

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 180/10
5287175

BETWEEN PERRY WRIGHT
 Applicant

AND CHRISTOPHER CLARK
 First Respondent

AND CLARK EDUCATION AND
 TRAINING LIMITED
 Second Respondent

Member of Authority: Philip Cheyne

Representatives: Stephen Thomas, Advocate for Applicant
 Frank Freeman, Counsel for Respondents

Investigation Meeting: 5 August 2010 at Nelson

Further Submissions: 12 August 2010 from the Respondent
 16 August 2010 from the Applicant

Determination: 15 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christopher Clark is the principal of a company called Clark Education and Training Limited. The company provides Farm Safe and other training workshops in the Nelson region. Perry Wright was engaged to help organise these workshops from about March or April 2009 until the relationship was terminated in July 2009.

[2] Several problems have arisen from the relationship which the Authority must resolve. There is a dispute about whether the relationship was employment. If it was employment, Mr Wright claims arrears of wages said to be owed under an employment agreement. Mr Wright also says that he was unjustifiably dismissed when Mr Clark ended the relationship. The proceedings are against Mr Clark

personally as well as against the company. I will also need to resolve who is the correct respondent.

[3] To determine these problems, I will set out how the relationship was established, what happened in practice and how it ended. In doing that, there are some factual disputes to resolve. Against that background, I will assess the real nature of the relationship and whether it was between Mr Wright and Mr Clark or the company. If the relationship was employment, I will assess whether there are any arrears and whether Mr Wright has a personal grievance.

The formation of the relationship

[4] Mr Wright and Mr Clark met socially about December 2007 and a friendship between them and their families developed during 2008. Mr Clark came to learn that Mr Wright had care of his two children and received the domestic purposes benefit while Mr Wright came to learn that Mr Clark operated training courses in the farm industry.

[5] While they were socialising one day, Mr Clark mentioned to Mr Wright that he was looking for someone to help organise Farm Safe workshops. Then, or on a later occasion, there was some discussion about the work required. It involved ringing or contacting people to enrol them in various courses and dealing with associated administrative tasks. The work was to be done from home. Mr Clark said that it paid \$130 for each course that was organised. Mr Wright's evidence is that he only learned later that the payment was only due for courses that were organised and proceeded while Mr Clark's evidence is that he made this clear from the outset. I prefer Mr Clark's evidence on this point.

[6] During their discussions, Mr Wright said that he did not have a landline phone and Mr Clark said he would put one on for him. It was agreed that \$80 gross weekly of the \$130 would be paid by direct credit into Mr Wright's bank account while the balance would be paid in kind. As Mr Clark put it in evidence, he arranged the payments this way to help out a friend who was on the DPB. At Mr Clark's request, Mr Wright filled in an IR30 form before he received any payment.

[7] Mr Clark arranged for a Telecom landline to be connected at Mr Wright's home. He also organised an internet account and provided a laptop computer.

[8] Mr Clark's evidence is that the *official* commencement date was 1 April 2009 while Mr Wright's evidence ties his commencement date to 17 March 2009, apparently the order date for the phone connection that the invoices show commenced on 1 April 2009. I prefer Mr Clark's evidence about the commencement date.

[9] None of these arrangements were recorded in writing. Mr Clark's evidence is that he prepared a contract but never gave it to Mr Wright. He says that he got a clear indication that Mr Wright did not want anything in writing that might jeopardise his DPB entitlement and that he himself was not convinced that Mr Wright *had the right skills for the job* but wanted to give him the benefit of the doubt.

[10] Mr Clark's evidence is that he explained to Mr Wright that he would be working under a contract for services with no holiday pay. However, Mr Wright agreed in evidence when it was put to him by counsel that they never discussed the status of the relationship. That too was his evidence in chief, which I accept as more probable.

[11] From all this, I conclude that there was a mutual agreement to arrange matters in a way that avoided any impact on Mr Wright's benefit entitlement and that neither Mr Clark nor Mr Wright expressed any preference about the intended status of the relationship.

