



[4] Mr Shadbolt says he was an employee and was unjustifiably dismissed. Tin Men's position is that Mr Shadbolt was a contractor, it had made other arrangements to cover his jobs but could potentially have found additional work for him had he not acted in a threatening manner towards Mr Mulholland.

### **How did the Authority investigate?**

[5] The investigation meeting was held in Auckland on 12 June 2025. Witness statements from Mr Shadbolt and his former partner, as well as from Mr Mulholland, were received. All three also answered questions at the meeting under oath or affirmation. A written statement was also provided from Tin Men's yard manager.

[6] Some submissions were received at the investigation meeting, with written submissions and other comment provided later.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

### **What are the issues?**

[8] The issues for investigation are:

- Were Tin Men and Mr Shadbolt in an employment relationship?
- If so, was Mr Shadbolt unjustifiably dismissed?
- If so, what remedies (if any) should Mr Shadbolt receive?
- If Mr Shadbolt was an employee, did Tin Men breach s 130 of the Act by failing to keep and provide wages and time records for him and should it be penalised?

## **What are the tests to decide if a person was an employee?**

[9] Employees are people employed to do any work for hire or reward under a contract of service.<sup>1</sup> The crucial point in deciding whether a person is an employee or an independent contractor is the real nature of the relationship between the parties.<sup>2</sup>

[10] A focus is required on the realities of the parties' mutual rights and obligations.<sup>3</sup> This includes consideration of all relevant matters including those which indicate the intention of the parties, but with statements about the nature of the relationship not being determinative.<sup>4</sup>

[11] Elements to be examined include the parties' intentions, the principal's control of the person working, the degree to which that person is integrated in the principal's business and the fundamental or economic reality test about whether the person working is carrying out their own independent business.<sup>5</sup>

## **What are the parties' backgrounds?**

[12] Mr Shadbolt has experience as a concreter and digger driver, both as an employee and a contractor. He often worked in diggers rather than doing solely truck driving but had carted around diggers and tip trucks. He had put in invoices as a contractor previously. Prior to his involvement with Tin Men, he was employed by a civil engineering company.

[13] Mr Shadbolt said he did not want contracting work as he and his partner wanted the stability of a steady job and wage. Mr Shadbolt's partner said she was very clear to him from when they moved up to Auckland at the start of 2021 that he should not be a contractor, as he did not have his own gear and it was hard, as the partner of a contractor, waiting until payments came through.

[14] Tin Men has two operational bases for different types of work. Its scrap metal yard in Silverdale is run by Mr Mulholland's wife and a yard manager. Mr Mulholland operates the demolition part of the business, including using a Henderson base site. The work depends largely on what clients make available.

---

<sup>1</sup> Employment Relations Act 2000 (the Act), s 6(1).

<sup>2</sup> The Act, s 6(2).

<sup>3</sup> *Rasier Operations BV & Ors v E tū Incorporated & Anor* [2024] NZCA 403 at [9].

<sup>4</sup> The Act, s 6(3).

<sup>5</sup> *Bryson v Three Foot Six Ltd* [2005] NZSC 34 at [32] and *Rasier*, above at n 3, at [9].

[15] Mr Mulholland describes his upbringing in Ireland where if they had work available, they felt an obligation to give it to people who needed it. There are ten or twelve people working with Tin Men, with Mr Mulholland describing trying to take people on when they turn up looking for work. He accepts this might not be a proper way for an employer but the company is not a normal employer. According to Mr Mulholland Tin Men has moved away from employing drivers to having them as contractors, as the work was not steady. Some drivers are more regular, with other contractors being called in as required for particular types of work.

[16] Both men acknowledge having limited written comprehension and not being very focused on paperwork. It was unusual for Mr Mulholland to give anyone paperwork, with his wife usually doing that.

### **How do the parties make contact?**

[17] A role was advertised in Trade Me, likely in November 2023. Neither party is able to provide a copy of the original ad. Mr Mulholland's practice is to dictate to someone in the office what he wants to advertise and they would put the ad up. He does not recall seeing this particular ad but notes everyone started on \$30 an hour.

[18] Mr Shadbolt's representatives identified a Tin Men Trade Me ad listed in early 2024 which included:

#### **TRUCK DRIVER**

...

##### **Details**

Company	Tin Men Limited
Job Location	North Shore City, Auckland
Type	Full Time
Duration	Permanent

##### Description

Company: Tin Men Limited  
Location: Auckland, Silverdale  
Type: Full time, Permanent  
Remuneration: \$30 per hour  
Working hours: Minimum 30 hours per week

We are a scrap metal company and we are looking for Class 4 Truck Driver and Class Five Truck Driver.

The successful candidates should be able to work under pressure, be able to work during weekends, shifting schedule and hold a full NZ clean driver's licence. Being a competent driver is essential for this role.

