

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 507
5509197

BETWEEN LEE-ANN DUXBURY
 Applicant

A N D SMITH AND COOMBES
 LIMITED T/A CORPORATE
 ANGELS
 Respondent

Member of Authority: Rachel Larmer

Representatives: Christine Pidduck, Counsel for the Applicant
 No appearance for Respondent

Investigation Meeting: 08 December 2014 at Tauranga

Date of Determination: 09 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Duxbury says she was employed by Smith and Coombes Limited trading as Corporate Angels (Smith & Coombes) from 08 May 2011 until 11 December 2013 in general Administrator position. She was not provided with a written employment agreement. Ms Duxbury's responsibilities included organising clients, collecting payments from clients, paying staff members and any other jobs that were needed to ensure the smooth running of the business.

[2] Ms Duxbury says she was interviewed and offered employment by Mr Allen Coombes, a director of Smith & Coombes. Ms Duxbury said that after starting work all her shifts and hours were agreed in discussion with Mr Coombes who set the start times and Ms Duxbury would contact him nearing the end of her shift to ask what time she should end her shift or close the business.

[3] Ms Duxbury was paid minimum wage for the hours she worked. In June 2011 Ms Duxbury claims Smith & Coombes told her that they were going to pay her 17 hours per week through the books (ie with tax deducted and remitted to Inland Revenue Department) by direct deposit into her bank account with the rest of the hours she worked to be paid to her in cash.

[4] Ms Duxbury says that whilst she was sometimes paid extra cash that did not always occur. She noted in her diary when she received cash payments and the amount of the cash she received. Ms Duxbury produced her original diary which contained this information to the Authority's investigation meeting.

[5] Ms Duxbury's then solicitor requested her wage and time records on 14 April 2013 but these were not provided. On 28 April 2014 Smith & Coombes' then lawyer contacted Ms Duxbury's then lawyer to advise that she had been an independent contractor so there was no obligation to provide wage and time records.

[6] Smith & Coombes denies that Ms Duxbury was an employee. It says she was an independent contractor. On 12 May 2014 Ms Duxbury's then lawyer wrote to Smith & Coombes disputing its claim that Ms Duxbury had been an independent contractor. On 15 May 2014 Ms Duxbury's lawyer received a telephone call from Smith & Coombes' then lawyer advising that Smith & Coombes were heading to insolvency.

[7] On 12 September 2014 Smith & Coombes' then solicitor advised the Authority it was insolvent and did not intend to take any further steps in respect of the Authority's investigation into Ms Duxbury's claims. It did not file a Statement in Reply, it declined an invitation to attend mediation and it did not appear at the Authority's investigation meeting. It was not in liquidation at the time of the Authority's investigation meeting.

[8] Ms Duxbury seeks a penalty for Smith & Coombes' failure to produce wage and time records for her on request.

[9] Ms Duxbury claims wage arrears, unpaid holiday pay and unpaid statutory holiday entitlements. Ms Duxbury claims she raised her wage arrears with Smith & Coombes numerous times and was assured that she would be paid cash for the unpaid hours she had worked. Ms Duxbury says that never happened but she stayed in the role because she needed a job.

[10] Ms Duxbury says that from 17 June 2013 she began recording her hours of work. Between 17 June and 6 September 2013, 14 direct credits bounced back due to insufficient funds. Ms Duxbury says that it appears that despite these issues Mr Coombes continued to pay her tax to IRD for the weekly 17 hours of her declared income.

[11] Ms Duxbury claims that she is owed unpaid wages (for hours worked but not paid) from 17 June 2013 – 11 December 2013 amounting to \$11,021.00 gross. She also claims she is owed \$1,418 gross holiday pay calculated at 8% on her total gross earnings of \$17,725 from 17 June – 11 December 2013.

[12] Ms Duxbury also claims she is owed \$165 unpaid statutory public holiday entitlements for working ten hours on Labour Day (Monday 28 October 2013). She claims \$55 unpaid wages for the hours she worked and \$110 for the alternative day holiday pay she earned for working on Labour Day but which was not paid out to her upon termination.

[13] Ms Duxbury produced to the Authority her original diary showing days, dates and times worked and cash received, her bank account records to show direct credit payments received and/or bounced from Smith & Coombes, letters from ASB confirming that 14 of Smith & Coombes' direct credit payments had bounced, her IRD records which show what tax was paid during her employment, a spreadsheet calculating unpaid wages and her annual leave and public holiday calculations.