[12] Turning to the work itself, Mr Clark provided a list of names and some partly organised courses as a starting point. Mr Wright was left to contact people from the list or others in order to get their commitment to scheduled courses. Mr Clark regularly checked with Mr Wright about progress with this work and about scheduling future courses, but Mr Wright was mostly left to determine how and when he worked. Mr Clark's evidence is that it became apparent to him over time that Mr Wright could not cope with the cold calling requirement and that he was in the habit of leaving it until the last minute to try and fill a course with the result that many courses had to be cancelled.

[13] Mr Clark's dissatisfaction got to the point that on 23 July 2009, he went to see Mr Wright and terminated the relationship.

Status

[14] The role for the Authority is to determine the real nature of the relationship, having considered all relevant matters including those that indicate the parties' intention without treating any statements by those parties as determinative: see s.6 of the Employment Relations Act 2000.

[15] Mr Wright worked for Mr Clark's business and was not operating his own business. He neither produced tax returns on that basis nor registered for or supplied any GST invoices. Mr Clark or his company provided the tools needed by Mr Wright to perform the work. Mr Wright performed the work under Mr Clark's direction but had significant latitude about when he did so since he worked from home and was not paid on an hourly rate basis.

[16] Although the agreement was for payment of \$130 per course that proceeded, Mr Clark actually paid Mr Wright monthly effectively on a retainer basis at \$80 (gross) per week. Mr Clark deducted PAYE tax from this amount before paying the net to Mr Clark. The tax deduction was forwarded appropriately to the IRD. As agreed, extra payments were made in kind. The initial intention was to buy groceries and the like but that changed at Mr Clark's initiative because he thought that would not be a proper deductible expense for his business. The kind payment then comprised petrol and the like.

[17] Overall, the arrangements in practice are strongly indicative of employment rather than independent contractor status.

[18] It is submitted that Mr Clark intended a contract for services. The evidence in support, apart from Mr Clark saying so, is a document in that form apparently prepared by Mr Clark during or at the start of the relationship but never shown to, much less agreed to, by Mr Wright. I am told that Mr Clark's company has or had similar contracts with others and that independent contracting is the norm for those in other regions doing the sort of work done by Mr Wright in Nelson. On this evidence, I am not satisfied that there is an established industry practice so as to make a difference to an objective view of the arrangements made between Mr Clark and Mr Wright. At best, there is an indication of Mr Clark's unannounced intention as to the nature of the relationship. That does not displace the strong indication of employment mentioned above.

[19] The real nature of the relationship was that Mr Wright was employed as an employee under a contract for service. The Authority has jurisdiction to investigate and determine his claims.

Dismissal

[20] It is not disputed that Mr Clark terminated the relationship on 23 July 2009. I will describe more fully what happened then and subsequently.

[21] Mr Wright had no forewarning of the purpose of Mr Clark's visit. Mr Clark told him that arrangements were not working out and, in the interests of their relationship, they should part company in the work environment. Despite the euphemism, the clear message was that he was dismissing Mr Wright or terminating the relationship.

[22] Mr Clark asked for the return of his records and computer. Mr Wright refused to hand over these items there and then but said he would return them by 1pm the next day. Mr Clark also had some personal items to return. Mr Clark said he would wait while Mr Wright sorted out his items. In his evidence, Mr Wright says that Mr Clark refused to leave his home despite being asked. He also says that Mr Clark was *quite intimidating* but I do not accept that gloss. Knowing that Mr Clark abhors cigarette smoke, Mr Wright lit a cigarette. Mr Clark then left on the basis that his property would be returned the next day and they would discuss payment for the courses organised by Mr Wright that would proceed.

[23] The next day, Mr Clark returned at the appointed time. He returned Mr Wright's property and asked for the computer and other items. Mr Wright refused to hand over the computer. He produced a list of courses he said were organised and said that he wanted payment (\$1,170) before he returned the computer and other materials. Mr Clark stormed off.

[24] Mr Clark went straight to the Police at Richmond and told them that Mr Wright had refused to return the computer and other items. The community constable then went to Mr Wright's house. Mr Wright handed over everything to the constable except the computer. Both he and the constable looked for it without success. The constable noticed an unlocked door and Mr Wright suggested that maybe an intruder had been in the house. The constable left and returned what items

he had gathered to Mr Clark. Later, Mr Wright returned the computer to the constable who passed it on to Mr Clark.

