

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 201
5448255

BETWEEN HUNTER DICK
 Applicant

A N D US BUGGERS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Makalita Maka , Advocate for Applicant
 Leanne and Anthony Sewell, Advocates for Respondent

Investigation Meeting: 19 November 2014 at Invercargill

Submissions Received: On the day of the investigation meeting

Date of Determination: 1 December 2014

DETERMINATION OF THE AUTHORITY

- A Hunter Dick was not employed by Us Buggers Limited.**
- B The claim against the company is dismissed.**
- C Costs are reserved.**

Employment relationship problem

[1] Hunter Dick says that he commenced employment with Us Buggers Limited (Us Buggers Ltd) in or about September/ October 2013 as an agricultural contractor. He was paid \$25 per hour and said he undertook between 40 to 60 hours of work per week.

[2] On or about 12 January 2014 Mr Dick says he was dismissed from his employment following an argument with Ewen McLeod. He says the dismissal was unjustified both procedurally and substantively. Further that he was not paid for

approximately 30 hours' work undertaken on 9, 10 and 11 January 2014 in the sum of \$750.

[3] Mr Dick seeks three months' lost wages, compensation in the sum of \$8,000 for humiliation and loss of dignity, wage arrears of \$750, reimbursement of the sum of \$1,500 which he paid Mr McLeod for a car but never received and costs.

[4] Us Buggers Ltd did not lodge a statement in reply but a director of the company Leanne Sewell provided to the Authority a copy of a letter from a lawyer Richard Allen from Richard Allen Law dated 3 December 2013 regarding Us Buggers Franchise. It was written to Dusty (Ewen) McLeod and Christine Anderson and advised amongst other matters that due to breaches described in the letter of 27 November 2013 our clients [Leanne Sewell and Anthony Sewell] were entitled to cancel the agreement due to the breaches described in our letter of 27 November 2014. They did so and such cancellation was subsequently accepted.

[5] That was the first time the Authority was aware that there was a franchise called Us Buggers.

[6] The directors of Us Buggers Ltd, Anthony Sewell and Leanne Sewell, attended the investigation meeting in Invercargill on 19 November 2014 and that was helpful for the Authority. They provided a written statement on the day and a brief adjournment was taken so that Ms Maka could discuss the written statement with Mr Dick. The Authority then heard evidence from Mr Dick and Mr and Mrs Sewell.

[7] This case is an example of how important it is for the Authority to have all parties participate in the Authority's investigation in order to properly determine the facts in an employment relationship problem.

[8] Us Buggers Ltd do not accept that it ever employed Mr Dick. The Sewell's say Mr Dick was a contractor and not an employee when he undertook work for the franchise they owned called Us Buggers which operated in Central Otago. It performed services for farmers. Mrs Sewell described the franchise as the provision of services to the farming community, a type of a *Hire a Hubby*.

[9] They say that because of serious difficulties with the franchisor, Ewen McLeod, known to them as Dusty McLeod, they cancelled the franchise agreement on 28 November 2013 and that such cancellation was accepted. They say that on advice

of their lawyer they then incorporated the company Us Buggers Ltd on 28 November 2013 but that Us Buggers Ltd never traded, received income, employed any individuals or paid any expenses. Mr Sewell said in his evidence that by incorporating the company there was some thought of preserving the name if they wanted to use it in the future and Mrs Sewell said that in incorporating the company they wanted to prevent Mr McLeod defrauding more people like they had been defrauded.

[10] Mr and Mrs Sewell say that after about 12 November 2013 Mr Dick did no further work for them in the Us Buggers franchise. The last payment made to him was on 14 November 2013. The said that from late November 2013 they knew that Mr Dick had chosen to continue working for Mr McLeod and wished him all the best.

The issues

[11] The Authority is required to determine the following issues:

- (a) Was Hunter Dick employed by Us Buggers Limited?
- (b) If Mr Dick was employed by Us Buggers Limited as at 12 January 2014 then was he dismissed
- (c) Was his dismissal unjustified?
- (d) Is he entitled to the remedies that he seeks and does the Authority have jurisdiction to grant the remedy in respect of the car?

Was Hunter Dick employed by Us Buggers Limited?

[12] There is no dispute that Mr Dick undertook work for the Us Buggers franchise. He was alerted to the work following the placement of an advertisement for the Central Otago Us Buggers franchise by Mr McLeod. Mr McLeod interviewed some individuals including Mr Dick in relation to the possibility of purchasing the franchise. Mr Dick accepted that he would have been interested in purchasing the Central Otago Us Buggers franchise, but was not in a financial position to do so.

[13] Mr and Mrs Sewell said that they were told by Mr McLeod he had interviewed three people for the Central Otago franchise. At this time they had purchased an Us Buggers franchise off Mr McLeod in early June 2013 covering Northern/Eastern

Southland and West/South Otago. They thought they had the first option for the Central Otago franchise as well and they then purchased that franchise. Mr McLeod mentioned Mr Dick and Mr Dick's nephew Darren Cavanaugh as good people to work for and help build the franchise. A meeting took place between Mr and Mrs Sewell, Mr Dick and his nephew, Darren Cavanaugh.