[14] Ms Duxbury also provided a report dated 01 December 2014 from Chartered Accountants, Mobile Accounting Services. Ms Penny Dobbie who prepared the report gave evidence via telephone to the Authority to confirm the accuracy of the amounts claimed by Ms Duxbury (based on the records she had provided in support of her claims).

Issues

[15] The following issues are to be determined by the Authority:

- (a) Was Ms Duxbury employed by Smith & Coombes Limited?
- (b) If so, is she owed wage arrears?
- (c) If so, how much is she owed?

- (d) Should a penalty be imposed for failure to provide wage and time records upon request?
- (e) What if any costs should be awarded?

Was Ms Duxbury employed by Smith & Coombes?

Relevant law

[16] The Authority only has jurisdiction to investigate MS Duxbury's claims if she was employed by Smith & Coombes. Section 6 of the Employment Relations Act 2000 (the Act) defines an employee.

[17] Section 6(2) of the Act requires the Authority in determining whether or not a person is an employee to determine the real nature of the relationship. When doing so, s.6(3) of the Act requires the Authority to consider all relevant matters, including the intention of the persons involved, but is not treated as determinative any statement by the persons involved which describes the nature of the relationship. This is merely one of the factors to be considered. The intention of the parties is relevant but not decisive.

[18] The control test, integration test, and fundament test and the economic reality of the relationship are all relevant factors to consider. The Authority's inquiry into the real nature of the relationship is intensely factual.

What do the relevant documents suggest?

[19] There is no written employment agreement and no wage and time records. The Employer's Monthly Schedule which was provided to the Inland Revenue Department by Smith & Coombes identifies Ms Duxbury as an employee. PAYE was also deducted from her wages which is indicative of an employment relationship. This supports Ms Duxbury's claim that she was an employee, not an independent contractor.

[20] There was no documentation produced to the Authority that would indicate or support the existence of an independent contractor relationship.

What did the parties intend?

[21] The intention of the parties is a significant factor in determining Ms Duxbury's status. The key question is whether I am satisfied on the balance of probabilities that there was a mutual intention that Ms Duxbury would be an employee. I am so satisfied.

[22] I do not consider that Smith & Coombes would have provided the Inland Revenue Department with information saying Ms Duxbury was an employee if the parties had not mutually intended there to be an employment relationship between them.

[23] There is also no evidence (other than an assertion in a letter from Smith & Coombes' former solicitor) showing that the parties had a mutual intention to enter into an independent contracting arrangement.

How did the arrangement operate in practice?

[24] Ms Duxbury's evidence suggests that she was told what to do by Mr Coombes, the director of Smith & Coombes. He told her when and where she would work and she required permission to close the business and leave work for the day. Mr Coombes also told Ms Duxbury what duties to do and how those duties were to be undertaken.

[25] There is no evidence that Ms Duxbury was in business on her own account. I consider the way the arrangement operated in practice suggests the existence of an employment relationship.

Tax and associated issues

[26] The tax arrangements show that Smith & Coombes was deducting PAYE from Ms Duxbury's wages. This strongly suggests an employment relationship. I also find that Ms Duxbury was not set up in business on her own account and did not derive any of the tax benefits that are associated with self-employment.

The control test

[27] The control tests looks at the degree of control that is exerted over the work done and the manner in which it is to be done. The greater the extent to which an

individual is regulated and supervised then the more likely they are to be considered an employee.

[28] Based on Ms Duxbury's uncontested evidence there was a significant degree of control exerted over her which is indicative of an employment relationship.

The fundamental/economic reality test

[29] The fundamental test looks at whether the person performing the services is in business on their own account. I find that there was no evidence that Ms Duxbury was in business on her own account. She had no ability to profit from her own endeavours and she had not assumed any risks in terms of the operations of Smith & Coombes' business or the way in which she provided her services.

[30] I find that the fundamental/economic test supports the existence of an employment relationship.

Integration

[31] The integration test considers whether work performed by the individual was an integral part of the business and whether the individual has effectively become part and parcel of the organisation.

[32] I consider the evidence tends to suggest that Ms Duxbury was integrated into the Smith & Coombes business. It provided her with all the equipment necessary to carry out her duties, she worked from their premises and under their direction. Ms Duxbury's work day and activities were monitored and she was required to report to the director of Smith & Coombes. I consider this test favours existence of an employment relationship.

Industry practice

[33] There was no evidence about this so this factor is inconclusive.

Outcome

[34] Standing back and carefully weighing all the various factors, I am satisfied that Ms Duxbury has discharged onus of establishing on the balance of probabilities that she was in an employment relationship with Smith & Coombes at the material time.

