

Mr Jones denied he was ever told this previously by Mr Brewer, either at the outset of the second period of employment with the respondent or at any other time except when he sought payment following his dismissal.

[4] The applicant seeks a declaration that his employment status was that of an employee, he also seeks lost remuneration including wages, holiday pay and statutory holidays, compensation and costs.

[5] Having reviewed the applicant's claims, the support officer set out to deliver the appropriate documents to the respondent and to advise him by telephone of the applicant's claims and of his opportunity to respond. The courier records show that NZ Post Couriers, using its track and trace system, attempted to deliver the statement of problem and the support officer's advice as to what was required of the respondent on four separate occasions without success. Eventually, the package was delivered on 1 September 2007 and was signed for, although the signature was illegible.

[6] Following that accepted delivery, Mr Gallen wrote to the respondent advising the Authority had not received a statement in reply within the 14 days stipulated in the notice. His letter advised Mr Brewer that the Authority would conduct a teleconference to schedule an investigation meeting at 9.30am on 13 November 2007 to the respondent's telephone number. Further, the letter advised that should Mr Brewer not participate in the teleconference, the matter would be dealt with in his absence.

[7] The respondent did not participate in the teleconference. Other attempts were to serve documents using Baycorp Document Services were made on 21 and 24 November 2007. Those documents set out the notice of direction from the Authority and the scheduling details, including the date on which the Authority would investigate the matter. The Baycorp report states:

“Visits were made on 21st and 24th November 2007 and on 3rd, 11th and 18th days of December 2007

On 18th day of December 2007 our agent makes mention that he had spent 20 minutes at the given address as the above subject was inside but would not respond to our agents calls.”

The agent's comments were:

“18/12/07 5 visits, debtor refuses to come to door. Ph’d disconnected, evasive and unable to get response.”

[8] The Authority is satisfied that Mr Brewer had every opportunity to be advised of the proceedings initiated by Mr Jones, of how and what was required from him and he has knowingly declined to receive that information.

The issues

[9] In order to determine this matter, the Authority needs to make findings on the following questions:

- Was the applicant an employee, or was he a self-employed contractor to Mr Brewer; and
- If he was an employee, was he unjustifiably dismissed from his employment; and
- If so, what remedies is he entitled to claim; and
- Did the applicant contribute to the circumstances giving rise to his dismissal?

The tests

[10] Section 6(2) of the Employment Relations Act 2000 and its amendments states:

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.

[11] This is usually done by applying a number of tests to the facts and the relationship between the parties.

[12] The first of these is the integration test which considers whether the work performed by the alleged employee is done as an integral part of the business or whether he or she has effectively become part and parcel of the organisation. Next is the fundamental or economic reality test which focuses on the way the individual engages himself or herself on his/her own account to perform the duties as required. Finally, there is the control test which looks at how the work done by the alleged

employee is carried out and under whose direction and control this occurs. The latter includes the right of a person who is an independent contractor to decline work for a principal and employ his skills on behalf of others with a freedom not available to an employee.

[13] The test in relation to Mr Jones' personal grievance test is set out in s.103A of the Employment Relations Act 2000 and its amendments. This requires the Authority to determine whether a dismissal or an action was justifiable on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

The investigation meeting

[14] There was no attendance at the investigation meeting by the respondent or any representative of the respondent.

[15] The applicant provided a basic statement of evidence and his mother, Mary Anne Jones, also provided evidence viva voce to the Authority. Mrs Jones' evidence was significant because it clearly established that Mr Brewer came to the family home each week and calculated what he owed to the applicant using the computer function on Mr Brewer's mobile phone. This witness confirmed there was no documentation provided and that Mr Brewer paid her son in cash.

[16] Mrs Jones also advised the Authority that she often had to deal with her son's disappointment after repeated *bust ups* between him and Mr Brewer. She spoke of the pattern of Mr Brewer and her son having disputes, of Mr Brewer then currying favour from the applicant by providing drink, meals and massage or escort services. Mrs Jones told the Authority that *then things would be okay between them until the next bust up*.

[17] Mrs Jones confirmed her son was unable to read and had a relatively trusting attitude to his employers. She also confirmed her concern at not having any documentation to establish whether her son's tax had been paid by Mr Brewer as he had assured her son, or whether her son had an outstanding liability to the Inland Revenue Department. Further, this witness told the Authority that whenever Mr Brewer rang, he always spoke to her and never to her son. This included the call requiring her to tell her son that he was *not to come in to work again*.

[18] Mrs Jones said in evidence that Mr Brewer frequently *bad mouthed* her son to her but that she had never conveyed that to Mr Jones because she did not want him to lose his job.

[19] Finally, Mrs Jones and John both stated that they had the view that Mr Brewer would calculate John's hours and pay John what he (Mr Brewer) accepted he had worked in a given week. Both proffered the view that, at times, John was short-paid but were in no position to be able to establish that as a fact.

Analysis and discussion

Employee or contractor?

[20] The difficulty in this case is the total absence of any documentation. The onus to define the terms on which any relationship rests lies with the respondent. In this case, it has provided none.

[21] In considering the fundamental or economic test, the question is, did Mr Jones undertake work for Mr Brewer as a person in business on his own account to his own financial benefit and/or loss? On the evidence before the Authority, this cannot be so. Mrs Jones' evidence on Mr Brewer's weekly visit to the home to calculate what was owed to John indicates strongly that Mr Brewer's attendance was not for the purpose of paying invoices submitted to him by John, but to pay John his wages. There was, in short, no evidence whatsoever of John structuring his own alleged self-employed business.

[22] The applicant himself confirmed he provided no tools of his own, no materials of his own, on any job he completed with Mr Brewer. He simply went to the job and did the bricklaying. In other words, he simply used the respondent's equipment and materials to complete the tasks Mr Brewer allocated to him.

[23] Nor was the applicant in control of the work done and did not have the choice to undertake other contract work for other principals in preference to Mr Brewer without severing the employment relationship.

[24] On the balance of probabilities, it is most likely that Mr Jones was an employee and was integrated into Mr Brewer's business. The severance by Mr Brewer of the applicant's services appears to indicate that Mr Jones was an

employee whose contract of service he had no further need to continue. There is no notice period stipulated as there is no individual employment agreement and no notice was given.

Unjustified dismissal

[25] It follows from the above that, in the absence of any formal notification of the reason for Mr Jones' dismissal, no procedure identifying whether the dismissal was for cause, for lack of capacity or for redundancy and, above all, no discussion with Mr Jones, that the applicant's dismissal was not justified. Significantly, the respondent has chosen not to contest the applicant's claim.

The determination

[26] Returning to the issues to be decided set out above in this determination, I find:

- On the balance of probabilities, Mr Jones was an employee of Mr Brewer; and
- Mr Jones was unjustifiably dismissed from his employment by Mr Brewer; and
- Mr Jones is therefore entitled to remedies under the Employment Relations Act 2000 and its amendments; and
- Mr Jones, in the absence of evidence to the contrary, did not contribute to the circumstances giving rise to his dismissal; and
- Mr Jones is therefore entitled to remedies under the Act.

Remedies

[27] In this case, the respondent has not assisted the Authority, nor its own cause by not presenting its case. That said, the Authority's jurisdiction is one of equity and good conscience and on that basis requested submissions from the applicant's representative as to quantum on each claim put before the Authority.

[28] It is significant that those submissions were, at the initiative of the applicant's representative, sent to Mr Brewer. Mr Brewer has neither acknowledged nor contested those submissions.

[29] The scarce documentary evidence makes the Authority's task particularly difficult in assessing remedies. Having heard the evidence from the applicant and Mrs Jones on the way the employment relationship was conducted, the Authority makes the following orders:

- The applicant sought lost wages in the sum of \$14,071.20 gross. Based on the evidence of an hourly net rate of pay of \$20, the applicant's gross pay would be \$24.60 per hour. Further, Mr Thompson submitted the applicant would have worked at least four hours' overtime each week, the combined ordinary and overtime hours equating to a gross weekly wage of \$1,082.40. Section 128(2) of the Act stipulates:

*The Authority must, whether or not it provides for any of the other remedies provided for in s.123, order the employer to pay to the employee the lesser of the sum equal to that lost remuneration or to three months' **ordinary time** remuneration.*

Given an hourly rate of \$24.60 gross, the applicant's entitlement to 40 hours' ordinary time remuneration is \$984 gross per week. Thirteen weeks at this weekly gross sum equates to \$12,792 gross. I order the respondent to pay the applicant this sum under s.123(1)(b).

- The applicant is said to have *possibly* worked three statutory days but to have been paid only the lieu day without the additional half day as required under the Holidays Act. The evidence before the Authority is too indistinct and hence no award is made under this head of claim.
- The applicant says he did not work on Christmas Day, Boxing Day, New Year's Day and the day following, but received no payment for those four days. His claim is \$787.20 gross. The Authority finds this claim made out and orders the respondent to pay the applicant the sum of \$787.20 gross.

- The applicant sought a compensatory sum of \$5,000 under s.123(1)(c)(i) of the Act for hurt and humiliation. It is a relatively modest claim yet it needs to be balanced against the seven month employment period and somewhat sparse evidence as to the effects of the dismissal on him. Considering these matters, I think it just to award the applicant the sum of \$2,500 under this head of his claim. I order the respondent to pay the applicant the sum of \$2,500 without deduction.

Costs

[30] The advocate for the applicant has submitted a costs claim for \$2,250.

[31] In spite of Mr Thompson providing his full submissions to the respondent, the Authority has had no response to the applicant's claim for costs. Given that the respondent declined to engage in the Authority's process and has lodged no objection to Mr Jones' claim for costs, an award for costs in the sum claimed may appear a foregone conclusion. The Authority must, nonetheless, consider a number of matters, not the least of which being to avoid being punitive to an unresponding party.

[32] The meeting took up some two hours of hearing time. That said, it is clear from the correspondence on file that Mr Thompson took every opportunity to engage the respondent, encourage Mr Brewer to mediation and, as noted above, provide Mr Brewer with his final submissions in spite of the respondent's enduring silence.

[33] In such a situation, given what appears to be the staunch refusal of Mr Brewer to engage in resolving the problem between he and the applicant, despite Mr Thompson's efforts, needs to be considered.

[34] Mr Brewer is to pay Mr Jones the sum of \$1,650 plus GST to the applicant as a contribution to what I find are Mr Jones' reasonably incurred costs.

Paul Montgomery
Member of the Employment Relations Authority