

- Whether Mr Ratcliffe was an employee or a contractor

- If Mr Ratcliffe is deemed to be an employee, whether he was unjustifiably dismissed.

Background Facts

[4] Prior to January 2008 Mr Ratcliffe had been the proprietor of Whirling Bros Circus for approximately 30 years. Mr Ratcliffe had showed various animals in the Whirling Bros Circus, including an African elephant called Jumbo, which he had owned for 30 years.

[5] Jumbo had been purchased at the age of 3 years from Honolulu Zoo in Hawaii by Mr Ratcliffe, with the financial assistance of his brother Robin. Mr Ratcliffe had assumed the care and control of Jumbo from that time onwards, and trained Jumbo to perform in the Whirling Bros Circus. Mr Ratcliffe explained that the care and control of Jumbo was a 24 hour, 7 days a week, responsibility.

[6] As Mr Ratcliffe became older, he decided to retire from circus proprietorship. Mr Ratcliffe retired most of his circus animals, which were either sent to sanctuaries or sold to zoos. Mr Ratcliffe explained that his relationship and close bond with Jumbo prevented him from selling her in such a way that he lost contact with her, and instead he began seeking a permanent solution which would allow him to retire Jumbo whilst retaining access to her.

[7] On or about December 2007, Mr Ratcliffe said he entered into discussions with Mr Weber for the sale and purchase of Jumbo. Mr Ratcliffe said that these negotiations involved discussion, not only of the sale of Jumbo, but also of his future employment by Mr Weber as the elephant handler for Jumbo. This employment was initially to assist with showing Jumbo during the circus performances of Mr Weber's Loritz Circus ("the Circus") tour, which was planned to operate and tour in New Zealand over a 2 year period until approximately 29 September 2009.

[8] Mr Ratcliffe said that thereafter the agreed intention as discussed between him and Mr Weber, and as understood by him, was to retire Jumbo to a property owned by Mr Weber in Cambridge, with Mr Ratcliffe continuing to be employed to care for Jumbo, and to assist with showing her to the public from time to time.

[9] Mr Ratcliffe said that an essential part of this employment arrangement as discussed and agreed with Mr Weber, was the proposal to recruit an assistant elephant handler to enable him to take 2 days off each week.

[10] A sale and purchase agreement (“the Agreement”) in respect of Jumbo was prepared by Mr Thomas Andrews, a family friend of the Ratcliffe family. The Agreement which stated a purchase price of \$70,000.00, was signed by Mr Ratcliffe and Mr Weber, and dated 8 January 2008.

[11] Mr Ratcliffe said that apart from Jumbo, Mr Weber also bought an elephant trailer and accessories, 5 ponies, a horse float and pony harness and accessories, although Mr Ratcliffe said there is no documentary evidence in respect of this purchase.

[12] There was no written employment agreement provided to Mr Ratcliffe. Mr Ratcliffe said that he was paid a salary of \$1,500.00 net per week, which he received in the form of cash. To receive the payment Mr Ratcliffe said that he, along with other circus personnel, queued at the ticket office each Sunday between 10.00 a.m. and 12.00 noon.

[13] Mr Ratcliffe commenced touring with the Circus on or about March 2008 and said that he showed both Jumbo and the ponies, in addition to a goat and a llama, during the circus performances.

[14] Mr Ratcliffe explained that Mr Weber had also wished to purchase a dwarf horse which was owned by Mrs Ratcliffe. It was agreed that Mrs Ratcliffe would show her dwarf horse during the circus performances, but Mr Ratcliffe said that Mrs Ratcliffe insisted on having an independent contractual relationship with Mr Weber, as she wished to retain her independence and would not agree to become an employee.

[15] Mr Ratcliffe said that as the months passed, he became increasingly concerned by the fact that no assistant elephant handler had been recruited and he raised this issue on several occasions with Mr Weber, but without resolution.

[16] On or about mid-December 2008, Mr Ratcliffe said that he had received only one payment of \$1,500.00 over a period of 3 weeks. Mr Ratcliffe said he had contacted Mr Weber, who said that no payment was due on the basis that Mr Ratcliffe was an independent contractor and there had been no circus performances during this period. Mr Ratcliffe had contacted Mr Fournier, a barrister, who wrote to Mr Weber on Mr Ratcliffe's behalf, submitting that Mr Weber was in breach of the employment contract. Mr Weber thereafter made a late payment of the monies owing to Mr Ratcliffe.

[17] On 2 October 2009 Mr Ratcliffe was becoming increasingly concerned at the non-appointment of an assistant elephant handler, and had written to Mr Weber asking if he could buy Jumbo back. However Mr Ratcliffe realised that he was unable to provide the long-term care Jumbo would need and so did not proceed with the offer.

[18] Towards the latter part of 2009, Mr Ratcliffe explained some area council authorities would not allow Jumbo to enter the sites made available to the Circus due to pressure from animal welfare advocates. It was decided by Mr Weber that on these occasions a feeding programme would be set up whereby members of the public could purchase food provided for the purpose, and feed Jumbo.

[19] On or about the beginning of November 2009, during a feeding programme at Waihi, there was an incident in which Jumbo reached with her trunk into the back of a car belonging to a member of the public, frightening the children who were inside. As a result of this incident, Mr Ratcliffe became concerned about safety issues relating to the feeding programme, specifically that vehicles were being allowed to park too close to the barriers of Jumbo's enclosure, and he communicated these concerns to Mr and Mrs Flutey, the circus staff who were managing the feeding programme. However Mr Ratcliffe said that Mr and Mrs Flutey did not respond to his concerns.

[20] The next location of the feeding programme was at the AP&H show in Te Aroha on 21 November 2009. Mr Ratcliffe said that he had been concerned that Mr and Mrs Flutey's vehicle, which included the feeding table, was too close to the barrier to Jumbo's enclosure, and he requested that it be moved. Mr Ratcliffe said Mr Flutey became abusive to him, and told him (Mr Ratcliffe) to do as he was told or that he would be assaulted by Mr Flutey.

[21] As a result of this altercation, Mr Ratcliffe, after having ensured that Jumbo was secure and the members of the public not in any danger, left the site in his caravan. Later that morning there was a discussion between Mr Ratcliffe and a member of the show committee, as a result of which the vehicle in close proximity to the enclosure barrier was moved. Mr Ratcliffe then returned to the A P & H show site and the feeding programme resumed.

[22] At the conclusion of the feeding programme, Mr Ratcliffe said he was told to put Jumbo away and was informed that the next stop would be at Tauranga racecourse. Mr Ratcliffe duly proceeded with Mrs Ratcliffe to Tauranga, assuming that Jumbo would be following as he had been advised.

[23] Mr and Mrs Ratcliffe arrived at Tauranga racecourse and Mr Ratcliffe said he was surprised to find no-one else there. Mrs Flutey arrived and told Mr Ratcliffe that Jumbo had been lost, advised him to wait while she and others tried to find the trailer with Jumbo in, and then she left the racecourse. Mr Ratcliffe said that he was shocked to hear Jumbo had been lost.

[24] Mr Ratcliffe stated that he received a telephone call from Mr Weber 10 minutes after Mrs Flutey had left, at approximately 6.30 p.m. that evening. There was a conversation between the two men which Mr Ratcliffe said concluded with Mr Weber saying that he would "*come and pay me and he would finish me up*". Mr Ratcliffe had then asked if he had been sacked, to which he said Mr Weber had responded "*Yes, we will find another elephant handler*".

[25] Mr Ratcliffe said that he had heard nothing further until Monday 23 November 2009 when he read in a newspaper that Jumbo had been given to the NZRSPCA.

Determination

Was Mr Ratcliffe an employee or an independent contractor when working for Mr Weber.

[26] Mr Ratcliffe gave evidence that he agreed to enter into an employment relationship rather than work as an independent contractor, on the basis that he was approaching retirement age, and after 30 years of operating his own circus business, he wished to relieve himself of this responsibility. In agreeing to work for Mr Weber, he would be able to continue to care for Jumbo, but with assistance in order that he could enjoy some free time, and earn a regular guaranteed income towards his retirement.

[27] There was no offer letter, or employment agreement provided to Mr Ratcliffe, he did not receive any wage slips, and although Mr Ratcliffe wrote to Mr Weber on 16 August 2010 requesting a wage certificate, he received no response. Mr Ratcliffe did provide copies of bank statements which indicated a regular weekly payment of \$1,500.00, but evidence of these payments do not of themselves establish the nature of the relationship.

[28] In deciding whether Mr Ratcliffe was employed by Mr Weber as an employee, I apply s.6 of the Employment Relations Act 2000 (“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 all 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

[29] In *Bryson v Three Foot Six Limited (No2)*¹ 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. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. 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 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. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.

Contractual basis

[30] I find that there is no documentation which establishes the real nature of the employment relationship and therefore 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 Mr Ratcliffe was working on his own account.

¹ [2005] 1 ERNZ 372

Control and Integration test

[31] Mr Ratcliffe said that although Mr Weber personally telephoned and met with him to issue instructions, he was subject to the delegated control and management of several people whilst working at the Circus as Mr Weber was primarily based in Australia. The principal of these was Mr Markus Weber, brother to Mr Harry Weber, whom Mr Ratcliffe said appeared to be in overall control of the Circus in New Zealand. However at various other times Mr Paul Johnson, Publicity Manager for the circus, Mr Weber Senior, and at the time the feeding programme was instituted, Mr and Mrs Flutey, all exercised delegated authority over Mr Ratcliffe..

