

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 62
5392938

BETWEEN SAID AGHA
Applicant

A N D ROYALENE GREENING T/A
FURNITURE FOR FLATS
Respondent

Member of Authority: Rachel Larmer

Representatives: Mike Harrison, Advocate for Applicant
Respondent in person

Investigation Meeting: 11 February 2013 at Auckland

Date of Determination: 22 February 2013

DETERMINATION OF THE AUTHORITY

- A. The Authority does not have jurisdiction to hear Mr Agha's unjustified dismissal claim because he was not an employee of, or in an employment relationship with, Royalene Greening.**

Employment relationship problem

[1] Mr Agha claims that Ms Royalene Greening employed him to work at Furniture for Flats. He says he had a one day work trial on 11 June 2012 for which he was paid \$40. Mr Agha says Ms Greening told him when he finished work on 11 June that "*he was successful in securing full time employment.*" Mr Agha says he worked from 9am – 4pm 7 days a week from 12 June to 5 July 2012. He claims he only received \$80 one Saturday (date unknown) for all of the work he did.

[2] Mr Agha claims he was unjustifiably dismissed on 7 July 2012. He says when he turned up at the Furniture for Flats shop on 7 July he saw an unknown person working there so asked Ms Greening who the new person was. Mr Agha claims Ms Greening told him the new person was working for free so she was no longer able to offer him (Mr Agha) a job.

[3] Mr Agha claims his dismissal is unjustified and he seeks 13 weeks' lost remuneration and \$6,000 distress compensation. He also claims wage arrears of \$2,079 for the days he says he worked from 12 June to 05 July 2012. Mr Agha also claims \$1,080.00 two weeks' unpaid notice and unpaid holiday pay of \$166.32.

[4] Ms Greening denies trading as Furniture for Flats. She says that the business is solely owned by Ms Maree Burns. Ms Greening denies being in a personal or business relationship with Ms Burns. Ms Greening says she is not employed by Ms Burns and is not paid for the time she spends at the Furniture for Flats shop because it is a condition of her home detention that she is at the shop within certain hours.

[5] Ms Greening says Mr Agha would sometimes hang around the shop asking for money for food or cigarettes and that she would give him donations of her own money out of the goodness of her heart. Ms Greening acknowledges Mr Agha would sometimes help her bring items in from outside the store but she is adamant she did not employ Mr Agha to work for her or for Furniture for Flats. Ms Greening says she would usually get family members to assist her with moving furniture around if required so did not need Mr Agha to do any work. Ms Greening says Ms Burns, the owner of the shop, was the only person who could have employed Mr Agha.

Issues

[6] The following issues are to be determined:

- (a) Did Ms Greening employ Mr Agha?
- (b) If so, was Mr Agha dismissed?
- (c) If so, was dismissal justified?

Did Ms Greening employ Mr Agha?

[7] The Authority's jurisdiction is confined to assisting parties who are in an employment relationship to resolve their employment relationship problem(s). With one exception,¹ the Authority does not have jurisdiction to hear a claim brought by an applicant who is not in an employment relationship with the respondent.

¹ The exception is a penalty claim under s.134 (2) ERA against a respondent who does not have to be in an employment relationship with the applicant.

[8] Section 6 of the Employment Relations Act 2000 (the Act) defines employee as “*any person employed to do work for hire or reward under a contract of service.*” This includes a home worker or a person intending to work, but excludes a volunteer who does not expect to be rewarded for the work and who receives no reward for work performed as a volunteer.²

[9] When determining whether a party is an employee the Authority is required to determine the real nature of the relationship between the parties. That includes consideration of all relevant matters, including the intention of the parties although any statement describing the nature of the relationship is not to be treated as a determining matter.³

[10] The onus is on Mr Agha to establish on the balance of probabilities that he was an employee of Ms Greening’s. I find that he has failed to discharge that onus.

[11] The usual contract formation elements such as offer, acceptance, certainty, consideration, and intention to create legal relations all apply to the forming of an employment relationship. Mr Agha was unable to satisfy me that any one of these necessary contractual elements were present in this case, much less that all of the elements required for contract formation were met.

[12] Mr Agha admits the parties did not discuss or agree a specific pay rate. I do not accept Mr Agha’s evidence that it was agreed he would work between 9am and 4pm because the shop was only open from 10am until 6pm. I accept Ms Greening’s evidence that she would never have offered someone the hours of work Mr Agha claims he worked. There was also no evidence that any specific duties were agreed between the parties.

[13] There is no documentary evidence to support the claim the parties entered into an employment relationship. Mr Agha says Ms Greening wanted to keep the arrangement off the books so she did not have to pay tax so he agreed with that. Ms Greening says Ms Burns as the owner of the shop was solely responsible for any employment decisions and would never have agreed to employ someone under the table. Ms Burns apparently does translation work for various Courts so would not jeopardise that ongoing work by acting illegally.

² Section 6(1) ERA

³ Section 6(3) ERA.

[14] During the period Mr Agha says he was an employee he was also in receipt of a benefit from Work and Income New Zealand (WINZ). The terms of Mr Agha's benefit required him to inform WINZ if he obtained work. Mr Agha never advised WINZ he had obtained employment which suggests he had not entered into an employment relationship with Ms Greening.

[15] Mr Agha was receiving a sickness benefit which he admits meant he had been signed off work by a WINZ doctor as medically unfit to work. I consider this is another indicator it was unlikely given Mr Agha's ongoing ill health that he had entered into an employment relationship with Ms Greening when the medical advice was that he was not fit to undertake work.

[16] At the time of the Authority's investigation (more than six months after Mr Agha says his employment ended), he was still in receipt of a sickness benefit. Mr Agha told me his eligibility for a sickness benefit has not changed over that period. This suggests his health issues were not transient or fleeting.

[17] After hearing from both parties I was not satisfied that Ms Greening made an offer of employment which was capable of acceptance by Mr Agha. I also consider it more likely than not that any involvement by Mr Agha in moving furniture in or out of the shop occurred on a casual informal basis and did not impose mutual obligations on both parties. I consider likely Mr Agha helped Ms Greening on occasion because she had previously given him donations of food and cash for cigarettes and other things.

[18] The evidence I heard does not satisfy me on the balance of probabilities that there was ever any mutual intention between the parties to create a legally binding employment relationship.

[19] I also find that key terms fundamental to the successful operation of an employment relationship, such as the pay rate and the hours of work, were not discussed and agreed upon by the parties. It follows Mr Agha is unable to satisfy me on the balance of probabilities that he falls within the s.6 (1) definition of an employee in the Act. Accordingly the Authority does not have jurisdiction to hear his unjustified dismissal claim.

Costs

[20] Ms Greening represented herself so there is no issue as to costs.

Rachel Larmer
Member of the Employment Relations Authority