

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 547
5328760

BETWEEN

CHRISTOPHER BRUCE
MARTIN ADAMS
Applicant

AND

GREGORY LINTON
Respondent

Member of Authority: Alastair Dumbleton
Representatives: Applicant in person
Respondent in person
Investigation Meeting: 13 April 2011
Further material supplied: 20 and 21 April 2011
Determination: 21 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a statement of problem lodged in November 2010 the applicant, Mr Christopher Adams, presented the problem he wished to have resolved by the Authority to be the following:

My last employer, Mr G Linton, is trying to portray me as a subcontractor to avoid Holiday Pay. He also fired me unfairly.

[2] To resolve his problem Mr Adams sought:

Holiday Pay owing to be paid, and small compensation (2 wks pay) for my unfair dismissal – (ie without notice or warning or reason).

[3] The respondent, Mr Gregory Linton, I am satisfied was served by the Authority with a copy of Mr Adams' application but did not respond to it by lodging a statement in reply, as he was requested in writing to do by 10 January 2011.

[4] An investigation meeting was set down to proceed on 13 April 2011 and Mr Adams and Mr Linton were each sent a formal notice in writing of the fixture on 23 March 2011.

[5] Mr Linton did attend the investigation meeting and he was given leave by the Authority to respond or reply to the claim, by giving evidence orally. A few days after the meeting he presented two diaries for the Authority to examine. Mr Adams also gave oral evidence in addition to the written material he had attached to his statement of problem.

Whether Mr Adams an employee

[6] To determine the claims for annual holiday pay and compensation for unfair dismissal, the Authority must identify the nature of the work relationship that existed between Mr Adams and Mr Linton from 2005 to the beginning of December 2008, when Mr Adams claims he was dismissed by Mr Linton. From the evidence the Authority must ascertain the real nature of the relationship, applying the test at s 6 of the Employment Relations Act 2000. The Authority must consider all relevant matters including any that indicate the intention of the parties, and it is not to treat as a determining matter any statement by them describing the nature of their relationship.

[7] As explained by the Employment Court in *Poulter v Antipodean Growers Ltd* [2010] NZEMPC 77, ultimately the approach to be taken is for the Authority to gain an overall impression of the underlying and true nature of the relationship between the parties.

[8] The work performed by Mr Adams for or with Mr Linton was fixing or installing fibre-cement sheeting used as building cladding.

[9] In 2005 when Mr Linton was doing this work he made arrangements with a company, pbs Contracting Limited, to do it under contract at different building sites. There was no guarantee of ongoing work throughout the year and sometimes Mr

Linton did not have any job from pbs to do. When he did work he often had an assistant and from 2005 this was usually Mr Adams.

[10] Mr Linton's evidence was that he was not an employee but an agent of pbs. He regarded himself as self employed.

[11] He said that neither he nor Mr Adams had much experience of the work and they worked as a team. The small number of basic tools needed for the work was supplied by Mr Linton to Mr Adams.

[12] Mr Linton was paid by pbs on invoice for the time spent on the fixing work he and Mr Adams carried out together. From money that was paid into his account by pbs, Mr Linton would withdraw cash and pay Mr Adams weekly for the hours he had worked. At some stage Mr Linton began deducting withholding tax from this money.

[13] He gave as an example that if pbs had paid him \$1,000 for a particular job, he would keep back \$200 as withholding tax, pay \$400 to Mr Adams and keep \$400 himself.

[14] Mr Linton kept some details in his dairies of time and hours worked on each pbs contract. He said that Mr Adams just turned up whenever he wanted to work. If Mr Adams had not helped do the work pbs would have found someone else to assist. There was no written agreement applying to their work relationship and the only records kept were of hours and the work done, which Mr Adams provided in writing. Mr Linton said that Mr Adams was not dismissed but had finished working for him after deciding to go to university in 2009.

[15] Mr Linton considered that Mr Adams was a worker provided to him by pbs whenever the company thought that two people were needed to perform the installing work in the time required to complete a contract. He said he had other casual employees. Mr Linton regarded Mr Adams as working for pbs.

[16] Mr Adams attached to his claim a *To Whom it may Concern* letter pbs had written, which states;

Mr Chris Adams has been a subcontractor to our company since June 2004.

This work requires accurate levels of detailing and the ability to get on with others within a team environment.

[17] Mr Linton kept no records other than his diaries showing the hours Mr Adams had worked. There was no other wages and time record or holiday and leave record.

Employment relationship

[18] I find that the real nature of the relationship was one of employer and employee. Mr Adams had minimal independence from Mr Linton in the work he did. Insofar as there was control and direction, this was not required to be extensive given the nature of the work being performed.

[19] I also consider that Mr Adams was casually employed, on a contract by contract basis depending on whether and when Mr Linton was given new work by pbs. The regular availability of that work meant that the change from one contract to another was reasonably seamless although at times, Mr Linton said, there was no work available at all and Mr Adams therefore did not get paid.

[20] In my view that is how and when the employment ended, by a particular job finishing and Mr Adams indicating that he was going to have a change of career. Mr Adams I find was not dismissed and has no personal grievance in that regard.

[21] It is clear that no great thought was given to taxation of income paid, although Mr Linton came to appreciate that he needed to be putting something aside out of the pay he was giving Mr Adams.

[22] Control and direction, integration, and the economic reality test, all point to this being an employment contract between an employer and employee, and I determine accordingly. I am satisfied that Mr Adams was not a person in business on his own account and the casual nature of his engagement should not be confused with commercial independence in the work relationship.

Annual holiday pay

[23] In the absence of any records kept, including a written employment agreement, I accept the schedule presented by Mr Adams as part of his claim which details payments made for most of the months in 2005 and 2008 and for some months in 2006 and 2007. Mr Adams has calculated the pay due by applying a percentage to the

total gross pay and has worked out that the total holiday pay owed to him is \$4,825.40.

Determination

[24] I find that Mr Adams was entitled to be paid holiday pay as a casual employee and there is no suggestion that his \$16 per hour incorporated that statutory entitlement. Mr Adams did not receive any holiday pay and accordingly I order Mr Linton to pay to him in total \$4,825.40.

[25] Interest at 5% per annum is to be paid on the arrears from 30 November 2010.

[26] In addition, Mr Linton is to reimburse Mr Adams \$71.56 as the fee paid for commencing this claim in the Authority, a claim which initially Mr Linton took no steps to respond to and consequently the parties did not have the benefit of mediation assistance before the investigation.

A Dumbleton

Member of the Employment Relations Authority