

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**CA 55/07  
5039179**

BETWEEN                      DANA TATOM  
   Applicant  
  
AND                              WAYNE DUFFIELD  
   Respondent

Member of Authority:        Helen Doyle  
  
Representatives:             Robert Thompson, Applicant  
   Respondent participated by telephone  
  
Investigation Meeting:      15 March 2007  
  
Submissions received:      27 March 2007 from Applicant  
   28 March 2007 from Respondent  
  
Determination:                16 May 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Dana Tatom, says that he was employed by the respondent as a hammer hand from early October 2005 until 12 December 2005. He says that on 12 December 2005 he was unjustifiably dismissed from his position without warning.

[2] Mr Tatom seeks lost wages in the sum of \$3,940, compensation for distress and humiliation in the sum of \$15,000, holiday pay and costs.

[3] The respondent, Wayne Duffield, says that Mr Tatom worked as a contract labourer on a day to day basis and that it was agreed that Mr Tatom would pay his own taxes. He does not accept the jurisdiction of the Authority to deal with the matter as he says that Mr Tatom was never an employee.

[4] Mr Duffield counterclaims against Mr Tatom for the amount of \$20,000 for slander, defamation, hurt and humiliation on the basis that Mr Tatom and his partner made false allegations against Mr Duffield's partner. Mr Duffield says that his partner was as a result of the allegations, dismissed from the Government Department where she had worked for 27 years.

[5] Mr Tatom says that he was an employee and in terms of the counterclaim that he was required by the Government Department to give a statement and that he is not responsible for Mr Duffield's partner's actions.

### **The issues**

[6] The issues for determination:

- (i) Whether Mr Tatom was employed by Mr Duffield as an employee or a contractor;
- (ii) If it is found that Mr Tatom was an employee then whether he was unjustifiably dismissed and what remedies is he entitled to.
- (iii) Is Mr Duffield entitled to receive with respect to his counterclaim?

### **The investigation meeting**

[7] Mr Duffield participated in a telephone conference on 10 November 2006 with the Authority and Mr Thompson. Mediation was discussed and a date was given for an investigation meeting to be held on 15 March 2007 in the event that the matter did not resolve at mediation. A notice of direction and notice of investigation meeting were then forwarded by the Authority to Mr Duffield and Mr Thompson. I am satisfied from courier details provided to the Authority Support Officer that both the notice of direction and notice of investigation meeting were served on Mr Duffield on 15 November 2006.

[8] The parties attended mediation but the matter was not able to be resolved. Shortly before the investigation meeting the Authority Support Officer made telephone contact with Mr Duffield. This was because nothing had been received from Mr Duffield in accordance with the timetabling agreed to by the parties to lodge statements of evidence.

[9] The Support Officer's written records support that Mr Duffield said he was not aware of the date of the investigation meeting and could not attend. Initially the Support Officer believed this was because Mr Duffield was away from Christchurch but Mr Duffield subsequently confirmed he

was too busy. Mr Duffield knew he had an opportunity to attend the investigation meeting if he wished. Mr Duffield did agree that he would participate by way of telephone on the day of the investigation meeting and would then be provided with an opportunity for submissions.

### **Was Mr Tatom engaged by Mr Duffield as an employee or a contractor?**

[10] Sections 6(2) and 6(3) of the Employment Relations Act 2000 provide with respect to whether a person is an employee:

*6(2) - In deciding for the purpose of subsection (1) (a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them*

*6(3) –For the purposes of subsection (2), the Court or the Authority-*

*(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*

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

In ascertaining what the relevant matters are that the Authority must consider for the purpose of s.6(3)(a) of the Employment Relations Act 2000, I have had regard to *Bryson v. Three Foot Six Limited* [2005] 1 ERNZ 372. The Supreme Court said at para.[32] of the judgment:

*“All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. 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 the 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 requires the Court or the Authority to have regard to the 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 at common law. It is not until the Court or 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 light of the control, integration and fundamental tests...*

### **The commencement of the relationship**

[11] Mr Duffield is a builder. Mr Tatom said that he is somewhat more experienced than a labourer but he accepted that, unlike Mr Duffield he is not a qualified builder. Mr Tatom worked as a contractor from April 2005 to September 2005 for a construction company. Mr Duffield also performed work for the company as a contractor. Mr Duffield and Mr Tatom had known each other

for some time and prior to working with the construction company Mr Tatom said that he would occasionally be called by Mr Duffield to do a days work here and there. He accepted that this work was performed by him as a contractor and at that time Mr Tatom also did some work as an artist and was registered for GST.

[12] Mr Tatom and Mr Duffield discussed working together when they were engaged by a construction company in or about September 2005. Mr Tatom said that Mr Duffield advised him that he would pay him *a couple of dollars more* than he was receiving with the construction company. Mr Tatom said that it was important to him that he worked regular hours and he wanted to make sure that Mr Duffield would employ him for a 40 hour week.

[13] It was agreed that Mr Tatom would receive an hourly rate of \$17 for work he performed with Mr Duffield. He recalls Mr Duffield saying *I will look after it for you* although was less sure that the word employment was mentioned. I accept that Mr Tatom thought he was to be engaged by Mr Duffield full time and that he thought that he was in an employment relationship with him. Mr Tatom said there was no agreement that he would pay his own taxes.

[14] Mr Duffield on the other hand does not accept that he employed Mr Tatom or that Mr Tatom actually worked 40 hours per week. He said it more like 15 or 20 hours per week. Mr Duffield said that the understanding was that Mr Tatom would pay his own taxes.

[15] On 30 September 2005 which was Mr Tatom's last day of work for the construction company before his engagement with Mr Duffield, he had a drink with some of the other contractors from the construction company. Mr Duffield was not present at the drinks. One of the company's senior employees expressed concern to Mr Tatom that Mr Duffield had obtained confidential taxation information about the construction company. There was concern expressed about where it had come from and some discussion then took place with Mr Tatom about the matter. Mr Tatom's partner then became aware of the concerns and because it was a requirement of her position she reported the concerns to her employer. Mr Tatom's partner worked at the same Government Department as Mr Duffield's partner. An investigation was then undertaken by the Government Department into the actions of Mr Duffield's partner. Mr Tatom was asked to provide statements as part of that investigation in early October 2005. This was shortly after Mr Tatom had commenced working for Mr Duffield. Mr Tatom provided statements on the understanding that they would be confidential and would not be provided to Mr Duffield.

**The nature of the work performed by Mr Tatom**

[16] Mr Tatom said that he worked for 40 hours per week when engaged by Mr Duffield. He said he would start work at 8am and finish between 4-4.30pm every day. Mr Tatom said that he worked together with Mr Duffield on site and Mr Duffield would ask him to perform some tasks on his own and he would help Mr Duffield with carrying and lifting. Mr Tatom said that he did not feel that he could take time off or simply leave the work site. He said that he did not undertake any other work for the period he was engaged by Mr Duffield.

[17] Mr Tatom was paid weekly in cash. He did not issue invoices and did not account for his own taxes.

[18] I put to Mr Tatom that Mr Duffield did not accept that he worked 40 hours per week and that he came and went as he pleased doing other work. Mr Tatom denied that and felt that Mr Duffield was confusing the situation with how their relationship was before they were engaged by the construction company. He said that the relationship he had with Mr Duffield in October 2005 was quite different to how it had been previously.

**Conclusion with respect to whether Mr Tatom was an employee or a contractor**

[19] I do not find that Mr Duffield and Mr Tatom turned their minds to the nature of their relationship. There was nothing put in writing and the evidence about oral statements made at the time that Mr Tatom was engaged was limited and unclear. Neither Mr Duffield nor Mr Tatom accounted to the Inland Revenue Department for tax on the payments made by Mr Duffield so there is no evidence of intention in that respect. In the circumstances I am not able to conclude that there was a common intention as to the nature of the relationship. I need therefore to examine the way in which the relationship operated in practice to ascertain its real nature.

[20] I have considered the extent to which Mr Tatom was working under the control of Mr Duffield, whether the work Mr Tatom performed was an integral part of Mr Duffield's business and whether or not Mr Tatom was effectively working on his own account.

[21] Mr Tatom's hourly rate was set by Mr Duffield. Mr Duffield supervised and directed Mr Tatom with respect to tasks to be performed and Mr Tatom usually worked closely with Mr Duffield. I prefer Mr Tatom's evidence that he did not feel free to come and go as he pleased and he was engaged solely in work for Mr Duffield. I do not find that Mr Tatom had the freedom to work his own hours independently from Mr Duffield and invoice Mr Duffield for the work

performed. I have placed some weight on the fact that Mr Duffield felt he could dismiss Mr Tatom for misconduct with respect to slander and untrue allegations. A principal terminates a contract rather than dismisses a person. I have only placed limited weight on that matter though because there was confusion with the language adopted at times by both Mr Tatom and Mr Duffield. I note for example that in one of Mr Tatom's statements provided to the Government Department he described himself as an employee when he worked for the construction company. Considered overall I am of the view that the different factors and terms of control weigh in favour of an employment relationship.

[22] The nature of the work performed by Mr Tatom of lifting and carrying out less skilled tasks could not be regarded in my view as other than an integral part in Mr Duffield's business. That is a factor that favours an employment relationship.

[23] I now consider whether Mr Tatom was engaged to perform services and business on his own account. This is often referred to as the fundamental test. Mr Tatom did supply his own tools which is a factor supporting a finding that he was an independent contractor. Mr Tatom did however also share some of Mr Duffield's tools.

[24] Mr Tatom did not take any financial risks in terms of his work with Mr Duffield and lacked any scope for increasing his income through his own efforts. He did not stand to profit from good management or arrangement of this work. He did not hire anyone to help him with his work or get someone to perform his work for him. Mr Tatom did not have to find clients, build external relationships or invest anything in Mr Duffield's business.

[25] There are some factors in terms of the fundamental test that do support a relationship between principal and a contractor but there are more factors in the reality of the working relationship between Mr Tatom and Mr Duffield which support an employment relationship.

[26] Mr Tatom's evidence, and indeed his previous engagement, support that there is some industry practice whereby unskilled labourers and hammer hands are treated as independent contractors rather than employees. I accept that is a relevant factor to be considered along with other factors.

[27] Mr Tatom was paid in cash so there is no record of payments made. I accept Mr Tatom's evidence that he worked for Mr Duffield Monday to Friday and it was usually a 40 hour week. Mr Tatom was not paid on the basis of GST invoices, but in accordance with an agreed hourly rate of \$17. Mr Duffield made no deductions from the hourly rate for tax purposes which is a factor which could support a finding that Mr Tatom was an independent contractor. Mr Tatom though

thought he was receiving a net hourly rate figure as discussed and that Mr Duffield was taking care of his tax. I have treated this matter as a neutral factor.

[28] I find in conclusion having taken all the relevant factors into account that the factors indicative of an employment relationship outweigh the factors indicative of an independent contractor.

[29] I find that the real nature of the relationship between Mr Tatom and Mr Duffield was that of employer and employee.

[30] The Authority has jurisdiction to now consider the personal grievance by Mr Tatom that he was unjustifiably dismissed.

### **Was Mr Tatom unjustifiably dismissed from his employment?**

[31] Mr Tatom says that Mr Duffield became aware of the statements that he had made to the Government Department on 14 November 2005. He said that Mr Duffield ranted and raved and he felt that Mr Duffield became extremely angry. Mr Tatom said that he was fearful at that time for his own safety but that Mr Duffield then said he had got it out of his system and they could continue to work on and that it would not influence their relationship.

[32] Mr Tatom said that he continued to work with Mr Duffield between 14 November 2005 and 12 December 2005. He said the pair of them tried to avoid discussions about Mr Duffield's partner and he thought that things were okay.

[33] Mr Duffield denied that that conversation took place. I think it is probable that Mr Duffield came to know of the statements Mr Tatom had made to the Government Department before 12 December 2005. I believe that he would have been very angry about them and it is more likely than not that he would have raised them with Mr Tatom. I find it less likely having heard from Mr Duffield that he advised or reassured Mr Tatom that the statements would not influence the relationship. I find it more probable that he adopted a wait and see type approach.

[34] On 12 December 2005 I find Mr Duffield telephoned Mr Tatom and said words to the effect *X is fired so you're fired. You and your bitch had better watch your backs.*

**Determination**

[35] Mr Duffield said that there is a moral issue in this case. He says that Mr Tatom's arrangement with the Government Department to keep his involvement with his partner's employer confidential shows a lack of respect, integrity and honesty. This is he says, because Mr Tatom expected to remain friends with him and have a continuing working relationship with him despite having provided the statements. Mr Duffield said that his partner became very depressed and upset as a result of being dismissed from the position she had held for 27 years. He says that their financial situation became serious.

[36] In determining whether a dismissal was justifiable I am required to determine on an objective basis whether the process leading to the dismissal and the dismissal itself was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred – s.103A Employment Relations Act 2000.

[37] I find that a fair and reasonable employer would have met or at least written to Mr Tatom, if the employer thought he could not control his anger in Mr Tatom's presence, and explained the difficulties in the two of them continuing to work together. A suitable notice period should have been negotiated. This did not occur. Instead Mr Duffield telephoned Mr Tatom and summarily dismissed him and then threatened him and his partner.

