

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 7/09
5129013

BETWEEN KIM ROBERSTON
 Applicant

AND MARLENE AND JOHN
 HICKMOTT
 First Respondents

AND IN THE ZONE EXTREME
 LIMITED
 Second Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 No Appearance for Respondents

Investigation Meeting: 8 January 2009 at Rotorua

Determination: 12 January 2009

DETERMINATION OF THE AUTHORITY

Preliminary matters

Identifying the correct employer

[1] Prior to the investigation meeting into this matter, Ms Robinson was granted leave to join In the Zone Extreme Limited (“In the Zone”) as a respondent. This application arose as a result of the initial respondent claiming they were not the employer and indicating that it was possible In the Zone was the legal entity responsible for Ms Robertson’s employment.

[2] I find that the correct respondent is In the Zone. This conclusion is supported by the fact that payments were made to Ms Robertson’s bank accounts from In the Zone and in the Statement In Reply lodged by Ms Hickmott, a Director and Shareholder of In the Zone, Ms Hickmott advises that Ms Robertson is a creditor of In

the Zone. Further, in an email sent from Ms Robertson to Ms Hickmott on 12 May 2008 Ms Robertson seeks payment of her final pay from her employment with In the Zone Extreme Limited.

Was Ms Robertson an employee or a contractor

[3] Ms Robertson's claim is for arrears of wages and holiday pay which she claims was not paid when she left her employment. In the respondent's Statement In Reply lodged by Ms Hickmott, Ms Hickmott says that Ms Robertson was offered an employment agreement and had the option of signing the agreement or being treated as a contractor. Ms Hickmott says that Ms Robertson did not sign the agreement and therefore she was a contractor.

[4] I am not satisfied the real nature of Ms Robertson's relationship with In the Zone was that of an independent contractor. Under the established legal tests Ms Robertson worked as the Manager of a Backpacker's clearly controlled by the company, totally integrated with its work, and the pay information shows she was not working on her own account.

[5] I find that at all times Ms Roberston was an employee of In the Zone.

Employment Relationship Problem

[6] Ms Kim Robertson responded to a newspaper advertisement on 10 November 2007 for a Manager of a new Backpackers based in Rotorua. She attended several interviews and was offered and accepted the position. Unfortunately the business was not successful and has not been trading since 30 April 2008.

[7] The respondents have failed to participate in the Authority's processes including refusing to attend mediation when directed by the Authority in September 2008. On 7 January 2009 Ms Hickmott notified the Authority via email that neither she, nor Mr Hickmott would attend the investigation meeting, nor would there be a representative of In the Zone present.

[8] As permitted by clause 12 of Schedule 2 to the Employment Relations Act 2000 I continued to hear and determine the matter as if In the Zone had attended or been represented.

Terms and conditions of employment

[9] Ms Robertson commenced employment with In the Zone on 13 December 2007. She was provided with a written employment agreement however, it was never signed as there were aspects of the agreement which Ms Robertson wished to negotiate with Mr and Mrs Hickmott. The issues were ultimately never discussed and therefore never resolved.

[10] I am satisfied the relevant terms and conditions of Ms Robertson's employment included a salary of \$33,000 per annum, together with the provision of full accommodation including power and telephone. Payment of salary was fortnightly by direct credit to Ms Robertson's bank account.

Outstanding Wages and Holiday Pay

[11] Ms Robertson claims payment for one weeks salary for the period 23 – 30 April 2008, an underpayment of \$200 for the pay period ending 22 April 2008, plus 9 days in lieu of public holidays Ms Robertson worked during her employment.

[12] To that is to be added the holiday pay to which Ms Robertson had become entitled at the end of the employment relationship. Based on the income figures provided to me by Ms Robertson I am satisfied Ms Robertson is owed the following sums (please note that all amounts are NETT):

\$200 underpayment for the pay period ending 22 April 2008;

\$478.58 being one weeks salary for the period 23 April – 30 April 2008;

\$615.31 being 9 days in lieu which remained an entitlement for public holidays worked during her employment;

\$789.62 being 8% of nett earnings.

In The Zone Extreme Limited is ordered to pay to Ms Robertson, within 14 days of the date of this determination, the sum of \$2,083.51 nett (without deduction), being unpaid wages and holiday pay, pursuant to section 131 of the Employment Relations Act 2000.

Costs

Ms Robertson is entitled to reimbursement of the Authority's filing fee of \$70.00. In The Zone Extreme Limited is ordered to pay her that amount within 14 days of the date of this determination.

Vicki Campbell
Member of Employment Relations Authority