[32] Mr Ratcliffe said that “*Harry at all times controlled and decided what work I would have to do with the Circus and with Jumbo*”. Mr Ratcliffe explained that he was told to move Jumbo from one location to another at Mr Harry Weber’s instructions, when to leave, where to go to and where to park his caravan on arrival. These instructions were conveyed to him by Mr Markus Weber, Mr Johnson, Mr Weber Senior, or by Mr and Mrs Flutey.

[33] As evidence of such instructions, Mr Ratcliffe provided an email dated 20 November 2009 from Mr Johnson to Mr Flutey. This email contained various instructions concerning the job responsibilities of several of the circus personnel whilst in Tauranga, for Mr Flutey to convey to those affected. In respect of Mr Ratcliffe the email stated:

Tony responsible for handling of Jumbo to meet with the Feeding times and also maintaining observation of Jumbo in enclosure when feeding and generally through the day, also at night if needed.

[34] Mr Ratcliffe participated in the circus performances through the showing of Jumbo and the other animals as and when instructed to do so, and in the feeding programme which was organised and managed by, and on behalf of, Mr Weber, thus forming an associated part of the circus operation.

[35] Mr Ratcliffe wore the same uniform as other circus personnel,

[36] I find that Mr Ratcliffe was subject to the control or delegated control of Mr Weber in respect of his duties at the Circus and that he was integrated into the operation of the Circus.

The fundamental Test

[37] In considering the fundamental question of whether Mr Ratcliffe was in business on his own account I find the following facts significant:

- Mr Ratcliffe explained that the feeding programme was instigated at Mr Weber's instruction and Mr Ratcliffe was instructed to purchase the food for the programme for which Mr Weber reimbursed him.
- Mr Ratcliffe said that Mr Weber provided the diesel for his vehicle, the electric fence enclosure for Jumbo, a broom, shovels, buckets for the cleaning and feeding of Jumbo, the food for Jumbo, and cleaning products.
- I note however that although Mr Weber supplied Mr Ratcliffe with a uniform to wear, this was not of significance in determining Mr Radcliffe's employment status, since Mrs Ratcliffe who was stated to be working as an independent contractor in the Circus, was also supplied with a uniform
- Mr Ratcliffe had, at the time he commenced working for Mr Weber, deregistered from GST and notified the IRD that he was no longer employing staff.
- Mr Andrews, who, in the course of the negotiations for the sale of Jumbo, had met Mr Weber on several occasions, was very clear in his evidence to the Authority that Mr Ratcliffe was to be employed as an employee, stating:

I recall that Tony was to be an employee at a salary of \$1,500 per week net of tax and I considered that this was a good deal for Tony who prior to that was self employed with an uncertain income due to the vagaries of the circus business.

- Mr Zane Ratcliffe, nephew to Mr Ratcliffe and who was involved in the negotiation discussions with Mr Weber for the sale of Jumbo, confirmed that his understanding was that Mr Ratcliffe was to be employed by Mr Weber following Mr Weber's purchase of Jumbo. It was on this basis that he built the trailer for Jumbo, supplying his labour on a cost-free basis as sponsorship.
- Mr Ratcliffe himself was clear in his understanding that he became and was an employee of Mr Weber, whilst Mrs Ratcliffe had maintained an independent contractor status.

In short, Mr Weber provided all the equipment necessary for Mr Ratcliffe to carry out his job responsibilities, and the three parties closely involved in the discussions with Mr Weber, being Mr Ratcliffe himself, Mr Andrews and Mr Zane Ratcliffe, concurred with an understanding that what was being contemplated at that time was an employment relationship.

[38] I determine that Mr Ratcliffe was an employee rather than an independent contractor in the employment of Mr Weber.

Was Mr Ratcliffe unjustifiably dismissed by Mr Weber?

[39] Mr Ratcliffe was instructed to go to Tauranga racecourse following the conclusion of that day's feeding programme with Jumbo. Mr Ratcliffe saw nothing suspicious in this request as he was accustomed to being told where to go and when, and he followed this instruction as a reasonable request. Shortly after his arrival at the Tauranga racecourse Mrs Flutey arrived to tell him that Jumbo had been lost. There was no further information provided to Mr Ratcliffe and no intimation that he was the subject of any disciplinary matter.

