over and above his hourly rate.

[128] Pro-Build did not pay PAYE to the IRD on Mr Michael's earnings. It paid schedular tax instead. However, Mr Michael was not aware of this until after he stopped working for Pro-Build. Mr Michael's evidence is that he did not submit tax returns to the IRD for the tax years he worked for Pro-Build and he has not claimed any expenses against his income tax.

[129] Pro-Build did not supply pay slips to Mr Michael. In August 2014 Mr Michael consulted an immigration consultant about how his partner could come and join him in New Zealand. Mr Michael was told that he needed to prove what his income had been.

[130] Mr Jerard's email stated:

*I remember distinctly when all this trouble started. Mr Michellis (sic) came to see me one day, stating that he had been to immigration to enquire about becoming a resident. During discussions with immigration he found he could not become a resident or get sponsored as he put it, if he remained on contract. He told me if I did not put him on wages and pay his holiday pay he would F??? me up, were his exact words. I was far from happy with Mr Michellis (sic) performance and told him I would not do so and terminated our relationship.*

[131] Mr Michael's sworn evidence was that to support his partner moving to New Zealand he attempted to get pay slips from Mr Jerard. He also asked to have his holiday pay paid as he hoped to go home to Cyprus over the Christmas/New Year break. When he was refused pay slips and his holiday pay he did say that he would complain about Pro-Build to Immigration NZ but was told by Mr Jerard that they were more likely to listen to Mr Jerard than to Mr Michael. Mr Michael then submitted his written resignation.

[132] Mr Michael's evidence is that over his notice period Pro-Build stopped giving him work.

[133] I prefer Mr Michael's evidence on this issue as it was sworn evidence and was tested by my questioning and that of Mr La Hood, counsel for the Labour Inspector.

[134] While working for Pro-Build Mr Michael did not act as if he was in business for himself. He acted at all times as if he was an employee, as he believed himself to be.

#### *Conclusion on Mr Michael's employment status*

[135] Mr Michael was an employee of Pro-Build. Therefore, I need to consider what, if any, holiday pay of various types he is entitled to be paid.

*Remedies due to Mr McGreevy, Mr McRae and Mr Michael*

[136] Section 130 of the Act provides that every employer must keep a time and wages record for each employee. Pro-Build did not keep such records although it did keep some timesheets.

[137] Section 132 of the Act provides that if a claim is made to recover wages or other money for an employee the employee may call evidence to show that the employer failed to keep or produce time and wages records and that failure prejudiced the employee's ability to bring an accurate claim for wages or other arrears. If the employee was so prejudiced, and in the absence of evidence from the employer that the employee's claims are incorrect, the Authority may accept as proved all claims in respect of the wages actually paid to the employee and of the hours, days and time worked by the employee.

[138] I am satisfied that in this case Pro-Build failed to keep, and therefore failed to produce, time and wages records allowing the three employees in this case to bring an accurate claim for their holiday pay entitlements in relation to the days actually worked by them and to the amounts actually paid to them. I am satisfied that the employees were prejudiced in their ability to bring an accurate claim for their wages due in respect of their leave entitlements by Pro-Build's failure. In addition, Pro-Build has not provided any evidence that the employees' claims are incorrect.

[139] I also note that apart from one week when Mr McRae was provided with a pay slip the three employees did not receive pay slips and so had no means of checking what the pay they received was for. In the absence of wages and time records pay slips have not been able to be used to check what entitlements the employees were paid for.

[140] In addition, s.12 of the Holidays Act applies to determine an employee's entitlements to a public holiday and an alternative holiday. Under s.13 of the Holidays Act if an employer and an employee cannot agree on what would otherwise be a working day<sup>5</sup> a Labour Inspector may determine whether any public holiday would otherwise be a working day. Ms Kim has undertaken this task as a part of her

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<sup>5</sup> The question is whether if the day was not a public holiday would the employee have been required to work that day.

calculation of what pay for working on public holidays is due as well as how much pay for alternative leave not taken is due.

[141] Ms Kim has prepared calculations of annual holiday pay owed, public holiday pay owed and pay for alternative holidays not taken after working on public holidays.

[142] It was agreed by the three employees that they did not work in the period over Christmas and New Year and so did not work on Christmas Day, Boxing Day, New Year's Day or the day after New Year's Day. The evidence of each of the three employees is that they did not otherwise take any paid time off work as annual leave in the time they were employed by Pro-Build. Except for Mr McRae as outlined below.

[143] Ms Kim used what records were available on behalf of the three employees, principally the copies of timesheets provided by Pro-Build, in the absence of accurate time and wages records. However, there were some periods for which timesheets have not been supplied, as noted above, and so Ms Kim has made calculations for those periods using average hours worked in the surrounding weeks for which there are timesheet records.

[144] I have checked Ms Kim's calculations and I am satisfied that they are as correct as they can be in the absence of wages and time records and pay slips. I am also satisfied that the three employees have given credible evidence that they were not paid at time and a half rates for working on public holidays, were not paid their annual leave entitlements either during their employment<sup>6</sup> or when they left Pro-Build's employment and were not paid for alternative days off in lieu of working on public holidays.

[145] Ms Kim has calculated amounts owed for leave entitlements based on the hourly rates that each employee was actually paid, rather than the lower hourly rates Mr Jerard submitted that calculations should be based on. I endorse this approach as I have found that each worker was an employee, and not an independent contractor, for the entire period that they worked for Pro-Build and their hourly rates were those actually agreed between the parties and actually paid to them. Therefore, the

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<sup>6</sup> With the exception of Mr McRae who was paid extra amounts for the two Christmas/New Year holiday periods he worked for Pro-Build. These amounts have been taken off the amounts Ms Kim calculated.

calculation of holiday pay at 8% of gross earnings<sup>7</sup> must be the correct method of calculation.

[146] I am also satisfied that where the timesheets show actual hours worked on ordinary working days those are the hours used to calculate gross pay and therefore holiday pay owed. Where the timesheets show actual hours worked on public holiday those are the hours that have been used to calculate what extra pay should have been paid and how many hours of alternative holiday time should be paid.

[147] **Barry McGreevy** – I am satisfied that Barry McGreevy must be paid \$8,814.27 gross in annual holiday pay, and \$3,455.25 gross for the extra amount he should have been paid for working on the following public holidays:

- Waitangi Day 2013,
- Good Friday and Easter Monday 2013,
- Anzac Day 2013,
- Queen's Birthday 2013,
- Labour Day 2013,
- Show Day 2013,
- Waitangi Day 2014,
- Good Friday and Easter Monday 2014,
- Anzac Day 2014, and
- Queen's Birthday 2014.

[148] Mr McGreevy is also owed \$1,948.66 gross for alternative holiday pay in lieu of having taken any alternative holidays.

[149] **Norm McRae** – Ms Kim calculated that Mr McRae was owed \$15,487.48 in annual holiday pay. However, at the investigation meeting Mr McRae's evidence was that one Christmas he was paid \$800 in addition to his pay for hours worked and the other Christmas he was paid \$2,000 in addition to his pay for hours worked. Mr McRae understood that to have been annual leave pay. Therefore, I have deducted that from Ms Kim's calculation, meaning he must be paid \$12,687.48 gross in annual holiday pay.

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<sup>7</sup> Less any annual leave taken and paid.

[150] Mr McRae did not work on public holidays but he was not paid his usual daily rate of pay for those days although he should have been. Pro-Build must pay Mr McRae \$6,169.21 gross for the public holidays on which he did not work.

[151] Because Mr McRae did not work on public holidays he is not entitled to any alternative holiday pay.

[152] **Michalis Michael** - I am satisfied that Michalis Michael must be paid \$5,207.81 gross in annual holiday pay, and \$2,824.26 gross for the extra amount he should have been paid for working on the following public holidays:

- Labour Day 2013,
- Show Day 2013,
- Waitangi Day 2014,
- Good Friday and Easter Monday 2014,
- Anzac Day 2014, and
- Queen's Birthday 2014.

[153] Mr Michael is also owed \$751.13 gross for alternative holiday pay in lieu of having taken any alternative holidays.

**Should interest be paid on the outstanding amounts?**

[154] Mr La Hood submits that Pro-Build should pay interest to the three employees on the amounts outstanding that it has now been ordered to pay.

[155] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by s.87(3) of the Judicature Act 1908, which is currently 5% per annum (updated in 2011 by Judicature (Prescribed Rate of Interest) Order 2011).

[156] Pro-Build has wrongly withheld pay from each of its three employees. I consider it reasonable that it pay interest on the outstanding sums at the rate of 5% from the date of the filing of the amended statement of problem, 28 February 2015, until each employee is paid in full.

**Should penalties be awarded against Pro-Build?**

[157] Mr La Hood submits that Pro-Build breached its obligations under the Holidays Act, specifically:

- Breach of s.16 by failing to provide paid annual leave to its employees;
- Breach of s.27 by failing to pay the employees their annual leave entitlements at the end of their employment;
- Breach of s.49 by failing to pay employees their relevant daily pay when they do not work on public holidays if those days would otherwise have been working days;
- Breach of s.50 by failing to pay employees who worked on public holidays time and a half for that work;
- Breach of s.55 by failing to pay for working on a public holiday within the pay period that relates to the period in which the holiday occurred;
- Breach of s.56 by failing to provide an alternative holiday when an employee worked on a public holiday that fell on what would have been a working day; and
- Breach of s.60 by failing to provide payment for days taken as alternative holidays.

[158] Section 75 of the Holidays Act provides that an employer who fails to comply with any of the sections listed in s.75(2) is liable, if the employer is a company, to a penalty not exceeding \$20,000. The provisions listed in s.75(2) include all of those sections listed above that Ms Kim alleges non-compliance with.

[159] The Labour Inspector is empowered to seek to enforce the Act and to claim a penalty under s.75 and does so in this case. Mr La Hood submits that a global penalty for all breaches should be imposed of between \$10,000 and \$15,000.

*Were there any breaches of the Holidays Act that could give rise to a penalty?*

[160] **Breach of s.16** – Mr McGreevy and Mr Michael each gave evidence about asking Mr Jerard about taking paid annual leave and being told they were not eligible to do so. There were few details given about those discussions and they were unable to recall any dates. It may have been for Mr McGreevy and it certainly was for Mr Michael that the discussions were during their first 12 months of employment and

before they had become entitled to the four weeks of annual leave that s.16 provides for.

[161] Section 20 of the Holidays Act allows an employer to grant an employee's request to take paid annual leave in advance, but an employer is not obliged to allow that.

[162] There is insufficient evidence to conclude whether or not s.16 of the Holidays Act was breached.

[163] **Breach of s.27** – this section was clearly breached in that none of the three employees were paid their annual holiday pay entitlement at the end of their employment.

[164] **Breach of s.49** – this section was breached in Mr McRae's case by failing to pay him his ordinary daily pay when he did not work on public holidays that would otherwise have been ordinary working days for him. However, he was paid for Christmas Day, Boxing Day, New Year's Day and the day after New Year's Day at least in one year if not entirely in another.

[165] The section was also breached in Mr McGreevy and Mr Michael's case because they were not paid over the Christmas and New Year periods.

[166] **Breach of s.50** – this section was breached for Mr McGreevy and Mr Michael as they were not paid time and a half for the public holidays on which they worked.

[167] **Breach of s.55** – this section was breached for Mr McRae as he was not paid for the public holidays on which he did not work in the pay periods in which the holidays occurred, nor were Mr McGreevy and Mr Michael paid the time and a half payments they should have been paid in the pay periods in which the public holidays occurred.

[168] **Breach of s.56** - this section was breached for Mr McGreevy and Mr Michael as alternative holidays were not provided to them for the public holidays on which they worked.

[169] **Breach of s.60** – section 60(2)(ii) was breached for Mr McGreevy and Mr Michael as they were not paid for any alternative days they had not taken in their final pay.

*Is this an appropriate case to award a penalty and if so what should the quantum be?*

[170] A penalty should only be awarded for the purpose of punishment and should not be used as an alternative way of increasing compensation<sup>8</sup> to parties who have been disadvantaged by the actions of the wrongdoing party, in this case the employer.

[171] The following non-exhaustive list of factors is useful to consider in exercising the Authority's discretion about whether or not to impose a penalty, and if it is to be imposed what amount should be ordered paid:

- the seriousness of the breach;
- whether the breach is on-off or repeated;
- the impact, if any, on the employees;
- the vulnerability of the employees;
- the need for deterrence;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases.<sup>9</sup>

[172] I consider the breaches to be serious. The breaches were repeated in that they applied to more than one employee and some such as failure to pay time and half for work on a public holiday, failure to pay annual leave at the end of the employment, and failure to pay Mr McRae for not working on a public holidays were repeated a number of times.

[173] The impact on the employees was relatively serious in that they were deprived of money that was rightfully theirs. In Mr Michael's case the failure to pay him his holiday pay meant that he could not afford to take leave over the Christmas/New Year 2014/2015 period when he had hoped to return to Cyprus.

[174] Mr McGreevy and Mr Michael in particular were vulnerable employees being migrant workers employed on work visas that were specific to Pro-Build. Both of

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<sup>8</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 (Employment Court).

<sup>9</sup> *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32].

them gave evidence that when they either demanded what they believed they were entitled to, in Mr Michael's case, or resigned, in Mr McGreevy's case, Mr Jerard made reference to their migrant status.

[175] In Mr Michael's case Mr Jerard told Mr Michael that Immigration NZ was less likely to believe him about not having had pay slips and more likely to believe Mr Jerard because Mr Jerard was a New Zealander.

[176] In Mr McGreevy's case Mr Jerard instructed his son, Damian Jerard, to write the following letter which he threatened to send to Immigration NZ unless Mr McGreevy returned to work for Pro-Build:

*This letter fulfils our obligation as set out by Immigration New Zealand to inform you of the abandonment of the employment contract of Mr Barry Joseph Patrick McGreevy who was previously working for our company Pro-Build Canterbury.*

*Mr McGreevy, sent a txt message to our project manager, Mr Norm McRae in the early hours of Monday morning the 7/7/14 in a drunken state, informing us that he was going to work for someone else and he would not be returning.*

*Barry worked as forman (sic) for our company with one person under his control, and the time was in possession of one of our company vehicle. Two current employees of the company visited Mr McGreevy's current address on the 7/7/14 to find him not present, but asked his flatmates for the keys to the vehicle and they obliged, we removed the van from Mr McGreevy's possession.*

*Upon entry of the company vehicle in which Mr McGreevy had in his control, we found the van was being used for purposes other than work for our company, as well as having over half a dozen empty Heineken bottles just behind the driver's seat, and the caps of those bottles in the ash tray, a clear sign the beers were consumed while driving.*

*Mr McGreevy was non communicative regarding any intention of leaving, and did not ... any issues with his employer leading up to his departure.*

[177] Mr Jerard's draft letter then supplied Mr McGreevy's current address and mobile phone number to Immigration NZ. Mr McGreevy denies the allegations made in the letter, apart from the fact that he did resign.

[178] Mr McGreevy's evidence was that one of the reasons he resigned was that he was being told that he was not entitled to paid leave. He is worried that the letter has been sent to Immigration NZ and could negatively impact on him when he seeks residency status in New Zealand.

[179] I consider that there is a need to deter both Pro-Build and specifically other construction companies involved with the Christchurch rebuild from acting as if employees are contractors and therefore not entitled to entitlements under the Holidays Act. That is more particularly so for migrant workers here on temporary working visas when employers are aware that their working visas were granted upon a representation to Immigration NZ that the employer offered employment to the workers.

[180] Pro-Build has not demonstrated any remorse despite accepting that it may not have been entitled to treat at least Mr McGreevy and Mr Michael as if they were independent contractors but did so on erroneous advice. Instead, in Mr Wither's email of 17 July 2015 he wrote:

*... the company filed a genuine defence to the claim, it defends its position at no time did it mislead any employee/contractor in terms of their position within the company.*

*... the company's position is it always acted correctly, contracted these workers as contractor (sic) and did nothing wrong.*

[181] Mr Jerard wrote:

*Whether it was legal for my company to employ the Irish migrants on a contract basis or not, does not change the fact that they agreed to being contractors and were paid a premium accordingly.*

*All of my workers both past and present have been paid extremely well, normally well above the recognised industry rates. At the time everyone was more than happy with there (sic) pay rates and conditions.*

[182] The penalties awarded in comparable cases against a company for multiple statutory breaches of the Holidays Act range from \$3,000<sup>10</sup> to \$60,000.<sup>11</sup> As at 1 April 2011 maximum penalties for companies under s.75 of the Holiday Act rose from \$10,000 to \$20,000. I have viewed all cases before that change in light of the fact that the relevant maximum penalty was only \$10,000.

[183] Mr La Hood submits that a combined penalty in the range of \$10,000 to \$15,000 is justified. I agree that a combined penalty is the correct approach and consider that Pro-Build should pay a penalty of \$15,000 to the Employment Relations Authority for transfer to the Crown Account within 28 days of this determination.

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<sup>10</sup> *Labour Inspector v R. V. Motor Home World (2003) Ltd*, ERA Christchurch CA 13/08.

<sup>11</sup> *Labour Inspector v Civic City Ltd t/a Civic Convenience* [2013] NZERA Auckland 385 for combined penalties for breaches of the Holidays Act 2003 and Minimum Wage Act 1983.

## Costs

[184] Pro-Build sought costs against the Labour Inspector. However, there are no grounds for costs to be awarded to Pro-Build as it was wholly unsuccessful in these proceedings.

[185] The Labour Inspector seeks costs of the total of witness expenses paid to the applicants, reimbursement of the filing fee and \$1,000. Mr Withers was informed of the claim for costs and despite having advised he was no longer acting for Pro-Build commented that he considered the amount sought *seems a lot*. No other comment or submission has been received.

[186] Generally, costs follow the event which means that the losing party can be expected to make a reasonable contribution to the winning party's legal expenses. The award of costs is a discretionary decision. The principles the Authority applies are well settled.<sup>12</sup> The Authority usually awards costs on the basis of a daily tariff of \$3,500 unless there are factors that should decrease or increase that amount.

[187] In this case despite only one party being present the investigation meeting went into the mid-afternoon, after lunch. Mr La Hood had prepared as if Pro-Build would be represented at the investigation meeting and had to respond to the emails sent by Pro-Build and Mr Withers and received in the middle of the morning at the investigation meeting. The amount claimed by Ms Kim for Mr La Hood's representation is a very reasonable amount. In-house counsel are entitled to seek costs. The amount sought is less than would be awarded if the daily tariff was used to calculate reasonable costs and must be paid by Pro-Build.

[188] Pro-Build must reimburse the Labour Inspector a total of \$1,145.36 made up of \$71.56 which is the cost of the fee for filing these proceedings, legal costs of \$1,000 and witness expenses tendered to the applicants a total of \$73.80 for all three.

Christine Hickey  
Member of the Employment Relations Authority

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<sup>12</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808