[25] In his evidence, Mr Wright told me that they had been unable to find the computer when they searched because it had slid down behind a seat under some children's clothes. His evidence was to the effect that it genuinely could not be located at the time. Eventually, but after initially denying this, Mr Wright admitted that he did not give the computer to the constable immediately because he wanted to retain it until paid in full for his services. After the constable left he reconsidered this strategy and delivered the computer to the constable.

[26] On 27 August 2009, Mr Clark paid Mr Wright for three further courses by depositing \$390 less tax in Mr Wright's bank account. Nothing further happened until 12 October 2009 when the two men chanced across one another at NMIT's Richmond campus. Mr Wright asked *where's my money?* Mr Clark replied *its coming*, intending to avoid engaging in any exchange with Mr Wright. Later that day, Mr Wright delivered to Mr Clark's letterbox a brief letter advising him:

I completely disagree with the way I was dismissed from my employment. You had no right to dismiss me. This is notice of my personal grievance. I will be seeking compensation for the financial difficulty you have put me in.

Justification

[27] Justification for the dismissal must be assessed objectively by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[28] Perhaps because Mr Clark did not stop to think about his obligations towards Mr Wright as an employee, he failed to act as a fair and reasonable employer. He gave Mr Wright no warning of his mounting dissatisfaction; he gave Mr Wright no opportunity to improve; he gave Mr Wright no opportunity to respond before dismissing him; and he dismissed Mr Wright without notice in circumstances where there had been no serious misconduct so as to warrant summary dismissal.

[29] Mr Wright was unjustifiably dismissed and he has a personal grievance.

Remedies

[30] Mr Wright did not contribute in a blameworthy way to the situation giving rise to his grievance. While he probably did not work to a satisfactory standard, he had no warning of that, either formally or informally, so as to give him an opportunity to improve. Mr Wright was not at all responsible for Mr Clark's complete failure to treat him in a fair and reasonable manner.

[31] There is evidence about Mr Wright's devastation, total embarrassment and humiliation as a result of the dismissal. This evidence significantly exaggerates the true position. I have already mentioned Mr Wright's actions in misleading the constable about the computer and the untruthful evidence he first gave the Authority about that. That throws doubt on his reliability generally. Mr Wright's evidence is that he was *totally embarrassed* about having to *frequently* go into WINZ. When questioned, it emerged that he had gone into the WINZ office just once after the dismissal, probably in either September or October last year. That is another example of the difficulty about accepting Mr Wright's evidence at face value.

[32] The more reliable evidence about the effect on Mr Wright of the dismissal is what he did rather than what he now says. He refused to return equipment that he knew was not his, even when asked for it by the constable. That indicates a level of anger on his part. However, his focus was on getting paid for his work rather than pursuing a grievance since he did nothing about that for almost three months. I also accept that the dismissal caused some deterioration in his financial position which no doubt caused Mr Wright some worry and concern. To remedy these proven effects, Mr Wright is entitled to an award of \$3,000 compensation.

[33] The only claim for pecuniary loss in the statement of problem is for payment in lieu of notice of two weeks' wages or \$260. I accept that Mr Wright was entitled to wages in lieu of notice. There was no agreed notice period and I fix reasonable notice at one week. Mr Wright's weekly payment was \$80 gross paid effectively as a retainer. He is entitled to \$80 gross in lieu of notice.

[34] During submissions counsel for Mr Wright sought compensation for 14 courses that Mr Wright was in the process of filling prior to the dismissal. Counsel referred to s.123(1)(b) of the Employment Relations Act 2000 which empowers the Authority to order reimbursement of wages or other money lost as a result of a

grievance. I decline to make any such award for two reasons. First, the claim is too late to allow for an effective response. Second, Mr Wright did next to nothing to try and mitigate his loss.