[19] Mr Shadbolt recalls the ad he responded to as being shorter – Class 2 driver, possibly class 4, with experience, for an immediate start, hourly rate up to \$30 depending on experience. He accepts the ad did not guarantee a full week but was for a normal week's work, everyday, pretty much full time.

[20] Mr Mulholland does not think there would have been a reference to Class 2 licence in the ad as what they really needed were Class 4 or 5 drivers. He recalls telling Mr Shadbolt that his Class 2 licence was not really what they needed but Mr Shadbolt being very eager for work and offering to do any job. Mr Mulholland thinks they would try to get more work on their small gantry truck, to give Mr Shadbolt enough to do. All drivers for Tin Men could cover that truck.

[21] I am satisfied that the ad is sufficiently similar to that which Mr Shadbolt saw to provide useful evidence for the purposes of this matter.

[22] Mr Shadbolt recalls Mr Mulholland being pretty busy and direct – telling him to turn up on site and they would go from there.

[23] Mr Shadbolt goes to the Henderson site and is asked to drive a Tin Men truck around the site enough to satisfy Mr Mulholland about his ability to operate the vehicle. Mr Mulholland then gives Mr Shadbolt some addresses to do pick-ups from.

#### **What documentation is there?**

[24] No documents are provided right at the start.

[25] Mr Shadbolt recalls having the trial day then doing another day of work. At the end of that day, he is asked by Mr Mulholland to sign a one or two-page employment agreement. He does not have a copy and his evidence regarding content is not particularly precise. He remembers there being two pages - an insurance page and an employment agreement page. And Mr Mulholland saying he should have got Mr Shadbolt to sign it before he started that day. Mr Shadbolt says he signed assuming it was an employment agreement but did not really read the document due to his limited capacity in that area.

[26] Mr Shadbolt recalls the hours being weather dependent but Mr Mulholland indicating if there was no driving he could do demolition work for Tin Men to keep his hours up.

[27] Tin Men is unable to find an employment or contractor agreement for Mr Shadbolt to provide to the Authority. Although it would be unusual for Mr Mulholland to be involved in getting paperwork signed at the Henderson site, there is no evidence of anyone else arranging for Mr Shadbolt's documentation.

[28] During the Authority's investigation meeting Mr Mulholland asked for a documentation search at the office. He then showed a simple "Contractor Details" form used in the period after Mr Shadbolt was with the company – including date, name, date of birth, contact details, driver's licence and next of kin, signed by the "contractor" and the manager.

[29] Mr Shadbolt accepted that that form looked like what he had signed but there was a second piece of paper too. This was likely an insurance document about Mr Shadbolt's use of company vehicles.

[30] Mr Mulholland speculated that Mr Shadbolt had taken the signed contractor details form home and showed his partner, who was upset by the fact Mr Shadbolt was a contractor. Although that could not be ruled out, there was little to support that suggestion.

[31] I conclude it most likely that Mr Shadbolt was not given an employment agreement to sign, even though he may have regarded what he signed as such. Rather he signed a contractor details form and an insurance form.

### **How is the work arranged?**

[32] Mr Shadbolt commences with Tin Men from 23 November 2023.

[33] Mr Mulholland explains that the Silverdale yard manager organises the runs for the waste bins. A lot of the work is picking up bins from Tin Men's main client, a metal processing business. Mr Shadbolt drives to pick up skip bins and other demolition material and takes them to scrap yards and commercial metal crushers or the wharves.

[34] Mr Mulholland recalls Mr Shadbolt expressing that he was financially struggling, likely the first time the two met. Mr Shadbolt recalls that as being at a later point where he had driven in his own car almost to Silverdale before being told to drive to Henderson and then the Silverdale manager asking him to drive back to Silverdale. Mr Shadbolt acknowledges saying he needed money for petrol and for lunch.

[35] Mr Shadbolt writes down his hours and takes photos of dockets he gets when dropping bins to the client. He sends the photos to Mr Mulholland, Mr Mulholland's partner and the yard manager.

[36] Usually Mr Shadbolt goes to pick up the truck from Mr Mulholland's house in the morning. This is arranged because that house property is semi-rural and nearer Mr Shadbolt's home than the Silverdale yard. The Silverdale yard manager emails Mr Shadbolt a list of work for the day and Mr Shadbolt completes the jobs. If Mr Mulholland requests something to be done, his requests are to be given priority.

[37] Mr Shadbolt starts around 6.30am and finishes around 5pm. He works Monday to Friday and sometimes Saturdays. He estimates working approximately 45 to 50 hours on average per week.

