

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 452
5382411

BETWEEN	JAMES PETERS Applicant
AND	K & K CATERERS AND EQUIPMENT 2010 LIMITED First Respondent
AND	ERU PHILLIPS t/as KCE CATERING EQUIPMENT SUPPLIES Second Respondent

Member of Authority:	R A Monaghan
Representatives:	J Peters in person E Phillips, advocate for respondents
Investigation meeting:	29 October 2012 at Rotorua
Additional information provided:	14 November 2012
Determination:	12 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] James Peters was a sole trader, in the business of buying, selling and supplying used catering equipment in the Bay of Plenty area. He was adjudicated bankrupt, but the Official Assignee was able to sell the business to purchasers who registered a company named K & K Caterers and Equipment 2010 Limited (K & K Caterers). Mr Peters sought to negotiate an employment agreement and a share buyback arrangement with the purchasers. He says an employment agreement was concluded and he began working.

[2] A dispute about financial matters arose between the two directors and shareholders in K & K Caterers and only one of them, Eru Phillips, continued to operate the business. He did so in his own name, trading as KCE Catering Equipment Supplies. Mr Peters says he continued working as an employee of Mr Phillips'.

[3] Mr Peters says he was not paid wages and expenses owed to him during his employment with either or both of K & K Caterers and Mr Phillips. He seeks to recover these payments.

[4] Mr Phillips says neither he nor K & K Caterers was in an employment relationship with Mr Peters, and denies any money is owed to Mr Peters.

[5] The issues are:

- Was Mr Peters in an employment relationship with K & K Caterers;
- Was Mr Peters in an employment relationship with Mr Phillips;
- Is Mr Peters owed wages and expenses by either of the above, and if so, how much.

Was there an employment relationship with K & K Caterers

[6] Mr Peters was adjudicated bankrupt on 20 February 2010. His business premises were closed, and the business and its assets were to be sold.

[7] Mr Peters was active in seeking purchasers. Because he had been relying on the business for a retirement income, he sought to preserve his position by proposing to potential purchasers a share buyback arrangement and an employment agreement for himself.

[8] In or about March 2010 Mr Peters met with M, a possible purchaser whose family Mr Peters knew. Mr Phillips, whom Mr Peters had not met before, was present at the time and was interested in becoming involved. Mr Peters proposed that a company be incorporated to run the business, anticipating at the time that the company name would include his former trading name of Grants Catering Equipment. The business assets would be sold to the company and the company would employ

him for 3 years, at the end of which time he would purchase shares that were to be held in trust for him. His role as an employee would be to make available his knowledge and his industry contacts, and to act as a sales or purchasing manager.

[9] Although these proposals were discussed, no written employment agreement was entered into. No terms and conditions of employment were discussed, other than Mr Peters' role in the business.

[10] With the involvement of the Official Assignee an agreement for sale and purchase was executed on 31 May 2010. K & K Caterers was registered with the companies office on 3 June 2010, with M and Mr Phillips as the directors and shareholders.

[11] A deputy Official Assignee attended the business premises on 3 June 2010, intending to meet with M and Mr Phillips. Mr Peters attended with her as he wished to retrieve some personal possessions. While there he spoke to Mr Phillips. He was dissatisfied because no arrangements had been made to allocate a shareholding in K & K Caterers for his eventual purchase. He was also dissatisfied with the role envisaged for him as an employee. As a result, by letter also dated 3 June 2010 he advised that he would be withdrawing from any arrangement to provide his services.

[12] Despite this Mr Peters continued to attend the premises from time to time, and assisted in the preparation for the re-opening of the business. However in or about June or July he had a heated disagreement with M's father. He ceased associating with the business for a period as a result.

[13] From this I conclude that, at best, by June or July Mr Peters was a 'person intending to work' for K & K Caterers in terms of the definition of 'employee' in s 6 of the Employment Relations Act 2000. However at the time the business had not yet re-opened, Mr Peters' attendances at the premises were on an ad hoc basis, the attendances were not for the purpose of meeting an obligation to perform work but were rather at his own discretion, and there was no associated obligation on the part of K & K Caterers to make payment for the attendances. Not only that, no agreement about the nature of Mr Peters' position had been finalised, and no hours of work or rate of remuneration for any work he was to do had been discussed.

[14] No employment relationship commenced. If there was ever an agreement to enter into such a relationship, it was terminated at Mr Peters' initiative and by his letter of 3 June.

[15] For these reasons I find there was no employment relationship between K & K Caterers and Mr Peters.

Was there an employment relationship with Mr Phillips

[16] Also in or about June or July 2010 a dispute over finance arose between M's family and Mr Phillips. M's family, too, stopped associating with the business.

[17] It came to Mr Peters' attention that Mr Phillips was proposing to buy M's shares in K & K Caterers, so in or about August or September 2010 Mr Peters returned to the premises and spoke again to Mr Phillips. By then the business had re-opened or was preparing to re-open.

[18] According to Mr Peters an agreement was reached under which he would be employed to attend auctions and act as a travelling salesperson. He prepared a written employment agreement which was not signed and which Mr Phillips denied seeing, but which included an hours of work provision stating he would work for 32 hours a week and would be paid at a rate of \$12.50 per hour. Mr Peters acknowledged no rate of pay was discussed, and said he included that figure in the document because it was the minimum wage at the time.

[19] There was no evidence that the written employment agreement was given to Mr Phillips and I accept that he did not see it.

[20] Mr Peters says that, also later in 2010, the continuing dispute with M's family led Mr Phillips to divert K & K Caterers' business and to trade as KCE Catering Equipment Supplies.

[21] Mr Phillips agreed that he began trading as KCE Catering Equipment Supplies and that Mr Peters performed work for the business.

[22] However Mr Phillips denied that the arrangement with Mr Peters was one of employer and employee. He said he told Mr Peters he could give him work for 3 days per week on an 'as and when required' basis, and that he could pay no more than \$400 in cash per week. Mr Peters would be a 'consultant' to the business. Mr Phillips said he sought a consultancy arrangement because certain clients of the business did not wish to deal with Mr Peters, or with the business itself if Mr Peters was associated with it as an employee. If, however, Mr Peters was a consultant to the business rather than an employee then the clients would find this satisfactory and would continue to deal with the business. Mr Phillips said he told Mr Peters this and that Mr Peters agreed to it.

[23] From Mr Peters' answers when I questioned him on the basis for his calculations in support of his wage claim I find it likely that there was a conversation to the effect that he was to be a consultant, as Mr Phillips described.

[24] The difficulty is that, to be a contractor rather than an employee for employment law purposes, Mr Peters must be found to be in business on his own account. As an undischarged bankrupt he could not be in business on his own account without the permission of the Official Assignee, and there is no evidence of such permission being sought or granted.¹ I accept it was not.

[25] Mr Phillips believed such permission was granted. However his belief was based on a conversation he had with the insolvency office also in late 2010, during which he advised that Mr Phillips would be a 'consultant'. The word 'consultant' is used frequently in employees' job titles, and this is common in particular in sales positions. Although a 'consultant' can also be a contractor, the mere use of the word 'consultant' does not necessarily denote a relationship of principal and contractor. Accordingly if it seemed to Mr Phillips that his intention was acceptable, that was not the case and any response he received did not amount to the necessary grant of permission to Mr Peters.

[26] For these reasons I find there was an employment relationship between Mr Peters and Eru Phillips trading as KCE Catering Equipment Supplies.

¹ s 149 Insolvency Act 2006

Is any money owed

1. Wages

[27] Mr Peters seeks payment calculated as:

- \$69,804 being a shortfall in payments of wages calculated at \$22 per hour for a 44 hour week, at a rate of \$22 per hour for the period 12 May 2010 to 22 February 2012; or
- in the alternative \$25,756 being the shortfall calculated at the minimum wage for the same number of hours and for the same period.

1. Period in respect of which payment can be claimed

[28] My findings on the existence of an employment relationship and the identity of the employer mean I do not accept the appropriate start date for the claim is May 2010. Although records indicate Mr Peters received some cash payments beginning in May 2010, the evidence about the parties' conversations and activities at that time was too vague to satisfy me that the payments were made pursuant to an employment agreement with anyone, let alone that they were made pursuant to an agreed term of employment.

[29] The appropriate start date for the claim is the date on which Mr Phillips began employing Mr Peters.

[30] I regard this as the date when Mr Phillips began trading as KCE Catering Equipment Supplies. The evidence of both Mr Peters and Mr Phillips was so vague about the timing of critical conversations and events from May 2010 to the end of 2010 in particular that it is difficult to fix that date. However since it appeared to be common ground that the business re-opened on 1 August 2010, and that the conversation about hours of work and payment occurred at or about that time, I fix that as the start date.

[31] The appropriate termination date for the claim is the date on which the parties' relationship ended.

[32] Mr Peters wrote a letter dated 3 November 2011, in which he said he would complete work on a particular contract or alternatively that his service would end at a time suitable to both parties. Mr Phillips did not respond to the letter and Mr Peters continued working. Mr Peters wrote a second letter dated 2 December 2011 in which he gave one month's notice of termination but indicated he remained willing to complete work on the contract referred to earlier. Again Mr Phillips did not respond. The termination was put into effect by a third letter dated 20 February 2012.

[33] The result is that I accept the termination date was 20 February 2012.

2. Rate of pay and hours of work

[34] There was no agreement to a rate of pay at either of the rates Mr Peters has cited. Mr Peters said he chose those rates for the purposes of his claim, on the grounds that \$22 would be an appropriate rate if he was a contractor and the minimum wage was the appropriate rate if he was an employee. I do not accept that either of the rates applies.

[35] Mr Peters acknowledged there was no discussion or agreement to the effect that he would work for the full time hours claimed. He simply said that those were the hours he worked. However, if he worked those hours, he did not do so solely pursuant to an employment-related obligation. He had the additional motives of wishing to prove his ongoing worth to the business, maintaining the business and wishing to buy back into it as soon as he could. I do not accept he has a claim for full time hours of work.

[36] Mr Peters' claim is not based on any term of employment that was even discussed let alone agreed. Because I accept that Messrs Peters and Phillips discussed Mr Peters' working for 3 days a week for payment in the maximum sum of \$400 in cash per week, I find Mr Peters was entitled to payment accordingly.

3. Calculation of amount owed

[37] With reference to the records Mr Peters provided I find he is entitled to payment calculated as follows:

82 weeks x \$400 per week	\$32,800
Less payments received	\$15,950
Total owed	\$16,850

[38] Mr Phillips is ordered to pay Mr Peters the sum of \$16,850 (nett).

2. Other claims

[39] Mr Peters had lodged claims in the Disputes Tribunal before approaching the Authority for a determination regarding the existence of an employment relationship. As well as the claim for wages, he had a claim for the reimbursement of fuel and general expenses, as well as another more extensive claim relating to reimbursement for certain payments recorded in K & K Caterers' books.

[40] Since there was no term of employment relating to entitlement to payment other than for wages I would not make such orders, but in any event Mr Peters has indicated that he intends to pursue the outstanding claims in the Disputes Tribunal. To the extent it is necessary to do so, I dismiss them on the ground that they are not matters arising from or related to an employment relationship.

Summary of orders

[41] Mr Phillips is ordered to pay to Mr Peters the sum of \$16,850 (nett).

Costs

[42] Mr Phillips is further ordered to reimburse Mr Peters for the filing fee of \$71.56.

R A Monaghan

Member of the Employment Relations Authority