[38] I find that the dismissal was unjustified because it was not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[39] Mr Tatom has a personal grievance and is entitled to remedies.

**Remedies****Contribution**

[40] I do not find that Mr Tatom can be said to have contributed to the dismissal in these circumstances by attending at the Government Department and giving statements.

**Lost wages**

[41] I do not find that Mr Tatom would have been surprised that the relationship between him and Mr Duffield could not continue once Mr Duffield's partner had been dismissed. In support of this I note that Mr Tatom specifically asked that his statements not be disclosed to Mr Duffield.

Mr Tatom was in my view a sensible person. He had previously been friends with Mr Duffield and his partner. Mr Tatom knew that Mr Duffield could get very angry and in those circumstances it would have been virtually impossible, exceedingly unpleasant and possibly dangerous to continue with the working relationship after Mr Duffield's partner had been dismissed.

[42] In those circumstances I am of the view that an award for lost wages under s.123(1)(b) of the Employment Relations Act 2000 should be limited to one month which would have been a suitable notice period in the circumstances. On the basis of \$17 per hour for a 40 hour week the calculation is \$680 per week and for the month \$2,720.00 gross.

[43] I order Wayne Duffield to pay to Dana Tatom the sum of \$2,720.00 gross being one months lost wages under s.123(1)(b) of the Employment Relations Act 2000.

### **Holiday pay**

[44] I was not provided with the actual details of Mr Tatom's gross earnings whilst he worked for Mr Duffield so I was not able to calculate an amount for holiday pay. If Mr Tatom wishes to pursue this claim then I reserve leave for him to return to the Authority and provide the details of his gross earnings whilst employed by Mr Duffield.

### **Compensation**

[45] Mr Tatom said that he was humiliated by the dismissal which came at a particularly bad time just before Christmas. He said that he could not keep up with his bills and found it difficult to obtain employment. Mr Tatom said that it was also necessary for him to go the Police because Mr Duffield had abused him and made threats to his life.

[46] The issue of compensation is not an easy matter. Mr Tatom was treated badly at the time of dismissal and there are factors that aggravate this such as the threats uttered. Mr Tatom has sought the sum of \$15,000. He worked for Mr Duffield for a short period of time and in my view it would not have been surprising to Mr Tatom that he could no longer continue his employment when Mr Duffield's partner was dismissed. I must place weight on those matters.

[47] In the circumstances and having considered the matter carefully I am of the view that a suitable award for compensation would be the sum of \$5,000.

[48] I order Wayne Duffield to pay to Dana Tatom the sum of \$5,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

**Counterclaim**

[49] Mr Duffield has counterclaimed against Mr Tatom for slander and defamation of character. He seeks lost earnings and compensation for hurt, humiliation and loss of dignity. In essence Mr Duffield says that the statements Mr Tatom provided in terms of the employment investigation into his partner's actions were false.

[50] The matter concerning Mr Duffield's partner was the subject of a separate employment investigation. Considering the matter objectively there would have been some further investigation by the Government Department to verify the truth or otherwise of Mr Tatom's statements, no doubt by way of computer or other records and/or other statements.

[51] I accept the dismissal of Mr Duffield's partner caused him a great deal of stress and anguish and that there have been financial issues as a result of her dismissal. Mr Duffield is asking for damages that flow from dismissal of his partner by her then employer. The Authority does not have jurisdiction to investigate the counterclaim and make an award of damages against Mr Tatom. The counterclaim is therefore dismissed.

**Costs**

[52] The investigation meeting took a little over one hour and a half hours. The statement of evidence was provided, there was attendance on a telephone conference and preparation of submissions. I propose to fix an amount for costs in the sum of \$1,000.

[53] I order Wayne Duffield to pay to Dana Tatom the sum of \$1,000 being costs.

**Summary of findings and orders made**

- I have found that Mr Tatom was employed by Mr Duffield;
- I have found that Mr Tatom was unjustifiably dismissed;
- I have ordered Mr Duffield to pay to Mr Tatom lost wages for one month in the sum of \$2,720.00 gross;
- I have reserved leave for Mr Tatom to return to the Authority with his gross earnings if he wishes holiday pay to be calculated;

- I have ordered Mr Duffield pay to Mr Tatom the sum of \$5,000 without deduction for compensation;
- I have dismissed Mr Duffield's counterclaim;
- I have made an award of costs in the sum of \$1,000.

**Helen Doyle**

**Member of Employment Relations Authority**