[40] Shortly after Mrs Flutey left the Tauranga racecourse, the evidence was that Mr Weber telephoned Mr Ratcliffe and informed him he was tired of Mr Ratcliffe not doing what he was told, which Mr Ratcliffe understood to refer to his having removed his caravan in Te Aroha, and Mr Weber refused to listen when Mr Ratcliffe tried to explain his concerns about the safety of the public. Mr Ratcliffe stated that Mr Weber

proceeded to tell him “*that he should have listened to his brother and got rid of me two months ago. He added that he would come and pay me and he would finish me up*”. Mr Ratcliffe said Mr Weber had that confirmed he (Mr Ratcliffe) was correct when Mr Ratcliffe asked him if he had been sacked.

[41] I find that in dismissing Mr Ratcliffe, Mr Weber did not adhere to the basic requirements of procedural fairness, specifically:

- a. Mr Ratcliffe was not informed of any specific allegation of misconduct or told what the likely consequences would be if the allegations were established;
- b. Mr Ratcliffe was not provided with a real opportunity to provide an explanation to refute the allegations; and
- c. There was no unbiased consideration of the explanation since no opportunity was given to Mr Ratcliffe to provide one.
- d. The decision to dismiss Mr Ratcliffe was pre-determined.

[42] I determine that Mr Weber departed so far from these basic requirements as to render the dismissal of Mr Ratcliffe an unjustifiable dismissal.

Remedies

Reimbursement of lost wages

[43] Mr Ratcliffe explained that although there was a clear agreement as to the payment of \$1,500.00 during the period of time that Jumbo was with the Circus, following the proposed retirement of Jumbo with Mr Ratcliffe to her new home at Mr Weber’s Cambridge home, there was to be a discussion between Mr Ratcliffe and Mr Weber as to the appropriate level of remuneration. Mr Ratcliffe further explained that as he would be retired at this stage, the money was less important to him than continued access to Jumbo.

[44] I find, especially in the circumstances that Jumbo is no longer in Mr Weber's ownership, there are no grounds for awarding any lost wages beyond a nominal notice period, which in the absence of an employment agreement, but taking into consideration the weekly remuneration period, I set at 2 weeks notice.

[45] I make the following award:

- a. A payment in respect of lost wages of \$3,000.00 net
- b. As interest on that amount, \$159.00 pursuant to s 11, Sch 2, Employment Relations Act 2000 ("the Act")

[46] Mr Ratcliffe claimed that he had received no annual or statutory holiday entitlement throughout his period of employment with Mr Weber. I determine that, as an employee, Mr Ratcliffe should have received the annual and statutory holiday payment entitlements.

[47] I make the following award:

- a. A payment of \$11,538.46 in respect of annual leave entitlement for the period 24 January 2008 to 21 November 2009.
- b. A payment of \$1,714.28 in respect of statutory leave entitlement for the period 24 January 2008 to 21 November 2009.

Compensation

[48] Mr Ratcliffe and Jumbo had a long 30 year relationship which was a very close relationship. Mr Andrew described Mr Ratcliffe's care of Jumbo as being of an extremely intensive nature, "*like taking care of a baby but this baby did not grow up*".

[49] Although Mr Ratcliffe had recognised that he was becoming too old to maintain this level of care for Jumbo, it had been his intention to provide in the short-term for additional assistance in order that he could enjoy a couple of days off each week, and in the long-term for a retirement for himself and Jumbo in which he could

continue to assist with her care on a much reduced basis and maintain his proximity to her.

[50] I find it reasonable to conclude that at the time when Mr Ratcliffe was sent to Tauranga racecourse, the plan to give Jumbo to the NZRSPCA was already formed by Mr Weber and his associates, and that sending Mr Ratcliffe to Tauranga racecourse was a deliberate ploy to ensure Mr Ratcliffe was not present at the time of transfer, a fact which had considerably distressed Mr Ratcliffe.

[51] Mr Ratcliffe had been shocked to be told that Jumbo had been lost, which in the circumstances I consider it not unreasonable to assume to have been a fabrication, and was extremely upset, not only by the fact of his dismissal, but to have heard subsequently that Jumbo had been sold in circumstances which had not allowed him to say good- bye to her.

[52] I find an additional element to Mr Ratcliffe's distress was only finding out what had happened to Jumbo after reading a newspaper report. A fair and reasonable employer would have informed an employee about the welfare of the animal in their care, especially given the special nature of that relationship, and in particular would have involved that employee in the plans to move that animal out of their ownership, prior to that occurrence. I further find that the manner in which Mr Weber treated Mr Ratcliffe in this matter to have been a significant breach of the good faith requirements an employer owes to an employee pursuant to s.4 (1A) of the Act.

[53] I make the following award: a payment under s. 123(1)(c)(i) of the Act for hurt, humiliation and injury to feelings in the sum of \$10,000.00.

Contribution

[54] I have considered the matter of contribution as I am required to do under s124 of the Act. Mr Ratcliffe did not contribute to the situation which gave rise to the grievances. There is to be no reduction in remedies.

Costs

Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority