

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

Under the Employment Relations Act 2000

BETWEEN William Hilton Doherty and Christopher Orchard (Applicants)
AND 54 Cuba Street (2007) Limited (formerly 54 Cuba Street Limited) and
PRP Auckland Limited (Respondents)
Member of Authority: P R Stapp
Representatives: Michael Quigg and Tim Sissons for Applicants
No attendance or appearance for Respondents
Investigation Meeting: Wellington, 15 May 2007
Determination: 18 May 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The employment relationship involves a claim from both the applicants for payment of outstanding sums of redundancy pay. In addition Mr Doherty has claimed outstanding bonuses and vehicle allowance. Mr Orchard has claimed a balance of travel expenses owing.

[2] 54 Cuba Street (2007) Limited has accepted liability on sums for the redundancy pay. Sarah Todd, a director of the company says the quantum for other payments has to be worked out.

[3] The respondents have counter claimed that Mr Orchard obtained cash from a company credit card for \$1,500 without authority. Mr Orchard says he obtained the cash to reduce his exposure from not being paid a claim for expenses in total of \$3,215.01.

Issues

[4] Sarah Todd has accepted there are sums of redundancy pay owing by 54 Cuba Street (2007) Limited to the applicants. She also conveyed to the applicants other outstanding entitlements for payment would need to be calculated.

[5] There is an issue about the standing of PRP Auckland Limited, which the applicants say also employed them. PRP Limited has replied that it has nothing to do with this matter. The question is what is that company's role and is it liable for any sums owing?

The Proceedings and Investigation Meeting 15 May 2007

[6] There was no attendance or appearance by the respondents. They have both been previously represented before the Authority in the matter. On 3 May counsel for 54 Cuba Street (2007) Limited, Chris Patterson, advised the Authority he was not being instructed and that he had informed Sarah Todd of the arrangements. On 4 May she advised that she could not attend a investigation meeting on 15 May because she could not make alternative arrangements for child care. On 10 May counsel for PRP Limited, Frank Godinet, advised he was no longer being instructed. A director of that company, and also a director of 54 Cuba Street (2007) Limited, Mr Tony Kidd advised the Authority on 14 May that the company could not afford to pay for the airfares to Wellington. He said that he was available by telephone if needed.

[7] I decided to proceed fully in the matter as if both respondents had duly attended or been represented. I decided that Ms Todd's reason that she could not make alternative child care arrangements was not a good cause for her failure to attend given the time available to make alternative arrangements. Also, I decided that Mr Kidd's information that the company could not afford the airfares lacked detail and specificity such as to be a good cause not to attend. I have had to balance these factors, alongside the availability of Ms Todd on another date, and Mr Kidd on the telephone (being in my opinion unsatisfactory in the circumstances), with the applicants being opposed to moving the investigation meeting to a later date. Also I have had to weigh the possibility of prejudice to the applicants who want to be paid and the risk of a delayed decision on what the role of these companies is. Also, both parties had representatives who committed their clients to the prior arrangements made with the Authority for the investigation meeting.

Determination

[8] 54 Cuba Street (2007) Limited accepts that redundancy pay is owed to Messrs Doherty and Orchard. The sum for Mr Doherty is \$30,570.22 nett of tax. The sum for Mr Orchard is \$19,384.61 gross.

[9] 54 Cuba Street (2007) Limited also owes Mr Doherty a sum for a bonus that has not been sufficiently calculated. This matter has to be reserved for more accurate detail. I request Ms Todd and Mr Kidd as co directors of 54 Cuba Street (2007) Ltd to assist and provide the necessary information to enable a calculation on the bonus to be made. Also, Mr Doherty is owed a car allowance by 54 Cuba Street (2007) Ltd. I accept his evidence that the total sum is \$1,380.27. This has been calculated from the monthly difference in his salary and the amount paid x 3 months in terms of the employment agreement for pay in lieu of notice based on the evidence he has given on oath in his written statement of evidence.

[10] Mr Orchard is owed the reimbursement of his outstanding expenses claimed. He accepted that he used a credit card, he thinks, in the name of "Axiom Rolle PRP". He obtained two cash payments totalling \$1,500 that he agreed needs to be off set from his expenses claim. His total claim was \$3,215.01. He is owed \$1,715.01.

[11] 54 Cuba Street (2007) Limited says it cannot pay and that the applicants are preferential creditors. That may be so but it is not to say that sometime in the future it can not meet its obligation to pay or arrange payment in accordance with the law. I must put a date on the compliance and do so as a matter of form that can be varied on application. See my order that follows

[12] Mr Quigg requested me to make some indicative finding about the role of PRP Auckland Limited that the applicants say employed them with 54 Cuba Street (2007) Limited. In this case the way the business of the two companies has been conducted leaves it open to make the conclusion that there is more in the relationship. The evidence for this is found in the documents produced. For example they include:

- Both companies have gone through a serious of previous and recent name changes (from the company register).
- Ms Todd and Mr Kidd are both directors of 54 Cuba Street (2007) Limited, and Mr Kidd is a director of PRP Auckland Limited.
- The applicants have given evidence of their belief of being jointly employed and working for both companies.
- There are no employment agreements with the name 54 Cuba Street (2007) Limited and the applicants. Mr Doherty and Mr Orchard had agreements with Rolle Limited dated 14 November 2001 and 13 February 2002 respectively.

- Both applicants received an “Information Memo” addressed to “*All Staff, ex Rolle Knight Frank*” and dated 17 September 2004 from Mr Kidd. That memo was on the letterhead of Axiom Advisory Limited, being a previous name of PRP Auckland Limited.
- Mr Doherty’s employment agreement referred to the employer in that agreement as being “Axiom Rolle PRP Valuation Services Limited, being another previous name of PRP Auckland Limited.
- A number of business, management and payroll functions were conducted through PRP Auckland Limited that included email exchanges.
- The applicant’s bank statements from which payments for salary and expenses are shown and do not include 54 Cuba Street (2007) Limited by name.

[13] Ms Todd and Mr Kidd may have some plausible and straight forward explanation for what appears to be a very untidy array of arrangements occurring with these two companies and relating to the applicants’ contractual employment relationship with them. The information produced by the applicants would not rule out a joint employer in these circumstances and leave PRP Auckland jointly liable for the sums claimed by the applicants. I have taken on board the issue of fairness raised by Mr Quigg about PRP Auckland Limited having enjoyed a further opportunity to reply, although Mr Kidd had the opportunity to provide a written statement in a timetable agreed to by his lawyer before the Authority’s investigation meeting. He also had a copy of a transcript of the preliminary investigation meeting held by the Authority on 13 April 2007 with access to all the documents being used including the sworn written evidence from the applicants. He did not take the opportunity that was given to him to provide a written statement. At this stage I have to give the benefit to the applicants’ evidence and their interpretation of the documents as if PRP Auckland attended the investigation meeting or was represented for me to fully act on the matter. At the request of the applicants this matter can be brought on for further investigation and I accordingly grant leave if they wish to pursue further definitive rulings on the role of PRP Auckland Limited and if it has any liability on the sums they have claimed. Leave is granted.

[14] I have not dismissed the counterclaim from the respondents on Mr Orchard’s conduct of using the credit card allegedly without authority and to obtain an explanation and motivation of why he did it. He has consented to offset the \$1,500 from the total amount he has claimed for expenses. I reach no conclusion on his behaviour.

Orders

[15] I order as a matter of compliance that 54 Cuba Street (2007) Limited pay William Hilton Doherty the sum of \$30,570.22 net redundancy pay and pay the tax in addition. 54 Cuba Street (2007) Limited is to also pay William Hilton Doherty the sum of \$1,380.27 reimbursing car allowance in lieu of notice under the terms of the employment agreement. The payment is to be made by 1 June 2007.

[16] The outstanding matter of Mr Doherty's bonus is reserved for calculation and payment between the parties because of the lack of detail and specificity. Leave is granted to return to the Authority if the matter cannot be settled. This will need to involve the respondents organising and producing relevant information to assist to make the calculation. Any such information available is to be produced by 23 May 2007 to accomplish this task.

[17] I order as a matter of compliance that 54 Cuba Street (2007) Limited pay Christopher Orchard the sum of \$19,384.61 gross redundancy pay by 1 June 2007.

[18] Also, I order 54 Cuba Street (2007) Limited to pay outstanding expense claims to Mr Orchard in the sum of \$1,715.01 by 1 June 2007.

[19] There is a matter of costs. The applicants have been put to the expense of representation and preparation of an Authority investigation process involving telephone conferences and a preliminary and a full investigation meeting. 54 Cuba Street (2007) Limited is to contribute a total of \$3,000 to Messrs Doherty's and Orchard's combined costs.

[20] Leave is granted for the applicants to resume the investigation meeting on the role of PRP Auckland Limited and what if any liability it has on paying the above sums.

P R Stapp
Member of the Authority