

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 147/09
5160016

BETWEEN

RENE PITTARD
Applicant

AND

ERS NEW ZEALAND
LIMITED t/a TRANSPACIFIC
INDUSTRIAL SOLUTIONS
Respondent

Member of Authority: G J Wood

Representatives: Rene Pittard on his own behalf
Allan Simmonds for the Respondent

Investigation Meeting: 8 September 2009 at Wellington

Submissions Received: 8 September 2009

Determination: 5 October 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Pittard claims that he was unjustifiably dismissed when the respondent (known as TIS) refused to engage him in his old job as a bus shelter cleaner, after TIS took over the contract for poster installation, cleaning and maintenance of bus shelters in the Wellington region from his former employer, Dentice Facilities Management Limited (Dentice). At the commencement of the investigation meeting, Mr Pittard withdrew his claim for reinstatement.

[2] TIS claims that it had no duty to employ Mr Pittard, as he was not an employee able to transfer to a new employer, such as it, under Part 6A of the Act (where some employees are guaranteed continuity of employment if their work is affected by restructuring).

The Facts

[3] Adshel New Zealand Limited lets a contract in Wellington for the installation of advertising posters at bus shelters, together with the cleaning and maintenance of said shelters. Until April 2009, this contract was held by Dentice.

[4] The applicant, Mr Rene Pittard, was originally employed by Dentice to work on this contract as a general hand. His main job was installing posters, and also helping out with cleaning when not so engaged. The maintenance work was always done by other people within Dentice's workforce.

[5] After a few months, Mr Pittard made it clear that he did not like installing posters and preferred cleaning. When Dentice's cleaner left, he then took up the specific position of bus shelter cleaner. On 5 May 2008, he signed a new individual employment agreement. It stated that his position was *bus shelter cleaner* and that his duties were as *the cleaner of Adshel bus shelters and other advertising stock*. He was employed for 45 hours per week during hours to suit bus timetables. The days and hours of work could be fixed or varied from time to time by Dentice following consultation with Mr Pittard, but at the time of the signing of the agreement, and thereafter, he was only required to work Monday to Friday. He was paid \$16 per hour.

[6] In October 2008, TIS tendered for the contract with Adshel, which was up for renewal. TIS was successful in its tender. That tender was prepared on a "clean sheet" basis by TIS, without looking at any historical methodology used by previous contractors, or indeed without any awareness of Dentice's structure or its capabilities, as TIS's area manager in the lower North Island, Mr Allan Simmonds, made clear.

[7] TIS intended, when it was successful in gaining the contract later that year, to run the contract in a completely different way to Dentice. Its approach, as in the Hutt Valley (where it already held a similar contract), was to employ maintenance technicians who covered all the duties associated with poster installation, cleaning and basic maintenance (such as graffiti removal, fixing broken glass, and replacing seats, lights, door hinges and locks etc). Having gained the contract, it then employed maintenance technicians for the Wellington city contract.

[8] On 19 February 2009, Dentice sent a letter to TIS informing it that Mr Pittard was the existing bus shelter cleaner and wanted to transfer to TIS when it took over

the contract on 6 April. The letter informed TIS that it had to employ Mr Pittard on the same contract he was currently on, a copy of which was attached. Contact details for Mr Pittard were provided.

[9] Unfortunately, perhaps because that letter was posted to an incorrect address, TIS did not become aware of it until 30 March, when given a copy by Adshel. Mr Simmonds noted that it was never brought to TIS's attention when negotiating with Adshel that there were any employees wishing to transfer their employment, information that he believed should have been supplied to Adshel by Dentice. Mr Simmonds claimed that any contractual obligations to Mr Pittard remained with Dentice until the matter had been appropriately resolved with Adshel.

[10] I accept Mr Pittard's evidence that he cleaned bus shelters and he was not involved in poster installation or maintenance, other than graffiti removal, because that sort of work did not suit him. Mr Simmonds, however, was under the mistaken belief that the work Mr Pittard did included maintenance, cleaning, graffiti removal and poster installation, as its maintenance technicians were doing in the Hutt Valley, and were to do in Wellington. Perhaps it is this misunderstanding that is at the core of this employment relationship problem, together with TIS's perception that it had been let down by Dentice in it not informing TIS of Mr Pittard's position until the last minute.

[11] A later communication from Dentice made it clear that it believed that while it was under an obligation to supply information regarding employees wishing to transfer if requested, it had never been requested to do so. TIS was informed that as Mr Pittard had elected to transfer to TIS, he had become an employee of it and was employed under the same terms and conditions as applied to him prior to the transfer. TIS declined to accept this because it did not consider that Mr Pittard's role was confined to cleaning duties.

[12] As it happened, in mid April a TIS employee left and a vacancy therefore became available for a maintenance technician. Mr Pittard was asked to apply, but was informed that any employment would be on TIS's standard terms and conditions, including a three month probation period. Mr Pittard was told again, at an interview, which he attended on 29 April, that there was a job available but that it would be on new terms and conditions. In particular, he would be required to do poster

installation, cleaning and maintenance and that this work would involve night work, plus work on Sundays.

[13] Mr Pittard declined to accept the job because TIS's representative was so firm that it either had to be accepted on the terms offered or not at all. Mr Pittard was not interested in changing his hours to that extent, or undergoing a trial period, and the matter therefore simply could not be progressed between the parties. Subsequently, Mr Pittard filed in the Authority for reinstatement, plus compensation and costs. It was not until a conference call on 16 July 2009 that Mr Pittard became aware of his responsibility to mitigate his loss and he had not looked for work in that 10 week period, expecting to be employed by TIS as a result of his claim for the right to take up and continue on his employment with TIS. That claim has, however, since been withdrawn.

[14] Subsequently, Mr Pittard has looked for other work, but has only been successful in getting some part time cleaning work. He has been to some employment agencies, but has not registered with Work & Income because he did not believe he was eligible to be assisted by it in finding work, a misunderstanding that I clarified for him. Although Mr Pittard has made a number of phone calls, perhaps 40, he has made no written applications for work because he has not found anything for which he is qualified.

[15] The matter was unable to be resolved in mediation and it therefore falls to the Authority to make a determination.

The Law

[16] Part 6A of the Act provides for continuity of employment for some workers if their work is affected by restructuring. Such workers are given the right to elect to transfer to the new contractor as employees on the same terms and conditions of employment that they previously held. The parties accepted that the re-letting of the contract in this case meant that on the face of it (apart from Mr Pittard's real role) the Act applied as this was a subsequent contracting situation, provided for under s.69C. In fact this situation is covered by example (E) in s.69E(5).

[17] Mr Pittard, if a worker whose work is covered under Schedule 1A, may therefore have elected to transfer to the new employer, in this case TIS. Mr Pittard did elect to transfer to TIS in time, even although it was at the last moment. If

covered by the Schedule, he would therefore have been entitled as of right to become an employee of TIS on the same terms and conditions as he had with Dentice, and his employment would be treated as continuous.

[18] The matter at issue in this case therefore is whether or not Mr Pittard met the criterion that he was a person to whom subpart (1) of Part 6A applies, which is dealt with in Schedule 1A to the Act. Mr Pittard claims that he provided cleaning services in relation to any place of work, which is one service covered by the Act. The sole issue is, therefore, whether or not the work that Mr Pittard did for Dentice constituted cleaning services. That phrase is not defined in the Act.

Determination

[19] The work Mr Pittard did was clearly a service. The Collins English Dictionary defines *to clean* as *to make free of dirt, filth etc.* A *cleaner* is defined as *a person that removes dirt, as from clothes or carpets.*

[20] Despite TIS's understanding at the time, Mr Pittard was employed as a bus shelter cleaner. While TIS had structured its workforce in such a way that its staff were required under the new contract to not only do cleaning but also poster installation and basic maintenance such as graffiti removal, replacing lights and locks etc, that was not what Mr Pittard did for Dentice. Unfortunately, TIS was not aware of this at the time. It had wrongly assumed that his role, despite the job title, was very similar to, if not the same as, the maintenance technicians it had engaged.

[21] I conclude that the bulk, if not almost all, of the work done by Mr Pittard was cleaning in the traditional meaning of the word. It is therefore clear that he provided cleaning services and was thus entitled as of right to transfer into TIS's employment on the same terms and conditions as he had enjoyed with Dentice. It is clear from the above that Mr Pittard, whatever TIS may have thought of the situation, had become its employee from 6 April 2009, pursuant to Part 6A of the Act. Its denial of that fact meant, in effect, that it had dismissed Mr Pittard from that date. It therefore follows that his dismissal was unjustified.

[22] Because TIS simply refused to accept what had happened by operation of law, there can be no way that there has been any contributory conduct by Mr Pittard in its decision not to allow him to continue carrying out his old work from 6 April. He informed TIS of this and it mistakenly refused to accept that.

[23] Mr Pittard would not necessarily have been made redundant if TIS had accepted its legal responsibilities, at least in the short term, because it had a vacancy for a maintenance technician, which I accept Mr Pittard may well have been prepared to work at, had he been offered the opportunity, on his existing terms and conditions. One cannot rule out the possibility, however, that he may have been made redundant at some point, given TIS's staffing needs were different than those of Dentice, in which case he would have been entitled to notice of one week plus any redundancy compensation that could be negotiated or determined by the Authority pursuant to Part 6A.

[24] Despite his unjustified dismissal Mr Pittard has been required to mitigate his loss. I accept that it was reasonable for Mr Pittard to decline the position offered by TIS in April 2009 because of the fundamental changes to the nature of his contract, whereas the law required TIS to accept him on his existing terms and conditions. These changes were not insignificant, including as they did not only changes to the hours of work (which I accept could have been varied over time), but also to the nature of the work and key conditions such as the imposition of a three month trial period.

[25] I accept that Mr Pittard has lost remuneration as a result of his effective dismissal by TIS. I also accept that it was reasonable for him to wait 10 weeks before looking for other work, as he did not understand that he was under an obligation to look for other work when expecting to be reinstated. I decline to award any further lost remuneration based on the fact that his efforts to find other work have been inadequate, particularly as he did not register with Work & Income. That is his responsibility, not that of TIS. Lost remuneration of \$7,200 gross is therefore appropriate, particularly considering the possibility of redundancy.

[26] Mr Pittard has been significantly affected by the actions of TIS in refusing to allow him to work for it when he had already, in law, become its employee. This put him under a lot of stress and he has struggled in a tough employment market. He has felt bad about having to rely on other people, such as his partner. It has put him into a state of depression.

[27] In all the circumstances, I consider that compensation of \$7,000 is appropriate.

[28] Mr Pittard is also entitled to recoup the cost of the \$70 filing fee.

Conclusion

[29] Mr Pittard was, in effect, summarily unjustifiably dismissed on 6 April 2009, when TIS refused to accept what was in fact the legal situation, i.e. that Mr Pittard had become its employee.

[30] I order the respondent, ERS New Zealand Limited trading as Transpacific Industrial Solutions, to pay to the applicant, Mr Rene Pittard, the sums of \$7,200 gross in lost remuneration, \$7,000 in compensation under s.123(1)(c)(i) and \$70 in expenses.

G J Wood
Member of the Employment Relations Authority