

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 182
5341630

BETWEEN BRYAN TREVOR GIBBS
 Applicant

A N D GRASSHOPPER
 LAWNMOWING SERVICES
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
 Peter Luxford, Advocate for Respondent

Interview with applicant: 7 July 2011 and further information provided 28 September
 2011

Interview with respondent: 31 August 2011

Date of Determination: 22 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Bryan Gibbs seeks from Grasshopper Lawnmowing Services Limited three weeks payment in lieu of notice for termination of his contract. He confirmed he had since lodging his statement of problem been paid the annual leave that was owing to him.

[2] Grasshopper Lawnmowing Services Limited (Grasshopper) is a duly incorporated company having its registered office in Auckland and carrying on the business of property maintenance in New Zealand.

[3] The manager and one of the directors of Grasshopper, Peter Luxford, said in the statement in reply that the contract with Mr Gibbs was terminated because of the Christchurch earthquake on 22 February 2011. He said that there was no provision in Mr Gibbs contract for notice where it was necessary to terminate because of a natural disaster and that Mr Gibbs was a labour only contractor.

The investigation process

[4] The Authority held a telephone conference with Mr Gibbs and Mr Luxford on 10 June 2011.

[5] At the time of the telephone conference Mr Gibbs had shifted from Christchurch to Blenheim in an attempt to find further work following the earthquake. Mr Luxford, although regularly travelling to Christchurch was primarily based in Auckland.

[6] In order to contain costs to both parties the Authority suggested, and the parties agreed, to the following process. The Authority would interview Mr Gibbs and hear his evidence during its next scheduled visit to Blenheim and then provide a typed record of the interview to Mr Luxford and to Mr Gibbs. The Authority would then interview Mr Luxford in Christchurch and hear his evidence and then provide a typed record of the interview to Mr Gibbs and Mr Luxford. Mr Gibbs could then make further comment. This process was duly followed.

The issues

[7] There are two issues that the Authority is required to resolve.

- Was Mr Gibbs working as an independent contractor or an employee for Grasshopper? If Mr Gibbs was not an employee of Grasshopper then the Authority has no jurisdiction to deal with his claim. The Disputes Tribunal would then be appropriate forum.
- If it is found Mr Gibbs was an employee then is he owed three weeks payment in lieu of notice in the sum of \$2,250.00 gross?

Was Mr Gibbs working as an independent contractor or an employee of Grasshopper?

[8] Mr Gibbs commenced with Grasshopper on or about 10 January 2011 and his last day with the company was 28 February 2011. He mowed lawns at a number of retirement home facilities around Christchurch.

[9] There is a signed agreement between Mr Gibbs and Grasshopper headed "Gardening Contractors Agreement". It records on the signature page a start date of 13 December 2010. Mr Gibbs and Mr Luxford both recall the start date as being in

early January 2011 and I accept, on that basis, that the recorded start date in the contract is more likely than not incorrect.

[10] Mr Luxford said and Mr Gibbs did not really challenge this that Mr Gibbs wanted to be a labour only contractor because his partner was already engaged in that manner with Grasshopper.

[11] There was no real dispute about the provisions of the contract and what happened on a practical day-to-day basis. Mr Gibbs was expected to pay his own tax and ACC payments out of the \$750 per week paid to him. He had spoken to an accountant from Small Business Accountancy about putting aside money each week to make the taxation commitments.

[12] The contract provided that the contractor was not to work on statutory days but did not receive a deduction in pay for those statutory days not worked. The contract provided for four weeks holiday per year and up to seven days sick leave with no doctors certificate required.

[13] Mr Gibbs was required to wear a green T shirt with a yellow emblem with Grasshopper Lawnmowing Services on it all times when undertaking work for the company. The hours of work provision in the contract required 40 hours per week to be worked and an expectation for a reasonably even spread of those hours over the week. Mr Gibbs said that his hours averaged about eight per day from Monday to Friday.

[14] Grasshopper provided all the equipment including a lawn mower and a van as well as when required a trailer. There was limited private use of the van.

[15] The contract provided support would be available from Grasshopper if required.

Conclusion as to whether Mr Gibbs was an independent contractor or an employee

[16] Section 6 of the Employment Relations Act 2000 deals with the meaning of employee and in that section refers to amongst other matters for the purposes of this case the following:

6. *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; and ...*
- (2) *In deciding for the purposes 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 Authority –*
 - (a) *must consider all relevant matters, including any matters that indicate the intention of the parties; and*
 - (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship. ...*

[17] There have also been a number of cases before the Courts to consider what *all relevant matters* means under s.6. One of the leading cases is the Supreme Court judgment in *Bryson v. Three Foot Six Ltd (No.2)* [2005] ERNZ 372. I have been guided by that judgment and have taken into account the matters considered appropriate in that judgment in determining the issue about whether Mr Gibbs was an independent contractor or an employee.

[18] I have considered the intention of the parties in this case. Mr Luxford explained in his evidence that Grasshopper has both employees and labour only contractors. In this case Mr Gibbs agreed to be a labour only contractor signing a written contract with Grasshopper that was headed up “Gardening Contractors Agreement”. The agreement describes Mr Gibbs as a contractor.

[19] Section 6 of the Act makes it clear that the Authority is not to treat as a determining matter any statement by the persons that describes the nature of their relationship and it is important for the Authority to consider the way the parties actually behaved in implementing the contract and how the relationship between them operated in practice.

[20] I turn firstly to the written agreement itself. There are provisions within it which are consistent with a contractor or contract for service arrangement. These provisions are the way the parties were described and the requirement that Mr Gibbs pay his own tax and ACC payments.

[21] There were several provisions in the contract that were indicative of an employment relationship. These were paid sick leave, the paid four weeks holiday, having no deduction made to the \$750 per week payment for not working on a statutory holiday and the supply of tools, vehicle and equipment. Also consistent with an employment arrangement was that Mr Gibbs did not render invoices and was paid the same amount each week of \$750.

[22] The common law tests to determine whether a person was an employee or not that historically applied have been also applied under the Employment Relations Act 2000. These tests assess in order to establish the real nature of the relationship the extent to which Mr Gibbs was working under the control of Grasshopper, whether what he did was an integral part of Grasshopper's business and whether or not he was effectively working on his own account.

[23] The work that Mr Gibbs was required to carry out was set out in the contract and involved mowing, trimming, weeding, pruning, spraying, removal of debris and other work as requested by Grasshopper or the management of the Oceania Group.

[24] Mr Gibbs was required with Grasshopper to formulate a schedule of works and every week by email advise what site he was working on each day for the next week. He was required and did undertake that work with an even spread over the week up to 40 hours per week. Mr Luxford was surprised that Mr Gibbs had not undertaken work elsewhere. Mr Gibbs said that he should not be surprised because Mr Gibbs was not allowed to use the van for other than reasonable private use. I accept Mr Gibbs did not work elsewhere. He was committed to Grasshopper for 40 hours per week or about eight hours per day between Monday and Friday.

[25] If Mr Gibbs needed support or additional manpower then the contract provided that would come through Grasshopper. He did not employ anyone himself to undertake the work for him or to assist in him doing so. If Mr Gibbs felt that he had been asked by a facility manager to a job outside of his responsibility then he was to refer that matter back to Grasshopper for clarification. It was set out in the contract that Grasshopper would carry out random site inspections to ensure the highest standard of workmanship.

[26] I find that there was control over what work Mr Gibbs did and when Mr Gibbs did his work. I find that the factors under the control test favour an employment relationship or a contract of service.

[27] The nature of the work carried out by Mr Gibbs was an integral part of the work that Grasshopper undertook of maintenance of property. In undertaking the work Mr Gibbs wore the Grasshopper uniform, used the tools and was provided with a van and a trailer by Grasshopper.

[28] I turn now to whether there was evidence of Mr Gibbs operating a business on his own account, the fundamental test. In support of Mr Gibbs operating on his account was his method of taxation. Taxation aside Mr Gibbs did not supply tools, a lawnmower, van or trailer. He did not hire anyone else to do the work for him and if needed assistance that was provided by Grasshopper. He did not invest anything in the business and he did not bring any particular skill to the role. Further he was paid \$750 per week even for those weeks when there were statutory days or the weather was such that he could not work and he was also to be provided with four weeks paid holiday. Mr Gibbs was also entitled to sick pay. There was nothing Mr Gibbs could do to increase his earnings unless he was specifically asked to carry out some more work by Grasshopper.

[29] In terms of industry practice I accept that the maintenance of property industry is one where there are independent contractors. I did not hear any evidence on industry practice to compare this relationship to.

[30] The parties intended this to be a labour only contract. The evidence though was that the relationship assessed in terms of control, integration and particularly the fundamental test support that the real nature of the relationship between Mr Gibbs and Grasshopper was one of employment.

[31] I find that Mr Gibbs was an employee and I can go on to determine the second issue about notice.

Is Mr Gibb's owed three weeks payment in lieu of notice in the sum of \$2,250 gross.

[32] Mr Gibbs and Mr Luxford agree that Mr Gibbs was paid one week's notice from 28 February 2011. Mr Luxford on behalf of Grasshopper resists the claim for the balance of three weeks notice and he does so for the following reasons:

- He says the wording of the contract does not require Mr Gibbs to be paid four weeks notice;
- Mr Luxford says the continued performance of the contract was frustrated by the February 22 earthquake;
- Mr Luxford says the company has been reasonable in paying one week's notice and also paying Mr Gibbs when he had four days off for family related earthquake matters the week prior.

[33] The contract provided the following in the event of termination:

If any customer is dissatisfied, or for any reason asks Grasshoppers to replace the contractor this contract could be terminated by Grasshoppers giving the contractor four week's notice of termination. Every effort will be made by Grasshoppers to resolve any problem that arises and only terminate this contract as a last resort. If the contractor is guilty of gross misconduct this contract could be terminated immediately. Should the contractor wish to terminate this agreement he must give at least four weeks notice of his intention.

[34] Mr Luxford says that four weeks notice is only required from Grasshoppers when the customer is dissatisfied or for any reason asks to replace the contractor. He says the situation that faced Grasshoppers was that two of the residential facilities were badly damaged in the earthquake and as a result the number of staff had to be reduced.

[35] I accept that there is no specific mention of the requirement for Grasshopper's to give four weeks notice of termination beyond the situation Mr Luxford relies on. I do note that Mr Gibb's would have regardless of the situation been required to give at least that amount of notice if he was to terminate the relationship. The situation that Grasshopper faced after the earthquake was akin to that of a redundancy situation. A decision had to be made to reduce staff and which staff would go. Mr Gibbs feels aggrieved about being selected although it is not an issue that I find I need to explore and make findings about.

[36] The law has held where there is no contractual right to notice in a redundancy situation an employee is entitled to reasonable notice at common law – *Charta Packaging Ltd v Howard* [2002] ERNZ 10 [CA]. I am guided as to reasonableness by the notice the parties agreed would apply in the situation if Mr

Gibbs had to be replaced because of customer dissatisfaction or where he wanted to resign. The period agreed to in those circumstances was four weeks. Mr Gibbs was helpful and flexible about continued employment after the earthquake. For completeness most of the other people employed/engaged by Grasshoppers in Christchurch stayed on with the company. Mr Gibbs put forward several suggestions to Mr Luxford in terms of his continued employment such as a Government subsidy, working on reduced hours and, I note there was some dispute about this, going back to his mowing role. For various reasons Mr Luxford did not consider these suggestions would be successful or practicable.

[37] I conclude that the period of reasonable notice for Mr Gibbs in the event of redundancy would be the same as that provided for other circumstances in the contract of four weeks.

[38] I now turn to the suggestion by Mr Luxford that performance of the contract was frustrated and therefore Grasshopper was discharged from further liability under it.

[39] The doctrine of frustration has been held by the Court of Appeal to apply to employment agreements in *Karelrybflot AO v. Udovenko* [2000] 2NZLR 24 at [37]. The Court however stated:

..... it seems to us that, in view of the nature of the contract of employment, the doctrine will not easily be able to invoked by an employer because of the drastic effects which it would have on the rights of vulnerable employees.

[40] The Court of Appeal in *A Worker v. A Farmer* [2010] NZCA 547 at para.21 held:

... it is only if the employment contract did not make sufficient provision for what occurred that the doctrine of frustration will apply.

[41] I do not find that the occurrence of an earthquake frustrated the employment agreement between Mr Gibbs and Grasshopper and discharged Grasshoppers from any further liability under it to give notice or make payment in lieu of notice. The employment agreement in this case was capable of being terminated. I have found

that a reasonable period of notice at common law based on what the parties themselves agreed for other circumstances would be four weeks.

[42] I find Grasshoppers is required to pay to Mr Gibbs the balance of the notice period of three weeks.

Determination

[43] I order Grasshopper Lawnmowing Services Ltd to pay to Bryan Trevor Gibbs the sum of \$2,250 gross.

[44] Neither party incurred the cost of a representative. Mr Gibbs did have to make payment for a filing fee for which having been successful he should be reimbursed. I order that Grasshopper Lawnmowing Services Ltd pay Bryan Trevor Gibbs the sum of \$71.56 being the filing fee.

Helen Doyle
Member of the Employment Relations Authority