

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 128
5357538

BETWEEN RAMI ODISHO
 Applicant

AND LA BELLA ITALIA
 DISTRIBUTORS LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: A Hill for the Applicant
 P Cheng and C Mosley for the Respondent

Investigation Meeting: 25 July 2012 at Wellington

Further information received: By 9 August 2012

Determination: 18 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Between August 2008 and 2011 the applicant, Mr Rami Odisho, worked for the respondent, La Bella Italia, as its cleaner. On 9 August 2011 that relationship came to an end after Mr Odisho overslept and did not come into work. He claims he was unjustifiably constructively dismissed, both because of La Bella Italia's reaction to his oversleeping and its ongoing poor treatment of him. He also claims that he is entitled to payment for sick leave, statutory holidays and annual holidays for the period he worked, because it is unlawful to contract out of the Holidays Act 2003, even although he had agreed that his work for the company would not entitle him to such payments. Mr Odisho also claims penalties for the failure of La Bella Italia to keep a wages and time record of his work.

[2] La Bella Italia denies that Mr Odisho was ever an employee of it, but rather a contractor, and that in any event he was not unjustifiably dismissed, but left of his own accord.

[3] The issues for determination are –

- (a) Was Mr Odisho an employee of or a contractor to La Bella Italia;
- (b) If an employee, was Mr Odisho unjustifiably dismissed;
- (c) If Mr Odisho was an employee, what remedies is he entitled to; and
- (d) Should any penalties be awarded against La Bella Italia?

Factual discussion

[4] Mr Odisho is a professional cleaner. He undertakes cleaning work either as a direct employee, or as a contractor through his company, Rami's Office and Home Cleaning Service Limited. Mr Odisho is the sole director of the company.

[5] La Bella Italia runs a well known café/shop in Petone. At the time that Mr Odisho started work with the company it also had similar premises on The Terrace, Wellington. Mr Antonio Cacace is the principal of La Bella Italia.

[6] In the middle of 2008 Mr Cacace was looking for new cleaners for the two premises. As the result of an advertisement Mr Odisho applied and was interviewed by Mr Cacace.

[7] While Mr Odisho ran his own cleaning company, I accept from his own work history that he preferred to be an employee. I also conclude, on the basis in particular of the PAYE arrangements, that Mr Cacace agreed to engage Mr Odisho as La Bella Italia's cleaner as an employee. The payment of PAYE commenced from the beginning of Mr Odisho's employment at La Bella Italia, unlike Mr Cacace's evidence that there was a change some months later. This is backed up by the fact that any additional cleaning required was charged separately by Rami's Office and Home Cleaning Service Limited.

[8] At the same time the parties agreed that Mr Odisho would not be eligible for annual leave and payment for public holidays, despite the fact that employees are entitled to such payments. The only conclusion I can reach is that this arrangement

was made to suit both parties. Certainly both agreed with it at the time, and it continued for several years. I also accept that Mr Odisho agreed to provide cover if he personally was unavailable to do the cleaning.

[9] Mr Odisho worked at La Bella Italia as its sole cleaner, unless Mr Odisho organised someone else to cover for him, between August 2008 and August 2011.

[10] However, from March 2009 La Bella Italia began paying Mr Odisho's wife as if she was an employee. No doubt this was because she did not have another job and was thus not paying secondary tax, which Mr Odisho was. I accept that the initiative for this came from pressure from Mr Cacace to lower the cleaning costs, whether or not it was his or Mr Odisho's suggestion that his wife be paid in future. I draw this conclusion because the benefit was entirely to La Bella Italia, as the net payments to Mr Odisho and his wife remained the same.

[11] The cleaning was done at night when the premises were not open, and as it was a café that was open almost every day, it had to be done 364 days a year. Mr Odisho had his own key and used a log in system separate to staff members. If he was away or ill, which did not occur very often, Mr Odisho would get one of his family members (not his wife) to clean the premises in his stead. If Mr Odisho was unable to attend, such as when he was ill, and could not find cover, then neither he (nor his wife) were paid.

[12] When The Terrace café/shop was sold Mr Cacace met with Mr Odisho and agreed with him that due to the lesser cleaning requirement, the pay for the cleaning would reduce by \$200 net per week. He also noted in a letter –

Please be aware, that as this amount is on the high side, we take this opportunity to search for other quotations, in the market place and this will be reviewed and we will advise in due course.

As we both agreed, if I can find a more agreeable option, I will advise you, so you can renegotiate.

[13] This is more evidence that Mr Cacace was focused on the cost structure of the business, as one would expect an experienced businessman such as him to do. I therefore can not accept his evidence that he never looked at this cost in the business. He is far too an experienced a businessman to have done that, and it is inconsistent with his own letter.

[14] I conclude that from around April 2011 Mr Odisho began to get frustrated with the scrutiny that La Bella Italia was paying to the standard of cleaning, despite there being no problems with the standard of cleaning for the two previous years. In particular, around that time Mr Cacace had hired a new staff member responsible for café co-ordination. That person and Mr Cacace's personal assistant would contact Mr Odisho with each concern and ask to meet with him. This caused Mr Odisho great concern, because he worked all night and did not like attending meetings during the day. The situation worsened in July/August. I accept that because of Mr Odisho's admitted lack of commitment to La Bella Italia, the cleaning was not up to standard towards the end of his time, and often parts of it had to be re-done. This caused particular difficulties for La Bella Italia as, for the reasons given above, Mr Odisho did not want to attend meetings to try and resolve matters.

[15] On 9 August at 7.31am Mr Odisho sent a text to Mr Cacace's personal assistant stating *Hi Miriam, sorry I slept in today. I didn't do the cleaning at La Bella. Rami*

[16] Mr Cacace's personal assistant immediately rang Mr Odisho, who told her that he had fallen asleep. She told him to come in straight away and do the cleaning. This would have meant that the cleaning would have had to be done while the café was open, but this was preferable to La Bella Italia than the staff having to do it themselves. Mr Odisho's response was that he would not come in because it was too late.

[17] At 8.06am Mr Odisho was sent a text saying *Either you come in now or you send in your resignation.* I accept that this comment referred back to a recent conversation when Mr Odisho had told La Bella Italia, in response to its concerns, that he would improve and that if he did not meet their standards in future he would resign.

[18] After that Mr Odisho texted at 8.58am stating *Miriam I will not do either of that. You want to fire me and you will pay me from day one all my public holiday and holiday pay and you will give me a letter then I am happy to go.*

[19] Mr Odisho was adamant that the personal assistant never phoned him on the morning of 9 August to speak to him about his text message saying he was not

coming into work that day. She was equally adamant that she had rung Mr Odisho and he had refused to come in at all.

[20] Mr Odisho maintained his evidence despite close questioning, as did the personal assistant, who offered to provide phone records which would confirm her evidence. Unfortunately the phone company no longer keeps these records.

[21] I conclude that Mr Odisho's evidence is not to be preferred, because in a letter dated 9 September 2011 from his lawyers the following was stated:

On 9 August 2011 Mr Odisho was running late and sent a text to the manager of La Bella Italia. The manager rang him and stated that either Mr Odisho came in immediately or his resignation should be tendered.

[22] That evidence, being given close to the time, is the evidence that I accept.

[23] After that La Bella Italia made a number of attempts, some involving Mr Cacace directly, to get Mr Odisho to return to work, but he had closed his mind to any such initiatives. For example that afternoon Mr Cacace's personal assistant sent an email to Mr Odisho trying to ascertain *what type of future there may be between La Bella Italia and Rami. Antonio wants still use of your service and you have to let us know if you want to continue to work for La Bella Italia. If so Rami, we would like to work out with you the terms of this relationship in the best and clear way ...*

[24] This was following up by other texts and emails in the next few days.

[25] Mr Odisho was not replaced immediately.

[26] Mr Odisho's only response to La Bella Italia's initiatives was to say that he had been in contact with the Department of Labour. He then involved his solicitors, resulting in these proceedings.

The law

[27] A factual analysis based on the relevant provisions of the Act is required to determine whether a person is an employee or a contractor. Section 6, set out below, requires the Authority to consider and determine the real nature of the relationship between the parties.

[28] Section 6 of the Act states:

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

In *Tsoupakis v. Fendalton Construction Ltd* (unreported, Colgan CJ, WC 16/09, 18 June 2009) key principles were held to include (at para 5):

- ...
- “All relevant matters” *include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship.*
- “All relevant matters” *will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.*
- “All relevant matters” *include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).*
- *Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the*

relationship in the light of the control, integration and fundamental tests.

- *Industry practice, while not determinative of the question, is nevertheless a relevant factor.*
- *Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.*
- *Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.*

Determination

[29] Any relationship such as this can be formulated and construed to be either an employment relationship or another form of contracting, but the Authority must determine the real nature of the relationship, taking into account all relevant factors.

[30] There was no evidence as to industry practice. While I accept that cleaners of commercial premises are often engaged as contractors by the owners or tenants of those premises, equally such cleaners are able to be, and are, employees as well. For instance, there is evidence of Mr Odisho working for a number of other companies as a cleaner as an employee. Industry practice is therefore not a significant factor in this case.

[31] Despite Mr Cacace's claims, it is clear that the common intention of the parties at the time of the commencement of their relationship was that Mr Odisho would be an employee of La Bella Italia, hence the arrangements with Inland Revenue. While Mr Cacace may now regret making that decision, albeit in the context of Mr Odisho agreeing to forego any entitlements to holiday pay, that was their common intention and that intention never changed, despite the "employment" of Mr Odisho's wife, who never did any work for La Bella Italia. I conclude that this was simply a device to minimise taxation arrangements. However, wherever the genesis of this idea came from, employment of Mr Odisho still remained the common intent of the parties - see for example *Glenmavis Farm Partnership (2007) v. Todd* [2012] NZEmpC 137. Furthermore, if Mr Odisho had not been considered as an

employee by La Bella Italia one would have expected him to have been replaced immediately.

[32] The documentation shows that Mr Odisho was clearly under the control of La Bella Italia, albeit that he was working alone at night. This is because La Bella Italia staff would directly follow up with him about any problems with the cleaning and did so by written, telephone and personal contact. Although there was no direct control at the time about how the cleaning was to be done, there was quality control over the way it was done and there were changes made as to what was required of Mr Odisho over time. This is therefore a strong indicator that Mr Odisho was an employee rather than a contractor.

[33] On the other hand, Mr Odisho was not at all integrated into the business of La Bella Italia. He worked on his own, and was not treated as part of the staff. For instance, he did not have his own uniform. Most significantly, the cleaning operation is incidental to La Bella Italia's operations. This test is more likely to indicate a contracting rather than an employment relationship.

[34] Finally, it is clear that while working at La Bella Italia, Mr Odisho was not in business on his own account. He or his wife was paid the same amount for the same job. He was expected to do the work himself or find his own replacement and because of the hours involved, had little opportunity to greatly expand his income. He certainly had no opportunity to change his income with La Bella Italia, except where additional work was required, which was conducted by the company run by Mr Odisho rather than by himself. Clearly, this test provides a strong indicator that Mr Odisho was an employee.

[35] With all factors except the integration test pointing to Mr Odisho being an employee, I have no hesitation in concluding that Mr Odisho was an employee of La Bella Italia. It follows that despite what Mr Odisho agreed, i.e. not to receive any forms of holiday pay, that being in an employment relationship the parties were unable to contract out of the Holidays Act, and he is entitled to claim for unpaid leave.

[36] I accept Mr Odisho's evidence, backed up by the pay sheets, that he is entitled to \$5,786.18 net in holiday pay, \$317.39 net in sick pay improperly deducted, \$293.40 net in unpaid statutory holiday leave, and \$7,141.90 net for statutory holidays worked, where time and a half was not paid and a day in lieu not provided.

[37] Mr Odisho also seeks a penalty for a failure by La Bella Italia to keep time and wage records. However, in the context where Mr Odisho agreed with La Bella Italia that he would not be paid holiday pay, it would be unfair to order a penalty against La Bella Italia, who considered as a result of their agreement that Mr Odisho was to be treated in effect as a contractor, even though he was taken on as an employee for tax purposes. In any event, La Bella Italia has already been ordered to pay significant sums as a result of that decision.

[38] While in submissions Ms Hill claimed that this matter could be seen as a dismissal, this is not how it was ever raised, either directly with La Bella Italia, or with the Authority. Mr Odisho was the one who did not come back to work after being requested to do so and therefore this can only be a claim for constructive dismissal.

[39] I conclude that Mr Odisho was not dismissed and neither was he constructively dismissed. He did not like the scrutiny that La Bella Italia started placing upon his cleaning. However, an employer is entitled to set its own standards for cleaning, provided it does not do so for improper motives. There is no evidence of improper motives here. I conclude that Mr Odisho had simply had enough of working for La Bella Italia, and that it could be said that the relationship came to a natural end. The requirements on Mr Odisho were not overly onerous, as proven by the fact that he managed to do the work well for the first two years or more of his employment. Given therefore that there was no breach of duty by La Bella Italia, who simply asked him to come into work to do the work he was paid to do, and the standards set were not unreasonable, it follows that there can be no successful claim for constructive dismissal.

[40] Mr Odisho has, however, succeeded in his claims for unpaid leave. I therefore order the respondent, La Bella Italia Distributors Limited, to pay to the applicant, Mr Rami Odisho, \$5,786.18 net in holiday pay, \$317.39 net in sick pay improperly deducted, \$293.40 net in unpaid statutory holiday leave, and \$7,141.90 net for statutory holidays worked.

Costs

[41] Costs are reserved.

G J Wood
Member of the Employment Relations Authority