

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 121  
5533636

BETWEEN            LEON DAVIS  
                                 Applicant  
  
A N D                HARD YARDS BRICK/BLOCK  
                                 & LANDSCAPE LIMITED  
                                 Respondent

Member of Authority:    Helen Doyle  
  
Representatives:        Robert Thompson, Advocate for the Applicant  
                                 Andrew Riches, Counsel for the Respondent  
  
Investigation Meeting:    12 May 2015 at Christchurch  
  
Submissions Received:    On the day  
  
Further Information  
Received:                20 and 21 May 2015 and 1 August 2015  
  
Date of Determination:    17 August 2015

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**DETERMINATION OF THE AUTHORITY**

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- A     Leon Davis was not in an employment relationship with Hard Yards Brick/Block & Landscape Limited.**
- B     Costs are reserved and failing agreement a timetable set.**

**Employment relationship problem**

[1]    Leon Davis says that he was an employee of Hard Yards Brick/Block & Landscape Limited (Hard Yards) from in or about late May 2013 until his employment was terminated on 19 October 2014. Mr Davis says that he was

unjustifiably disadvantaged in his employment by a lack of clarity about the nature of the relationship and the fact he did not have an employment agreement. He says further that he was unjustifiably dismissed from his employment on 19 October 2014. He seeks reimbursement of lost wages and payment of compensation in the sum of \$15,000 together with costs.

[2] Hard Yards carries on business in the Christchurch area as a brick and block laying business. The managing directors of Hard Yards are Matthew and Sarah Groufsky. Hard Yards says that at all times Mr Davis was engaged as an independent contractor under a contract for service dated 30 May 2013.

### **The issues**

[3] The Authority will need to determine the following issues in this matter:

- Was Mr Davis an employee under a contract of service or an independent contractor under a contract for service?
- If the answer to the first question is that Mr Davis was an employee, then the Authority will need to determine whether he was unjustifiably dismissed or disadvantaged in his employment and if he was what remedies should be awarded;
- If the answer to the first question is that Mr Davis was an independent contractor under a contract for service then the Authority has no jurisdiction to hear the matter.

[4] Section 6 of the Employment Relations Act 2000 (the Act) provides the meaning of employee. The Authority is required, in deciding whether a person is employed by another person as an employee, to determine the *real nature of the relationship between them*. The Authority must consider all relevant matters including any matters that indicate the intention of the parties and is not to treat as a determining matter any statement by them that describes the nature of their relationship.

[5] The Supreme Court in *Bryson v. Three Foot Six Limited (No.2)*<sup>1</sup> stated amongst other matters:

[32] *“All relevant matters” certainly 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. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature.*  
*“All relevant matters” equally clearly requires the Court or Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law.*

### **The start of the relationship**

[6] Mr Davis is a qualified brick and block layer. In or about May 2013 he was living in Timaru and was unemployed. He understood through a contractor of Hard Yards, Adam, that there may be an opportunity of work and made an approach to Mr Groufsky. Mr Davis then drove to Christchurch and met with Matthew Groufsky. Mr Groufsky undertakes the work for Hard Yards aside from the administrative work tasks which Mrs Groufsky performs.

[7] It is common ground that there was some discussion between Mr Groufsky and Mr Davis about Mr Davis being taken on as a contractor. He had only previously been an employee. There is a difference in the evidence as to whether Mr Davis then talked to Mrs Groufsky about the contract for service and the terms and conditions of the contract. Mr Davis does not accept such a discussion took place.

[8] Mrs Groufsky said that Mr Davis came to the house where the business is run from and she recalled sitting down with him and going through the contract for services which was ultimately signed. She said that prior to taking Mr Davis on as a contractor they had engaged an accountant, Matthew Bendall, to get advice about payment of withholding tax from contractors.

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<sup>1</sup> [2005] NZSC34, [2005] ERNZ 372 at [32]

[9] Mrs Groufsky said that she specifically asked Mr Davis at the meeting if he understood the responsibilities of a contractor and the difference between an employee and a contractor and Mr Davis informed her that he did. She advised Mr Davis that the company was to pass on withholding tax to the Inland Revenue Department on a monthly basis and asked whether he had somebody he could seek advice from. Mrs Groufsky recalls that Mr Davis told her that his sister was an accountant and that he was happy with the arrangement and took two copies of the contract away. Mr Davis agreed in his evidence that he was living with his sister at the time.