### **What happens about payment?**

[38] Initially some cash is paid to Mr Shadbolt. Some of these payments are from Mr Mulholland, usually when Mr Shadbolt seeks recompense for truck diesel he put in the tank at petrol stations. The Tin Men truck Mr Shadbolt is driving does not have a fuel card, so he pays until he gets reimbursement from the company. Mr Shadbolt and his partner find this arrangement surprising. Sometimes his partner puts money into Mr Shadbolt's account, say \$100, to cover fuel or his lunch money.

[39] Mr Mulholland does not think there should have been much need for diesel to be purchased as diesel trucks come onsite to deliver diesel for Tin Men equipment and trucks. Mr Mulholland's impression is that Mr Shadbolt sometimes forgets to refuel at the yard and is hard up, needing some assistance, so Mr Mulholland occasionally gives Mr Shadbolt cash from his pocket. Mr Mulholland sees this as cash in advance of formal payments. Mr Shadbolt also refers to receiving more like a usual pay in cash from Mr Mulholland's wife who has administration responsibilities for Tin Men. Mr Mulholland may not have been aware of those payments.

[40] There was a sense of several miscommunications between the parties.

[41] Cash was not Mr Shadbolt's preference as he wanted to make sure tax and child support are being deducted and sought timesheets be sent to his email address.

[42] It was not clear that cash was Tin Men's preferred payment method either. It seemed to be waiting for Mr Shadbolt to invoice.

[43] It is possible Mr Shadbolt was told at some point early on to download a relevant hours/invoicing app (such as Hnry). He does not recall that happening until 23 December. Mr Mulholland says he thinks either his wife or the Silverdale yard manager would have told Mr Shadbolt about the app but is unable to confirm when or if that happened. He also describes his wife and the yard manager being frustrated with Mr Shadbolt not getting the invoicing done and Mr Mulholland having to give cash.

[44] Mr Shadbolt's understanding was that the app needed was a timesheet reporting app. He had used a similar app previously to record time undertaken on particular jobs which the employing company used to bill clients. By contrast, Hnry is an accounting and tax automation tool for sole traders.<sup>6</sup>

[45] There is one Hnry invoice in Mr Shadbolt's name, although it is stamped "Cancelled". This relates to a session where the yard manager gave Mr Shadbolt a demonstration on the Hnry app. Mr Mulholland refers to the yard manager as a contractor himself so used to that system. Mr Shadbolt recalls this demonstration occurring pre-Christmas just before work finished. The invoice is dated 23 December 2023.

[46] Mr Shadbolt recalls the manager saying something along the lines of "but you've been asking for payslips, that's how we do it. It does tax and things". Mr Shadbolt replied that he did not want to be like that (as a contractor). However, during messages to Mr Mulholland trying to check when money would come through after Christmas, Mr Shadbolt messages "I have confirmed that I sent you the invoice".

[47] The invoice is cancelled, by someone, likely because Mr Shadbolt sought quicker payment than the invoice's due date of 14 January 2024, with him expecting to be paid before Christmas.

[48] The yard manager is in contact with Mr Shadbolt a few days after Christmas and arranges for money to be paid, out of cycle, into Mr Shadbolt's bank account. This was the only amount paid into his account.

---

<sup>6</sup> <https://hnry.co.nz>.

[49] There was no common understanding about when or who marked the invoice as cancelled. In any event payment was made of the total amount specified in the invoice.

### **What difficulties arise with Mr Shadbolt's driver's licence?**

[50] Attempts during and after the investigation meeting to discover more about what happened with Mr Shadbolt's licence were not particularly successful.

[51] Demerit points are given for some speeding and traffic infringements and offences.<sup>7</sup> Accumulation of 100 or more active demerit points within any two-year period results in a three-month licence suspension.<sup>8</sup> The suspension period begins as soon as the demerit suspension notice is served on the driver.<sup>9</sup>

[52] Mr Shadbolt recalls getting earlier demerit points for seat belt and cell phone matters.

[53] Mr Mulholland suggests the combination of circumstances meant Mr Shadbolt knew he had demerit points and would have known he was close to losing his licence at the time he started at Tin Men. Mr Shadbolt gave somewhat unclear evidence about his experiences with demerit points. He suggests a move to Auckland with resulting lost mail was a factor but later clarification on the timing of that move, meant it was outside the relevant two-year period. I do not rule out Mr Shadbolt having some awareness of a high demerit level but Tin Men did not seem to ask any questions to establish that drivers being taken on were not near the demerit point limit.

[54] On 19 or 20 December 2023 Mr Shadbolt is pulled over by a police officer for what he describes as a combination of slight speeding and the truck having a slightly raggedy appearance including a crack in the windscreen. He recalls the officer giving him a warning about the windscreen but for the speeding (3 or 4 km over the limit) he got demerits. The officer shows Mr Shadbolt his log of demerit points and indicates his licence will be suspended but he could apply for a work licence.

[55] On about 20 December 2023 Mr Shadbolt phones a lawyer about getting a limited licence to drive for work. She recommends he tells Mr Mulholland.

---

<sup>7</sup> <https://nzta.govt.nz/driver-licenes/driving-offences-and-penalties/demerit-points> -

<sup>8</sup> As above.

<sup>9</sup> As above.

[56] Mr Shadbolt proceeds to phone Mr Mulholland. Mr Mulholland asks him how long and in the reply Mr Shadbolt speaks of a good chance of getting the work licence soon. He may have been unrealistically optimistic about the likely outcome time. Mr Mulholland tells Mr Shadbolt that he will help him as much as he can.

[57] At this time no formal steps are taken regarding Mr Shadbolt's arrangement with Tin Men.

[58] Mr Shadbolt loses his licence from Christmas Day 2023 onwards.

### **What happens after Christmas?**

[59] The process is not nearly as quick as Mr Shadbolt was hoping. It seems a lack of clarity about Mr Shadbolt's status with Tin Men meant additional paper work. Mr Shadbolt describes some delay in getting hold of Mr Mulholland although Mr Mulholland describes himself as always ringing back people who ring him, with the exception being Boxing Day which he strictly has off.

[60] On Wednesday 3 January 2024 the Silverdale yard manager messages Mr Shadbolt asking when he is back at work. Mr Shadbolt replies Friday. Further messages are exchanged the next day about whether the limited licence has come through and whether there is any work Mr Shadbolt can do without a licence. The manager does not think so.

[61] On 4 January Mr Shadbolt texts Mr Mulholland about his lawyer hopefully having an affidavit to Mr Shadbolt tomorrow to get sworn tomorrow and there will also be something for Mr Mulholland to sign (at some stage).

[62] Mr Shadbolt's lawyer tells him the affidavit had been sent to Mr Mulholland on 5 January to his nominated email address.

[63] On 10 January Mr Mulholland sends through to Mr Shadbolt his full work details, including his cell phone, office number and email address. Mr Shadbolt replies that papers had now been sent to Mr Mulholland.

[64] It appears Mr Shadbolt picks Mr Mulholland's sworn affidavit up on Monday 15 January and messages Mr Mulholland that he is hoping to have an answer by (presumably the following) Monday.

[65] Mr Shadbolt messages Mr Mulholland and the yard manager a week later, hopeful of getting a licence and starting again at work. The yard manager messages he has a few jobs for the truck that need to happen.

[66] At some point Mr Mulholland allocates another Tin Men driver to cover more often the gantry truck Mr Shadbolt had used. She usually drives a larger truck but there was not always enough work to keep that operating every day.

[67] On 24 January Mr Shadbolt notifies Mr Mulholland he is in court on 5 February. On 1 February Mr Shadbolt messages that his lawyer is pretty confident he will have his licence on Monday and did Mr Mulholland want him to work that afternoon?

[68] Mr Mulholland does not text in response between his 10 January text and 8 February. He describes this as being his busiest time of year, with factory shut downs and clearances leading to large amounts of demolition being required.

[69] In summary Mr Shadbolt was very communicative. There was a positive spin on the likely speed of the outcome, particularly given the unfortunate timing of losing his license shortly before the Christmas closedown. It was difficult to assess whether this was Mr Shadbolt trying to be positive, whether he was reflecting his legal advice or whether hiccups delayed things. Mr Mulholland accepts that Mr Shadbolt likely genuinely believed what he was saying.

[70] Mr Mulholland understandably has a sense that there were numerous positive messages about an imminent return which did not eventuate. It was actually seven weeks from when Mr Shadbolt loses his licence to when he regains it. Some pressure comes on with the Silverdale yard manager asking when his jobs were going to be done.

### **What happens once the licence was obtained?**

[71] On Monday 5 February 2024 Mr Shadbolt goes to court and gets his limited licence granted. He messages that news to Mr Mulholland, saying the physical licence has to be sent out and then he can start work. He also messages the yard manager who says to make sure to let Mr Mulholland know and “we can plan from there”.

[72] Getting a complete picture of events from there was not straightforward.

[73] At the investigation meeting Mr Shadbolt recalled a call, possibly on 6 February, where Mr Mulholland said he had to let Mr Shadbolt go, he had got someone else in

there. However, such a call was not referred to in the fairly detailed grievance letter from Mr Shadbolt's representatives nor in the statement of problem nor witness statement. It also does not fit well with later messages. I conclude it is more likely than not that there was no call on 6 February.

[74] Mr Shadbolt follows up on Thursday 8 February saying he can start tomorrow. Mr Mulholland replies by text:

Sorry we had to go with another driver.

[75] Five minutes later Mr Shadbolt requests a call from Mr Mulholland as soon as possible - "I don't understand your txt."

