



(the Act), and for a breach of s 65 of the Act for not providing Ms Randall with an employment agreement

### **Background facts**

[4] Ms Randall said that she was unemployed after a period of ill health and was looking for employment when she saw an advertisement on TradeMe for a position as a personal nanny/housekeeper for: “*a busy business man*”. The job advertisement stated that it was a job with flexibility and nanny duties included looking after a dog and housekeeping duties in addition to some cooking or breakfast preparation.

[5] Ms Randall said there was nothing in the advertisement she saw which indicated to her that it was not an employment agreement.

[6] Mr Davys said that in the advertisement which he had posted with TradeMe the job had been previously advertised and it was possible on this occasion there had been no reference to the position being contractual in nature.

[7] Ms Randall was interviewed by Mr Davys who it would be a long term appointment. She would be paid \$625.00 per week for 25 hours to be worked 5 days Monday to Friday, however if she worked less than 25 hours she would still be paid for the 25 hours provided that the work he required was completed.

[8] Ms Randall said that she was provided with a credit card in the name of ChoiceKids to be used for work-related approved expenses, a mobile telephone, and she had the use of a car during work hours.

[9] Mr Davys said he had not wanted to incur the obligations imposed by an employment relationship and had firmly stated in the interview with Ms Randall that it was to be a contract position. He told Ms Randall that he would pay a set fee each week regardless of hours; provided the job was completed which he estimated would take four hours a day. He told Ms Randall that the work had to be completed between 9am to 5pm every day except weekends, and agreed to a fee of \$625.00 per week.

[10] Mr Davys said he had shown Ms Randall around his home initially and had worked from home for a few days when she started to help her understand her duties.

[11] Ms Randall said she saw Mr Davys infrequently after the initial period, but frequently sought guidance from him by email which was their main form of communication.

[12] Her duties included a list of maintenance tasks on Mr Davys' house which he had provided to her in addition to shopping and normal housekeeping duties, and looking after his dogs.

[13] Ms Randall provided her bank account details to Mr Peter Brown who is a director and the HR Manager for ChoiceKids, a franchise operation of which Mr Davys is also a director, and he arranged for payments to be made direct to her bank account. Bank statements provided by Ms Randall show that payments were made by direct debit into her bank account in the name of ChoiceKids.

[14] Ms Randall did not provide her IRD information to Mr Davys. Payment was made weekly into her bank account and she had assumed that Mr Davys was paying her PAYE contributions.

[15] She said she had not queried the non-provision of an employment agreement as she had expected all the requisite employment documentation and arrangements to be provided.

[16] Mr Davys said that he had been concerned about the standard of work that Ms Randall was undertaking for him and he spoke to her about this, however, there had been no formal performance management steps undertaken.

[17] During March 2017 Ms Randall said she had contacted Mr Brown to request a payslip to confirm her income to the bank in relation to a loan application.

[18] Mr Brown told her that she was being paid in cash and she did not receive payslips. Ms Randall said she had been shocked at this statement and had intended speaking to Mr Davys, however before she could do so her son had been taken into hospital.

[19] Ms Randall said her son had to undergo surgery and she took two days off work during this period. She kept in touch with Mr Davys and notified him of her absence and the reason for it.

[20] Ms Randall returned to work on 20 March 2017. On 24 March she emailed Mr Davys and stated:

*Hi Paul,*

*My pay hasn't come through again. I really need this to be through in time as I have bills to pay. I've tried to get hold of Peter and no response. Also I'm not sure why last week's pay wasn't discussed with me when I had emailed you in regards to what we could do about this and had no response from you. I would appreciate a bit of communication in this regard. Thanks.*

[21] In response she received a text message from Mr Davys which read: “*Kelly, time to move on. I’m giving you two weeks’ notice to find another job.*”

[22] Ms Randall said she had replied: “*OK, may I please have a letter that I am no longer employed by you to take into work and income.*”

[23] Mr Davys provided the requested letter on 27 March 2017 which stated:

*To whom it may concern,*

*This email is to confirm that Kelly has been my personal house keeper for the past 6 weeks. Kelly’s last day in this role will be Friday 7 April 2017.*

### **Determination**

#### **Was Ms Randall an employee or a contractor when working for Mr Davys?**

[24] In deciding whether Ms Randall was working for Mr Davys as an employee, I apply s.6 of the Act which provides:

“s.6 *Meaning of employee:*

1. *In deciding ... whether a person is employed by another person under a contract of service, the ... Authority-... must determine the real nature of the relationship between them.*

(3) *For the purposes of subsection (2)... or the Authority-*

*(a) must consider any relevant matters, including any matters that indicate the intention of the parties*

*(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[25] In *Bryson v Three Foot Six Limited (No2)*<sup>1</sup> the Supreme Court stated the following:

*“‘All relevant’ matters certainly includes 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 ... It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to*

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<sup>1</sup> [2005] 1 ERNZ 372

*whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. ...”.*

#### *Contractual basis*

[26] In *Cunningham v TNT Express Worldwide (NZ) Ltd*<sup>2</sup> the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship.

[27] Despite Mr Davys being an experienced businessman and therefore expected to be familiar with the statutory requirements regarding a normal business operation, surprisingly he provided Ms Randall with no documentation which would assist in establishing the real nature of the employment relationship.

[28] I find this especially surprising given his firm statement during the Investigation Meeting that he did not want to be encumbered with the obligations of an employment relationship. In that situation documentation setting out clearly the nature of the relationship at the outset would have precluded any later confusion.

[29] I find that Ms Randall understood herself to be an employee as supported by her request to Mr Brown for a payslip.

[30] As there is no documentation however I must turn to the way in which the relationship operated in practice by having regard to the features of control and integration, and to the fundamental test of whether or not Ms Randall was working on her own account.

#### *Control and Integration*

[31] Ms Randall was engaged to clean Mr Davys house, to look after his dog and do some cooking as required. Mr Davys provided her with a list of maintenance duties to be undertaken and an initial induction in her duties.

[32] Thereafter it is clear from the evidence that Ms Randall required Mr Davys to advise her on the manner of carrying out the duties he required, and that he was proactive in advising her on the work performance standards he expected her to maintain.

[33] Mr Davys provided Ms Randall with the tools she needed to perform her role, including a credit card on which to make household and associated purchases, a mobile telephone for business usage, and use of a car in the performance of her duties.

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<sup>2</sup> [1993] 1 ERNZ 695

[34] I find these factors to indicate that Ms Randall was subject to the control of Mr Davys and integrated into the business of his operating his home responsibilities.

*The Fundamental Test*

[35] Mr Davys did not calculate, deduct or pay PAYE on behalf of Ms Randall.

[36] Ms Randall's evidence is that she believed that PAYE had been deducted from the wage amounts deposited in her bank account, and that she had been unaware during the period she worked for Mr Davys that the PAYE deductions had not been made on her behalf and remitted to the IRD.

[37] I note that Ms Randall had not provided any IRD information to Mr Davys, but I do not find that the fact of non-payment of the PAYE in respect of Ms Randall to be determinative of the issue of whether she was an employee whilst working for Mr Davys.

[38] In considering the fundamental question of whether Ms Randall was in business on her own account I find the following facts significant:

- Ms Randall received an agreed weekly payment in respect of hours to be worked to complete the allocated tasks during Monday to Friday each week;
- She had no previous experience of working as a contractor, but had worked as an employee previously;
- She was provided with the tools necessary to carry out her duties;
- She was provided with a credit card for purchasing further supplies as necessary;
- She was provided with use of a car for the performance of her duties;
- She was provided with a mobile telephone for work related usage;
- She did not provided invoices;
- Mr Davys provided her with two weeks' notice which is a feature of an employment relationship; and
- When requested for a letter to state Ms Randall was no longer employed by him, he did not dispute that statement but instead provided a letter stating Ms Randall had been: "*personal house keeper for the past 6 weeks*".

[39] I find no evidence indication that Ms Randall was in business on her own account.

[40] I determine that Ms Randall was an employee rather than an independent contractor during the period when she carried out work for Mr Davys.

### **Was Ms Randall unjustifiably dismissed by Mr Davys?**

[41] Ms Randall denied resigning from her employment with Mr Randall, however she had written to Mr Davys on 24 March 2017 querying why she had not received her weekly payment as expected. In response she had received a text message from Mr Randall dismissing her with two weeks' notice.

[42] The test of justification in s103A of the Act states:

#### ***S103A Test of Justification***

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[43] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Mr Davys must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[44] The evidence from Mr Davys was that he had verbally raised her standard of work not being satisfactory with Ms Randall, however, he had not taken any formal disciplinary action or advised her that her employment was in jeopardy as a result.

[45] Mr Davys dismissed Ms Randall by text message on 24 March 2017.

[46] I find that the dismissal of Ms Randall fell far short of the requirements of procedural fairness and the concept of natural justice.

[47] I determine that Ms Randall was unjustifiably dismissed by Mr Davys.

### **Remedies**

[48] Ms Randall has been unjustifiably dismissed and is entitled to remedies.

### *Reimbursement of Lost Wages*

[49] Ms Randall obtained alternative employment on 21 June 2017.

[50] Employees are under a duty to mitigate their loss following the unjustifiable termination of their employment. Ms Randall has provided evidence that she actively applied for some positions following notification of the termination of her employment.

[51] I order that Mr Davys pay Ms Randall the sum of \$6,875.00 gross, calculated as 11 weeks at \$625.00 per week, pursuant to s 128(2) of the Act.

### *Holiday Pay*

[52] Ms Randall is also entitled to holiday pay in respect of her period of employment with Mr Davys.

[53] I order that Mr Davys pay Ms Randall the sum of \$300.00 gross pursuant to s 28 of the Holidays Act 2003

### *Compensation for Hurt and Humiliation under s 123 (1) (c) (i) of the Act*

[54] Ms Randall is also entitled to compensation for humiliation and distress. I accept that Ms Randall experienced distress at the loss of her employment with Mr Davys and the abrupt manner in which it was communicated compounded this distress.

[55] However I take into consideration the fact that Ms Randall, whilst not expecting to be dismissed, was aware that her relationship with Mr Davys was variable with him frequently criticising her work and her evidence was that: “*he often threaten my job*”. In that respect I consider that the termination of her employment was not completely a shock.

[56] I order Mr Davys to pay Ms Randall the sum of \$8,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

### *Contribution*

[57] I have considered the matter of contribution as I am required to do under s124 of the Act. Ms Randall did not contribute to the situation which resulted in her dismissal and there is to be no reduction in the remedies awarded.

## **Penalties**

[58] Ms Randall is seeking a penalty for a breach of good faith, and the failure to provide her with a written employment agreement.

[59] I have already found that Mr Davy breached the duty of good faith he owed Ms Randall by unjustifiably dismissing her. I make no separate order for a penalty to be awarded for a breach of s 4A of the Act.

[60] Mr Davys failed to provide Ms Randall with a written employment agreement as required in accordance with s 65 of the Act. The requirement to provide employees with an employment agreement is a long established part of the employment law of New Zealand, and employers in New Zealand are expected to know the minimum legal requirements in respect of their employees and adhere to them.

[61] However I accept that Mr Davys considered Ms Randall was a contractor and therefore no employment agreement was necessary. Whilst I have determined that that understanding was false, I do not consider the non-provision of an employment agreement to have been deliberate and award no penalty for the breach.

## **Costs**

[62] Costs are reserved.

## **Taxation Matters**

[63] Ms Randall was paid a gross sum of remuneration into her bank account from which no tax had been deducted. She is therefore responsible to account for the tax which should have been paid to the IRD, unless the ChoiceKids accountant made provision for withholding tax.

[64] Mr Davys provided Ms Randall with a credit card in the name of ChoiceKids and her remuneration was remitted to her bank account in the name of ChoiceKids. I anticipate that Mr Davys has made provision for these aspects as a benefit in kind for taxation purposes.

[65] A copy of this determination will be provided to the IRD.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**