

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 296/07
5086050

BETWEEN	DESMOND GEORGE TEAUKURA Applicant
AND	RICHMOND CONSTRUCTION LIMITED Respondent

Member of Authority: Dzintra King

Representatives: Desmond George Teaukura In Person
Shane Richmond, Advocate for Respondent

Investigation Meeting: 5 September 2007

Determination: 24 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Richmond contends that Mr Teaukura was a contractor. Mr Teaukura says he was an employee. If Mr Teaukura is an employee he claims he was unjustifiably dismissed.

[2] The first issue to be determined is that if Mr Teaukura's employment status.

[3] There was no written contract. Mr Richmond did not play a direct part in employing Mr Teaukura. Mr Teaukura said that a friend of his, Mr Norman Vui, who worked for Richmond Construction, told him about a job. Mr Teaukura said he had always been interested in a building job so when Mr Vui told him he could work for Richmond Construction he resigned from his existing job. He turned up to work on the day Mr Vui, who had spoken to Mr Richmond, told him to start work.

[4] Mr Richmond said Mr Vui was a hammer hand and a labour only contractor. Mr Richmond was vague about Mr Vui's ability to commit the company to taking on staff and about his ability to set a pay rate. Mr Richmond said he did not know entirely what arrangement Mr Vui had made with Mr Teakura.

[5] Mr Teakura said Mr Vui told him he would be getting paid the same as him. This was an hourly rate. There was no discussion between him and Mr Vui about the status of his employment. Neither was there any such discussion between Mr Richmond and Mr Teakura.

[6] Mr Richmond said all his staff were contractors and that was how he saw Mr Teakura. Mr Teakura said he believed he was an employee because he understood it was a permanent job.

[7] Mr Teakura was 21 and it was his first building job. It was clear that until his employment was terminated and he sought advice that he was totally unaware of there being any distinction between an employee and a contractor.

[8] Mr Teakura started work on 8 February 2007. On 21 February he was given a tax form to sign. This was an IR330 and it provided for the payment of withholding tax and stated that the withholding tax category was "Building labour only". It appears that the tax code and the words "Building labour only" were written in by Mr Richmond's partner. Mr Teakura did not understand the implications of this.

[9] Mr Richmond produced a copy of an invoice signed by Mr Teakura. Mr Teakura said this was not generated by him; it was given to him by Mr Vui. He said he asked Mr Vui what the invoice was for and Mr Vui said he did not know, just to sign it.

[10] Mr Richmond told me that the company generated the invoices and left them in the workers' in trays for the workers to sign. Once they were signed the workers were paid. The workers filled in job sheets stating how many hours they had worked and what they had done and the invoices were based upon that information.

[11] The pay slip shows that withholding tax was deducted, refers to Mr Teaukura as an employee and his position as that of hammer hand.

[12] Mr Teaukura had his own hand tools but would also use the company's tools, especially bigger tools. He did not know he could claim tax exemptions on his tools if he was a contractor; and did not do so.

[13] Mr Teaukura made no ACC arrangements.

[14] Mr Richmond gave instructions as to where and when and how the work was to be carried out. Mr Teaukura said they were told the day before where to go and to start at 7am and work till 5.30. Mr Richmond said the workers would show up when they felt like it and that the hours were recommended hours. Mr Teaukura said he did not get to choose what time he finished or started.

[15] I am required to determine the "real nature of the relationship" and to "consider all relevant matters, including any matters that indicate the intention of the persons". The intentions of the parties are not decisive of the nature of the relationship. The real nature of the relationship can be ascertained by analysing the control, the integration and the fundamental tests. The fundamental test examines whether the person performing the services is doing so on his own account. Industry practice may also be relevant.

[16] Mr Teaukura made some use of his own equipment and supplied his labour. He was paid by the hour, not by product or outcome. He was fully integrated into the company and on a day to day basis did what he was told, when he was told, how he was told. There was no suggestion that he was able to delegate his work or arrange for someone else to carry it out. Workers on building sites can be employed as employees or contractors. Mr Teaukura did not have any investment in the company and no ability to profit from his work aside from being paid for the hours he as given to work. He was not in business on his own account and there was no financial risk to him. The tax certificate is not determinative of his employment status.

[17] Weighing matters up, Mr Teakura was an employee not a contractor.

The Dismissal

[18] Mr Teakura was absent from work on Friday 16 March 2007. He went to see his doctor who gave him a medical certificate putting him off work until 19 March. Mr Teakura sent Mr Richmond a text message on the Friday morning and Mr Richmond asked for a medical certificate. Mr Teakura contacted Mr Richmond again on the Monday saying he was still unwell.

[19] Mr Richmond texted back saying “best find yourself another job”. The text exchange continued with Mr Teakura asking why he had to look for another job when he had obtained a medical certificate as requested. Mr Richmond said Mr Teakura had not been sick on the Friday, he had been pissed. Mr Teakura said he told Mr Richmond he had been sick and that Mr Richmond could contact his doctor who would confirm that. He provided his doctor’s phone number. He did not hear anything further from Mr Richmond.

[20] Mr Richmond said he had terminated Mr Teakura’s employment because Mr Vui had gone into work drunk on the Friday and had told Mr Richmond that he had been out all night partying with Mr Teakura.

[21] Mr Richmond said that at a later stage he told Mr Vui to tell Mr Teakura that he could come back to work. Mr Teakura accepted that he had been told this by Mr Vui but did not return because he wanted to hear it from Mr Richmond. It appears this was about a week later. Mr Teakura started another job on 27 June.

[22] The dismissal was unjustified. Mr Richmond acted on information given by an intoxicated worker and did not give Mr Teakura the opportunity to respond.

[23] Mr Teakura seeks reimbursement of lost wages and compensation for humiliation and distress.

[24] I have considered whether Mr Teaukura failed to mitigate his loss by not taking up the offer of re-employment. He did not say he would have felt uncomfortable working with Mr Richmond, just that he wanted the offer from Mr Richmond. In the circumstances I find there was a failure to mitigate and Mr Teaukura is entitled to reimbursement only for the period of a week prior to the offer of re-employment being conveyed to him.

[25] The only income information I have been provided with is the invoice from the first week of employment. Mr Richmond did not bring any other documents to the hearing. In that week Mr Teaukura earned \$539.00. The respondent is to pay that amount to Mr Teaukura as reimbursement for lost wages pursuant to s 123 (1) (b) Employment Relations Act 2000.

[26] Mr Teaukura is also to be paid the sum of \$2,000 as compensation for humiliation and distress pursuant to 123 (1) (c) (i) Employment Relations Act 2000.

[27] There was no evidence that Mr Teaukura contributed to the situation that led to the personal grievance so there will be no deductions to the amounts awarded.

Costs

[28] If Mr Teaukura has incurred any legal costs he should file a memorandum with the Authority within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

[29] Mr Teaukura is entitled to have his filing fee of \$70 paid by the respondent

Dzintra King

Member of the Employment Relations Authority