[10] Having heard the evidence I find it more likely than not that Mr Davis did talk about the content of the contract with Ms Groufsky and that with the passage of time he has not recalled that.

[11] Mr Davis returned a signed copy of a contract for service dated 30 May 2013.

### **The contract for service**

[12] The contract for service provided under nature and intention of the parties in clause 1.1 that the company wishes to engage the services of a contractor in the form of a schedule from time to time. Each engagement was specified to constitute a separate and distinct contract for service. Clause 1.2 provides that the contractor agreed to provide services as an independent contractor and accepted that he is not an employee for the purposes of any matter related to the Employment Relations Act 2000, the Holidays Act 2003, the Holidays Amendment Act 2004 or any other such legislation designed to regulate the relationship between an employer and an employee.

[13] Clause 2 specified how services were to be provided. This included providing the services in a manner and with such consideration for the company as to maintain its good name and complying with any instruction from the company in respect of the provision of the services. With the arrangement approved in advance and not unreasonably withheld by the company the contractor could use a substitute, assign or subcontract to perform the services provided under the contract. The contractor is free to provide services to other person or organisations.

[14] Clause 3 provides for the scheduling of work which was to be determined on a week by week, job by job, or project by project basis and there were to be controls on

the quality of services provided and the timing of services provided as the company thinks necessary. The contractor was free to accept or decline any job or project offered but on committing to a job or project is to be available to complete it. The contractor was to provide and maintain any personal protection equipment necessary for the work.

[15] Clause 4 provided for fees for services. A \$25 per hour fee was agreed to however the contract also permitted a set price contract job. Payment was to be made for each agreed period and no less than 7 days after invoice date subject to the contractor providing an accurate written invoice detailing services provided.

[16] Clause 5 of the contract dealt with termination of the contract. It was noted that the contract *will terminate upon reaching its expiry date or may be terminated by either party giving one week's notice either verbally or in writing or may be terminated for serious breach*. No expiry date was in the contract.

[17] Clause 6 was a provision dealing with a process if a dispute between the parties arose out of the contract.

### **Intention of the parties**

[18] An independent contractor arrangement was discussed and a written contract was duly entered into. Mr Davis was clearly anxious to secure some work because he was unemployed at that time. He had not previously been in a contracting relationship. The bargaining power was not altogether equal however Mr Davis was able to take some time to consider the contracting arrangements. There was some discussion about the implications of such a relationship. Mr Davis said he did not discuss the contract with his sister who is an accountant but he was living with her at that time. He could have availed himself of that opportunity. Mr Davis under questioning agreed that he was initially excited at the prospect of an independent contracting relationship and he was going to receive about two dollars more per hour than he had when he was employed.

[19] There was a common intention at the outset of the relationship that it would be other than an employment relationship. Mr Davis under the contract was to provide labour as a tradesperson. The common intention of the parties though is not determinative of the real nature of the relationship and I now proceed to consider the operation of the agreement in practice. Judge Inglis stated in the Employment Court

judgment in *D'arcy-Smith v Natural Habitats Limited*<sup>2</sup> that *the inquiry into the nature of the relationship is an intensely factual one.*

**The relationship between the parties following the signing of the contract for services**

*Transport to and from site*

[20] Mr Davis said that for the first week of work Mr Groufsky told him the jobs he wanted him to do and he drove himself to the work sites. After the first week Mr Davis drove to Adam's house and Adam would drive him to the worksites in Hard Yards company van. Mr Groufsky said that it was for Mr Davis to get himself to and from the sites and I find that travel with Adam in the company van was more related to Mr Davis' friendship with Adam than an organised mode of transport to the site by Hard Yards. Mr Davis claimed expenses for mileage of \$3,850 and that would support that he did independently travel to and from work sites as well as with Adam in the company van.

*Payments and hours worked*

[21] Mr and Mrs Groufsky were very clear in their evidence that Mr Davis would record hours he worked in a red notebook. Mr Davis said that he relied on what was in Mr Groufsky's diary and did not accept there was such a note book. No notebook was made available to the Authority. Mr Groufsky thought he would be able to provide his 2013 and 2014 diaries in which he recorded work undertaken but in affidavits provided after the investigation meeting both Mr and Mrs Groufsky deposed to not being able to locate the diaries despite a thorough search and there is a possibility that they may have been disposed of in a move of offices in 2015. Mr Davis said that he would from time to time raise differences about what he thought he was owed and what was paid. I find it less likely in those circumstances that Mr Davis did not keep his own record of hours worked.

[22] The only evidence that I have of hours and payments to Mr Davis is a schedule of payments provided to Mr Bendall for completion of the forms for the Inland Revenue Department (IRD). It is unfortunate that I cannot see what was

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<sup>2</sup> [2015] NZEmpC 123[55]

recorded for work undertaken for the material period because during the investigation meeting there were some questions that arose from the spread sheet entries.

[23] There was regularity about when payments were made to Mr Davis. Payments were made every Monday with the money going through that evening. That type of regularity could be consistent with an employment arrangement but is also not inconsistent with the contract for service the parties entered into which provided for payment to be made at the end of a set period and no less than 7 days after production of an invoice.

[24] Mr Davis provided invoices until about the end of October 2013. He said that he was asked to provide invoices after he was paid and thought it was a waste of time. I find it likely that Mr Groufsky encouraged Mr Davis to write invoices which record the hours of work and the site worked on but Mr Davis did not continue with writing invoices. The evidence supports that each Monday Mr Groufsky and Mr Davis would discuss what Mr Davis was owed considering entries made in their respective diaries and notebooks. Mrs Groufsky would then be advised of the payment to make to Mr Davis.

[25] For the period of work in 2013 the spread sheet shows an initial hourly rate of \$25 per hour and then an increase to that rate from September 2013 to \$27 per hour. The hours worked in 2013 varied from week to week. The lowest number of hours worked in a week by Mr Davis was 20 hours and the highest on the spread sheet is 70 hours which was recorded just before a period Mr Davis did not work from the start of August to early September 2013. He took a pre-arranged overseas trip for that period.

[26] Mr Thompson put to Mr and Mrs Groufsky at the investigation meeting that holiday pay was paid. That was strenuously denied by the Groufskys. Some reliance was placed by Mr Thompson in questioning about holiday pay on the absence of any payments for the period between 26 November 2013 and 31 December 2014 shown on the spread sheet and a payment into Mr Davis' account for the end of week 23 December 2013 of \$1432.

[27] Mrs Groufsky said at the investigation meeting that it was possible she was working remotely away from Christchurch during those weeks in December and did not update the master spreadsheet. She subsequently provided affidavit evidence

dated 20 May 2015 which attached a copy of the spreadsheet provided by the accountant showing payment made for that December 2013 period. For the four weeks in December 2013 it shows Mr Davis worked varying hours from 20 to 66 hours, the latter for which Mr Davis was paid the \$1432 net Mr Thompson referred to. Mr Groufsky said that in the run up to Christmas the hours were longer.

[28] Mr Davis did not undertake any work from 23 December 2013 through to 14 January 2014 and the spread sheets reflect for that period zero hours of work and zero payments were made. There was no information to support that there was any element of holiday pay paid. Mr Davis agreed under questioning that he had never asked for payment for holiday or sick leave.

[29] For 2014 the hours worked each week by Mr Davis are again variable. There is some variation to payment as well. One period from 14 January 2014 to 20 January 2014 shows a rate of \$25 per hour but then until 29 April 2014 the hourly rate is \$27.00. Eleven hours are worked in the week from 29 April 2014 to 5 May 2014 at \$40 per hour. Mr Groufsky thought that was a rate negotiated for some weekend work. The hourly rate increases again to \$28 per hour from July 2014. Towards the end of the relationship the spread sheet shows some payments made on the basis of a block rate of \$2 per block. Mr Groufsky said that Mr Davis started working on a block rate from around August 2014.

[30] Mr Davis said that Mr Groufsky increased his hourly rate without discussion. Mr Groufsky said that Mr Davis would often mention other rates and contract work available and use that as leverage to increase his rate. I find that Mr Groufsky felt some pressure to increase the rates paid to Mr Davis.

[31] Mr Davis said that he could only recall one occasion towards the end of the relationship where he agreed to a block rate and a disagreement arose because Mr Davis had used two of Hard Yards labourers to help. He said that Mr Groufsky had approached him and Adam and said that they could earn more money from him if they went onto a block rate and they should try it for the next job.

[32] Mr Groufsky however, after the work was completed, said that Mr Davis should pay for the labourers' time. Mr Davis was not happy with that and felt that Mr Groufsky was trying to change the terms of the arrangement. The spread sheets confirm that the block rate was paid on the basis of \$2 per block on that occasion.

*Control over work undertaken*

[33] Mr Davis says that each job had to be done to Mr Groufsky's standards, specifications and timeframes and that Mr Groufsky had control of the ordering of bricks, blocks and mortar. Mr Groufsky he said was in control of how long he could work. Mr Davis said that he would receive a text message on rainy days to tell him whether there was work or not and on site Mr Groufsky would advise when the day was called off or to go home when there was no work.

[34] Mr Davis said that he was expected to assist two labourers employed by Hard Yards that he worked with and direct them as to what was required. Mr Groufsky said that Mr Davis was not given any responsibility over employees and there was no requirement to do so as Mr Groufsky was able to undertake those duties. I accept that Mr Davis may have given some direction to the labourers but I am not satisfied there was a formal requirement to do so by Mr Groufsky.

[35] Mr Davis said that he would hold himself out as an employee of the company if Mr Groufsky was not on site although I am not satisfied that he was instructed to do that. He also said that from time to time Mr Groufsky would introduce him as an employee of the company by referring to him as a foreman. Mr Groufsky accepted that there may have been occasions when Mr Davis was introduced to clients or other people on site. Those occasions he said were simply a courtesy and he did not give an impression that Mr Davis was an employee.

[36] Mr Groufsky said that the start time for a job fluctuated between 6.30 – 9.00am and there were no standard hours. He agreed that he did advise Mr Davis what time to turn up because there was no point in turning up until the materials, sand, cement, brick and box were on site. The work to be done was arranged on a weekly and/or job to job basis. The job would be started and then finished. There would be a discussion once a job was completed about whether anything else was lined up and sometimes there was no flow on work. If there was no flow on work then Mr Groufsky said that he did not expect Mr Davis to *stick around*. He said that Mr Davis did often work alone and whilst he did check the quality of his work he left Mr Davis to do his work as he regarded him as a competent tradesman.

[37] Mr Groufsky said that Mr Davis could come and go as he pleased and was free to accept or reject jobs which he did not want to do.

*Tools and uniforms*

[38] There was no dispute that Hard Yards provided Mr Davis with a High Vis top with the Hard Yards logo. Mr Groufsky said that these tops were made available to contractors as part of health and safety requirements although they could wear their own clothes. Mr Davis said that he always turned up in the uniform and did not wear his own clothes. I did view some photographs to support that Mr Davis did sometimes wear his own clothes. I was not satisfied that they advanced matters particularly. I accept Mr Davis's evidence that he usually wore tops with the Hard Yards logo on them.

[39] Mr Davis provided hand tools such as a trowel and a ruler. He used other tools belonging to Hard Yards. I do not find that too much turns on the fact that Mr Davis was given a level by Mr Groufsky. Mr Groufsky had a spare spirit level and Mr Davis's level was worn.

*Taxation*

[40] Mr Bendall in his evidence to the Authority explained that compliance with IRD requirements was maintained with withholding tax deductions from Mr Davis's pay because Mr Davis was providing only labour and did not hold a withholding tax exemption certificate from IRD. Mr Davis claimed expenses for mileage together with work boots and tools. He was not GST registered.

*Health and Safety Induction form and Site Safe Course*

[41] Mr Davis attended a site safe course that was paid for by Hard Yards. He was not paid for the time he attended. Mrs Groufsky said that employees were paid for their time and the cost of the site safe course was minimal but it was considered to be in the best interests of Hard Yards to ensure all contractors complied with health and safety obligations. Mrs Groufsky said that she developed a health and safety policy for Hard Yards in September 2014 for both contractors and employees. Mr Davis signed an induction checklist for contractors on 1 October 2014. There was a different induction check list for employees of Hard Yards.

*End of the relationship*

[42] Mr Davis said that when the issue arose about payment of a block rate and whether he and Adam should pay Mr Groufsky for the labourers' time in October 2014 he told Mr Groufsky that Hard Yards should have him as an employee paying him \$26 per hour with normal entitlements. Mr Davis said that he told Mr Groufsky if he wanted Mr Davis to remain a contractor he should pay a greater rate and no less than \$30 per hour.

[43] Mr Groufsky said that there was no reference by Mr Davis to becoming an employee at that time only to increasing the contractor rate. Mr Groufsky said that Mr Davis told him unless the higher rates were paid he would not be providing any further work and that consistent he thought with that Mr Davis did not attend work on the Friday. Mr Davis said that he needed to travel down south to see his grandfather who was dying on 15 and 16 October 2014 and he let Mr Groufsky know about this.

[44] Mr Davis said that he received the following voice message from Mr Groufsky on 19 October 2014:

*How ya going there Leon mate. Look um just going back to where we left off last week, I'm not going to be able to come up to those rates that you're after mate so um, just going to part with you for now, um you're obviously ready for a change as well and want to go out and chase a bit of work so I'm not going to hold you back just um I'll fix you up for all your work you did last week, I'll have it worked out tomorrow with Adam tomorrow and um I hope it all works out and um if all else fails give us a buzz in the New Year or whatever and um, yeah thanks for all your help anyway. Sorry that it came to a bit of a blow up at the end there but um it is what it is so going forward um yeah I wish you all the best anyway but um give us a buzz back if need be. Cheers Leon.*

[45] Mr Groufsky said that the first mention there was of an employment relationship was when he received Mr Thompson's letter raising a personal grievance on 5 November 2014. His evidence was supported I find to an extent by the absence of any reference to the possibility of an employment relationship in his voice message.

## **Conclusions**

### **Control and Integration**

[46] I accept that the work Mr Davis did could have been undertaken by an employee or an independent contractor. There was a reasonable level of control over how Mr Davis performed his tasks which is consistent with an employment relationship. Some control is not inconsistent with the contract for services which provided for controls on the quality of service provided and the timing of service provided.

[47] The hours were quite variable. Mr Groufsky said in his evidence that Mr Davis did perform other jobs as a contractor but Mr Davis denied that. I asked Mr Davis why he had not undertaken other jobs and he said that he was loyal to Mr Groufsky. The contract for services did require Mr Davis to finish a job once he had accepted one but there was no evidence to support he could not have advised his unavailability for a further job. I do not find that the hours worked for Hard Yards prevented him undertaking other work as the contract for services permitted him to do.

[48] Mr Thompson submits that Mr Davis was not able to quote for jobs or control what he received for each job which is more consistent with an employment agreement although also not inconsistent with a tradesperson providing labour only.

[49] Mr Davis was provided with tops with the logo of Hard Yards on them which does support a level of integration. A first aid kit was provided. There was supply of some tools by Hard Yards although that is not inconsistent with a labour only engagement.

[50] Although the evidence was that Mr Davis was driven to the work site in a company van the expense claim for mileage would support that he also drove himself to the worksites as well. Some of the evidence such as unpaid attendance at the site safe course supports that Mr Davis was treated differently to those employed by Hard Yards.

[51] There are factors in the relationship when the control and integration tests are applied that are consistent with an employment relationship. There are also factors

that are consistent with a contract for services. With regard to all the circumstances I do not find these factors strongly weighed in favour of an employment relationship.

#### **Fundamental or economic reality test**

[52] Under this test I have considered whether Mr Davis was effectively working on his own account. Mr Thompson submits that Mr Davis did not provide regular invoices for services, was paid on an hourly rate which increased and his deductions of tax were managed by Hard Yards.

[53] The provisions of invoices did stop however payment was still made on the basis of discussion and there were no pay slips provided. There was some change in the rate paid for some jobs. It went down for one and increased for another to \$40 per hour. That is not consistent with employment. There was discussion about a block rate towards the end of the relationship. Although Mr Thompson said that the rates increased without request Mr Groufsky I find felt some pressure to increase the rate paid to Mr Davis.

[54] Mr Bendall explained that the deduction of withholding tax was done at his instruction because there was no withholding tax exemption certificate provided. Mr Davis claimed business expenses of \$4,446.67 as tax deductions during this period.

[55] I find that the fundamental test favours a contracting relationship.

#### **Determination**

[56] Mr Davis was unhappy with the contracting arrangement. As in all these types of cases there are factors when the relationship is carefully examined that could point towards an employment relationship and a contracting relationship.

[57] I conclude that the intention of the parties at the outset was for a contracting relationship and engagement of Mr Davis as a labour only tradesperson. There are some factors pointing towards an employment relationship but viewed overall the real nature of the relationship was not one of employer/employee.

[58] The Authority does not have jurisdiction to deal with Mr Davis's claims.

**Costs**

[59] I reserve the issue of costs. Mr Riches has until 28 August 2015 to lodge and serve submissions as to costs and Mr Thompson has until 11 September 2015 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority