

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 238  
3030816

BETWEEN	FAYE JENSEN Applicant
AND	TONY BRAKE First Respondent
AND	RACHEL IRWIN Second Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person  
Tony Brake for the Respondents

Investigation Meeting: 25 July 2018 by telephone

Date of Oral Indication: 25 July 2018

Written Record Issued: 30 July 2018

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**WRITTEN DETERMINATION FOLLOWING ORAL INDICATION OF  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. Faye Jensen was an employee of Tony Brake.**
- B. Within 14 days of the date of this determination Tony Brake is ordered to pay the following sums to Faye Jensen:**
- (i) \$1063.12 gross as wage arrears; and**
  - (ii) \$71.56 being the filing fee**

### **What is the employment relationship problem?**

[1] Faye Jensen claims that she was employed to work at the Mamaku Village Takeaways by Tony Brake and his partner Rachel Irwin, or alternatively by Mr Brake alone. She seeks payment of wage arrears.

[2] Mr Brake says that he was a sole operator of the Mamaku Village Takeaways (the takeaways or the business) and that Mrs Jensen worked there as an independent contractor, not as an employee.

[3] With the parties' agreement, the Authority proceeded to investigate this matter over the telephone, as a party was about to leave the country for a job overseas.

[4] The investigation meeting was held by telephone on 25 July 2018. I heard from Mrs Jensen, her husband Don Jensen, Mr Brake and Ms Irwin.

[5] I gave an oral indication of my preliminary findings at the end of the investigation meeting.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **What are the issues?**

[7] Although Mrs Jensen sent a letter to Mr Brake and Ms Irwin raising a personal grievance claim based on non-payment of wages, her statement of problem was focused on the failure to pay and for resolution, she sought payment of the wages in full. I therefore dealt with the matter as a wage arrears claim.

[8] The issues for investigation and determination are:

- (i) Was Mrs Jensen an employee and if so, who was her employer?
- (ii) If she was an employee, is she owed any money by her employer, and if so, how much?

### **What happened at the beginning?**

[9] Mr Brake and Ms Irwin rented a house from Mr and Mrs Jensen. Mr Jensen loaned Mr Brake some money to assist with the establishment of the takeaways.

[10] Mrs Jensen claims wages only for the period from 7 November 2017 to 14 February 2018. She worked at the takeaways in August and September 2017 to help Mr Brake and Ms Irwin out, as they were a young couple starting a business. She does not wish to claim wages for that period. Mr Brake says that some payments were made for the August and September 2017 period. Mrs Jensen finished helping out at the takeaways when she went for a few weeks' holiday.

### **What new arrangement was reached?**

[11] On her return from her trip to Australia Mrs Jensen was not intending to go back to assist at the takeaways. However, Mr Brake approached Mrs Jensen and asked her to work again. He said that she should write down her hours on a timesheet and he would pay her for them.

[12] Both agree that there was no mention of Mrs Jensen being a contractor as such. However, Mr Brake says that they agreed that Mrs Jensen would pay her own tax. Mrs Jensen disputes that.

[13] Mr Brake's understanding was that as he was a sole trader he could not employ anyone. He thought that an employer needed to be a company or the like. He says that he discussed this with Mrs Jensen and they agreed she would be a contractor. He says that Mrs Jensen told him that she could only earn so much money without it affecting her pension. Mrs Jensen denies that they had this discussion.

### **Was Mrs Jensen an employee or a contractor?**

[14] An employee is defined under the Act to mean any person employed by an employer to do any work for hire or reward under a contract of service.<sup>1</sup> I must determine the "*real nature of the relationship*" between the parties<sup>2</sup>, including any matters that indicate the intention of those involved. Any statement by the parties

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<sup>1</sup> S 6(1) of the Act

<sup>2</sup> S 6(2) of the Act

describing the nature of their relationship does not determine the issue.<sup>3</sup> An open textured inquiry is necessary.<sup>4</sup>

### **What was the parties' intention?**

[15] I now examine the real nature of the relationship between Mrs Jensen and the takeaways' business. There was no written agreement between the parties, of an employment or contractor nature. There was no written offer of employment or job advertisement. The parties therefore did not agree on any written label for their relationship.

[16] Mr Brake understood that as a sole trader he could not be an employer. This was a misunderstanding on his part. However, he says that as a result he agreed with Mrs Jensen that she would be responsible for her own tax.

[17] There appears to have been little or no consideration at that point about whether the role, and the way the parties intended it to operate, was in the nature of employment or not. Mr Brake considered Mrs Jensen to be a contractor to avoid what he understood were the implications of him being a sole trader. He acknowledged that this word was not used between them however. I consider that the label adds little to my consideration of what the real nature of the relationship was.

