

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 214
3004315

BETWEEN DARREN GIBSON
 Applicant

A N D FINEWAY BUILDERS
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Dave Vinnicombe, Advocate for Applicant
 Brendon Hamill, Director for Respondent

Investigation Meeting: 20 July 2017 at Auckland

Written Record of Oral
Determination: 21 July 2017

**WRITTEN RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Gibson says he was employed on 14 September 2016 by Fineway Builders Limited (Fineway) as a painter then unjustifiably dismissed on 07 November 2016. Mr Gibson says that on 07 November 2016 Fineway's then manager, Mr Mark Winks, texted him (Mr Gibson) saying there was no more work available.

[2] Fineway denies employing Mr Gibson and say he was an independent contractor. Fineway accepts that if Mr Gibson was an employee then Fineway didn't comply with its good faith and procedural fairness obligations before he was dismissed.

The issues

- [3] The following issues are to be determined:
- (a) Were the parties in an employment relationship?
 - (b) If so, was Mr Gibson dismissed?
 - (c) If so, was dismissal justified?
 - (d) If not, what if any remedies should be awarded?
 - (e) What if any costs should be awarded?

Were the parties in an employment relationship?

Relevant law

[4] In order for the Authority to have jurisdiction to investigate Mr Gibson's unjustified dismissal claim he must establish on the balance of probabilities that the parties were in an employment relationship as defined in the Employment Relations Act 2000 (the Act).

[5] Section 5 in the Act interprets an employment relationship as any of the employment relationships specified in s.4(2) of the Act.

[6] Section 4(2) of the Act defines an employment relationship as (among other things) the relationship between an employer and an employee employed by the employer. Section 4(2) of the Act does not include parties who are in an independent contractor relationship.

[7] Section 6 of the Act defines the meaning of "*employee*". It includes any person employed by an employer to do any work for hire or reward under a contract for service.

[8] Section 6(2) of the Act requires the Authority, in determining whether or not a person is an employee, to determine 'the real nature of the relationship' between the parties.

[9] When doing so, s.6(3) of the Act requires the Authority to consider all relevant matters, including the intention of the persons involved, but it is not to treat as

determinative any statement by the parties which describes the nature of their relationship.

[10] The labelling of a relationship by the parties is therefore merely one of the factors to be considered within the overall mix. So the intention of the parties is relevant but not decisive of the question of whether or not Mr Gibson was an employee.

[11] The control test, integration test and fundamental/economic reality tests of the relationship are all relevant factors to consider along with other relevant matters. The Authority's inquiry into the real nature of Mr Gibson's relationship with Fineway is intensely factual.

Offer of work

[12] Mr Gibson and his partner rented residential premises off Mr Winks' partner Debbie. After being made redundant from his job Mr Gibson approached Mr Winks' partner, Debbie, to see if Mr Winks had any work for him (Mr Gibson) to do.

[13] As a result of that inquiry Mr Winks offered Mr Gibson painting work at \$18.50 per hour. Mr Gibson asked for 40 hours' work a week but Mr Winks says he could not guarantee that because there was not enough work to keep him fully engaged and poor weather also meant painting may have to stop.

[14] This offer of work involved a casual conversation that lasted a few minutes and was devoid of specifics, other than the rate of pay. The status of the relationship was never discussed. The arrangement was that Mr Winks would tell Mr Gibson when and where to work, with Mr Winks effectively being Mr Gibson's manager.

[15] Mr Winks was responsible for engaging contractors to complete Fineway's painting jobs. He has since left Fineway's employment. Mr Winks provided an unsigned witness statement but did not appear at the Authority's investigation meeting to give evidence.

[16] Mr Hamill as sole director of Fineway had no direct contact with Mr Gibson. Mr Hamill was therefore unable to provide evidence about the offer of work or the ending of the engagement.

What do the relevant documents suggest?

[17] There is no employment agreement. There are no wage and time records or holiday and leave records. There is no independent contractor documentation. There are no invoices which are usually a feature of an independent contractor arrangement.

[18] There is a “*Contractor Payslip Summary*” document which identifies the “*contractor*” name as Darren Gibson and the fact that his tax code is WT, which signifies that withholding tax was deducted.

[19] Mr Gibson did not see this until it was appended to the Statement in Reply. The version provided to the Authority is date and time stamped 22/11/2016 at 14:20 which supports Mr Gibson’s claim that this was not a document that he saw, either at the beginning of his employment or while employed.

[20] Because it was generated after the relationship between the parties had ended and Mr Gibson was unaware of it while engaged I consider it a neutral factor because it is indicative of Fineway’s view of the relationship only.

What did the parties intend?

[21] The intention of the parties is a significant but not determinative factor in determining Mr Gibson’s status.

[22] I find that there was no mutual intention regarding the status of the arrangement between the parties. Mr Winks appears to have assumed that it would be an independent contracting arrangement while Mr Gibson assumed that it would be an employment relationship.

[23] Mr Hamill told the Authority he assumed that any painters Fineway used would be independent contractors because it had never wanted to engage painters as employees.

[24] I find there was no evidence of a mutual intention to enter into either an employment relationship or an independent contracting arrangement. Each party just proceeded in accordance with their assumption about the status of the relationship.

[25] I consider that the lack of mutual intention tends to support the existence of an employment relationship. The Act defines employee as somebody who is intending to

work for reward. Mr Gibson was obviously intending to be compensated for the work he did for Fineway.

[26] If Fineway wanted to create an independent contractor arrangement the onus was on it to make that clear to Mr Gibson by specifically discussing the status of their relationship and providing the documentation so that he could make an informed decision about whether or not he was prepared to work as an independent contractor. However, that did not occur.

How did the arrangement operate in practice?

[27] Mr Gibson says Mr Winks told him when and where to work and what sort of work to do. If the weather was too rainy then it was Mr Winks who made the decision about whether or not to send Mr Gibson home or to offer him alternative interior painting work to do.

[28] It was Mr Winks who identified which worksites that Mr Gibson was to be on and what time he was to start and finish. Mr Winks also assessed whether the job had been done as instructed. Mr Gibson reported to Mr Winks when he (Mr Gibson) could not attend work.

[29] Mr Gibson also had to advise Mr Winks of the actual hours he had worked on any given day. Once Mr Gibson had completed the work he had been assigned to do by Mr Winks that he would need to ask Mr Winks about where to go and what to do next.

[30] I accept Mr Gibson's evidence that Mr Winks was allocating the work to him and was monitoring the work that he did so it appears that Mr Gibson was merely following Mr Winks' specific instructions regarding the work required.

Payment

[31] Mr Gibson was paid by direct transfer from Fineway's bank account into his own bank account. Mr Gibson did not produce nor generate invoices nor was he ever asked to do so.

[32] Mr Gibson would advise Mr Winks of the actual hours he had worked then Mr Winks used that information to get Fineway's payroll provider to pay Mr Gibson. From Mr Gibson's perspective he received weekly wages. Mr Gibson did not receive

payslips while employed so assumed Fineway was deducting the correct PAYE before he was paid.

[33] This tends to suggest the parties were in an employment relationship.

Was Mr Gibson in business on his own account?

[34] Mr Gibson was not in business on his own account. He has never operated his own business and has only ever been an employee.

[35] Mr Gibson did not have a business entity. He did not set up or own a company or other legal entity to operate a business. He did not have business cards or an office. He did not have any business tools or work items which he used for the work he did for Fineway. He did not have a commercial vehicle of his own.

[36] Mr Gibson took no risks and have no opportunity to profit from his actions. He was merely paid per hour that he worked.

[37] The way the relationship operated in practice is strongly indicative of an employment relationship.

Tax arrangements

[38] Mr Winks did not make it clear to Mr Gibson at the outset that Fineway would be deducting withholding tax from his pay. Mr Gibson had no idea that is what had happened until Fineway provided evidence about that to the Authority.

[39] Withholding tax should not have been deducted because there was no evidence Mr Gibson was running his own business at the time. He had not attempted to avail himself of the tax or other benefits that can be associated with self-employment.

[40] I consider that the tax arrangements are neutral in terms of establishing the nature of the relationship.

The control test

[41] The control test looks at the degree of control that is exerted over the work and the manner in which it is to be done. The greater extent to which an individual is regulated and supervised then the more likely they are to be considered to be an employee.

[42] Mr Winks exercised a relatively high level of control over Mr Gibson in terms of allocating the hours of work, the location of the work, the type of work to be done. He also approving Mr Gibson's hours of work before Mr Gibson could be paid.

[43] The degree of control that existed is indicative of an employment relationship.

The fundamental/economic reality test

[44] The fundamental test looks at whether a person performing services is in business on their own account. I find that there was no evidence that Mr Gibson was in business on his own account.

[45] Mr Gibson had told Mr Winks that he had recently been made redundant which was why he was seeking work.

[46] Mr Gibson had no ability to profit from his own endeavours and he had not assumed any of the risks associated in terms of Fineway's operations or regarding the way in which he provided his services to Fineway.

[47] Mr Gibson had no autonomy in terms of how or when he would do the work he was required to do. Mr Gibson was paid for the labour he provided and that was the full extent of the arrangement between the parties.

[48] The fundamental/economic test strongly suggests the existence of an employment relationship.

Integration test

[49] The integration test considers whether work performed by Mr Gibson was an integral part of Fineway's business and whether Mr Gibson had effectively become part and parcel of Fineway's organisation.

[50] There was nothing to suggest that Mr Gibson could or would be seen by outsiders as anything but a Fineway employee. There was no evidence to suggest that Mr Gibson was operating distinct from Fineway in any way. The customers for whom Mr Gibson was doing painting work would not have known he was not part of Fineway's organisation.

[51] The integration test is indicative of an employment relationship.

Tools of trade

[52] Fineway provided Mr Gibson with all the equipment necessary to carry out his duties. Mr Gibson did not have any tools of trade. Fineway provided everything he needed to do the painting jobs it gave him to do. This included rulers, paintbrushes, overalls, paint and all the sundries needed to carry on painting operations on behalf of Fineway.

[53] This supports the existence of an employment relationship.

Ability to subcontract

[54] Mr Gibson had no ability to subcontract the work Mr Winks had allocated to him. This indicates an employment relationship.

Ability to work for others

[55] The issue of Mr Gibson working for others never arose. Mr Gibson also only worked for Fineway over the material period. He did not receive income from elsewhere and did not engage in any other work activities.

Industry practice

[56] There was no evidence about this so it is a neutral factor.

Real nature of the relationship

[57] Standing back and weighing all of the various factors to determine the real nature of the relationship establishes that Mr Gibson was more likely than not an employee who was in an employment relationship with Fineway as defined by the Act.

[58] Because Mr Gibson has established that he was an employee in terms of the s.6(1)(a) meaning of employee in the Act the Authority has jurisdiction to investigate his unjustified dismissal claim.

Was Mr Gibson unjustifiably dismissed?

[59] Dismissal is to be objectively determined in accordance with the justification test in s.103A of the Act. A fair and reasonable employer is expected to comply with its statutory obligations.

[60] I find that Fineway's decision to advise Mr Gibson by text that it would not have any work available for him in future was a decision that adversely impacted on Mr Gibson's ongoing employment.

[61] That meant s.4(1A) of the Act applied.

[62] Section 4(1A) of the Act requires an employer that is proposing to make a decision about an employee's ongoing employment to provide the employee with access to relevant information and an opportunity to comment on it before a final decision is made. That did not occur.

[63] Fineway also failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act.

[64] Fineway's failure to comply with its statutory obligations fundamentally undermines its ability to establish that its dismissal of Mr Gibson were justified.

[65] Fineway's failure to carry out a fair and proper process before deciding to end Mr Gibson's employment also fundamentally undermines its ability to substantively justify the decision that it made.

[66] Mr Hamill told the Authority that at the time Mr Winks sent Mr Gibson a text saying there was no more work available Fineway was wanting to reduce its costs. However none of the financial or other information to support that claim was produced to the Authority. Nor was it shared with Mr Gibson. Nor was there any selection criteria or process applied.

[67] Mr Gibson says that his partner and Mr Winks' partner had an altercation which resulted in Mr Gibson and his partner moving out of their rental property. Mr Gibson says that as soon as they did that Mr Winks texted him to say there was no work available.

[68] The timing of the decision to dismiss Mr Gibson tends to lend weight to Mr Gibson's view that the dispute between their partners caused Mr Winks to dismiss Mr Gibson. Fineway is therefore unable to discharge the onus of establishing that Mr Gibson's dismissal was substantively justified.

Outcome

[69] Fineway's dismissal of Mr Gibson was substantively and procedurally unjustified.

What if any penalties should be awarded?

Mitigation

[70] Mr Gibson mitigated his loss by obtaining new employment two months after he was dismissed.

Lost remuneration

[71] Mr Gibson was out of work for two months. He has based his lost remuneration claim on the average number of hours he worked for Fineway (27) each week multiplied by his hourly rate of \$18.50 multiplied by the eight weeks he was out of work.

[72] Mr Gibson then subtracted the \$1,800 he received in benefit payments while out of work to arrive at the figure of \$2,196 in actual lost remuneration.

[73] Fineway is ordered to pay Mr Gibson \$2,196 under s.128(2) of the Act to compensate him for the actual remuneration he lost as a result of his unjustified dismissal.

Distress compensation

[74] Mr Gibson gave evidence of the distress hurt humiliation and injury to feelings he suffered as a result of his unjustified dismissal.

[75] Fineway is ordered to pay Mr Gibson \$3,500 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his unjustified dismissal.

What if any costs should be awarded?

[76] Mr Gibson as the successful party is entitled to a contribution towards his actual legal costs.

[77] The notional starting point for assessing costs is \$4,500 for the first day of an investigation meeting. This matter involved one hour of investigation time so the notional starting point for assessing costs in this matter is \$750.

[78] Neither party identified any factors which they say should warrant the notional starting tariff being adjusted and I am not aware of any.

[79] Fineway is ordered to pay Mr Gibson \$750 towards his actual legal costs plus \$71.56 to reimburse his filing fee.

Summary

[80] Within 28 days of the date of this determination Fineway is ordered to pay Mr Gibson \$6,517.56 consisting of:

- a. \$2,196 lost remuneration;
- b. \$3,500 distress compensation;
- c. \$750 legal costs;
- d. \$71.56 filing fee.

Rachel Larmer
Member of the Employment Relations Authority