

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 22
3153769

BETWEEN A LABOUR INSPECTOR OF THE
 MINISTRY OF BUSINESS
 INNOVATION AND EMPLOYMENT
 Applicant

AND SLD AGRICULTURE LIMITED (IN
 LIQUIDATION)
 First Respondent

AND SCOTT DONALDSON
 Second Respondent

Member of Authority: Peter van Keulen

Representatives: Rochelle Hill, counsel for the Applicant
 Gordon Paine, counsel for the Respondents

Investigation Meeting: 13 July 2022 at Christchurch

Submissions and Further Up to 5 December 2022 from the Applicant
Information Received: Up to 14 December 2022 from the Respondents

Date of Determination: 19 January 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a statement of problem lodged with the Authority the Labour Inspector alleges that SLD Agriculture Limited failed to pay two employees the minimum wage for all of the hours worked, failed to pay two employees their correct holiday pay entitlements and failed to

comply with a request to provide employment records. The Labour Inspector seeks wage arrears for the minimum entitlements and penalties for the breaches.

[2] The Labour Inspector also says that Scott Donaldson, a director and shareholder of SLD Agriculture, was a person involved in these breaches pursuant to s 142W of the Employment Relations Act 2000 (the Act). The Labour Inspector says, as a person involved in the breaches, Mr Donaldson should be ordered to pay any arrears of minimum entitlements due by SLD Agriculture if it does not pay them and the Labour Inspector seeks penalties against Mr Donaldson for SLD Agriculture's failure to pay minimum entitlements.

[3] In its statement in reply SLD Agriculture says that the two employees, Petrus Grobbelaar and Riana Grobbelaar, were not employed by it but rather Mr Grobbelaar was employed by a different company, West Coast Milk Limited and Mrs Grobbelaar was not an employee of SLD Agriculture or West Coast Milk.

The Authority's investigation

[4] The parties agreed that I would determine the identity of the employer of Mr and Mrs Grobbelaar as a preliminary issue.

[5] I investigated this preliminary issue by receiving written evidence and documents, holding an investigation meeting on 13 July 2022 and assessing the oral and written submissions of the parties' representatives.

[6] I received witness statements from the Labour Inspector, Mr Grobbelaar and Mrs Grobbelaar. In my investigation meeting, under oath or affirmation, the witnesses confirmed their statements and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided written submissions.

[7] Between the investigation meeting being held and submissions and further information being provided by the parties, SLD Agriculture was placed into liquidation. This meant the Labour Inspector could not proceed against SLD Agriculture but it can still proceed with the claim against Mr Donaldson and for this purpose I can establish if there were breaches of minimum standards by SLD Agriculture, if it is the employer.¹

¹ *Lawton v Steel Pencil Holdings Limited (in Liquidation)* [2021] NZEmpC 199.

[8] So this determination resolves the issue of whether SLD Agriculture was the employer of Mr and Mrs Grobbelaar.

[9] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Issues

[10] The starting point for identifying the employer is actually to use s 6 of the Act which defines an employee; this is because s 6 is about identifying whether an employment relationship exists, and that will assist the Authority in determining which entity was the employer.²

[11] Taking what the relevant case law says about s 6 of the Act and about assessing who the employer is, the issues I must address are:³

- (a) What was the intentions of the parties as to who the employer is – this may be indicated by an employment agreement. Was there then a mutual agreement to change the employer at any stage.
- (b) Overall, how did the relationship operate, assessing how the work was carried out in practice, applying the control test and integration tests if they assist with this assessment, to establish if in practice the employer was different from what was first intended.

What happened?

[12] SLD Agriculture was incorporated on 11 May 2018. It is still registered but was placed into liquidation on 30 September 2022. Mr Donaldson was, and still is, the sole director and shareholder of SLD Agriculture.

² *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 69; *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 112; and *Hutton v Provencocadmus Ltd (in Receivership)* [2012] NZEmpC 207, [2012].

³ *Bryson v Three Foot Six Ltd* [2003] ERNZ 581 (EmpC); *Bryson v. Three Foot Six Ltd (No 2)* [2005] NZSC 34; *Noble v Ballooning Canterbury.com Limited* [2019] NZEmpC 98; *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 and *Narinder Singh v Eric James & Associates Ltd* [2010] NZEmpC 1.

[13] West Coast Milk was incorporated on 26 April 2019. Mr Donaldson was the sole director and shareholder of West Coast Milk. West Coast Milk was removed from the Companies register on 29 January 2021, as the Registrar had reasonable grounds to believe West Coast Milk was not carrying on business and there was no proper reason for the company to continue in existence, West Coast Milk never having filed an annual return.

[14] In late 2018 Mr Grobbelaar became aware, through his previous employer, that Mr Donaldson was looking for someone to run a farm he leased on the West Coast. Mr Grobbelaar and Mrs Grobbelaar then had an informal interview with Mr Donaldson in relation to managing the farm on the West Coast. The farm was located at 3782 State Highway, Ahaura, Totara Flat (the Farm). Mr Donaldson initially only wanted one person to run the Farm but Mr and Mrs Grobbelaar negotiated for the role to be split between the two of them as they believed it would require two people to carry out the work.

[15] Mrs Grobbelaar started working on the Farm on 1 February 2019. Mrs Grobbelaar did not have an employment agreement when she commenced employment.

[16] Mr Grobbelaar required a visa to work in New Zealand and SLD Agriculture completed an Employer Supplementary form which Mr Donaldson signed on 8 March 2019 as director of SLD Agriculture. An Employer Supplementary form is completed by an employer who has offered a position to a person who is applying for a work visa.

[17] Attached to the Employer Supplementary form was:

- (a) A Skills Match Report for a role as Herd Manager (Mr Grobbelaar's role) and SLD Agriculture was listed as the business name.
- (b) An employment agreement for Mr Grobbelaar in the role of Herd Manager which had been signed by Mr Donaldson on behalf of SLD Agriculture on 8 March 2019 and Mr Grobbelaar on 10 March 2019.

[18] Mr Grobbelaar started working on the Farm on 17 May 2019, after his visa was granted.

[19] Mr Grobbelaar worked as the Herd Manager on the Farm and Mrs Grobbelaar worked as a Farm Assistant. Between the two of them, Mr and Mrs Grobbelaar ran the Farm,

undertaking general farm work such as milking, feeding, farm maintenance, and stock management.

[20] Mr Grobbelaar reported to Mr Donaldson and to the extent required he took instruction from Mr Donaldson. Expenses for the work done at the Farm were largely charged to an account for the Farm. It is not clear whether this was an account in the name of SLD Agriculture, West Coast Milk or Mr Donaldson – Mr Grobbelaar says he simply referred to Mr Donaldson's account when charging items to it.

[21] At some point in their employment Mr and Mrs Grobbelaar were given a fuel card which was in the name of West Coast Milk.

[22] On 13 July 2019, Mr Grobbelaar signed a second employment agreement, which named West Coast Milk as employer; this was also signed by Mr Donaldson on 14 July 2019.

[23] Mrs Grobbelaar signed an employment agreement around the same time, but it was backdated to 1 February 2019. West Coast Milk was named as the employer, but it was also signed by Mr Donaldson.

[24] Between 17 March 2020 and 9 June 2020, Mr Donaldson applied for the COVID-19 Consolidated Wage Subsidy on behalf of both Mr Grobbelaar and Mrs Grobbelaar through SLD Agriculture. These applications were made on the basis that Mr Grobbelaar and Mrs Grobbelaar were full time employees of SLD Agriculture.

[25] Between 10 June 2020 and 1 September 2020, Mr Donaldson applied for the COVID-19 Wage Subsidy Extension on behalf of both Mr Grobbelaar and Mrs Grobbelaar through SLD Agriculture Limited. This was on the basis that Mr Grobbelaar and Mrs Grobbelaar were full time employees of SLD Agriculture.

[26] Both Mr Grobbelaar and Mrs Grobbelaar were paid by SLD Agriculture with SLD Agriculture accounting for these payments, PAYE and ACC Levies to the IRD. This was the case for their whole employment except for two payments made to them by West Coast Milk, which appears as the payor for these two transactions in Mr and Mrs Grobbelaar's bank statements. These payments are not accounted for in either Mr Grobbelaar or Mrs Grobbelaar's IRD summaries and it appears that no income, PAYE nor ACC levies were accounted for by either SLD Agriculture or West Coast Milk in respect of these two payments.

[27] On 21 August 2020, Mr and Mrs Grobbelaar resigned, saying their last day of work would be 4 September 2020. Following their resignation Mr and Mrs Grobbelaar made various complaints about SLD Agriculture, naming that entity as their employer.

[28] SLD Agriculture's financial accounts for the year ended 31 March 2020 show sharemilking income and wage expenses, without particularising where that income is derived from and to whom the wage expenses are paid.

Analysis

[29] At the outset both Mr and Mrs Grobbelaar were employed by SLD Agriculture:

- (a) Mrs Grobbelaar did not have an employment agreement when she commenced work but West Coast Milk was not incorporated then and she was paid by SLD Agriculture.
- (b) Mr Grobbelaar had an employment agreement with SLD Agriculture and was paid by SLD Agriculture.

[30] Mr and Mrs Grobbelaar then entered into employment agreements with West Coast Milk but there was no intention to change employer:

- (a) Mrs Grobbelaar's employment agreement with West Coast Milk is faulty as it is back dated to a date before West Coast Milk was incorporated.
- (b) Neither Mr Grobbelaar nor Mrs Grobbelaar realised there was a different entity named on the new employment agreements and they were not told about this.
- (c) Both Mr Grobbelaar and Mrs Grobbelaar believed SLD Agriculture was their employer at the end of their employment and complaints were made about this entity.
- (d) Whilst the new employment agreements were signed in July 2019 the next salary payments were from SLD Agriculture. Then two subsequent payments were from West Coast Milk but these were not accounted for by it as the employer. Then salary payments reverted to payments being made by SLD Agriculture.

- (e) Overall SLD Agriculture was held out as Mr and Mrs Grobbelaar's employer and it acted as their employer; SLD Agriculture accounted to IRD for their salary and employer deductions, there was no change of employer notified to INZ in respect of Mr Grobbelaar's work visa and COVID-19 wage subsidy applications were made in the name of SLD Agriculture.

[31] Assessing the real nature of relationship, based on how it operated including how the work was carried out and how the parties treated themselves in terms of the employer:

- (a) SLD Agriculture's financial accounts show that it controlled and operated at least one farm. At least part of its recorded operating expenses must have been salary payments to Mr and Mrs Grobbelaar as this would be consistent with its other IRD filings – it follows that it is likely that other expenses and income related to the Farm.
- (b) In comparison there is no known business income or expenditure for West Coast Milk.
- (c) Mr and Mrs Grobbelaar reported to Mr Donaldson on Farm related matters and Farm expenses were largely paid for through an account set up by Mr Donaldson. This is consistent with SLD Agriculture being the employer.
- (d) Mr Donaldson ran employee related matters (IRD filings, INZ applications, and COVID-19 wage subsidy) through SLD Agriculture and naming SLD Agriculture as the employer.
- (e) Mr and Mrs Grobbelaar treated SLD Agriculture as their employer.

[32] On the basis of all assessments, I conclude that Mr and Mrs Grobbelaar were employed by SLD Agriculture initially, there was no mutual agreement to change the employer (notwithstanding the new employment agreements) and on balance it appears that the parties operated as SLD Agriculture being the employer.

[33] I conclude that Mr Grobbelaar and Mrs Grobbelaar were employed by SLD Agriculture Limited.

Costs

[34] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority