

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

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| BETWEEN | Gary Fraser (applicant) |
| AND | Francis Weston t/a Sportscar World (respondent) |
| REPRESENTATIVES | Mark Nutsford for the applicant No appearance by or for the respondent |
| MEMBER OF THE AUTHORITY | Denis Asher |
| INVESTIGATION | New Plymouth, 18 April 2006 |
| DATE OF DETERMINATION | 26 April 2006 |

ORAL DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. This determination records my oral determination given at the conclusion of the relevant investigation on 18 April 2006.
2. Mr Fraser says he was unjustifiably summarily dismissed following a disagreement over a work practice and that he is owed holiday pay – statement of problem received on 25 November 2005. He seeks lost wages and holiday pay owing to

him, interest on the latter, compensation for humiliation, a penalty in respect of s. 130 (4) of the Act and reimbursement of costs.

3. In a statement of reply received on 7 December, the respondent identified itself as Sportscar World Limited. It noted that, while Mr Fraser had named Mr Weston as the respondent, the latter had always traded as Sportscar World Limited, a limited liability company. It said the applicant was not unjustifiably or summarily dismissed, that Mr Fraser was an independent contractor, who had always been required to pay his own tax, and that it was therefore able to terminate the contract without cause. In support of its action, the respondent alleged that Mr Fraser's independent contract was terminated because of "*the applicant's theft and breaches of trust*". It was claimed that Mr Fraser had gone through its accounts and company information and had passed on the same to competitors. It was also claimed Mr Fraser had retained a client's trade in vehicle as his own and that he had "*essentially stolen the vehicle*". The respondent also said Mr Fraser knew it was operating on a month to month lease, that he had attempted to take over the lease himself, that he was required to pay his own tax and could take leave when he wanted and in fact did so.
4. The parties did not undertake mediation in respect of this employment relationship problem.
5. During a telephone conference on 13 February 2006, the then counsel for the respondent, Ms Kylie Pascoe, agreed with the applicant's advocate, Mr Mark Nutsford, that mediation was unlikely to assist their clients. This was because of the dispute between the parties as to Mr Fraser's employment status, a separate legal process then underway that could see the Company's director struck off and the parties' overall costs. I therefore declined to direct this matter to mediation: s. 159 of the Act applied.
6. During the same conference the parties agreed to a one-day investigation in New Plymouth on Tuesday 18 April.
7. By letter dated 22 March Ms Pascoe forwarded on her client's behalf a letter from the Companies Office dated 12 January 2006. It advised that Mr Weston, Sportscar World Limited's sole director, had been convicted of charges under s. 128A of the

Insolvency Act 1967 on 30 September 2005. It also advised that Mr Weston was “prohibited” under s. 382 of that Act. As a result he was disqualified from registering as a motor vehicle trader (s. 24(i) of the Motor Vehicle Sales Act 2003).

8. Section 382(1)(a) of the Companies Act 1993 provides:

Where a person has been convicted on indictment of any offence in connection with the promotion, formation, or management of a company: ... that person shall not, during the period of 5 years after the conviction ... be a director ... of, or in any way, whether directly or indirectly, be connected or take part in the management of, a company, unless that person first obtains the leave of the Court which may be given on such terms and conditions as the Court thinks fit.

9. Referring to the Companies Office advice, Ms Pascoe advised that her client believed he would be in breach of the Companies Act 1992 were he to respond to witness statements or in any other way participate in the Authority’s investigation: he therefore declined to issue instructions to Ms Pascoe.

10. Ms Pascoe also advised that Sportscar World Limited’s trading licence had been cancelled: it did not trade, had no assets and all its funds had been disbursed to secured creditors.

11. Mr Nutsford advised the Authority of his client’s intention to proceed with his application. A reason given was that the applicant believed Mr Weston was continuing to operate as a motor vehicle dealer from premises known as “Giant Car Clearance Centre”. These premises carried advertising inviting the public to “See Francis – The Finance Specialist”.

12. By email received on 30 March Ms Pascoe advised that Mr Weston would not be taking “any further steps in the proceedings and neither will I”.

13. During the investigation on 18 April, Mr Fraser confirmed through his advocate that he was bringing his application against Mr Weston personally, and not against Sportscar World Limited. Because of the arguable case that Mr Weston was the applicant’s employer and therefore personally liable, and as the Companies Act

1993 does not prevent Mr Weston participating in the Authority's investigation in a personal capacity, I was satisfied it was appropriate to proceed to investigate and determine this employment relationship problem: ss. 160 & 173 of the Act applied.

Background and Applicant's Position

14. As is made clear in his statement of problem and witness statement and by way of oral evidence affirmed at the Authority's investigation on 18 April, Mr Fraser says he sought and obtained employment with the respondent, Mr Francis Weston, in Stratford, as a car salesman, from 11 February until 20 July 2005. Mr Fraser says that at no time did he have reason to believe he was an employee of any company. He says Mr Weston told him, *"You will be working for me and accountable to myself or Marion"*. Ms Marion Adams (aka Ms Marion Allen) is Mr Weston's domestic partner. The applicant also says he was told he would be paid weekly and that he was to give Ms Adams/Allen his IRD number, which he says he did.
15. Mr Fraser says he received his pay of \$400 every Thursday, following his commencement. Payment was by cash cheque. The drawer of the cheque was either *"Sportscar World"* or *"McLeod Trust"*. He says Ms Adams/Allen wrote each time on the cheque butt, *"Gary – Wages"*. He says he was also told he could make personal use of any car in the yard and that there was never any mention of him being an independent contractor. He believed the wages he received were nett of tax.
16. Mr Fraser says that, after about 3-months employment, Mr Weston proposed – and he accepted – an incentive for sales, over and above the continuation of his \$400 weekly wage, being 10% of the profit on each car sale he made.
17. Mr Fraser says that, in response to an approach from Ms Adams, and because of a new computerised wage programme, he and another worker subsequently completed some tax forms.
18. According to the applicant, problems occurred on 18 July 2005 when Mr Weston asked him to register a car notwithstanding the absence of a particular form (the MR2a form). He refused. On Wednesday 20 July Mr Fraser says he confronted Mr

Weston by cell phone about the latter using his name to falsely register a motor car: he says Mr Weston became very angry, that he said to him if he was not prepared to do this then he could go. He was twice told to go. The call ended. Mr Weston then called him back and again told him to go. Shortly afterwards Mr Weston drove into the car yard and again told him to leave. The applicant says Mr Weston used obscene language throughout these exchanges, to reinforce the point that Mr Fraser had to go.

19. Corroborating evidence in support of Mr Fraser's account of events on 20 July 2005 was provided by a former work colleague, Mr Brent Shaw. In a written statement, confirmed under affirmation at the Authority's investigation, Mr Shaw explained how, at that time, he also worked for Sportscar World "*under the owner Francis Weston*" (par 3 of his statement). While working out of the Hawera Branch, Mr Shaw explained that he was in Stratford on 20 July to pick up a vehicle for transfer. He overheard Mr Fraser's telephone conversations with Mr Weston. He could hear the latter getting angry as well as his use of obscene language. He says Mr Fraser was calm. He also says he heard Mr Fraser ask the question of Mr Weston, "*So you are firing me, is that right, so I'm fired*" (par 10 of his statement). Mr Shaw says that, later the same day, he reported the dismissal to his manager in Hawera who told him (the witness) that he already knew, that Mr Weston had telephoned him to say that Mr Fraser had quit: Mr Shaw says he corrected his manager by saying the applicant had been fired by Mr Weston.
20. Mr Fraser says that the first time the claim he was an independent contractor arose in a conversation with Mr Weston, after his dismissal, when he says he was attempting to obtain holiday pay owed to him. He also says Mr Weston warned him to back off or he would be in trouble with the IRD and for theft. Mr Fraser says that the respondent's warning caused him to approach, and be interviewed by, IRD. After showing the IRD representative all of his receipts for weekly pay, and after a 3-hour interview, Mr Fraser says the IRD representative assured him they were happy and that they were of the belief he was definitely an employee (although in Mr Fraser's witness statement the reference is to the IRD representative believing the applicant was an employee of Sportscar World Limited).

