

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 62  
5411041

BETWEEN	STEPHEN REAN Applicant
A N D	RICHARD KIRKLAND First Respondent
A N D	JACKIE KIRKLAND Second Respondent
A N D	EVENTO COMPANY LIMITED Third Respondent
A N D	FUNWORKS LIMITED Fourth Respondent

Member of Authority:	P R Stapp
Representatives:	Megan Williams for the Applicant No appearance for the Respondents
Investigation Meeting:	21 May 2013 at Napier
Date of delivery of oral Determination:	21 May 2013 at investigation meeting
Date of written Determination:	28 May 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The employment relationship problem is a claim from Mr Rean for a personal grievance, arrears of wages, holiday pay and costs. The respondents have not replied to the statement of problem filed in the Authority by Mr Rean and his representative. The respondent had every opportunity to reply to the statement of problem and an amended statement of problem and a minute issued by the Authority before the

investigation meeting. There was no request to reply and respond late, and leave to do so would not have been unreasonably withheld. The respondents have not complied with orders of the Authority to produce documents such as wage, time and holiday records and the employment agreement. Documents have been produced before the Authority by a Labour Inspector from the Ministry of Business Innovation and Employment (MBIE). The documents include an unsigned employment agreement, ACE payroll summaries and wage payment slips. Mr Rean says he has never seen the employment agreement, summary of wages and pay slips before. Mr Rean's pay and hours of work have been recorded in a book that he produced during the Authority's investigation meeting and this establishes his hours and the amounts that he was entitled to be paid.

[2] I want to make a comment about the service and knowledge of the notice of investigation meeting involving the respondents. Mr Kirkland is a director of two companies – Evento Company Limited and Funworks Limited. Richard and Jackie Kirkland and Evento Company Limited have been served with the notice of investigation meeting and the employment relationship problem. There is some doubt that Funworks Limited has been properly served where the documents have not been uplifted for that company in the courier pack addressed to that company. However, I am satisfied that the director, Mr Kirkland does know about the investigation meeting from the notes on file and communications made with him by the support staff. Furthermore I am confident from the record that Mr Kirkland as a mutual director of both Invento Company Limited and Funworks Limited has uplifted the statement of problem, the amended statement of problem (including Funworks Limited), and the notice of investigation meeting from at least one of the addresses available as the same personal address for directors has been used for both companies. Mr Kirkland has to take some responsibility as a director. The courier record shows that the amended statement of problem (including Funworks Limited) has been uplifted.

[3] I decided to proceed because:

- (a) Sufficient service has been achieved at least on Richard and Jackie Kirkland and Evento Company Limited and Funworks Limited.
- (b) Mr Kirkland is a mutual director of both companies. He uses the same personal address as a director.

- (c) No good cause has been identified as to why the respondents have not turned up to the Authority's investigation meeting.
- (d) Attempts have been made to contact Mr and Mrs Kirkland prior to the investigation meeting starting, without success.
- (e) The start of the investigation meeting was delayed to give Mr Kirkland an opportunity to be heard if he turned up.

[4] Pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 I have proceeded fully in this matter as if the respondents had attended or been represented.

### **The issues**

[5] I turn to the issues, and the issues in this matter are:

- (a) Who was Mr Rean's employer?
- (b) Has Mr Rean been paid properly?
- (c) Is the employer entitled to pay holiday pay incorporated in the weekly pay?
- (d) Is Mr Rean owed arrears of wages?
- (e) How much holiday pay is Mr Rean entitled to?
- (f) Is Mr Rean entitled to any statutory holidays?
- (g) How did the employment end?
- (h) Does Mr Rean have a personal grievance and has there been a breach of s 4 of the Employment Relations Act, and if so, what remedies apply?
- (i) Which party is entitled to costs and how much?

**The facts**

[6] Mr Rean was a general labourer and started work on or about 9 January 2012. His employment finished on or around 28 August 2012. He kept his hours in a book and the book was used by his employer to calculate his weekly hours for pay. He says he was not given an employment agreement and did not receive pay slips at all during his employment. He says he was always paid in cash, except for once when Jackie Kirkland paid \$540 into his bank account. This was supported by a bank statement produced by Mr Rean. The date of the payment was 4 April 2012. The employment agreement, ACE payroll summaries and pay slips only emerged following a complaint made by Mr Rean to a Labour Inspector from the Ministry of Business, Innovation and Employment (MBIE) who received from Mr Kirkland a copy of an unsigned employment agreement, an unsigned covering copy of a letter for employment, the ACE payroll summary of wages and holiday pay, and wage slips.

[7] My reasoning for a decision that the employer must be Funworks Limited and/or Evento Company Limited is as follows:

- (a) That the statement of problem clearly states that Mr Rean "... worked for the company". I interpret this to mean at least he worked for a company that must be Funworks Limited either and/or Evento Company Limited.
- (b) That a letter dated 6 November 2012 written by Mr Rean's representative to Mr Richard Kirkland acknowledged that Mr Rean "was a past employee of the company – Evento Company Limited".
- (c) That the copy of the employment agreement refers to 'Evento' only.
- (d) That Mr Rean's Westpac bank details provide no information on the name of the employer. I note that Mr Rean's comments that the only deposit made by Mrs Kirkland in his entire time employed was for \$540 and there are no other details in regard to the payment. This is a consistent sum in Mr Rean's book of hours and pay.
- (e) That there is information from an MBIE workplace coordinator that Funworks Limited was Mr Rean's employer (letter from MBIE to Work and Income dated 4 September 2012). The letter is not

determinative, but supports the information Mr Rean was consistently providing in regard to his belief as to who his employer was. He informed MBIE that his employer was “*Funworks, Evento, Jackie Kirkland*” (MBIE complaint form dated 4 February 2012).

- (f) That the Labour Inspector’s conclusion that Funworks Limited was the employer (letter dated 31 October 2012) is supported by the oral evidence now from Mr Rean and the information recorded from him in his MBIE complaint form.
- (g) That the employment agreement produced by the Labour Inspector from Mr Kirkland refers to the existence of “Evento”, but it is a defective agreement in a number of respects and does not provide the full legal entity of the employer.
- (h) That the ACE payroll summary of wages and holiday pay and payslips refer to Evento Company Limited paying the amounts recorded in these documents. This does not rule out some agency pay arrangement between Mr Kirkland’s companies.
- (i) That the undisclosed principle does not apply because Mr Rean accepted that a company was his employer, therefore it must be one and/or both Evento Company Limited and Funworks Limited.
- (j) That Paragraph 22 of Mr Rean’s statement of evidence acknowledges Evento Company Limited was the employer.
- (k) That Mr Kirkland has failed to be responsible enough to give any evidence of his arrangements and failed to reasonably be available at the Authority’s investigation meeting to discuss the documents attributed to his businesses that emerged through the labour inspector’s enquiries. Indeed there may be a proper explanation and that the documents always existed (perhaps put on a file, but never given to Mr Rean), and being less than charitable that the documents have some other history.

[8] Mr Rean, although described as a casual, on the basis of being needed as and when required, his work pattern of hours and length of running continuous service

means that his employment was not intermittent and holiday pay could not be paid on an as you go basis for a casual with less than 12 months. Also he was not employed under a fixed term arrangement (for less than 12 months under s 66 of the Act). I accept that he worked less than 12 months, but as he had never seen the arrangements let alone agreed to them in the unsigned employment agreement, the employer could not rely on such a payment regime for holiday pay. That arrangement was apparently the intention according to the ACE payroll details and the payslips.

[9] Mr Rean's rate of pay according to the documents that the employer relies upon would appear to be \$540 extra than the information Mr Rean had about his arrangements for the payment of his hours. Mr Rean accepts that he has been paid except for the extra amounts calculated in the ACE wage summaries and pay slips. The documents are not proof of payment and I accept his claim (\$20 unpaid extra) to be paid (according to the Ace payroll and pay slips). The employer acted to incorporate pay as you go holiday pay.