[35] The Authority therefore has jurisdiction to investigate her wage arrears claims.

Is Ms Duxbury owed unpaid wages?

[36] In accordance with s.132 of the Act I am satisfied that Smith & Coombes has failed to keep wage and time records for Ms Duxbury. I find that in terms of s.132(2) of the Act Smith & Coombes has not provided any evidence to contradict Ms Duxbury's claims or evidence.

[37] I therefore accept (in accordance with s.132(2) of the Act) as proved, all claims that Ms Duxbury makes in respect of the wages actually paid to her and the hours, days and times worked by her.

[38] I also accept the evidence filed by Ms Eve Shepherd of Mobile Accounting Services NZ Limited who has confirmed that based on the documentation she has reviewed Ms Duxbury is owed wage arrears of \$12,604.00.

[39] This is comprised of \$11,021.00 not paid for hours worked, \$165.00 short paid for the hours worked on the Labour Day public holiday on 28 October 2013; and \$1,418.00 unpaid holiday pay (being 8% of Ms Duxbury's gross wages of \$17,725.00).

[40] Ms Penny Doobie assisted Ms Shepherd to prepare the report. Ms Doobie gave evidence to the Authority that the calculations Ms Duxbury had made are correct based on the supporting evidence she produced.

Should a penalty be imposed for not providing wage and time records upon request?

[41] Ms Duxbury seeks that a penalty be imposed on Smith and Coombes for not providing her wage and time records upon request in breach of s.130(2) of the Employment Relations Act 2000 (the Act).

[42] I consider a penalty is appropriate to punish Smith and Coombes for not complying with its legal requirements and to deter others who may elect to do the same. Accordingly, a penalty of \$1,000 is imposed on Smith and Coombes for its breach of s.130(2) of the Act. This penalty is payable to the Crown bank account.

Costs

[43] As the successful party it is appropriate for Ms Duxbury to receive a contribution towards her actual costs. I am satisfied from the evidence given at the investigation meeting that Ms Duxbury has incurred actual legal costs of \$1,608.

[44] I consider it appropriate to award Ms Duxbury costs on a pro rata basis based on the Authority's usual notional daily tariff based approach to costs. The investigation meeting took an hour so the notional starting point for assessing costs is \$500.

[45] I am not aware of any factors that warrant a reduction to the notional starting tariff. Ms Pidduck submits that costs should be increased because Smith & Coombes declined to attend mediation and it increased Ms Duxbury's costs by arguing she was not an employee in the face of all the evidence pointing to an employment relationship and in the absence of any evidence suggesting she was an independent contractor.

[46] I accept Ms Pidduck's submissions and consider these factors warrant significantly increasing the notional starting tariff. Smith & Coombes is ordered to contribute \$1,500 towards Ms Duxbury's actual costs.

Disbursements

[47] I am satisfied from the evidence given at the investigation meeting that Ms Duxbury has incurred total disbursements of \$1,229.54. These consist of \$71.56 for her filing fee, \$153.72 for counsel's travel time from Hamilton to Tauranga for the investigation meeting, \$160.16 for counsel's mileage from Hamilton to Tauranga for the investigation meeting and \$844.10 for the accountant's report.

[48] I consider it appropriate for Ms Duxbury to be reimbursed for these disbursements which I consider were all reasonable and properly incurred. Ms Duxbury and her counsel live in Hamilton but they accommodated an investigation meeting in Tauranga to fit in with the Authority's pre-existing commitments in Tauranga. I therefore consider the travel time and mileage in these circumstances is recoverable.

[49] The accountant's report also significantly decreased the time required for the Authority's investigation meeting because all the documentation and calculations had been independently verified. Ms Doobie was also able to clearly explain the basis of Ms Duxbury's calculations. I consider it appropriate for Ms Duxbury to be reimbursed for the full cost of the accountant's report because it greatly assisted the Authority.

Orders

[50] I make the following orders:

- a. The parties were in an employment relationship so the Authority has jurisdiction to determine Ms Duxbury's claims.
- b. Smith & Coombes is to pay Ms Duxbury within 28 days of the date of this determination:
 - i. \$11,021 wage arrears;
 - ii. \$165 public holiday entitlements;
 - iii. \$1,418 unpaid holiday pay;
 - iv. \$1,500 towards her actual costs;
 - v. \$1,229.54 for disbursements;

[51] Smith & Coombes is ordered to pay a penalty of \$1,000 to the Crown for failing to produce Ms Duxbury's wage and time records on request.

Rachel Larmer
Member of the Employment Relations Authority