

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 134
5355999

BETWEEN	BRETT ALBERT CARSTENS Applicant
AND	MICHAEL KOHERE
AND	HIKONUI CONTRACTING SERVICES LIMITED Respondents

Member of Authority:	P R Stapp
Representatives:	Brett Carstens in person No appearance for the respondents
Investigation Meeting:	16 October 2012 at Wellington
Determination:	31 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Brett Carstens was a meter installer who says he was employed by Michael Kohere trading t/a Hikonui Contracting Services. Because there is a registered company called Hikonui Contracting Services Limited I joined it on notice (and in reliance on the respondents' statement in reply) under s.221 of the Employment Relations Act (the Act).

[2] In their SIR the respondents' claim that Mr Carstens was not employed, but was a contractor, and they deny all Mr Carstens' allegations about unfair dismissal. Mr Kohere denies that he is personally involved.

[3] There has been no appearance by the respondents despite being put on notice of the investigation meeting and the statement of problem. Michael Kohere is a director of Hikonui Contracting Limited. The start of the investigation meeting was delayed to enable a support officer to contact Mr Kohere. In responding he made it

clear that he would not be attending, and there has been no arrangements made for someone else to attend. Mr Kohere had not provided any advance notice of any difficulties and other arrangements preventing him attending and/or arranging for someone else to attend. Therefore I was not prepared to accept that whatever he was doing on the day of the Authority's investigation meeting provided good cause for the respondents to be absent.

[4] I have proceeded in the matter because there has been no good cause for the respondents failing to attend the Authority's investigation meeting. I continued to investigate the matter fully as if the respondents had attended and had been represented. I had absolutely no assurances from Mr Kohere that any further delays would mean that he would co-operative and attend later.

The issues

[5] What was the employment arrangement between Mr Carstens and Michael Kohere and/or Hikonui Contracting Services Limited? In other words what was the real nature of the relationship?

[6] What was the role of the respondents?

[7] What were the terms of the relationship?

[8] How did the relationship end?

[9] Section 6, set out below, requires the Authority to consider and determine the real nature of the relationship between the parties.

[10] Section 6 of the Act states:

Meaning of employee

(1) *In this Act, unless the context otherwise requires **employee** –*

(a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service;*

...

(2) *In deciding for the purpose of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*

- (3) *For the purposes of subsection (2), the court or the Authority*
 –
- (a) *must consider all relevant matters including any matters that indicate the intentions of the persons; and*
- (b) *is not to treat as a determining matter any statement by the persons that describe the nature of their relationship.*

In *Tsoupakis v. Fendalton Construction Ltd* (unreported, Colgan CJ, WC 16/09, 18 June 2009) key principles were held to include (at para 5):

- ...
- “All relevant matters” *include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship.*
- “All relevant matters” *will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.*
- “All relevant matters” *include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).*
- *Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental tests.*
- *Industry practice, while not determinative of the question, is nevertheless a relevant factor.*
- *Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.*
- *Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.*

Mr Carstens' relationship with the respondents

[11] Mr Carstens says he was a meter installer employed by Michael Kohere. He started work on 8 June 2011. He says he was paid a rate for completing meter installations, plus a rate when he had to use a ladder. Mr Carstens had to pay for his own petrol, but says the agreement was for the petrol to be reimbursed. He expected Mr Kohere to provide a vehicle for his use some time in the future instead of using his own vehicle. The reimbursement of petrol and the arrangement for a vehicle never occurred. He had to pay his own licence fee. He says he was required to work between 30-40 hours per week and attended work to meet the requirement.

[12] Mr Carstens acknowledged that there were problems in the relationship: first with an earlier employer running the business and Michael Kohere taking it over and putting in place arrangements for Mr Carstens. Second there were issues in the employment about the amount of work available. Third there were issues about the work arrangements with other workers when Mr Carstens returned from a week's bereavement leave.

[13] Mr Carstens says that the work arrangement proved to be unsatisfactory with his pay being a lot less than he expected and fewer jobs given to him to work and that Mr Kohere was playing him off. After four weeks he had a weeks' bereavement leave after which he says he could have left for other work, but Mr Kohere wanted him to stay for at least 3 months. Mr Carstens says that this was the first time that Mr Kohere referred to this period as a probation period.