### **What other considerations are there?**

[18] I now look at other factors, including whether Ms Jensen was operating autonomously as a contractor usually does or whether the takeaways controlled her work.

[19] Mamaku Village Takeaways was open six nights a week starting at 4pm. Mrs Jensen estimated that she worked about 90% of the nights it was open. She mainly worked with Ms Irwin who was in charge. Occasionally other people worked too if it was busy. Mr Brake was sometimes present. Mrs Jensen's start and finish times were determined by the business. She gave Mr Brake a note of her hours.

[20] Mrs Jensen took time off work for various trips. Although she notified the takeaways of when she was unavailable, my impression is that she was free to take

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<sup>3</sup> S 6(3) of the Act

<sup>4</sup> *Three Foot Six Ltd v Bryson* (2004) 2 NZELR 29 CA

relatively unlimited amounts of time. She took more days off than would usually be the case for annual leave. This favours the possibility of her being a contractor.

[21] On the other hand Mrs Jensen's work was an integral part of the takeaways' operation. She was involved in serving at the counter, cooking hamburgers and cleaning up. Mrs Jensen worked at the takeaways' premises and largely used the equipment provided by the business. She did use her own car to pick things up for the takeaways, although she is not claiming for her time relating to this and seemed to regard it more as a favour to the couple.

[22] Could Mrs Jensen be seen as being in business on her own account? She did not submit invoices for her work. It was understood between the parties that Mrs Jensen would be paid on an hourly basis. She had no opportunity to participate in the business's good fortunes or rearrange her work so as to improve her profit.

[23] Mrs Jensen was able to take on other work. However, when she was not available to work she let Mr Brake or Ms Irwin know and they arranged for another person to cover for Mrs Jensen. This suggests that she may have been an employee.

[24] I look now at the payment situation. As outlined below the parties are in dispute about how much Mrs Jensen was paid. However, there are some indications that about what payments were for. In November 2017 Mrs Jensen texted Mr Brake saying "Are you in a position to pay wages plesssae", as she needed to get a phone bill paid. A payment of \$450 was made as a result. In February 2018 she texted Mr Brake that she could really do with some pay. The references to wages and pay support an employment relationship existing.

[25] Payments were made at the minimum wage rate, which also supports this being an employment relationship. In terms of terms of tax arrangements, there was no tax deducted from the amounts paid to Mrs Jensen.

[26] There was no evidence of any relevant industry practice. However, Mr Jensen questioned, how can someone working in a takeaway bar be a contractor?

### **Was Mrs Jensen an employee?**

[27] Although there are factors supporting both the employee and the contractor scenarios, I find that the relevant factors predominantly indicate that Mrs Jensen was

an employee. I am satisfied that the real nature of the relationship was that of a contract of service, with Mrs Jensen being an employee.

**Who was the employer?**

[28] Having found that Mrs Jensen was in an employment relationship the next question is whether she was employed solely by Mr Brake, or whether she was employed by Mr Brake and Ms Irwin.

[29] Mrs Jensen regards Mr Brake and Ms Irwin as her employers. She provided a flyer for the takeaways which said that it was owned and operated by “Tony & Rachel Brake”. Mr Brake’s response on this flyer implied that it would have been ungracious or disrespectful not to have mentioned Ms Irwin, when they had been in a relationship for ten years and both did work at the takeaways.

[30] Mrs Jensen thought that they both leased the takeaways premises although she accepted that she did not know whose names were on the lease. She assumed that both owned the business as Ms Irwin did the ordering of stock. On questioning she said that perhaps it was just Mr Brake’s business.

[31] Mr Brake says that he managed the business and was a sole trader. He says that Ms Irwin worked there because she was his relationship partner, but they were not in business together. He points to an Inland Revenue My Business record which refers only to him and shows the GST number as being his alone.

[32] Ms Irwin says that Mr Brake was the sole owner of the business. She was not a party to the takeaway’s lease. Ms Irwin did not regard herself as Mrs Jensen’s employer.

[33] I find that Mrs Jensen was employed solely by Tony Brake.

**What payments were made?**

[34] The parties agree that Mrs Jensen’s pay rate was \$15.75 an hour. They also agree that in the period Mrs Jensen is claiming for, Mr Brake made a payment to her of \$450.00 on 17 November 2017. This was made electronically and so a record exists.

[35] Two other payments were referred to by the parties but ultimately they agreed that those payments were not for Mrs Jensen's wages.

