

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 107  
5646440

BETWEEN VANESSA BARNES, JERRILEE  
BURKE and STACEY GUTHRIE  
Applicants

A N D KAIKOURA V8 SEAFOODS  
SUPPLIES PTY LIMITED t/a  
THE TOP SHOP  
Respondent

Member of Authority: David Appleton

Representatives: Applicants in person  
Russell Borland, Advocate for Respondent

Investigation Meeting: 29 June 2017 by telephone

Submissions Received: 29 June 2017 from the Applicants  
29 June 2017 from the Respondent

Date of Determination: 30 June 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Prosser had ostensible authority to bind the respondent in respect of the contents of the employment agreements entered into by the three applicants.**
- B. The three applicants were not casual employees in law.**
- C. The respondent is to pay to the three applicants the sums set out in this determination.**
- D. The respondent is to reimburse to Ms Barnes the \$71.56 lodgement fee, but there is otherwise no order as to costs.**

**Employment relationship problem**

[1] The three applicants say that they are each owed final wages and holiday pay by the respondent company. The respondent denies this saying that the three applicants were paid their final wages and were casual employees, who received their holiday pay with their wages each week, and that the respondent does not owe any holiday pay to them.

**The investigation meeting**

[2] The Authority's investigation meeting was conducted by telephone due to Mr Borland's presence in Australia and difficulties in finding a venue in Kaikoura with facilities for making a conference call. Upon calling Mr Borland, he said he thought the investigation meeting was on the following day, but agreed to take part in any event.

**Background**

[3] The respondent company owned and operated a fish shop business in Kaikoura called The Top Shop. The respondent's directors and shareholders were resident in Australia at the material time. The Top Shop was managed by Mr Brian Prosser. Whilst Mr Borland called him a "team leader" he acknowledged that Mr Prosser was the respondent's man on the ground in charge of the day to day running of the business.

[4] The business closed on 22 June 2016, and the three applicants were given final wage slips by Mr Prosser setting out what they were owed in terms of final pay and final holiday pay. These wage slips were created using Xero software, and were accurate according to Mr Prosser's evidence. Each applicant says that they have not been paid all of the sums set out in their respective wage slips.

**The respondent's position**

[5] It was Mr Borland's position that Mr Prosser employed the three applicants on agreements which had not been approved by him or his wife, his fellow director. He says he only saw the contracts after the business had closed due to bad debts. He says he would never have agreed to enter into the contracts had he seen them at the time,

and that he would only have agreed to the three employees being employed as casual staff.

[6] Mr Borland said he and his fellow director did not regard the respondent as being bound by the employment agreements as they were not entered into with their approval. In addition, he said that the staff, being casuals, would have been paid their holiday pay at 8% with each weekly pay, and so are not due any further holiday pay.

### **The issues**

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

- a. Is the respondent bound by the contracts entered into by the applicants?
- b. Were the applicants casual employees?
- c. If they were casual employees, were they paid 8% holiday pay with each weekly pay?
- d. If they were not, what is each applicant owed?

### **Is the respondent bound by the contracts entered into by the applicants?**

[8] According to Ms Burke, Mr Prosser was the applicants' "boss". He was the intermediate between the applicants and the respondent. Mr Prosser, as the respondent's "man on the ground" was therefore acting as agent for the respondent in the absence of the respondent's directors.

[9] I do not doubt the evidence of Mr Borland when he says he did not know what contract the three applicants had been placed on. However, I do not accept that means that the respondent is not bound by those contracts. This is because of the doctrine of "ostensible authority". This doctrine was explained by Lord Justice Diplock in the UK case of *Freeman & Lockyer*<sup>1</sup> as follows:

... a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger.

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<sup>1</sup> [1964] 2 QB 480 at 503

He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

[10] This doctrine has been accepted into New Zealand law by the New Zealand courts, and was cited in the Employment Court case of *Hoyts Cinemas (New Zealand) Ltd (Hoyts Moorhouse) v Jacob*<sup>2</sup>. In that case, His Honour Judge Palmer also referred to the words of Lord Justice Kerr in the English Court of Appeal case of *The Rafaella*<sup>3</sup>, which commented on Lord Diplock's statement of the doctrine as follows:

It contains an authoritative analysis of the principles governing the concept of an agent's ostensible or (better) apparent authority which entitles a third party to rely, against the agent's principal, upon some act of the agent which, viewed on its own, lacks actual (or implied) authority. The important point which it establishes, as analysed and explained in the judgment of Lord Justice Diplock in particular, is that the acts done, or the appointment held, by the agent, which clothed him with the alleged appearance of having the principal's actual authority to do the unauthorized act in question, must themselves rest upon actual authority from the principal. In other words, the agent cannot create an appearance of authority by means of conduct which is itself unauthorized, since the principal will in that event not have held him out to have the apparent authority which the third party is seeking to invoke against him.

[11] In my view, Mr Prosser clearly had actual authority given to him by the respondent to do a number of things relating to the applicants. These were, as a minimum:

- a. to hire the three applicants (as the respondent knew he was doing so and did not object);
- b. to issue them with employment agreements (as the respondent was obliged under New Zealand law to do so, and the respondent cannot legally have ordered Mr Prosser to disregard the respondent's legal obligations);
- c. to roster them to work each week (which the respondent would have known he was doing, as it saw the advice from Mr Prosser each week as to what to pay the three applicants);

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<sup>2</sup> [2002] 2 ERNZ 638

<sup>3</sup> [1985] 2 Lloyd's Rep 36,

- d. to calculate the pay due to them each week; and
- e. to advise the respondent of the pay due to each applicant each week (which the respondent then paid out of its business current account).

[12] Mr Prosser's actual authority to do these activities would have created in the eyes of the three applicants the apparent authority to issue them with contracts, and to roster them each week as if they were permanent employees.

[13] Therefore, in accordance with the doctrine of ostensible authority, the principal (the respondent) is bound by the contracts and the arrangements entered into by Mr Prosser with the three applicants.

### **Were the applicants casual employees?**

#### *Ms Barnes*

[14] Ms Barnes was employed in the position of Duty Manager under the terms of an individual employment agreement. This agreement stated that it was "individual agreement of ongoing and indefinite duration" and it stated that she was to report to Brian Prosser "or to any other representative of the employer designated from time to time by the employer". The employer was identified as Kaikoura V8 Seafood Supplies Pty Limited t/a The Top Shop.

[15] In view of the contents of the contract, and the work carried out by Ms Barnes, I am satisfied that she was not a casual employee.

#### *Ms Guthrie*

[16] Ms Guthrie was employed in the position of "front of house" under the terms of an individual employment agreement. This agreement was referred to as a "casual employment agreement (intermittent)". It stated that the parties to the agreement agreed that the nature of the relationship was a casual "as required" employment relationship with the employer agreeing to provide reasonable notice to the employee regarding when she would be requested to perform duties.

[17] However, Ms Guthrie's actual pattern of work was not that of a casual employee. She said she was rostered on each week, which was confirmed by Mr

Prosser. In the case of *Jinkinson v Oceania Gold (NZ) Ltd*<sup>4</sup> the Employment Court stated as follows:

[40] ...The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.

[41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[18] In light of this test, I am satisfied that, in law, Ms Guthrie was not a casual employee, but a permanent part time employee, as there was a mutuality of obligation and there was a predictability to her weekly roster which was not of the character of a casual contract.

*Ms Burke*

[19] Ms Burke did not have a copy of her contract to hand but she was also purportedly on a casual contract according to the respondent. However, she was also on a regular weekly roster which was not of the character of a casual arrangement. I am satisfied that she was not a casual employee.

[20] Even if I were wrong in these findings about the employment status of the employees, I accept the evidence of the three applicants and Mr Prosser that they were not paid the 8% holiday pay that would have been due to them each week under s 28 of the Holidays Act if they had been working intermittent or irregular hours.

### **What pay is owed to each applicant?**

[21] Section 23 of the Holidays Act 2003 provides as follows:

**23 Calculation of annual holiday pay if employment ends within 12 months**

(1) Subsection (2) applies if—

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<sup>4</sup> [2009] ERNZ 225

- (a) the employment of an employee comes to an end; and
  - (b) the employee is not entitled to annual holidays because he or she has worked for less than 12 months for the purposes of section 16.
- (2) An employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount—
- (a) paid to the employee for annual holidays taken in advance; or
  - (b) paid in accordance with section 28.

*Ms Barnes*

[22] Ms Barnes was employed at an hourly rate of \$19. She was entitled under the contract to four weeks' annual leave for each 12 months of service, the entitlement accruing on a pro rata basis during each month of the employment from the first day of employment.

[23] Ms Barnes disclosed her final wage slip which showed that she was owed \$271.58 after deductions in respect of her final week's work. She accepted, though, that she was paid this sum in July 2016, together with a further sum of \$228.42. This further sum was, she believed, one week's notice pay. She said she was owed a further week's notice pay.

[24] I note that Ms Barnes had in her employment agreement a right to two weeks' notice in the event of redundancy. As her employment ended because of the closure of the business, which would amount to a dismissal by way of redundancy, I believe that Ms Barnes is owed a further week's pay, as Mr Borland did not say that Ms Barnes had been given this notice or pay in lieu of it. I infer that this is the net sum of \$228.42.

[25] In addition, Ms Barnes' final wage slip shows that \$1,853.83 was due as holiday pay. I understand that this is a gross figure. This sum was calculated automatically by the Xero software, according to Mr Prosser. No holiday and leave records or wage and time records have been produced by the respondent and so I am unable to cross check that this sum is correct. I have no reason to doubt the accuracy of this sum as Mr Borland did not argue that it was incorrectly calculated. His objection was that no holiday pay was due at all as the employees were all casuals.

*Ms Guthrie*

[26] Ms Guthrie's employment agreement stated that she was entitled to paid annual leave of four weeks per year after 12 months continuous employment. Ms

Guthrie's final wage slip showed that she was due the net sum of \$765.16, comprising pay for her final week, alternative holidays and final holiday pay. She received the sum of \$173.44 from the respondent on 8 August 2016, although this sum did not match any of the sums on the wage sheet and Ms Guthrie could not explain it. I infer that it is a part payment of the wages due according to the final wage slip. Ms Guthrie gave no evidence about notice pay.

[27] In the absence of holiday and leave records and wage and time records I am satisfied that the respondent owes Ms Guthrie the balance of the sum shown on the wage slip; namely the sum of \$591.72 net of deductions.

*Ms Burke*

[28] Ms Burke's final pay slip showed that she was due the net sum of \$537.58, comprising pay for her final week, alternative holidays and final holiday pay. The bank statement of the respondent showed that a payment was made to Ms Burke in the sum of \$140.25 on 8 August 2016. Ms Burke did not recall if she ever received this sum. However, I find on a balance of probabilities that she did receive it given that the other two applicants confirmed that they had received the sums shown to have been paid to them on the respondent's bank statement. Ms Burke gave no evidence of notice pay.

[29] In the absence of holiday and leave records and wage and time records I am satisfied that the respondent owes Ms Burke the balance of the sum shown on the wage slip; namely the sum of \$397.33 net of deductions.

**Orders**

[30] I order the respondent to pay the following sums within 14 days of the date of this determination:

- a. To Ms Barnes the net sum of \$228.42, together with the gross sum of \$1,853.83;
- b. To Ms Guthrie the net sum of \$591.72; and
- c. To Ms Burke the net sum of \$397.33.

**Costs**

[31] None of the parties were represented, and so did not incur any legal costs. However, the applicants are entitled to recovery of the Authority's lodgement fee, in the sum of \$71.56. I order the respondent to pay this sum to Ms Barnes within 14 days of the date of this determination. Ms Barnes will be responsible for reimbursing to the other applicants any proportion of this sum which they are owed.

David Appleton  
Member of the Employment Relations Authority