[14] However Mr Carstens' was given a weeks notice on 25 August 2011. He says he was given his dismissal in writing by Mr Kohere, but threw the note away at the time. He worked the notice out and ended on 31 August 2011. He requested Mr Kohere to honour his arrangement on paying holiday pay, but no payment was made. Subsequently Mr Carstens filed an employment relationship problem in the Authority. This included claims for wages and compensation for hurt and humiliation. His grievance statement alluded to a personal grievance and sought remedies to fix it. Given it was filed on 19 December 2011 it would have been out of time (90 days to raise a personal grievance) since the dismissal allegedly occurred on 31 August when the notice to end the relationship had been completed. It is not sufficient to file it in

Authority and purport to raise a personal grievance when the responsibility exists to raise it first with the employer. There is no sufficient evidence that the personal grievance was raised with the employer in time before the matter was filed in the Authority.

[15] The respondents' only reply (statement in reply) denies all Mr Carstens' claims, and it contends that he was a *contractor*. It has not challenged Mr Carstens raising the personal grievance out of time, probably because of the "contractor" defence. Therefore I have to assume the respondent consented to the grievance being raised if the alternative applied and Mr Carstens did happen to be an employee. Mr Kohere says Mr Carstens was dismissed in the statement in reply for being: "*Uncooperative; Argumentative; Disrespectful; Negative*".

[16] It therefore purports to attempt to justify its actions.

[17] The parties had a verbal arrangement. Mr Kohere arranged to pay taxes and his accountant provided the services. There was no written individual employment agreement and/or written contract for services. The payment of wages to Mr Carstens has been supported by bank statements he produced, and 2 pay slips that Mr Carstens says he received sometime after his employment ended. He says he received his last pay a short time after 31 August 2011, but without any holiday pay. This was not supported by any documentation and details. His total payment in the period was \$4,434.38 in the hand from his bank statements and the 2 payslips to support it. There are no details on any holiday pay, except that Mr Carstens says he agreed to be paid \$1 per meter to cover holiday pay and that he believed this was more beneficial than the holiday pay requirements.

Determination

What was the employment arrangement? What was the real nature of the relationship?

[18] First the law requires me to approach this in a principled way and to apply the proper tests to assess the real nature of the relationship. This means not necessarily believing and relying on the label the parties put on their relationship. Secondly the tests involve the degree of control in the relationship, the integration of the worker in the business (that involves whether the work is integral) and whether the worker has

been engaged to perform services in a business of their own. All relevant matters have been considered on the basis of Mr Carstens' evidence.

[19] Mr Kohere controlled the amount of work allocated to Mr Carstens. Indeed he was also responsible for managing Mr Carsten's conduct and performance given the reasons provided in the statement in reply for dismissing Mr Carstens, and the probation period that applied. Mr Carstens relied on Mr Kohere's arrangements for appointments. His hours were dependent on Mr Kohere allocating work involving meter installation and additional wiring work and appointments. Also he was involved in having to keep appointments on the timetable for city work arranged by Mr Kohere and administration that involved sending emails on the daily instalments. This leads to the inference that Mr Kohere had a fair measure of control over Mr Carstens and what Mr Carstens had to do.

[20] There was no written employment agreement and no written contract for services. The terms had been agreed orally. The records show that wages were paid with tax deducted and no holiday payments in place. His wages were related to performance based on an installation rate plus a ladder allowance. Mr Carstens says that his pay would have been calculated at least in part from the documents for installing the meters and additional wiring work he undertook. He was paid, regularly but the amounts varied. The payments were made by the accountant. Over his employment he was paid various amounts 6 times totalling \$4,434.38 in the hand. There may have been an earlier payment but this has not been confirmed with any documentation and independent record. However these signal that Mr Carstens had been integrated in the business to undertake the work involved with installing meters and additional wiring work.

[21] Clearly whatever the terms were they were oral arrangements between Mr Kohere and Mr Carstens. Mr Carstens has not been entirely coherent about the terms of his employment and in particular his payments, but I have been able to ascertain that he was paid on average \$739.06 per week in the hand.

[22] Mr Carstens says his work for Michael Kohere was the only work he was doing full time and that he was available at all times for Mr Kohere and attended to work place that involved 30-40 hours per week.

[23] Mr Carstens says he was not in business on his own account for this work even although he was GST registered for contracting at other times. There were no invoices and no records relating to GST payments for Mr Carstens' work.

[24] I put it to Mr Carstens that the arrangements seemed to be more consistent with a contractor than employee, but he was emphatic that Mr Kohere employed him and that he was not sub-contracting. Since it is clear that both parties have put their own label on what they considered the relationship was I hold that the following information is all relevant in determining the matter:

- i. That the arrangements were not put in writing by either side.
- ii. That the payments were performance related. There was no hourly rate as such. There are no time records. The job sheet relied upon to calculate any work related to a professional installation service and certification report than any employment details.
- iii. That Mr Carstens paid his own petrol and used a private vehicle. No reimbursements have been made for the cost of these. There were other payments such as a licensing fee that he had to pay for too, and were not supported by any agreement for it to be reimbursed later. Given the direct conflicts between Mr Carstens and Mr Kohere's information from the statement in reply I would have had to be satisfied that there was some other independent information to prove that there was any such agreement.
- iv. That the payments have been made without any details of time and wage references in the 2 payslips and the bank statements. These documents do not assist in providing any certainty that the payments were actually wages and not a payment, even although tax was deducted for PAYE and they were called "wages".
- v. That there are no records from IRD to assist.

- vi. That the holiday payment was apparently agreed outside the provisions of the Holidays Act and was \$1 for each meter installed.
- vii. That Mr Carstens was GST registered. I accept that he could be registered and at the same time been an employee. In this case he did not invoice the respondents, but he accepted the respondents' accountants being involved in making the payments.
- viii. That there is a problem about the role of Michael Kohere personally in the matter and his responsibility and the existence of a registered company.
- ix. That this seems to be a small business with variable volumes of work. Mr Carstens referred to there being other people working but he had no information about what their arrangements were.
- x. That the claim has been brought outside the timeframe for raising a personal grievance with the employer in 90 days. The respondent's statement in reply solely relates to the defence in the matter being on the "contractor" arrangement and if that is lost then it looks as though consent has been given to consider the dismissal.
- xi. That Mr Carstens would not have been able to go away and do other work because of the demands Mr Kohere had put on him to work and the amount of time he was required to attend work (30-40 hours).

[25] I therefore conclude that it is more likely than not that Mr Carstens was an employee because Mr Carstens was working full time (30-40 hours per week). His work was provided and directed by Mr Kohere at all times. Mr Kohere has relied upon terms relating to an employee to justify the reasons why Mr Carstens' employment ended. Mr Carstens was required to meet Mr Kohere's arrangements for installations and attend customers. There seems to have been arrangements in place that made Mr Carstens' work integral to do the amount of installations required and to

get new work for the business. He was not engaged to perform services in a business of his own. Given the hours he had to attend and Mr Kohere's direction there was no evidence of Mr Carstens being able to come and go as he liked. There was no evidence of any of Mr Carstens business arrangements and being registered for GST applicable to his role with the respondents. Even although he was paid by piece rate this does not stop a person being an employee. The parties entered into an arrangement to substitute for holiday pay. This was contrary to the provisions of the Holidays Act in regard to pay as you go arrangements. The fact is that he was paid "wages" and taxed PAYE for his work.

The role of the respondents

[26] Mr Carstens says he had no knowledge as to the arrangements in regard to Hikonui Contracting Services Limited. As far as he knew his arrangement to work was with Mr Kohere personally trading as Hikonui Contracting Services. Indeed he says he only became aware of the existence of the reference to the company referred in the 2 payslips as "HCS Limited" after his employment ended. As far as he was aware he was dealing with Mr Kohere personally otherwise. This is supported by the payments put in Mr Carstens' bank account without any reference to the company and that it was "Limited".

[27] In such a situation I hold that the undisclosed principal applies.

[28] It is my conclusion that as Mr Carstens was an employee and the relationship ended with dismissal on notice at the end of 31 August 2011 when Mr Carstens finished working out his notice. In the absence of any justification for the dismissal since Mr Carstens challenged Mr Kohere's information in the statement in reply I hold that a fair and reasonable employer could not have justified the dismissal.

[29] Mr Carstens average weekly wage was \$739.06 in the hand. He is entitled to 3 months lost wages without deduction for contributory conduct because I hold he did not contribute to his personal grievance. Also I am satisfied he attempted to find other work albeit without much success. Michael Kohere is required to pay Mr Carstens \$9,607.78 lost wages.

[30] Further Mr Carstens is entitled to an amount of compensation. I am satisfied that his feelings were hurt and that he has been humiliated by Mr Kohere's action. Mr Kohere is required to pay Mr Carstens \$3,500 compensation for hurt and humiliation.

[31] Mr Kohere is to pay Mr Carstens the filing fee of \$71.56.

Summary

[32] Michael Kohere is to pay Brett Carstens:

- a) \$9,607.78 lost wages under s 128 of the Act.
- b) \$3,500 compensation under s 123 (1) (c) (i) of the Act.
- c) \$71.56 filing fee under clause 15 Schedule 2 of the Act.

P R Stapp
Member of the Employment Relations Authority