

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 55/10
5137501

BETWEEN	APPELLATION VINEYARD SERVICES LIMITED Applicant
AND	LABOUR INSPECTOR (DOUGLAS HIXON) Respondent

Member of Authority: Philip Cheyne

Representatives: No appearance for the Applicant
Alex Leulu, Counsel for the Respondent

Investigation Meeting: 9 March 2010 at Christchurch

Determination: 9 March 2010

DETERMINATION OF THE AUTHORITY

[1] Appellation Vineyard Services Limited is a registered company. It operated a business contracting with vineyards to provide vineyard services in Marlborough such as pruning and thinning. Jason Clouston was the sole director and is the principal of another company that owns all the shares in Appellation.

[2] Douglas Hixon is a Labour Inspector. He received and investigated complaints about unpaid holiday pay from two people who had been engaged by Appellation during May to September 2008. Following his investigation Mr Hixon advised Appellation of his grounds for believing it owed money to the complainants and issued demand notices dated 7 October 2009 after giving Appellation an opportunity to comment on the identified grounds. Mr Clouston for Appellation then lodged with the Authority objections to the two demand notices.

[3] During a phone conference on 10 December 2009, arrangements were agreed for an investigation meeting in Christchurch today. Both parties provided various documents and statements following the phone conference. In his statement dated 15 February 2010 Mr Clouston says that his principal witness is in jail and is scheduled for removal from New Zealand on 3 March 2010; that the applicant is insolvent; and that he resigned as a director in February 2010 but has agreed with IRD to remain registered as a director until outstanding taxation issues are resolved.

[4] Yesterday, just before 2pm, the Authority received an email from Mr Clouston advising that his principal witness had been removed from New Zealand and that he was unable to travel to Christchurch because of stomach cramps and the attendant consequences. There was no express request for an adjournment. At my direction a reply was sent to Mr Clouston saying that the Authority would not at such late notice adjourn today's investigation meeting on the basis of an informal application unsupported by any evidence. Mr Clouston responded but without seeking an adjournment. There was no appearance this morning for the applicant. There being no good reason for the non-appearance I decided to proceed.

[5] Mr Hixon confirmed on oath the contents of his statement in reply. In short, having received the complaint about non payment of holiday pay from two Germans here on temporary work visas, Mr Hixon investigated by obtaining their detailed account of what happened in practice regarding their work for Appellation and similarly getting Appellation's views. Neither complainant was operating their own business – they performed work for Appellation's clients as part of Appellation's business. Appellation invoiced its clients for these services. The complainants were paid weekly by Appellation at first on a piece rate then on an hourly rate basis. They were subject to Appellation's control as to the manner and frequency of their work either directly or by Appellation's client. Mr Hixon formed the view that the real nature of the relationship was that of employment under contracts of service rather than contracts for service as per the written agreements so he served the demand notices on Appellation.

[6] There is significant merit in the position reached by Mr Hixon. In addition I note that the demand notices are prima facie evidence that Appellation owes the sums specified: see s.225(4)(b) Employment Relations Act 2000. In the absence of

Appellation to support its objection I find that the whole of the money specified in each of the demand notices is payable by Appellation.

[7] To summarise:

- a. Appellation Vineyard Services Limited is to pay to the Labour Inspector for the use of Jost Dammann the sum of \$585.07; and
- b. Appellation Vineyard Services Limited is to pay to the Labour Inspector for the use of Daniel Alexander Munzer the sum of \$556.10.

[8] When asked, counsel did not claim costs but did seek interest on the sums mentioned in the demand notices. I accept that this is a matter involving the recovery of money so clause 11 of the 2nd schedule to the Act permits the Authority to award interest. Appellation Vineyard Services Limited is to pay to the Labour Inspector for the use of each employee interest on the abovementioned sums at the rate of 4% commencing on 7 October 2009.

Philip Cheyne
Member of the Employment Relations Authority