

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 139/10
5311898

BETWEEN MICHAEL KOTUHI AND
 SIMON KAPENE AND
 TRAVOR CAMPBELL
 Applicants

AND HEMI KIRO POU TRADING
 AS KAHUKURA
 PLASTERING SYSTEMS
 Respondent

Member of Authority: P R Stapp

Representatives: Applicants in person
 No appearance for the Respondent

Investigation Meeting: 2 September 2010 at Wellington

Determination: 2 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants have claimed sums of money from Hemi Kiro Pou trading as Kahukura Plastering Systems for hours they have worked. They say that Mr Pou has refused to pay them. Michael Kotuhi has claimed \$1,180. Simon Kapene has claimed \$1,270. Trevor Campbell has claimed \$1,260. Mr Kotuhi has claimed the Authority's filing fee that he paid.

[2] After the application was filed the Authority's support officer attempted to contact Mr Pou on his mobile phone without getting an answer and or a reply until 30 July 2010. Mr Pou claimed that he had not received the statement of problem. He confirmed his address that the support officer used to send the statement of problem to. The support officer talked to Mr Pou again, on 5 August. It was confirmed papers

had been received and signed for at the address given. Mr Pou said that he could not find them and requested further papers be sent. A further copy of the statement of problem was sent to Mr Pou at the same address by the support officer. Mr Pou claimed that he did not employ the applicants.

[3] Mr Pou has provided no statement in reply, despite telling the support officer on 13 August that he had sent it. Nothing was received and when the support officer made further attempts to talk to Mr Pou he hung up. Mr Pou did not comply with a request made by me for him to provide relevant documents to facilitate the Authority's investigation meeting. There was no other contact with him, until late on 1 September 2010.

[4] Late on 1 September 2010 Mr Pou faxed to the Authority a letter "To Whom it May Concern". This document provided information on the three applicants being labour only contractors and made a reference to unsigned contracts. Mr Pou said that he would be unable to attend the investigation meeting due to ill health and that he would be available by telephone if needed. He was informed that I would not be contacting him by telephone and that he would have to arrange to be present or be represented at the investigation meeting. If he was unable to attend he needed to arrange to provide some sworn proof of any ill health and preferably evidence from a doctor. He was also requested to provide copies of the contract he had referred to.

[5] I am satisfied that Mr Pou has been served with the statement of problem and the notice for the investigation meeting. His fax is ample proof that he knows about the investigation meeting.

[6] The start of the Authority's investigation meeting was delayed when Mr Pou failed to appear or be represented. The support officer tried to make contact with him as to his whereabouts, but was unable to do so, despite Mr Pou saying he would be available by phone. I concluded that there was no good cause shown for why Mr Pou had failed to appear or be represented. I decided to act fully in the matter as if Mr Pou had duly attended or been represented: clause 12 of Schedule 2 of the Employment relations Act applied.

[7] Mr Pou had plenty of time to reply and provide details and information on the employment relationship problem. By leaving his approach to the Authority until the last moment is clearly unacceptable. However, I decided to receive Mr Pou's fax and the information contained in it for the applicants to be able to comment. My reason was that there is relevant information in the letter that might assist in determining the real nature of the relationship and the proper jurisdiction for the claim to be dealt with.

[8] Pursuant to section 159 of the Employment Relations Act I considered mediation and noted that the parties had not been to mediation. I considered directing the parties to mediation. However, I decided not to make such a direction because the Authority had not received a statement in reply and it was proving to be difficult to contact Mr Pou. His behaviour of hanging up the phone when attempts were made to talk to him gave me no confidence that he would cooperate or even attend mediation and only put the applicants to more time and expense. Also there was information available that meant there was a real possibility of a jurisdictional issue about the real nature of the relationship that would need to be determined.

Issues

[9] What is the real nature of the applicants' relationship with Mr Pou?

The facts

[10] The applicants are labour only contractors, which they confirmed was their understanding of their relationship with Mr Pou, when they each gave their evidence before me.

[11] The applicants have produced documents from Wallace Construction Limited that indicate that Hemi Pou "Kahukura Plastering Systems" is a subcontractor and there is a record of details of payments and hours. Attached invoices make a reference to each of the applicants and their labour cost has been invoiced including GST to Hemi Pou as a sub contractor trading as Kahukura Plastering Systems.

[12] The applicants each received a “fortnightly labour only sub contractors” payslip, and although the payslip included a reference to them as an “employee”, withholding tax was deducted from the gross earnings. Each of the applicants has been a labour only contractor previously in their work. Thus, I accept that they understand the nature of the engagement and have no claim as employees in the Employment Relations Authority.

Determination

[13] The real nature of the relationship between the applicants and Hemi Pou is that the applicants were labour only contractors. This means that the applicants will have to pursue their claims elsewhere such as the Disputes Tribunal.

Orders of the Authority

[14] The Employment Relations Authority does not have jurisdiction on the claims from the applicants for the money they are allegedly owed.

[15] In such circumstances I am not able to award the reimbursement of the filing fee.

P R Stapp
Member of the Employment Relations Authority