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Stevenson v The Cutting Krew Limited (Auckland) [2016] NZERA 398; [2016] NZERA Auckland 295 (31 August 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 295
5438135

BETWEEN PASQUALINA STEVENSON Applicant

A N D THE CUTTING KREW LIMITED

Respondent

Member of Authority: T G Tetitaha

Representatives: H Burdon, Advocate for the Applicant

L Hawley, Respondent representative Investigation meeting: 29 August 2016 at Auckland Submissions received: 29 August 2016 from both parties

Date of oral

Determination 29 August 2016

Date of written

Determination: 31 August 2016

ORAL DETERMINATION OF

THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Pasqualina Stevenson alleges she was employed then unjustifiably dismissed by The Cutting Krew Limited (respondent company). She also seeks unpaid wages for holiday pay, sick leave and KiwiSaver.

Relevant Facts

[2] Ms Stevenson started work as a hairdresser at the respondent company's business premises on 4 June 2009. Cutting Krew is a walk-in hair salon based in Whenuapai. There is a dispute whether there was discussion about whether she was

an independent contractor or employee. Irrespective, the respondent company paid

PAYE on Ms Stevenson's behalf throughout the work period.

[3] Employment matters came to a head in 2012. Ms Hawley raised issues of overpayment of taxes. Ms Stevenson sought clarity around her employment relationship. The respondent company drafted and offered Ms Stevenson an employment agreement, but it was never signed.

[4] Between 4 and 21 September and 5 and 23 November 2015 Ms Stevenson took unpaid sick leave due to stress. She alleged

the stress arose because of the irregular payment of wages throughout her employment.

[5] On 12 November 2015 Ms Stevenson instructed a legal advocate to raise issues about the irregular payment of wages.

[6] On 16 November 2015 the respondent company raised allegations of serious misconduct which could lead to termination of Ms Stevenson's employment. A meeting was set to occur on 23 November. However, Ms Stevenson's representative was unable to attend and the meeting did not occur.

[7] During this period Ms Stevenson was also looking at purchasing the salon business. By December 2015 no agreement had been reached.

[8] No further meetings occurred regarding the employment issues. By

24 November 2015 Ms Stevenson alleged she had been dismissed.

Issues

[9] At a telephone conference on 13 June 2016 the parties agreed the following issues were going to hearing:

(a) Whether the applicant was employed by the respondent; (b) Whether there are wage arrears owed for:

- Sick leave taken but not paid;
- Annual leave taken but not paid;
- KiwiSaver entitlements;

(c) Whether the applicant was unjustifiably dismissed, including whether she was dismissed at all or constructively dismissed by the respondent's behaviour towards the end of her work;

(d) Whether there should be a penalty for non-payment and/or deduction of wages owed under the [Wages Protection Act 1983](#).

Was Ms Stevenson employed by Cutting Krew Limited?

[10] An "employee" is "*any person ... employed by an employer to do any work for hire or reward under a contract of service*".¹ I "*must determine the real nature of the relationship*" between the alleged employer and employee.² This assessment includes considering "*all relevant matters, including any matters that indicate the intention of the persons*" and "*not treat as a determining matter any statement by the person's that describes the nature of their relationship*".³

[11] In considering "all relevant matters" I may apply tests such as control,

integration and the fundamental test.⁴

[12] The control test considers the degree of control or supervision exercised by the

employer over the alleged employee's daily work.⁵

[13] The integration test considers whether the work performed by the alleged employee is an integral part of the business and whether he or she has effectively become "part and parcel of the organisation".⁶

[14] The fundamental test is whether the alleged employee engaged him or herself to perform the services for the employer as a person in business on their own account.⁷

[15] I must also examine the terms and conditions of the contract and the way in which it actually operated in practice. Documentation evidencing the alleged

agreement between parties is a useful indication of their intention.

¹ [Employment Relations Act 2000, s 6\(1\)](#).

² [Employment Relations Act 2000, s 6\(2\)](#).

³ [Employment Relations Act 2000, s 6\(3\)](#).

⁴ *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] NZEmpC 111; [2002] 1 ERNZ 114 (NZEmpC) at [46].

⁵ *Bryson v Three Foot Six Ltd* [2003] NZEmpC 164; [2003] 1 ERNZ 581 (NZEmpC).

⁶ *Bank voor Handel en Scheepvaart NV v Slatford (No.2)* [1953] 1 QB 248 (CA) at [295].

[16] There was evidence of control by the respondent company. Ms Stevenson was required to attend the salon on Tuesdays to Saturdays during the opening hours. The respondent set her wages. It was accepted she was paid \$100 per week plus commission – 40% on hair cutting services and 50% on colours. When she took leave she was not paid at all.

[17] She was in sole charge of the salon. Although there was some dispute whether she controlled her own hours, I accept there had to have been some opportunity for her to leave for lunch and rest breaks or to attend to her own business during the opening hours.

[18] She was also integral to the respondents business because there did not seem to be anyone else available to undertake that work on her behalf. Ms Hawley came in to cover on days when Ms Stevenson was away on unpaid leave but this appeared to be at great inconvenience.

[19] There was no evidence Ms Stevenson was in business on her own account. There was no invoicing, no evidence of GST registration or payment of ACC levies or other taxes. Her accountant also provided evidence based upon his knowledge and preparation of her accounts that she was employed from 2009 until now.

[20] One indication of possible employment would be the continued payment of PAYE by Cutting Krew Limited on Ms Stevenson's behalf. Ms Hawley, the respondent company director, believed it was a mistake by her accountant. She knew about this mistake in 2012 but took no steps to correct it.

[21] There was evidence a person could still be employed even if it was on a commission basis in this industry. Commission would still be consistent with an employment relationship in the hairdressing industry.

[22] Ms Hawley's view that this was an independent contracting arrangement was not consistent with the documents and conduct of the respondent company. The employment agreement offered in 2012, Ms Hawley's letter to Ms Stevenson on 16 November 2015 alleging serious misconduct leading to termination of employment and the continued payment of PAYE, all indicate that this was an employment relationship.

[23] Ms Stevenson was employed by Cutting Krew Limited.

Was Ms Stevenson dismissed by Cutting Krew Limited?

[24] Where there is a dispute about whether an employee was dismissed or not, the onus falls upon the employee to prove the employment was terminated by an action of the employer.

[25] This dismissal allegedly occurred on 24 November 2015. In an email dated 24

November 2015 her representative alleged the dismissal occurred because a second client had been informed by Ms Hawley that Ms Stevenson no longer worked at Cutting Krew Limited.

[26] The evidence did not show that. One client alleged she had been told that same day by Ms Hawley that Ms Stevenson was not there and would not be back tomorrow.⁸ There was no evidence of any second client at the date of the alleged dismissal. The evidence from the second client related to a conversation with Ms Hawley in December, sometime after the alleged dismissal.

[27] At no stage was Ms Hawley made aware of this client's concern before the alleged dismissal occurred. There was the real possibility Ms Stevenson and/or the client were mistaken about the intent of the conversation. However Ms Hawley and the respondent company were never given an opportunity to discuss this further.

[28] Ms Hawley gave evidence, which I accept, that she did not tell clients that Ms Stevenson had left work until mid-December when she still did not return. Ms Stevenson accepted she had not been told she was dismissed by Ms Hawley or the respondent company.

[29] Despite the above reason for dismissal, Ms Stevenson told me she did not want to return to work until there was a meeting with Ms Hawley about her employment matters. Ms Hawley had arranged a meeting for 23 November but Ms Stevenson's advocate could not attend. Ms Stevenson then alleged Ms Hawley would not meet again because she would not respond to emails.

[30] Even if there was no meeting about the employment issues, these were being discussed as part of the negotiations to purchase the business. In particular I note one of the proposals to Ms Hawley about purchasing the respondent's business included settlement of outstanding holiday pay. What Ms Stevenson sought was being

provided, albeit through the purchase negotiations. These continued until 9 December despite the alleged dismissal on 23 November.

[31] I am not convinced on the balance of probabilities that the respondent dismissed Ms Stevenson. In my view this employment was terminated by Ms Stevenson's refusal to return to work. The application for unjustified dismissal is dismissed.

Should a penalty be awarded for non-payment and/or deduction from wages owed?

[32] I have considered whether to order a penalty in this matter for breaches of the

[Wages Protection Act 1983](#). I decline to do so.

[33] There was a dispute about whether Ms Stevenson was employed or not that required determination. The evidence also does not meet the test required for a penalty to be awarded. The penalty application shall be dismissed.

Remedies

[34] Because I have found there was an employment relationship but dismissed the remaining applications, the only remedies are for unpaid wages of annual leave, sick leave and KiwiSaver.

Annual Leave

[35] The calculation of the amount of annual leave has been difficult because of the lack of quantification of wages earned. There were no wage and leave records because Ms Hawley did not believe this was an employment relationship. Ms Stevenson has produced her income from the Inland Revenue Department and her accountant.

[36] I do not have sufficient information to calculate the "ordinary weekly pay"⁹ for Ms Stevenson. She submitted evidence that her 12 months earnings for the period ending 31 March 2016 were \$23,783.00, giving an average weekly wage of \$457.40. Over the six complete years of employment Ms Stevenson would have accrued

24 weeks of annual leave. 24 weeks at the average weekly wage of \$457.40 gives a total of \$10,977.69 due for holiday pay.

[37] For the period 3 June 2015 to 16 November 2015 the gross wages received would have been \$17,837.25.¹⁰ Ms Stevenson is entitled to 8% of her gross wages received prior to her 12 month employment anniversary as holiday pay.¹¹ This gives a total of \$1,426.98 due.

Sick Leave

[38] I accept that Ms Stevenson was sick between 4 and 21 September and 5 and 23

November 2015 because she produced medical certificates showing she was unfit to work during those periods. Ms Hawley alleged she was in Australia but did not pursue this in examination.

[39] The sick leave entitlement capped at 20 days per annum.¹² The "average daily pay"¹³ was \$103.31 per day, giving a total of \$2,068.26 owing for unpaid sick leave.

KiwiSaver

[40] Ms Stevenson seeks payment of lost Kiwisaver benefits. The employer's contribution would have been 2% of gross wages from 2009 to 31 March 2013. The employer's contribution from 31 March 2013 would have increased to 3%. Accordingly the lost Kiwisaver benefit based on the evidence filed is \$5,915.80. I intend directing this to be paid to Ms Stevenson's nominated Kiwisaver provider because it is a benefit she is entitled to upon retirement only.

Orders

[41] Accordingly, the following orders are now made:

(a) Cutting Krew Limited is ordered to pay wage arrears of holiday pay and sick pay only to Pasqualina Stevenson totalling \$14,472.93.

(b) Cutting Krew Limited is ordered to pay the KiwiSaver benefit of \$5,915.80 to Pasqualina Stevenson's nominated KiwiSaver provider

account.

10. This figure is calculated by dividing her gross earnings of \$23,783.00 by the 8 months she worked between 1 April and 16 November 2015. This gives average monthly earnings of

\$2,972.88. Deducting two months (\$5,945.75) from the gross earnings leaves \$17,837.25.

11 [Holidays Act 2003, s 23.](#)

12 [Holidays Act 2003, s 66.](#)

13 [Holidays Act 2003, s 9A.](#)

(c) The applications for unjustified dismissal and penalty are dismissed.

Costs

[42] After hearing from both parties regarding costs, the starting point shall be half of the Authority's daily notional tariff which is \$1,750. An increase of \$500 is appropriate for the late filing of evidence and additional reply evidence filed.

[43] Cutting Krew Limited is ordered to pay Pasqualina Stevenson \$2,250 contribution towards her costs.

T G Tetitaha

Member of the Employment Relations Authority

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