[76] Mr Mulholland told the Authority he saw this as potentially a short term situation and they might be able to get more work for Mr Shadbolt from a major client. He felt an obligation to the other driver who had taken over the gantry truck. Mr Mulholland says he was always intending for Mr Shadbolt to come back and that did not change until events on 12 February, outlined below. Those intentions may well not have been so clearly articulated to Mr Shadbolt at the time.

[77] Mr Shadbolt recalls having a call with Mr Mulholland later that day with Mr Mulholland saying "it is what it is". Mr Shadbolt did not give evidence of being told whether he was going or staying more definitively.

[78] Mr Shadbolt further recalls calling Mr Mulholland the next day and begging for his job back as the limited licence only applied to Tin Men and he had spent money in legal fees to get it.

[79] On Sunday 11 February Mr Shadbolt messages Mr Mulholland that he had been told there was a new driver to replace him but Mr Shadbolt had told him on 5 February that the court had approved his licence and he could be back at work on the 12<sup>th</sup>. He continues that he spent \$1,435 and will send receipts through. As he has to apply for a new licence now so he can get a job so could Mr Mulholland please pay (the amount Mr Shadbolt had spent) into Mr Shadbolt's account. There had been no previous discussion about Tin Men paying for the limited licence and Mr Mulholland was not aware that it was linked solely to driving for Tin Men. He messages "No", seemingly indicating he was not going to pay.

[80] On Monday 12 February Mr Shadbolt messages again – “William did you just need another driver. When can I start back I have my licence so I can be there today at 9.00am”. About half an hour later, at 9.04 am he messages “I’m on the way to your house”.

[81] At some point, seemingly between those two texts, Mr Shadbolt and Mr Mulholland are in a heated phone call. According to Mr Mulholland, Mr Shadbolt says he was going to come and sort it (or him) out. Mr Mulholland replies he was not at home but Mr Shadbolt says he is coming anyway. Mr Mulholland describes Mr Shadbolt as being very angry and sounding threatening. Mr Shadbolt denies that, saying he was begging for any sort of work.

[82] Mr Mulholland then phones Mr Shadbolt’s lawyer. She does not particularly want to get involved. Mr Shadbolt acknowledges his lawyer described Mr Mulholland on the phone as sounding scared and saying something about the phone conversation (between Mr Shadbolt and Mr Mulholland) getting violent.

[83] That evening Mr Mulholland messages regarding the 9.04 am text:

I just saw your text. I see that as a threat. You are now trespassed from my home and any Tin Men property. Breaching the trespass notice will result in legal action.

[84] Reference is also made to possible police steps if the trespass notice is breached.

[85] In reply Mr Shadbolt texts “Sorry William that was an old text nothing to be worried about”.

[86] Mr Shadbolt told the Authority that he had been deleting old texts and sent that earlier one to Mr Mulholland by mistake.

### **Nature of the relationship - what were the intentions of the parties?**

[87] I move now to consider whether Mr Shadbolt was in an employment relationship with Tin Men or whether he was a contractor. Firstly what are the indications of the parties’ intention regarding employment or contractor status?

[88] Although not necessarily identical to the actual advertisement Mr Shadbolt saw, the ad supplied to the Authority is very suggestive of an employment relationship – a

full time, permanent role on an hourly rate with a minimum of 30 working hours a week.

[89] Mr Mulholland did not accept those features suggest employment, rather Tin Men aimed to give people a contract and enough work to make a living. That description may sound like employment but Mr Mulholland indicates Tin Men had moved away from employing people to the point where there are only a few employees and all others are contractors.

[90] I conclude an objective observer would see the ad as indicating that employment was available.

[91] Mr Shadbolt says Mr Mulholland did not mention anything about him being a contractor. This was not disputed. There seems to have been little discussion about the nature of the relationship when the two first met.

[92] Mr Shadbolt assumed the agreement he signed was an employment agreement but his description of it did not sound like an employment agreement and he ultimately accepted that the Contractor's Details form shown during the investigation meeting was like the document he signed. That document does not attempt to described how the relationship between the company and the driver will operate but mentions "Contractor".

[93] It appears no holiday pay or paid public holidays were given. Mr Shadbolt did not seek these at the time, suggesting he did not think he was yet entitled to them having been with Tin Men for such a short time.

[94] Mr Shadbolt's affidavit for the limited licence application referred to him being "employed as a contractor/Truck driver". Reference is made to such things as days of work, hours of work and work mobility. Mr Mulholland's affidavit for the limited licence application refers to Mr Shadbolt being "contracted as a Class 2 truck driver and has worked in this capacity since November 2023". He also states that the company is short of four drivers and "severely understaffed in terms of drivers and it's difficult to find suitable staff". Thus both affidavits blend contracting and employment references.

[95] It could be suggested that the absence of steps by Tin Men at the time Mr Shadbolt's licence was suspended may suggest the arrangement was casual

employment or more likely to be of a contractor nature than an employment one. There was no suspension by Tim Men of Mr Shadbolt. On the other hand, the company appears not generally inclined to take a formal approach.

### **Control or independence?**

[96] Mr Shadbolt's hours and duties were set by Tin Men. He had little or no control over his availability or the hours he worked. Mr Shadbolt picked up the company's truck from wherever it was. Usually the Silverdale manager gave him a run list of bins to pick up which he did in that order, with Mr Mulholland occasionally requiring other tasks to be taken straight away. On occasions Mr Shadbolt was told he needed to start earlier because of a customer request, such as from a supermarket.

[97] Mr Mulholland's affidavit refers to Mr Shadbolt's hours of work being flexible but a standard day being 7am to 5pm Monday to Friday and two to three hours' work on a Saturday.

[98] Mr Mulholland described drivers being expected to undertake jobs as they come in when they are available but they may let Tin Men know if they are not going to be available, for a day for example, in which case they do not work. There was no indication of Mr Shadbolt being informed that he had that freedom although he did seem to assume he could have time off over the Christmas/New Year period.

### **Integration or separation?**

[99] Mr Shadbolt was integrated into the day to day running of the Tim Men organisation. Some people would only be called in to cover particular types of work but Mr Shadbolt was a regular.

[100] Mr Shadbolt drove a truck supplied by Tin Men with the company's branding on it, rather than supplying his own vehicle. He also used a company digger on occasions. Tin Men either paid for diesel directly or reimbursed Mr Shadbolt for that cost.

[101] This operation of company-owned equipment is considered a traditional indicator of being integrated into a business.<sup>10</sup> Mr Mulholland did not accept the

---

<sup>10</sup> *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192, upheld by the Court of Appeal, now under appeal in the Supreme Court.

provision of a branded company truck to Mr Shadbolt as significant – he and others go to their biggest clients and drive that client’s branded trucks to help them out but do not see themselves as becoming employees of that other business.

[102] Mr Shadbolt was integrated into the team, receiving daily, or more frequent, instructions from the yard manager and Mr Mulholland

[103] Generally Mr Shadbolt wore his own clothes rather than a company uniform.

### **What was the economic reality?**

[104] The short period of Mr Shadbolt’s time with Tin Men makes some of these tests more challenging to apply.

[105] From the evidence before the Authority, Mr Shadbolt was not running his own business during this period although he had operated as a contractor in some previous periods.

[106] His pay was \$30 an hour, well higher than the minimum wage. No tax or ACC levies was paid for Mr Shadbolt’s earnings at the time by either party. He says he thought Tim Men was deducting tax although he was worried that they were not, as he was receiving some cash and not getting payslips. The picture from the invoice suggests a contractor arrangement. On the other hand the pay was by the hour, rather than based on performance of particular jobs or results.

[107] By way of sample, Tin Men provided some invoices from another driver. A GST number was provided, although as Mr Mulholland points out this will also be the IRD number if an individual is billing. In what is more typically an employment pattern, these invoices were provided weekly and were always for 30 hours a week. The unit price was \$37 (incl GST).

[108] It appears none of the other drivers were designated as employees. They and the yard manager put in invoices for their time.

[109] Mr Shadbolt did not risk his own capital nor have the potential to make a profit through increased efficiency or improved margins. To make more money he had to work more hours. Mr Shadbolt did not advertise his services or business.

[110] Mr Shadbolt actually worked exclusively for Tin Men in that month although there was nothing in writing preventing him from working elsewhere. There was evidence of at least some of the company's other drivers also undertaking work regularly or occasionally for other companies.

[111] There was no evidence that Mr Shadbolt was permitted to sub-contract his work although there was no explicit restriction on this.

[112] Mr Shadbolt was not paying GST or ACC levies. He says he would never have accepted \$30 an hour as a contractor, as he would have had to pay GST, levies, given himself holiday money etcetera out of that. The minimum wage rate in the period Mr Shadbolt was with Tin Men was \$22.70 gross an hour.

[113] The one invoice in Mr Shadbolt's name, marked "Cancelled", shows 44 hours at \$28.00 an hour and no GST component.

### **Industry practice?**

[114] Mr Mulholland described arrangements with contractors using companies' trucks rather than their own, as common in the waste/demolition industry. Mr Mulholland also understood the practice was common in the wider transport industry.

[115] Mr Shadbolt's experience in concreting and digging sectors was mixed, so sometimes he was a contractor, sometimes an employee.

### **Conclusion**

[116] The ad suggests employment with its references to full time and permanent.

[117] There was a mutuality of expectation regarding Mr Shadbolt's work. Tin Men controlled his hours and work – the company told him when to start, which tasks he had, what order to do them in and when to take Mr Mulholland's work instead. There was little opportunity for him to make his own arrangements.

[118] The work Mr Shadbolt undertook was central to Tin Men's operations, continuing to be undertaken by another while he was unable to drive in January 2024.

[119] Tin Men provided the truck and Mr Shadbolt appears to have signed documentation regarding the company's insurance policy.

[120] I have considered Mr Mulholland's evidence regarding his understanding of other businesses' operations but do not consider it sufficient to outweigh the strong factors of Tin Men being in control of the work, the work being a central part of Tin Men's business and the company supplying the truck and insurance.

[121] I conclude that Mr Shadbolt was in an employment relationship with Tin Men.

### **Was Mr Shadbolt dismissed?**

[122] There was no announced dismissal in the sense of a reference by Tin Men to Mr Shadbolt being dismissed or his employment terminated.

[123] I have considered whether communications about the absence of work when Mr Shadbolt's obtained a limited licence amounted to a dismissal. Neither party's evidence solidly supported that proposition.

[124] The message of 8 February – we had to go with another driver - might refer to an ongoing lack of work for Mr Shadbolt or a shorter-term situation. Mr Shadbolt had messaged at lunchtime on Thursday the 8<sup>th</sup> that he would be back to work the next day, giving little time to discuss a return to work plan.

[125] The yard manager's positive messages from 15, 21 and 24 January about progress being made on the licence and on 5 February when he hears the licence has been granted, support there being intention by Tin Men to continue to offer work. The comments about telling Mr Mulholland and "we can plan from there" may suggest that reintegration is not entirely straight forward. By this point, Mr Shadbolt had been out of the business for longer than he was in it.

[126] Mr Shadbolt messaged back promptly asking for a call, stating he did not understand the text. His version is that Mr Mulholland said on the phone "it is what it is".

[127] There is insufficient evidence to establish that Mr Shadbolt was dismissed prior to 12 February 2024.

[128] The critical date is then 12 February when the two men have a headed phone discussion. By way of background Mr Mulholland accepts that he is frank and takes short cuts, he is often talking to people whilst driving (hands free). This is likely not conducive to fuller discussions or explanations.

[129] Mr Mulholland's evidence was that Mr Shadbolt got wild on the phone when he told Mr Shadbolt that Tin Men did not have enough work for him – saying he was going to come up and sort him out. This contrasts with Mr Mulholland's witness statement which refers to sort "it" out. I give Mr Shadbolt the benefit of the doubt on this point.

[130] Mr Shadbolt does not accept that he was angry, saying he became quiet.

[131] Mr Mulholland was so concerned that he turned around from his work travel going in a southerly direction and drove straight home. Mr Shadbolt did not turn up.

[132] Mr Mulholland says he never sacked Mr Shadbolt as such, in the sense of saying "you can't come back" but accepts the relationship ended the day Mr Shadbolt lost his temper.

[133] I accept there was a heated phone call with Mr Shadbolt quite desperate to obtain some work promptly. The explanation for the text Mr Shadbolt sent about going to Mr Mulholland's house, namely that he was deleting texts and sent this one by accident, was unlikely. But regardless, from an objective recipient's point of view, the text could be seen as threatening. Mr Mulholland did not appear someone who readily feels threatened but he took immediate steps to get home and thinks he rang a mate go round to the house, if Mr Shadbolt turned up.

[134] Mr Mulholland did not go to the police, telling the Authority that this was a scrap yard and there are all sorts of issues for which he would be at the police everyday (if he took that approach).

[135] In conclusion there was a sending away of Mr Shadbolt by Tin Men through the issuing of a trespass notice for Tin Men property and the sending of a text message reinforcing that, adding that Mr Shadbolt was not to contact Mr Mulholland or Tin Men "in any form". Mr Shadbolt was dismissed by Tin Men on 12 February 2024.

### **Was the dismissal justified?**

[136] Did Tin Men behave as a fair and reasonable employer could have done in the circumstances, including taking into account the elements in s 103A(3)(a) to (d)?

[137] Mr Shadbolt made a comment in the context of a heated discussion, which could have been interpreted as threatening. Likewise the text.

[138] However, context is important. Mr Mulholland himself gave a sense of the world of a scrap metal yard, with a higher level of tolerance for what in other contexts might be seen as troublesome behaviour.

[139] There were less threatening explanations of Mr Shadbolt's text. He had gone round to Mr Mulholland's house on a regular basis to pick up the gantry truck. It was not surprising that Mr Shadbolt might have pursued a face to face discussion rather than texts or unsatisfactory phone calls. Mr Shadbolt was struggling to get an understanding of where things were at with Tin Men and why, given his significant attempts to gain a limited licence for driving for it and keep its people informed, he was in this situation.

[140] Tin Men simply decided to cut Mr Shadbolt off. There was no attempt to raise Mr Mulholland's concerns with Mr Shadbolt, give him a reasonable opportunity to respond and take into account his explanation before dismissing.<sup>11</sup> This comes against a background of lack of adequate good faith communications about Mr Shadbolt's return to work. Tin Men did not act as a fair and reasonable employer would have done.

[141] I conclude Mr Shadbolt was unjustifiably dismissed by Tin Men.

### **Remedies**

[142] Mr Shadbolt seeks lost wages and compensation for humiliation, loss of dignity and injury to feelings. His contribution to the situation also needs to be considered.

#### *Lost wages*

[143] Mr Shadbolt had some difficulties for Mr Shadbolt finding another job. A couple of operators expressed some interest in taking him on with a limited licence but then their business partners said no. He was without work for seven weeks and is claiming \$6,300, based on an hourly rate of \$30 for a minimum of 30 hours a week. That is a fair rate given that initial communications and the amount of work Mr Shadbolt actually did for Tin Men.

---

<sup>11</sup> The Act, s 103A(3)(b), (c) and (d).

### *Compensation*

[144] Mr Shadbolt felt completely wrecked, losing his self-confidence. He was too embarrassed to go to a doctor to seek help. His partner's evidence confirms he seemed depressed, frustrated and demoralised – the lowest she had seen him in ten years.

[145] Mr Shadbolt saw himself as little use at home. His partner describes him as feeling his treatment by Tin Man as being deeply personal – attacking who he was as a man, partner, father and son.

[146] Mr Shadbolt stopped being able to sleep properly which resulted in him becoming snappy during the day. He became extremely withdrawn socially, stopping seeing family and friends as he was so embarrassed and did not want to be around anyone.

[147] The family were under financial pressure. For the first time ever, he cried in front of his partner. The family had to sell their second car to catch up on bills. The landlord came to their house and demanded rent arrears. When a final demand was made the partner said that she was done. They broke up.

[148] Compensation of \$18,000 is reasonable before consideration of Mr Shadbolt's contribution.

### *Contribution*

[149] Under s 124 of the Act Mr Shadbolt's contribution is considered. To result in a deduction from remedies Mr Shadbolt's conduct must be blameworthy and contribute to the situation giving rise to his dismissal.<sup>12</sup>

[150] Mr Shadbolt's licence suspension can be seen as blameworthy and his being unable to work contributed to the situation where his jobs had to be distributed to someone else. However, Tin Men was willing to continue having him with the company. Any return to work was impacted by Mr Shadbolt saying, in a manner Mr Mulholland found threatening, that he was coming round to sort it out and texting that he was coming to Mr Shadbolt's house. These communications have the potential to legitimately be seen

---

<sup>12</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136 at 175.

as threatening, thus blameworthy and contributed to Mr Mulholland's decision to trespass Ms Shadbolt and thus not have him back working for Tin Men.

[151] This is a significant contribution by Mr Shadbolt and a 40% reduction to the amounts assessed above is warranted.

### **Wages and time records**

[152] Mr Shadbolt seeks a penalty be imposed on Tim Men for its failure to provide copies of his wages and time records in breach of s 130 of the Act. The Maximum penalty is \$20,000.

[153] Under that section Tin Men is required to keep and provide those records. It did not provide records regarding payments made to Mr Shadbolt, other than via the cancelled invoice.

[154] I have considered whether a penalty is appropriate. Even a contractor's details form for Mr Shadbolt was unable to be provided but in any event the sample form provided gives little information on the nature of the arrangement between the parties and their obligations to each other.

[155] A modest penalty is appropriate. Considering the factors in s 133A of the Act – I accept that Tin Men did not intentionally fail to provide an employee's wages and time records but Mr Shadbolt was unable to readily ensure that he was being paid the correct amount. Ultimately however he does not seek any wage arrears. Tin Men is to pay a \$1,000 penalty within 28 days to the Crown, via the Authority's account.

### **Orders**

[156] The Authority orders:

- Taking into account the 40% reduction, Tin Men is to pay Mr Shadbolt within 28 days of the date of this determination \$3,780 as lost wages and \$10,800 as compensation; and
- Tin Men to pay \$1,000 penalty payable to the Crown.

## **Costs**

[157] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[158] If the parties are not able to reach an agreement on costs then Mr Shadbolt should lodge and serve a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Tin Men would then have 14 days to lodge any reply memorandum. If additional time is needed for discussion the Authority would consider granting an extension.

[159] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would be considered.<sup>13</sup> The starting point for a costs assessment for a one-day investigation meeting is \$4,500.

Nicola Craig  
Member of the Employment Relations Authority

---

<sup>13</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).