Penalty claims

[35] There is a claim for a penalty for the employer's failure to provide a written employment agreement. Under s.63A of the Employment Relations Act 2000, Mr Clark should have provided Mr Wright with a copy of the intended employment agreement and advice of the right and an opportunity to get independent advice. That was not done, presumably because Mr Clark did not intend to engage Mr Wright as an employee.

[36] This is not a case that calls for the imposition of a penalty on the employer for the failure to comply with the Employment Relations Act 2000. In effect both Mr Wright and Mr Clark were happy to enter into an informal arrangement as a result of their friendship for the benefit of them both in a way that did not impact on Mr Wright's benefit and without either of them being concerned about the legal status of the relationship.

[37] There is also a claim for a penalty pursuant to s.75 of the Holidays Act 2003 for the failure to pay holiday pay, contrary to s.27(2) of that Act. The difficulty for Mr Wright with this claim is s.76(1) which provides that a Labour Inspector is the only person who may bring an action in the Authority to recover a penalty under s.75. The claim must fail.

Arrears

[38] There are claims for arrears and holiday pay.

[39] I have been given a copy of Mr Clark's handwritten cashbook that records the courses for which a payment was due to Mr Wright. I accept that as the best evidence of the payments due to Mr Wright and prefer it to the evidence of Mr Wright were there is any difference. Between 1 April and 22 July the record shows a total of \$2850 with a further \$390 due for three courses in August that proceeded. In his evidence Mr Clark also said that he was willing to pay for 2 ATV courses. The total then payable was \$3,500.00 plus holiday pay of \$280.00, a total of \$3,780.00 (gross).

[40] Mr Clark's hand written payment record kept in the style of a wages book shows payments totalling \$1,830 (gross). There is no dispute that the net value of these payments was received and the PAYE remitted to IRD. That leaves \$1,950 (gross) owing. It is also accepted that payments in kind should be brought to account for present purposes but there is a dispute about whether Mr Wright received all the payments Mr Clark says were made. With reference to the second schedule produced by Mr Clark: I accept Mr Clark's evidence that Mr Wright received payments in kind as follows: \$82.32 on 30 April, \$258.00 on 8 May, \$69.00 and \$88.57 on 11 May, \$29.98 on 16 May, \$86.04 on 28 May, \$78.59 on 29 May, \$305.63 on 29 May, \$132.49 on 29 May, \$85.11 on 22 June, \$84.19 on 2 July, \$61.98 on 10 July and \$74.26 on 16 July. It is also accepted that Mr Wright should have the benefit of the fuel discount, shown as \$28.63. Those payments total \$1,407.53, leaving a further \$542.47 to be paid.

[41] Accordingly I find that Mr Wright is owed \$542.47 (gross) in arrears of wages and holiday pay.

Correct respondent

[42] I accept the evidence of Mr Clark that the company operated the business in which Mr Wright worked. However, it is also clear that Mr Clark never told Mr Wright that he was acting as an agent for a company and that his relationship would be with a company rather than with Mr Clark personally. In that situation Mr Wright is entitled to choose whether to sue the agent or the undisclosed principal.

[43] Mr Wright initiated these proceedings against Mr Clark personally and against the company. I take that as an unequivocal election to sue the principal so Mr Wright is not entitled to sue Mr Clark personally. It follows that the claims against Mr Clark personally must be dismissed.

Counsels' memoranda

[44] Counsel for the respondents objected to parts of the applicant's 16 August 2010 memorandum being placed before the Authority on the basis that they contained submissions that should have been made during the investigation meeting. Strictly speaking, counsel is correct but I did read the whole memorandum. I would have given counsel an opportunity to respond if the objectionable submissions might have affected the outcome.

Summary

[45] Mr Wright was an employee.

[46] Mr Wright was unjustifiably dismissed.

[47] Clark Education and Training Limited is to pay Mr Wright compensation of \$3,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[48] Clark Education and Training Limited is to pay Mr Wright \$80.00 (gross) in lieu of notice of dismissal.

[49] Clark Education and Training Limited is to pay Mr Wright \$542.47 (gross) in arrears of wages and holiday pay.

[50] Costs are reserved. If counsel cannot agree, a claim for costs can be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve a memorandum in reply.

Philip Cheyne
Member of the Employment Relations Authority