21. Mr Fraser's advice of a personal grievance in respect of "Sportscar World" was set out in a letter dated 1 August 2005. It was responded to by letter dated 25 August 2005 by counsel, Mr Grant Smith. I am advised that Mr Smith is since deceased. In his letter Mr Smith uses the intituling "Gary Fraser v Sportscar World" and refers to "my clients" without identifying them further. Mr Smith's instructions were, he said, amongst other things, that Mr Fraser was not an employee and, because he was instead an independent contractor, his clients were not required to keep his records. Serious allegations were levelled against the applicant, namely theft, breaches of trust and industrial sabotage. Mr Smith recorded his clients reserving "the right to make a complaint to the Police". Mediation was refused as not "suitable ... for the abovementioned reasons".

22. I record here that no evidence has been advanced by Sportscar World Limited or Sportscar World or by Mr Weston at any time in support of the very serious allegations set out in Mr Smith's letter of 25 August 2005 or the statement in reply received on 7 December. There is also no evidence of any complaints to the Police about theft, industrial sabotage or collusion with other parties to sell cars and provide himself with bonus payments he was otherwise not entitled to. There is no evidence of the respondent or his company seeking injunctions or damages against Mr Fraser in respect of their claim he was going through accounts and company information and was passing on the same to competitors.

23. During the investigation Mr Fraser quantified the remedies he seeks. They are:

- Lost wages: the applicant says he sought work without success for 17 weeks following his termination, before obtaining his current salesman position in a truck wrecking company. That included pursuing "everything that came up including stores, packing, salesmen, deliveries positions, etc" (oral evidence) He therefore claims \$400 plus average weekly commission earnings of \$100, i.e. \$900 x 17 weeks, for that period, a total of \$15,300 nett.
- Holiday pay: Mr Fraser says he is owed holiday pay on 7 and ½ months' wages. Mr Fraser calculates his average nett earnings for that period as \$29,250 and therefore claims unpaid holiday pay totalling \$1,755 nett.

- Mr Fraser seeks interest on his unpaid holiday pay and leaves the calculation of that amount to the Authority's discretion.
- Mr Fraser seeks compensation for humiliation, etc of \$8,000.
- A penalty in respect of s. 130 (4) of the Act; and
- Costs of \$2,500.

Discussion and Findings

Employee or Independent Contractor?

24. I am satisfied for the following reasons that the real nature of Mr Fraser's employment status was that of an employee and not that of an independent contractor: s. 6 of the Act applied. This is because of the applicant's uncontested evidence that, from the outset of their relationship, the applicant was "*working for*" Mr Weston. There is no evidence that this relationship was anything other than that of employer/employee. There is no reason to doubt Mr Fraser's claims he provided Mr Weston and his partner with relevant IRD information for PAYE deductions. There is no evidence of Mr Fraser selling cars independently of Mr Weston's activities, either for himself or for any other entity, or of him working in any way on his own account. I find Mr Fraser was not engaged as an independent contractor: *Bryson v Three Foot Six* [2003] ERNZ 581.

Who was the Employer?

25. I do not accept that Mr Fraser was employed, in any capacity, by Sportscar World Limited. Instead, I am satisfied that Mr Weston was the applicant's employer. I reach this conclusion because: there is no written employment agreement to the effect that the Company was the applicant's employer. While cash wages cheques were apparently drawn by "*Sportscar World*" that is not on its face the same entity as the company, and other cheques were drawn by "*McLeod Trust*" (par 11 of the applicant's statement and reiterated by way of oral evidence).

26. And while there is no written employment agreement recording Mr Weston as the applicant's employer, I am satisfied from Mr Fraser's uncontested evidence that Mr Weston made it clear from the outset the applicant would be working for him, that he effectively controlled the applicant throughout the duration of their employment relationship and that the applicant had no reason to believe he was employed by any one other than Mr Weston. If Mr Weston employed the applicant on behalf of his company he clearly failed to disclose that fact: Mr Fraser is therefore able to rely on the doctrine of "*undisclosed principal*" and proceed against Mr Weston (*Cuttance v Purkis* [1994] 2 ERNZ 321).

Unjustified Dismissal?

27. I am satisfied from the uncontested evidence provided by the applicant and his witness, Mr Shaw, under affirmation at the investigation on 18 April, that Mr Fraser was unjustifiably dismissed on 20 July 2005: this is because Mr Fraser's dismissal was unlawful in that he was dismissed – and here I accept Mr Fraser's uncontested evidence – for refusing to undertake dishonest behaviour. The dismissal was also summary and without cause. There is no evidence of Mr Weston giving reasoned consideration to what Mr Fraser was able to say, in the limited time available to him. There is every indication that Mr Fraser's unjustifiable dismissal occurred in the context of an angry rage by his employer that was generated by the applicant's refusal to behave dishonestly, as required by Mr Weston: the latter's demands of the applicant were in complete violation of his obligations, as a fair and reasonable employer, to make only lawful demands of his employee.

Remedies

Penalty

28. Mr Weston declined Mr Fraser's advocate's request to provide wage and time records on the ground that he was not an employee, but was instead an independent contractor, and he was not required to keep records. I do not accept the genuineness of this claim. It was reasonable to expect, on a practical basis, records to have been kept, and therefore made available, of the regular weekly payments made to the applicant throughout the employment relationship. It was

also reasonable to expect the information to have been provided without prejudice to the reasoning advanced on Mr Weston's behalf, and until the issue was agreed or determined.

29. Section 130(4) provides, amongst other things, that every employer who fails to comply with such a request is liable to a penalty. I am satisfied that the Authority's discretion in this instance is properly exercised by imposing on the respondent, Mr Francis Weston, a penalty of \$500, all of which is to be paid to the Crown.

Holiday Pay, Interest and Lost Wages

30. I am also satisfied that Mr Fraser is fairly entitled to recover unpaid holiday pay totalling \$1,755 nett and to have interest awarded on it at the current Reserve Bank 90 day rate of 7.46% from the day of his dismissal, 20 July 2005, to the date of payment and that he is fairly entitled to recover 17-weeks' wages of \$15,300 under s. 128 (3) of the Act.

Compensation for Humiliation, Etc

31. I am also satisfied, from the evidence presented at the investigation, that Mr Fraser has fairly and reasonably made out his claim for \$8,000 compensation for humiliation, etc as a result both of the effects on him resulting from his unjustified summary dismissal and from the respondent's unfounded serious allegations of theft, sabotage and breach of trust.

Contributory Fault

32. I am satisfied from the investigation that there is no evidence to support a finding that the applicant in any way contributed to the situation that gave rise to Mr Fraser's personal grievance: s. 124 of the Act applied.

Costs

33. Mr Fraser also seeks to recover costs relating to the investigation totalling \$2,500. While detailed submissions were not provided in support of this claim, Mr Nutsford

spoke to the costs incurred by his client to date, exclusive of costs attending mediation and GST. I am satisfied that \$2,500 is a fair and reasonable contribution to the applicant's costs.

Determination

34. For the reasons set out above, I find for the applicant, Mr Gary Fraser's claim that he was unjustifiably dismissed by the respondent, Mr Francis Weston, and direct him to pay the following sums to the applicant:

- holiday pay and lost wages: unpaid holiday pay totalling \$1,755 (one thousand, seven hundred and fifty-five dollars) nett and 17-weeks' lost wages arising out of Mr Fraser's unjustified dismissal totalling \$15,300 (fifteen thousand, three hundred dollars) nett.

- Interest on holiday pay: to be calculated at 7.46% on \$1,755 from the day of the applicant's dismissal, 20 July 2005 to the day of payment by the respondent.

- Penalty: \$500 (five hundred dollars) for breach of s. 130(4) to be paid to the Crown.

- Compensation for humiliation, etc: \$8,000 (eight thousand dollars)

- Costs: \$2,500 (two thousand, five hundred dollars) contribution to the applicant's costs.

Denis Asher

Member of Employment Relations Authority

