

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 218
5602340

BETWEEN

ROSS THOMSON
Applicant

A N D

ARROW LINE MARKING
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: E Burke, Counsel for Applicant
G Rogers, Advocate for Respondent

Investigation Meeting: 29 June 2016 at Hamilton

Date of Oral Determination: 29 June 2016

Date of Written Determination: 1 July 2016

ORAL DETERMINATION OF THE AUTHORITY

- A. Ross Thomson was employed by Arrow Line Marking Limited from 19 June to 8 October 2015;**
- B. Mr Thomson was unjustifiably dismissed on 8 October 2015;**
- C. Arrow Line Marking Limited is ordered to pay Ross Thomson wage arrears of \$3,067.93;**
- D. Arrow Line Marking Limited is ordered to pay Ross Thomson holiday pay of \$1,220.37;**
- E. Arrow Line Marking Limited is ordered to file a letter from its accountant stating the net profit earned for the period 1 July to 8 October 2015 together with a copy of its profit and loss statement for the year ended 31 March 2016 by 31 July 2016 at 3pm. The file**

is then to be referred to me to finalise the wages and holiday pay to be paid upon that profit share, unless the parties advise the Authority that they have reached agreement about this;

- F. Arrow Line Marking Limited is ordered to pay Ross Thomson lost remuneration of \$1,380 including 25% contribution pursuant to ss.123, 124 and 128 of the Act;**
- G. Arrow Line Marking Limited is ordered to pay Ross Thomson hurt and humiliation of \$7,500 including 25% contribution pursuant to ss.123 and 124 of the Act.**
- H. Arrow Line Marking Limited is to pay costs of \$3,500 to Ross Thomson as a contribution towards his legal costs.**

Employment relationship problem

[1] This is an employment relationship problem where Ross Thomson alleges he was employed by Arrow Line Marking Limited in June 2015 until unjustifiably dismissed on or about 8 October 2015. He seeks wages, compensation and penalties.

Issues

[2] The issues for determination were agreed at an earlier teleconference¹ as follows:

- (a) Was Mr Thomson employed by Arrow Line Marking Limited;
- (b) If he was employed:
 - (i) Was he unjustifiably dismissed;
 - (ii) Are there any wage arrears owed;
 - (iii) Should a penalty be awarded for failure to produce a wage and time record under s.130(2) of the Employment Relations Act 2000 (the Act); and

¹ Minute dated 3 March 2016.

- (iv) Should a penalty be awarded for failure to produce a written individual employment agreement under s.64(4) of the Act?

Was Mr Thomson employed by Arrow Line Marking Limited?

[3] The law in this area is relatively straightforward. The issue for determination is whether the applicant is an employee or not. The outcome will determine whether I have any jurisdiction to continue to deal with this matter. If Mr Thomson is not an employee, I have no jurisdiction and the application will be dismissed. If I find he is an employee, then I may continue to determine the issues under (b) above.

[4] An “employee” is “any person ... employed by an employer to do any work for hire or reward under a contract of service”.² In deciding whether Mr Thomson was employed by Arrow Line Marking Limited, the Authority must determine “the real nature of the relationship between them”.³ This assessment includes considering “all relevant matters, including any matters that indicate the intention of the persons” and “is not to treat as a determining matter” any statement by the parties describing “the nature of their relationship”.⁴

[5] When I consider “all relevant matters”, I am directed to apply the tests which are known as the control, integration and fundamental tests.⁵ I must first examine the terms and conditions of the contract and the way in which it actually operated in practice. It is then possible to examine the relationship in light of these tests.

[6] The control test considers the degree of control or supervision exercised by the alleged employer over the alleged employee’s daily work.⁶ The integration test considers whether the work performed by the alleged employee is an integral part of the business and whether he or she has effectively become “part and parcel of the organization”⁷ For the “fundamental” test the question is whether the alleged employee engaged themselves to perform the services with the employer as a person in business on their own account.⁸

² Section 6(1) of the Employment Relations Act 2000 (Act).

³ Section 6(2) of the Act.

⁴ Section 6(3) of the Act.

⁵ *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114 (EmpC) at [46]

⁶ *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC)

⁷ *Bank voor Handel en Scheepvaart NV v Slatford* (No 2) [1953] 1 QB 248 (CA) at 295

⁸ *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [52]

[7] To create an employment contract there must be a common intention of the parties to enter into legal obligations. Whether a "common intention" can be read into an arrangement between the parties is to be determined in the evidence of their respective statements and/or actions at the time of, or before, or after that arrangement is made.⁹

[8] When the intention of the parties has to be gathered partly from documents but also from oral exchanges and conduct, the terms of the contract are questions of fact.¹⁰ Documentation evidencing the alleged agreement between parties is a useful indication of their intentions.¹¹

[9] The onus is upon the alleged employee to prove the existence of an employment relationship. It must be to the balance of probabilities which means it must be more probable than not that an employment relationship existed.

[10] Arrow Line Marking Limited says that Mr Thomson was not an employee but a contractor or operating under an agreement as a director or shareholder.

Intention

[11] Standing back and looking at all of the evidence I heard, I cannot discern any clear intention from either party that this was to be an employment relationship or any other type of relationship. Both parties gave evidence which showed that this was a moving feast.

[12] Initially, there was evidence of an agreement for two weeks work between Mr Thomson and his friend Aaron Woolley. Mr Thomson was to be paid \$200 per \$1,000 earned or 20% of his earnings. The two weeks covered a period of time when Aaron Woolley was overseas (19 to 30 June 2015). When Mr Thomson arrived in New Zealand to start work he had further discussions with Stephen Woolley, the respondent director and shareholder.

[13] The evidence was at 1 July 2015, a further agreement had been entered into between Stephen Woolley on behalf of the respondent and Mr Thomson.

⁹ *Inspector of Awards and Agreements v Religious Society of Friends (Quakers) Wellington Monthly Meeting* [1984] ACJ 409

¹⁰ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [20]

¹¹ *Hutton & Ors v Provencocadmus Ltd & Anor* [2012] NZEmpC 207 at [80]

Mr Thomson to be paid \$920 per week. There is some dispute as to whether the \$920 was in addition to or to be deducted from a 25% net profit share.

[14] I do not accept Mr Stephen Woolley's evidence that the \$920 was drawings. This is because it was raised for the first time today. His brief of evidence also states that he believed Mr Thomson was a contractor. I also take note of the respondent's accountant's evidence. The accountant states that the funds were intended to be treated as a loan. However there is no evidence of any loan either.

[15] The evidence was that these parties had a relationship prior to the dismissal, that I understand was close. Both parties described the other as surrogate family (father/son).

[16] I think it more likely that these work arrangements were a lot looser. I expect there may have been an agreement about some wash-up being done on the basis of a further 25% profit share. I do not accept that there was a firm agreement that the \$920 was to be taken out of a 25% profit share. This conclusion is based upon the evidence of the close relationship between Stephen Woolley and Ross Thomson. It seems unlikely Mr Woolley would want to leave Mr Thomson in any deficit position.

[17] It seemed to me that Mr Woolley was looking at options about how he could set both his son, Aaron Woolley, and Mr Thomson up in business but wanted to ensure that it would be profitable. He said to me or certainly it was the impression I gained from his evidence was Mr Thomson was treated like a surrogate son. I strongly doubt he would have wanted to leave Mr Thomson in a worse position than he would have been if he had simply gone into employment as a Line Marking employee somewhere else. I just do not think that would be in the nature of the man I heard and saw today.

[18] I had evidence which I do not think was greatly contested that an employee of Mr Thomson's experience would have expected to earn \$100,000 per annum if he was employed elsewhere. Mr Thomson also gave evidence that he is subcontracting to another provider at \$65 per hour. Even as a contractor, he would have expected to have received \$135,000 or more if he was working 40 hours per week.

[19] It is more probable, in my view, that the terms and conditions more likely to have been agreed between the parties at the time would have been \$920 per week plus a 25% profit share to bring parity with what he would have earned elsewhere.

[20] I do not believe there were any particular discussions between the parties about whether Mr Thomson's status was to be as an employee or as a contractor. The evidence shows both parties were more focused on whether Mr Thomson could pull together the finance to purchase the business. I think that was their focus. I doubt either properly turned their minds to, if that agreement could not occur, what his status would be as a consequence? In my view, the evidence of any intention is at best inconclusive.

Control

[21] I accept the evidence that Stephen Woolley or Aaron Woolley would have set the work to be done for the week. I do not believe Mr Thomson had either the contacts or the knowledge to do that job and it had to be done by either of the Woolleys, whoever was available at the time. However, it is quite clear Mr Thomson was of seniority where he would not have required any great supervision or control over his work. I accept Mr Stephen Woolley's evidence that Mr Thomson would have worked primarily on his own or certainly without great supervision. Mr Thomson would have discussed allocation between himself and Aaron Woolley as opposed to having any direct input from Stephen Woolley.

[22] There was evidence that Mr Thomson was required to turn up for work on a daily basis, whether there was work or not. In my view certainly there was some control over his activity although not as much as there would have been if he had been a newer employee which he was not.

Integration

[23] It is accepted that Mr Thomson used Arrow Line Marking Limited equipment and also that his services were particularly important to the company during periods of time that Aaron Woolley and/or Stephen Woolley were away overseas.

Fundamental

[24] The crucial element that determines whether this is an employment relationship must be the fundamental test. There is no outward sign that Mr Thomson was a contractor. There is no tax paid by him or on his behalf. He received \$150 cash each week and the rest was held and apportioned by the respondent to his living expenses. I accept Mr Thomson's evidence he believed taxes were being paid and he

was given the remainder. I also take note of the description Stephen Woolley gave me in evidence of the payment of \$920 being a payment of a “minimum wage.”

[25] There was no invoicing for services done by Mr Thomson. From the evidence I heard and saw in evidence from Stephen Woolley he was well aware of what a contractor was and did. He also knew what a director or shareholder was and did. None of the evidence I have seen would equate what was actually happening for Mr Thomson with being either a contractor or a director. He cannot have taken drawings as a director because there is no proof that he was a director of a company.

[26] In my view, Ross Thomson was an employee of Arrow Line Marking Limited.

Was Mr Thomson unjustifiably dismissed?

[27] It is accepted he was dismissed on 8 October 2015. Section 103A of the Act places the onus upon the respondent employer to show that the dismissal was justified. None of the tests in s.103A are met. Mr Thomson was instantly dismissed when Stephen Woolley required him to leave their accommodation on 8 October 2015.

Are there any wage arrears owed?

[28] There was an agreement Mr Thomson be paid 20% of the two weeks' profit earned from 19 to 30 June 2015. I accept Stephen Woolley's evidence that the two weeks' profit was \$10,373 plus an additional \$1,500. This equates to \$11,873, 20% of which is \$2,374.60.

[29] I accept Mr Woolley's evidence that he paid \$12,186.67 either in cash or to other debts of Mr Thomson during this period. This is because he has produced evidence which accords with the requirements under s.131 of the Act showing these payments were made, although he may not have termed them as wages at the time.

[30] From 1 July until 8 October 2015 Mr Thomson worked an additional 14 weeks. By my calculation, 14 weeks multiplied by \$920 per week equals \$12,880. Deducting the \$12,186.67 paid, leaves only an amount of \$693.33 owing.

[31] There is also the issue of an additional 25% profit share for the period 1 July to 8 October 2015. I do not have evidence as yet from Arrow Line Marking Limited's

accountant as to the amount of profit that can be attributed to that period of time. I will make orders for that to be provided to me by 31 July 2016.

[32] There is also the issue of holiday pay. The wage arrears that are able to be calculated total \$15,254.60 8% of which is \$1,220.37. There is still an additional holiday pay calculation of 8% of the 25% profit share yet to be done.

Personal Grievance Remedies

Lost remuneration

[33] As Mr Thomson has a personal grievance of unjustified dismissal, he is entitled to lost remuneration and compensation for hurt and humiliation. However the lost remuneration must be limited to two weeks. This is because I accept the evidence that Mr Thomson could not purchase into the respondent business and was actively seeking employment elsewhere prior to the dismissal because there are text messages to friends and family that support this. I accept the submission of the respondent advocate that it was likely this relationship would not have continued for any great period of time. In my view it is unlikely to have continued beyond the two weeks it took for Mr Thomson to secure the employment he had been seeking with another Line Marking company in Northland.

[34] Accordingly lost remuneration will be limited to two weeks being \$1,840 subject to any deduction for contributory behaviour.

Compensation

[35] There was some but not excessive evidence in his written statement about what hurt and humiliation he had faced. I accept there was some inconvenience in him being unable to see his children and having to relocate to Northland. However the main loss was the personal relationship with the Woolleys. It was clear the Woolleys' were an extremely important support base for Mr Thomson. He lost that upon the dismissal and it seems to have been compounded by this litigation. That is the saddest aspect of these types of disputes. It is also realistically difficult to quantify in any monetary terms.

[36] The starting point for these types of hurt and humiliation would be around \$10,000 subject to any deduction for contributory behaviour.

Contributory behaviour

[37] Contributory behaviour may be taken into account to reduce any remedies.¹² As indicated to both parties, there is contributory behaviour here leading to the dismissal on 8 October 2015. When Mr Woolley arrived home from an overseas holiday he discovered there was damage to a ute by Mr Thomson, although I accept it was an accident as opposed to anything deliberate or intentional. There was also accepted damage to quite an expensive iPhone 6S worth approximately \$1,600.

[38] I believe there was more damage to Mr Woolley's house than what Mr Thomson accepts. It may be that some of this could be apportioned to Aaron Woolley and his girlfriend. There were also issues about Mr Thomson's data plan overuse. There certainly was causative and blameworthy behaviour by Mr Thomson which requires some reduction for contribution.

[39] I have come to the conclusion that a 25% reduction is appropriate.

Should any penalties be awarded?

[40] I decline to award any penalties. This is because these parties required a determination about the status of their relationship before any obligations to keep wage and time records and written employment agreements would have been known.

Orders

[41] Accordingly, the following orders are now made:

- (a) Ross Thomson was employed by Arrow Line Marking Limited from 19 June to 8 October 2015;
- (b) Mr Thomson was unjustifiably dismissed on 8 October 2015;
- (c) Arrow Line Marking Limited is ordered to pay Ross Thomson wage arrears of \$3,067.93;
- (d) Arrow Line Marking Limited is ordered to pay Ross Thomson holiday pay of \$1,220.37;

¹² Section 124 of the Act.

- (e) Arrow Line Marking Limited is ordered to file a letter from its accountant stating the net profit earned for the period 1 July to 8 October 2015 together with a copy of its profit and loss statement for the year ended 31 March 2016 by 31 July 2016 at 3pm. The file is then to be referred to me to finalise the wages and holiday pay to be paid upon that profit share, that is unless the parties advise the Authority that they have reached agreement about this;
- (f) Arrow Line Marking Limited is ordered to pay Ross Thomson lost remuneration of \$1,380 including the 25% contribution pursuant to ss.123, 124 and 128 of the Act;
- (g) Arrow Line Marking Limited is ordered to pay Ross Thomson hurt and humiliation of \$7,500 which is inclusive of a 25% contribution pursuant to ss.123 and 12 of the Act.

Costs

[42] After having heard from both parties, Arrow Line Marking Limited is to pay costs of \$3,500 to Ross Thomson as a contribution towards his legal costs.

T G Tetitaha
Member of the Employment Relations Authority