[14] There is a dispute as to whether Mr Dick was engaged as a contractor or an employee for the franchise. There was nothing in writing between the parties. Mr Dick was paid \$25 per hour. Mr Dick agreed that some lower hourly amounts were discussed on the basis that Us Buggers franchise would pay for the petrol but he paid for his own fuel costs. No tax was deducted from the hourly rate before payment was made to Mr Dick.

[15] Mr Dick commenced work for the franchise from in or about, he thought, early October, although there was a payment made to him from late September 2013. Mr Dick said that he considered himself an employee. Mr and Mrs Sewell said that they thought it was clear that Mr Dick would pay taxes and meet his fuel costs and they did not consider him an employee.

[16] Difficulties arose between Mr and Mrs Sewell and Mr McLeod. These concerned issues over communication, on the job behaviour and some financial aspects. Matters seem to have come to a head after a tailing trailer was purchased and there was conflict over who was in charge of the workers, Mr McLeod or the Sewell's.

[17] For a short period of time the Sewell's provided a caravan for Mr Dick and his nephew to stay in at the local camping ground in Tapanui and Mr Dick used their vehicle for the tailing run. From in or about mid to late November Mr Dick and his nephew lived with Mr McLeod and his partner, Christine Anderson. Although there were some attempts to resolve the conflict between Mr McLeod and the Sewell's this did not prove successful. Mr Dick was I find aware of the conflict.

[18] The Sewell's contacted their solicitor on 18 November 2013 and any further discussions about the franchise were conducted with their lawyer. I am satisfied they talked to the workers including Mr Dick about the situation.

[19] The Sewell's cancelled the franchise agreement and agreed to cease trading under that name on 28 November 2013. Mr McLeod was served with a trespass

notice requiring he stay away from the Sewell's and cease all communication with them.

[20] Mr Dick said that towards the end of November or early December 2013 Mr McLeod asked him to check whether Mr and Mrs Sewell had removed the Us Buggers signage off their truck. He said that at that point he realised there was a choice as to whether he should continue to work or not for Mr McLeod. Mr Dick accepted that after 6 December 2013 he did not have anything further to do with Mr and Mrs Sewell but continued to work for Mr McLeod and live at his home. Mr Dick confirmed from his diary that the last day he undertook any work for Mr and Mrs Sewell was 12 November and I am satisfied that the last payment from them made to Mr Dick was on 14 November 2013.

[21] Mr Dick continued to work for Mr McLeod undertaking work on farms until he had an argument with Mr McLeod on or about 12 January 2014 at which time Mr Dick says he was unjustifiably dismissed.

Conclusion

[22] Mr Dick was either engaged or employed by the Us Buggers franchise from September or October 2013. The Us Buggers franchise for Central Otago had been purchased by Mr and Mrs Sewell from Mr McLeod. Although Mr and Mrs Sewell had purchased the franchise, Mr McLeod continued to be heavily involved in its operation. Following conflict in late November 2013 the franchise agreement between the Sewell's and Mr McLeod was cancelled.

[23] Mr Dick, I find, knew about the situation with the Sewell's and Mr McLeod. In his evidence, Mr Dick accepted that he knew at least by early December 2013 that he would have to make a choice in the circumstances to work or not for Mr McLeod. He made a decision I find to work for Mr McLeod knowing that Mr and Mrs Sewell had cancelled or ended the Us Buggers franchise agreement. Mr and Mrs Sewell did not pay Mr Dick for work after 14 November 2013 and the last work Mr Dick undertook for them was on 12 November 2013.

[24] After late November or early December 2013 I find that Mr Dick knew that he was no longer employed or engaged by the Sewell's.

[25] There is no evidence to support that Mr Dick was ever engaged or employed by Us Buggers Limited which was not incorporated until 28 November 2013. I am not satisfied that Us Buggers Limited ever employed Mr Dick and these proceedings cannot be maintained against that company.

[26] The evidence supports that at the time Mr Dick says that he was dismissed he was either engaged by or employed by Mr McLeod. The basis on which the claim was brought against Us Buggers Ltd was that that company shared the same name as the franchise. The company was not incorporated until at or about the same time the Sewell's relationship with Mr Dick ended on 28 November 2013. After that date Mr Dick decided to work with Mr McLeod, did not work again with the Sewell's and was not paid after that date by them or the company.

[27] The proceedings against Us Buggers Limited are dismissed.

Costs

[28] Mr and Mrs Sewell attended on behalf of the company and I do not imagine that there will be any issue as to costs. I will however reserve costs in the event that an application is to be made.

Helen Doyle
Member of the Employment Relations Authority