

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 29
5322543

BETWEEN	KIN TO (STEVEN) LAU Applicant
AND	CANAAN PRODUCTIONS LIMITED (in liq) First Respondent
	MICROB LIMITED (formerly UNIFORMS PLUS LIMITED) Second Respondent

Member of Authority: R A Monaghan

Representatives: Steven Lau in person
No appearance for respondents

Investigation Meeting: 19 January 2011

Determination: 20 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kin To Lau says he was employed as a homemaker, and in that capacity he is entitled to holiday pay which he has never received. Accordingly he seeks:

- a. a declaration that he was a homemaker; and
- b. an order for the payment of holiday pay.

[2] Mr Lau also says he is owed unpaid wages, and seeks an order for payment.

[3] Canaan Productions Limited (Canaan) says Mr Lau was a subcontractor to it. There was no employment relationship and Mr Lau was not a homemaker. Canaan was placed in liquidation on 25 November 2010, after the statement in reply was filed.

Preliminary matters

1. Liquidation of party

[4] Canaan's liquidation means this matter cannot continue against it without certain permission, which is not available. However Microb Limited (ML) remains on the companies office register and Mr Lau can continue against that company.

2. Failure by party to appear or be represented

[5] A statement in reply was filed by Robyn Smith, who was the managing director and a shareholder in CPL, and is the sole director and shareholder in ML. Ms Smith participated in a conference call with the Authority and Mr Lau, when the week in which an investigation meeting would be conducted was discussed. The precise date was later confirmed in a notice of meeting which I am satisfied was served on Ms Smith as the representative.

[6] There was no appearance on behalf of ML. Since no good cause has been shown for the failure to appear or be represented I proceed to hear and determine this matter under clause 12, Schedule 2 of the Employment Relations Act 2000.

3. Limitation period

[7] Mr Lau's claim for holiday pay concerns failures to pay commencing in 2001.

[8] Section 142 of the Act provides:

No action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[9] Mr Lau commenced his action by filing a statement of problem in the Authority on 13 October 2010. His claims for payment for the period prior to 13 October 2004 are barred.

Whether Mr Lau was an employee

[10] Canaan, and by implication MP, deny that Mr Lau was an employee. Their associated denial that Mr Lau was a homemaker appears to be based on their view that he was a contractor.

[11] ‘Employee’ is defined in s 6 of the Act as:

- a. ...*
- (a) ...; and*
- (b) Includes –*
 - (i) a homemaker;*

[12] ‘Homemaker’ is defined in s 5 of the Act as:

- Homemaker –*
- i. means a person who is engaged, employed, or contracted by any other person (in the course of that other person’s trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings or furniture in it); and*
 - ...*

[13] ‘Dwellinghouse’ is defined in s 5 as:

- Dwellinghouse –*
- i. means any building or any part of a building to the extent that it is occupied as a residence; and*
 - ii. ...*

[14] The use of the words ‘engaged, employed or contracted’ in the definition of homemaker mean the usual distinction between employees and contractors is not relevant in the case of homemakers. It is not necessary to determine whether or not Mr Lau was an employee or a contractor if Mr Lau’s working arrangements fell within the remainder of the definition of ‘homemaker.’

[15] Mr Lau was engaged to carry out work in a dwellinghouse (his own residence) to sew items of clothing on a piece rate basis for the person who engaged him, being work carried out in the course of that person’s trade or business. The arrangements did fall within the remainder of the definition.

[16] Therefore I find that Mr Lau was an employee.

The identity of the employer

[17] The statement in reply effectively denied that ML was the employer. In a subsequent message to the Authority Ms Smith said 'Uniforms Plus' was not a legal entity when Mr Lau was engaged, and that Mr Lau was engaged by and worked for CPL.

[18] 'Uniforms Plus' was a trading name used by CPL during the early period of Mr Lau's engagement, and the name by which Mr Lau knew his employer throughout. A memorandum dated February 2001 is addressed to 'all outworkers of Uniforms Plus', and details certain sewing requirements as well as the procedures to be followed on the completion of orders. Mr Lau communicated with 'Uniforms Plus' throughout his engagement, and the limited documentation available in respect of the relationship is in the name of Uniforms Plus. Finally, Mr Lau was paid by cheques in the name of 'Uniforms Plus'.

[19] Uniforms Plus Limited was registered as a company on 1 May 2007. In the absence of evidence from Ms Smith I infer that a division of CPL which was trading as Uniforms Plus was registered separately as a company on that date. Otherwise matters continued as before. Since Mr Lau acquiesced in the change, I conclude that the company which is now named ML became Mr Lau's employer.

[20] In summary:

- . CPL was Mr Lau's employer from the commencement of his employment to 1 May 2007;
- . ML became Mr Lau's employer on 1 May 2007.

Holiday pay owed

[21] Section 5 of the Holidays Act 2003 defines 'employee' as follows:

Employee has the same meaning as in section 6 (except subsection (1)(b)(ii)) of the Employment Relations Act 2000

[22] Accordingly, and again regardless of whether he would otherwise be described as a contractor, as a homeworker Mr Lau is an employee for the purposes of the Holidays Act.

[23] Since CPL was the employer to May 2007, and is now in liquidation, Mr Lau's claims for payment for the period October 2004 – May 2007 cannot proceed.

[24] The remaining claims for payment are quantified with reference to Mr Lau's total gross earnings for the years in question as follows:

2007-2008:	$8\% \times \$24,395 = \$1,951.60$
2008-2009:	$8\% \times \$16,861 = \$1,348.88$
2009-2010:	$8\% \times \$13,030 = \$1,042.40$
Total	\$4,342.88

[25] Payment was not made, and is ordered accordingly.

Payment for work done and not paid for

[26] Mr Lau says that monies owed to him as at August 2010 were underpaid in the sum of \$598. He seeks payment of that sum.

[27] Payment is ordered accordingly.

Summary of orders

[28] ML is ordered to pay to Mr Lau:

- i. \$4,342.88 as holiday pay; and
- ii. \$598 as payment owed for work done.

[29] I further order that interest be paid on the above sums calculated as 5.2% from the date of this determination to the date of payment.

Costs

[30] ML is further ordered to reimburse Mr Lau for the filing fee of \$71.56.

R A Monaghan

Member of the Employment Relations Authority