[10] Mr Rean readily and after methodically working through his record accepted that he worked on only one statutory holiday and not the two as claimed. He established that his pay for 19 hours on Waitangi Day was his standard hourly rate of pay and not at time and a half per hour as required under the Holidays Act. He is entitled to \$159.70 for the half ordinary rate of pay per hour for 19 hours. His rate of pay using the gross figures from the ACE pay roll summaries means Mr Rean's hourly rate was \$16.81.

[11] In addition, Mr Rean is entitled to a day in lieu because he worked on Waitangi Day under the Holidays Act. He is entitled to \$134.48 (\$16.81 times 8 hours). He could not explain the Labour Inspector's opinion to him that he was entitled to two statutory days. Maybe the inspector was referring to the day in lieu entitlement that he is due. The employer made no allowance for this at all.

[12] Mr Rean has not been paid his final holiday pay upon the termination of his employment. I accept his employment ended when he was not paid and he is therefore entitled to his claim for holiday pay at 8% of his total gross earnings and that is a sum of \$1,209.60 as calculated in the claim.

[13] I accept Mr Rean's word that he never had seen the employment agreement, the letter of offer for employment, the wage slips before the Labour Inspector

received them. This is because I accept that he never had the documents until the inspector received them, that the agreement was not signed, that the wage summary and pay slips were different to Mr Rean's understanding about his pay, that Mr Rean kept his own book used by the employer to calculate the hours, that Mr Rean did not fully understand/ know his rate of pay, and that Mr Rean steadfastly referred to his employer as Funworks and Evento. Also I assessed Mr Rean as a reliable witness and credible. He honestly accepted that only one statutory holiday had been worked even though he genuinely believed that he may be entitled to 2 days, but could not find the details for the second day. In all other respects he has relied on his representative for his claim. There is no detail to show that he was paid for the statutory holiday lieu day.

[14] I accept that Mr Rean left his employment because of the failure of the employer to pay him wages. He says he went to Work and Income for help because he could not pay his rent. He then complained to the Labour Inspector that he had not been paid. He was accurate about not being paid for three weeks in July/August. The inspector properly put the matter on a course of mutual resolution, and payment of the wages was finally made some time after Mr Rean had given up on his job. Once payment was confirmed the inspector closed the matter as it was not related to the minimum wage.

[15] I accept that due to the employer's breach of not paying wages for three weeks that Mr Rean has been disadvantaged in his employment to be paid properly and regularly, and as such Mr Rean has lost wages. This amounts to the nine weeks before he obtained new work on or about the 1st November 2012. He is therefore entitled to \$5,040 as claimed. I accept that he has mitigated his loss and that he has no contribution in regard to any unjustified action and disadvantage occurring. He showed me the list of jobs he searched and applied for work. There were a lot and he did get another job. There is to be no reduction made to this sum.

[16] Also he is entitled to compensation for hurt and humiliation of \$2,000 as claimed. He has expressed during the Authority's investigation meeting, in addition to the evidence that he has given, disappointment, being mucked around, annoyed and has dealt with these matters on his own until getting representation to help him. I accept that this has created some hurt and humiliation.

[17] In regard to costs, I award Mr Rean a contribution of \$2,500 costs. The hearing has lasted less than one day. I accept there has been preparation based on an assumption that the respondents may have appeared or been represented at the Authority's investigation meeting. I accept there has been work that has been undertaken including attendances at the Authority's investigation meeting. The filing fee of \$71.56 is to be paid to reimburse Mr Rean.

[18] I order that Evento Company Limited and/or Funworks Limited pay Mr Stephen Rean:

- a. \$540 wage arrears
- b. \$159.70 extra for 19 hours work on Waitangi Day
- c. \$134.48 day in lieu for Waitangi Day
- d. \$5,040 lost wages for unjustified disadvantage when Mr Rean's employment ceased
- e. \$2,000 compensation for hurt and humiliation
- f. \$2,500 costs and \$71.56 filing fee.

A certificate of determination is to be issued.

**P R Stapp**  
**Member of the Employment Relations Authority**