[36] Mr Brake claims that he has paid Mrs Jensen for the hours she worked until the end of December 2017. He acknowledges that the payment pattern was not entirely regular but says he paid her in cash, usually every couple of weeks. This is discussed more below.

#### **How much does Mrs Jensen claim she is owed?**

[37] Mrs Jensen claims that she worked 292 hours, which at \$15.75 per hour she calculates totals \$4606.90. By my calculation it totals \$4599.00.

[38] In the statement of problem Mrs Jensen deducted from what was owing to her the \$450.00 paid and also \$300.00 received by bank transfer during the period her claim relates to. She deducted these from the total owing. However, at the investigation meeting she said that the \$300 related to another matter, and Mr Brake agreed. This means that, according to my calculation, Mrs Jensen's claims would then be \$4149.00.<sup>5</sup>

[39] Mrs Jensen's total hours claimed is based on an average of 4.5 hours per day. Three days a week the takeaways was open for four and a half hours, and for another three nights it was open for five hours. Mr Jensen is uncertain how many hours she actually worked as she left post-it notes for Mr Brake of her actual hours and days of work but does not have her own record.

#### **How much does Mr Brake accept is owing?**

[40] Mr Brake accepts that some money is owing, but says it is substantially less than the amount claimed by Mrs Jensen.

[41] Mr Brake maintains that Mrs Jensen worked a total of 219.5 hours in the relevant period, about 70 less hours than she asserts. He bases this on his handwritten records (the records) listing Mrs Jensen's hours which he made from the post-it notes she supplied. Other than one note which he still has, he threw the post-it notes away

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<sup>5</sup> \$4599.00 less \$450.00

once he put them in the records. He acknowledges that Mrs Jensen never saw the records.

[42] Mrs Jensen is mostly unable to recall whether the hours recorded in Mr Brake's records are an accurate reflection of what she actually worked. She largely did not dispute the records although she maintains that her averaging system produced a more accurate result. A number of the days she accepts she had off are shown in that way in the records. She did point to two days at Christmas when she says the takeaways was open but Mr Brake's record state it was not.

[43] Prior to this proceeding Mr Brake acknowledged that he owed Mrs Jensen a figure. However, he says that there was a calculation error and now maintains that he owes her a slightly smaller amount. Mr Brake claims that he has paid Mrs Jensen for 152 hours, and he owes her 67.5 hours. At \$15.75 per hour, that amounts to \$1063.12 owing.

#### **Was any cash paid?**

[44] Mr Brake says that most payments were made to Mrs Jensen in cash. Mr Brake's record notes three payments made in November and three in December 2017. He acknowledges that no payments were made in January or February 2018 and this is what he owes Mrs Jensen for.

[45] Ms Irwin confirms that she was aware of cash payments being made to Mrs Jensen but was not involved in the payments.

[46] Mrs Jensen's statement of problem did not acknowledge any cash payments to her. Rather, by deducting only for the bank transfers and claiming the remainder, she implies that no cash was received. At the investigation meeting I asked Mrs Jensen about three cash payments in November 2017. She said that she had no record of those. When pressed she delayed in responding then said that she did not recall getting paid (in cash), that was why she was pursuing the matter now.

[47] In terms of getting cash payments before October 2017 she said that it was possible but she did not have a record. She then spoke of not getting much cash or any real cash. When asked about the dollar amounts noted in Mr Brake's record as

paid in November, which totalled a little over \$1,000, she denied receiving them, saying that she never got a lot of money from the couple at all.

[48] When asked again whether she received any cash in November she said \$200 or \$300 perhaps. She initially denied getting the amounts listed in the record for December, but when pressed about whether she had received any cash in December she admitted getting perhaps \$200.

[49] In conclusion Mrs Jensen was very reluctant to concede that she received any cash payments, but did eventually accept that she did. I find Mr Brake's evidence on this issue more credible. I therefore accept that the records do reflect the cash payments which he made to Mrs Jensen.

**How much is owing?**

[50] On the basis that Mr Brake paid Ms Jensen for her work at the takeaways to the end of December 2017, the records show that she was owed 67.5 hours for her work in early 2018. At \$15.75 an hour, that amounts to \$1063.12. I order Tony Brake to pay Faye Jensen the sum of \$1063.12 gross in wage arrears within 14 days of the date of this determination.

**Are there any costs issues?**

[51] The parties were not independently represented. Mrs Jensen has established that she was an employee and is owed money. She incurred the Authority's filing fee. I order Tony Brake to pay Faye Jensen the sum of \$71.56 for the filing fee within 14 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority