

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 226
5647017

BETWEEN A LABOUR INSPECTOR
Applicant

AND KARAMEA HOLIDAY HOMES
LIMITED (in liquidation)
First Respondent

 ROBINWOOD FARMS
LIMITED
Second Respondent

 JULIA OSSELTON
Third Respondent

Member of Authority: Andrew Dallas

Representatives: Claire English, Counsel for the Applicant
Julia Osselton, Director of the First and Second
Respondents

Investigation Meeting: 28 June 2017

Date of Determination: 22 December 2017

DETERMINATION OF THE AUTHORITY No.1

- A. Racheal Mcgowan was an employee of Robinwood Farms Limited.**
- B. Huikun Quan was an employee of Robinwood Farms Limited.**
- C. Robinwood Farms Limited must pay Racheal Mcgowan \$2604.38 as arrears of minimum wages and holiday pay within 28 days of this determination.**

D. Robinwood Farms Limited must pay Huikun Quan \$2675.42 as arrears of minimum wages and holiday pay within 28 days of this determination.

E. Robinwood must pay interest of 5% per annum on the outstanding amounts owed to Ms McGowan and Mr Quan from 31 October 2016 until the date paid in full or within 28 days of the date of this determination, whichever is earlier.

F. Penalties and costs are reserved,

Employment relationship problem

[1] A Labour Inspector, Sacha Hodgson lodged a statement of problem in the Authority on behalf of several individuals against named respondents.

[2] By consent determination on 24 April 2017, the Labour Inspector and Karamea Holiday Homes Limited agreed to terms to resolve the employment relationship problem between them in respect of Anders Sarreigi.

[3] Since the issuance of that determination and the substantive investigation meeting, a liquidator was appointed for Karamea by the High Court under s 241(2)(c) of Companies Act 1993. As Karamea is in liquidation, the appropriate notation reflective of its current legal status has been made to the intituling.

[4] This determination relates to claims brought by the Labour Inspector on behalf of Racheal McGowan and Huikun Quan for arrears of minimum wages and holiday pay.

The Authority's investigation

[5] During the investigation meeting, I heard evidence from Labour Inspector, Sacha Hodgson, Ms McGowan, Mr Quan, Julia Osselton and David Pettit. Various other witnesses either lodged statements or were said to be willing to give evidence in support of Ms Osselton, however these witnesses did not materialise at the investigation meeting.

[6] This determination, reserved at the conclusion of a one day investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Employment Relations Act 2000 (the Act) to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[7] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[8] The issues for investigation and determinations are:

- (i) Was Ms McGowan an employee and if so, of whom?;
- (ii) Was Mr Quan an employee and if so, of whom?;
- (iii) If Ms McGowan and/or Mr Quan were employees, are they owed minimum wages and holiday pay by their employer?;
- (iv) If owed, whether interest is payable on any outstanding arrears?;
- (v) Whether either party should contribute to the costs of the other?

[9] By agreement, the issue of penalties arising out of any determined breaches of minimum standards will be dealt with separately.

Narrative

[10] The Labour Inspector says Ms McGowan and Mr Quan were employed by any or all of Karamea, Robinwood Farms Limited or personally by Mr Osselton. The Labour Inspector says Ms McGowan and Mr Quan are owed minimum wages and holiday pay by one or more of these employers and has provided calculations in support of these claims.

[11] Karamea operated a holiday home business. Ms Osselton was sole director and shareholder. Prior to its liquidation, the company operated a holiday home in Karamea, a small coastal community located approximately 90 kilometres northeast of Westport. Prior to its liquidation, she was also sole director and shareholder of Karamea.

[12] Robinwood operates a small organic farm at Tai Tapu, on the outskirts of Christchurch. Ms Osselton is sole director and shareholder of Robinwood. She controls and directs the company. In addition to its farming operation, Robinwood is also a firewood business and gardening business. On the evidence, all parts of the business are operated for profit. Robinwoods' business activities are publicly advertised as such, predominately on-line.

[13] In undertaking her business activities, Ms Osselton relies up heavily on unpaid, predominantly overseas workers who are recruited through advertisements placed on-line with local and overseas recruitment websites. The evidence established these advertisements were placed by Ms Osselton or her mother. A review of a number of the advertisements provided by the Labour Inspector as part of her evidence discloses that they often refer to duties, hours and days of work and remuneration expressed in terms of both money and in-kind.

[14] The Labour Inspector said Ms Osselton told her she may have recruited "hundreds" if not "thousands" through this method. A visitors' book kept by Ms Osselton was exhibited in evidence and disclosed a large number of names of persons; predominantly from overseas. Apart from the visitors' book, Ms Osselton said she kept no records for workers including length of engagement, a description of the work undertaken, the hours and days the work was performed.

[15] The Labour Inspector has brought this claim on behalf of Ms McGowan and Mr Quan, whom she located and who were able to provide detailed witness statements.

Labour Inspector investigation

[16] The Labour Inspector said she conducted two investigations. The first in January 2016 in response to a complaint. The complaint was received from one of Ms Osselton's clients. The complainant responded to an advertisement placed by Ms Osselton for gardening and landscaping services. Ms Osselton quoted the complainant \$540.00 for the work to be performed. The complainant became concerned after speaking to the workers who attended the property about whether they were being paid. When the Labour Inspector enquired of Ms Osselton she claimed the workers were volunteers. As there was no documentation available to review, the Labour Inspector closed her investigation due to lack of evidence.

[17] The Labour Inspector re-opened her investigation in March 2016 after uncovering evidence on the internet. She found three job advertisements posted by Ms Osselton and she said the language used in these was consistent with employment. These advertisements were provided to the Authority as part of the Labour Inspector's evidence. The Labour Inspector also interviewed several people who had worked for Ms Osselton. They included Ms McGowan and Mr Quan, for whom this claim is brought.

[18] The Labour Inspector met with Ms Osselton and was advised, among other things:

- (i) she had over 1000 people per year working on her properties in exchange for accommodation and food;
- (ii) the hours of work for the unpaid workers was 32 hours per week;
- (iii) the payment of \$120 per week was to be spent refuelling a farm vehicle the workers used;
- (iv) workers were sent to other properties and were "hired-out" on maintenance and gardening jobs for which she received payment;
- (v) there were no records available detailing the workers (although one was subsequently provided);
- (vi) the workers were "volunteers" or "Woofers" engaged in a cultural and skill-based exchange and were not employees.

[19] Ms Osselton's position did not alter throughout the course of the Authority's investigation of the matter in respect of Ms McGowan and Mr Quan.

Evidence of Ms McGowan

[20] The Labour Inspector was provided with Ms McGowan's contact details by another person who had been engaged at Robinwood. In summary, Ms McGowan worked at Robinwood from 3 November 2015 to 15 December 2015 as a "head honcho" under the direction of Ms Osselton. She said she took the job because she wanted to gain experience in organics and permaculture. Ms McGowan was not provided with an employment agreement, minimum wages or annual leave. She was paid \$120 per week plus food and accommodation for working 40 hours per week by either Ms Osselton or her mother. In addition to this, Ms McGowan expected to be able to use a car because that was stipulated in the advertisement she responded to. Ms McGowan believed she was the only "head honcho" at the farm, but other apparently found out about the arrangement and Ms Osselton commenced paying them \$120 per week as well.

[21] Ms McGowan said during her time at Robinwood, Ms Osselton was running some type of labour hire business. She said Ms Osselton would send workers to undertake gardening and maintenance jobs and she would receive payment for this. Workers undertaking this work would still only receive the flat-rate of \$120 per week.

Evidence of Mr Quan

[22] Ms McGowan provided Mr Quan's contract details to the Labour Inspector. In summary, Mr Quan's evidence was he came to New Zealand from China on a working holiday visa. Mr Quan worked as a head honcho at the premises of Robinwood and Karamea from 10 November 2015 to 14 December 2015. He worked under the direction of Ms Osselton. Mr Quan was not provided with an employment agreement, minimum wages or annual leave. He was paid \$120 per week plus food and accommodation for working 40 hours per week by Ms Osselton. Mr Quan undertook gardening jobs and other labour work as directed by Ms Osselton. He said he was aware she was being paid by clients for this work to be performed by himself and other workers. Mr Quan said regardless of the hours worked or the work performed he was only paid \$120 per week.

[23] The Labour Inspector said in completing her investigation and assessing the evidence, she concluded the workers were treated as employees, were controlled in their work by Ms Osselton and worked at her direction for remuneration and reward. Consequently, the Labour Inspector said all employees were entitled to minimum wages and holiday pay.

Evaluation

Were Ms McGowan and Mr Quan employees or volunteers?

[24] The starting point is s 6 of the Act. “Work” is not defined by the Act. However, the Court of Appeal endorsed a three step test to ascertain whether a person is “working” for the purposes of s 6.¹ Applying this test, I find Ms McGowan and Mr Quan were “working” when performing duties directed or supervised by Ms Osselton. It is clear from the Labour Inspector’s evidence Ms Osselton, supported to the extent it was by Ms McGowan and Mr Quan, was running a series of commercial operations for profits and Ms McGowan and Mr Quan (and seemingly many others) were engaged activities in support of these operations.

[25] While they may have been working, did Ms McGowan and Mr Huan expect to receive “reward” for the work being performed? The evidence of both is very firm on this point: they did. The job advertisements both responded to identified payment (\$120), accommodation, food and the use of a motor vehicle. While Ms Osselton said McGowan and Mr Quan were engaged in a cultural and skill-based exchange as evidence of their volunteer status, such non-monetary benefits arising out of the performance of work can also be indications of an employment relationship.

[26] I find then, on the balance of probabilities, Ms McGowan was an employee within the meaning of that term set out in s 6 of the Act. Having found Ms McGowan was an employee, the next question becomes, who was her employer.

[27] I also find, on the balance of probabilities, that Mr Quan was an employee within the meaning of that term set out in s 6 of the Act. Having found Mr Quan was an employee, the next question becomes, who was her employer.

¹ *Idea Services v Dickson* [209] ERNZ 116 (CA) at [63]

Who was Ms McGowan and Mr Quan's employer?

[28] On the evidence, there was overlap between the Robinwood and Karamea businesses. It is clear a majority of the commercial activity by Ms Osselton was carried out at or in connection with Robinwood's farming and ancillary business. It was in these operations Ms McGowan and Mr Quan were predominantly engaged.

[29] In addition, there appeared to be some type of informal "cross-hire" arrangements between them. However, this was likely a function of Ms Osselton being the sole director of both companies, rather than any other single causative factor. Indeed, I do not believe Ms McGowan and Mr Quan were employed by Ms Osselton personally.

[30] Having considered all the evidence and the submissions of the parties, I find, on the balance of probabilities, that Ms McGowan was an employee of Robinwood. I further find, on the balance of probabilities, Mr Quan was an employee of Robinwood.

Has Robinwood failed to meet minimum employment standards as identified by the Labour Inspector?

[31] A Labour Inspector has the power to bring an action on behalf of employees under s 228(1) of the Act for the recovery of wages and/or holiday pay arrears.

[32] Section 228 of the Act allows a Labour Inspector to seek to rely on s 132. Section 132 relevant provides:

132 Failure to keep or produce records

(1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that—

(a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and

(b) that failure prejudiced the employee's ability to bring an accurate claim under section 131.

(2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—

(a) the wages actually paid to the employee:

(b) the hours, days, and time worked by the employee.

[33] Robinwood did not provide wage and time records in response to the Labour Inspector's notice to produce wage, time and holiday records.

[34] The Labour Inspector sought arrears of wages and holiday pay on behalf of Ms McGowan. She calculated the total amount of arrears as \$2604.38. The Labour Inspector said the calculations were based on upon information provided by Ms McGowan.

[35] The Labour Inspector also sought arrears of wages and holiday pay on behalf of Mr Quan. She calculated the total amount of arrears as \$2675.42. The Labour Inspector said the calculations were based on upon information provided by Mr Quan.

[36] I find that the Labour Inspector has demonstrated on the balance of probabilities Robinwood failed to pay Ms McGowan minimum wages in breach of 6 of the Minimum Wage Act 1983 and failed to pay her holiday pay in breach of s 23 of the Holidays Act 2003.

[37] I find that the Labour Inspector has demonstrated on the balance of probabilities Robinwood failed to pay Mr Quan minimum wages in breach of 6 of the Minimum Wage Act 1983 and failed to pay her holiday pay in breach of s 23 of the Holidays Act 2003.

[38] It is appropriate in all the circumstances of this matter to require Robinwood to pay the arrears of wages and holiday pay as calculated by the Labour Inspector under s 131 of the Act.

[39] Within 28 days of the date of this determination, Robinwood must pay the Labour Inspector on behalf, and for the benefit, of Ms McGowan \$2604.38 as arrears of minimum wages and holiday pay

[40] Within 28 days of the date of this determination, Robinwood must pay the Labour Inspector on behalf, and for the benefit, of Mr Quan \$2675.42 as arrears of minimum wages and holiday pay.

Claim for interest

[41] The Labour Inspector sought interest in the outstanding amounts owing to Ms McGowan and Mr Quan. The Authority has the power to award interest pursuant to cl 11 of the Second Schedule of the Act at the rate prescribed under s 87(3) of the Judicature Act 1908, which is currently 5% per annum.

[42] I consider that it is appropriate Robinwood pay interest on the outstanding amounts owed to Ms McGowan and Mr Quan. The statement of problem was lodged in the Authority on 31 October 2016. That is the appropriate date from which interest could accrue.

[43] Robinwood must pay interest of 5% per annum on the outstanding amounts owed to Ms McGowan and Mr Quan from 31 October 2016 until the date paid in full or within 28 days of the date of this determination, whichever is earlier.

Next steps

Directions to issue

[44] Penalties and costs are reserved. An Authority Officer will contact the parties shortly to discuss a timetable for a sequential exchange of submissions on these matters.

Mediation to be considered

[45] If the parties believe mediation will assist them in arriving at an agreed approach to penalties and costs to be put before the Authority for its consideration, they may request a referral or direction for that purpose.

A handwritten signature in blue ink, appearing to read 'Andrew Dallas', written over a horizontal line.

Andrew Dallas
Member of the Employment Relations Authority