

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 487
5444613

BETWEEN VICTOR WHAREMATE
Applicant
A N D NEW ZEALAND FORESTS
LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: R Ali, Advocate for the Applicant
T L Clarke/S L Maxfield, Counsel for the Respondent
Investigation Meeting: 7 October 2014 at Auckland
Submissions Received: 9 October 2014 from the Applicant
9 October 2014 from the Respondent
Date of Determination: 1 December 2014

DETERMINATION OF THE AUTHORITY

- A. Victor Wharemate was unjustifiably dismissed by New Zealand Forests Limited.**
- B. An order that New Zealand Forests Limited pay Victor Wharemate wage arrears in the form of holiday pay pursuant to s.131 of the Employment Relations Act 2000 totalling \$272.20.**
- C. An order that New Zealand Forests Limited pay Victor Wharemate lost remuneration of \$567.08 pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**
- D. An order that New Zealand Forests Limited pay Victor Wharemate compensation of \$1,000 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**

- E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] Victor Wharemate (Victor) has filed an application for a personal grievance of unjustified disadvantage and unjustified dismissal following the non-provision of work by New Zealand Forests Limited (the respondent). He also seeks recovery of wage arrears alleging he was promised 20 plus hours of work but received far less.

[2] Both parties agree the primary issue for determination was whether Mr Wharemate was an employee or an independent contractor. If he was an employee, the non-provision of work may operate as a dismissal. If he is not an employee, I have no jurisdiction to deal with this matter. The respondent alternatively submits that even if he was an employee it was casual employment.

Facts leading to dispute

[3] In August 2012 Victor was introduced to the respondent by his brother James or Jim Wharemate. His brother was working for the respondent as a truck driver. At the time Victor was on an unemployment benefit and lived in Kaikohe.

[4] On or about 27 August 2012 Victor undertook truck driving work for the respondent and was paid \$300.00. There is no corresponding paperwork such as a contractor daily driving log or invoice for this work.

[5] In December 2012 Victor travelled with his brother to the respondent's truck yard in Penrose, Auckland in the hope of obtaining further work. On 17 December 2012, the respondent supplied a truck and instructed Victor to cart a load from Mangawhai to Kumeu. He filled in and signed a contractor daily driving log. The respondent prepared an invoice from Victor to Kauri World Co Limited which was undated and unsigned. The invoice recorded the above date worked, number of hours, rate and total amount owed. Although the invoicing was to Kauri World Co Limited, the parties do not dispute Victor's contracting arrangements were with the respondent's.

[6] From 14 to 15 and 19 to 21 February 2013, Victor was given further work carting loads from Mangawhai to Kumeu and assisting with repairs and water-blasting. He filled in and signed the contractor driver daily logs. The respondent prepared an invoice dated 1 March 2013 from Victor to Kauri World Co Limited which he signed. The invoice recorded the dates, work done, number of hours, rate and total amount owed.

[7] On 22 and 28 February and 1 March 2013 Victor was given work water-blasting. He again filled in and signed the contractor driver daily log. The respondent prepared an invoice dated 1 March 2013 from Victor to Kauri World Co Limited which he signed. The invoice recorded the dates worked, work done, number of hours, rate and total amount owed.

[8] On 29 and 30 April, 1 to 3, 8, 13 to 14 May 2013, Victor was given work carting loads from Wally Jones' site to the respondent's Kaitaia yard. He again filled in a contractor driver daily log for all dates except 29 April. He signed those contractor driver daily logs with the exception of one for 14 May 2013. The respondent prepared an invoice dated 20 May 2013 from Victor to Kauri World Co Limited which he signed. The invoice recorded the dates worked, work done, number of hours, rate and total amount owed.

[9] On 30 May and 18 June 2013, Mr Wharemate was given work carting loads from Heath Road to the respondent's Kaitaia yard. He filled in and signed the contractor driver daily log. The respondent prepared an invoice dated 21 June 2013 which he signed. The invoice recorded the dates worked, work done, number of hours, rate and total amount owed.

[10] On 24, 26, 28 June and 1, 2 and 8 July 2013, Victor was given work carting loads around the Kaitaia area. He again filled in and signed the contractor driver daily log. The respondent prepared an invoice dated 19 July 2013 but he did not sign it. The invoice recorded the dates worked, work done, number of hours, rate and total amount owed.

[11] On 26 and 30 July 2013, Victor was again given work carting loads around Kaitaia. He filled in and signed the contractor driver daily log. The respondent prepared an invoice dated 19 August 2013 but he did not sign it. The invoice recorded the dates worked, work done, number of hours, rate and total amount owed.

[12] Victor continued presenting at the Kaitaia yard for work. He assisted other workers around the yard until September 2013. No further work was offered to Mr Wharemate. He resigned thereafter.

[13] In October 2013 he found alternative employment in Tauranga.

[14] On 21 November 2013, Mr Wharemate raised a personal grievance with New Zealand Forests Limited.

[15] On 20 May 2014, a Statement of Problem was filed in the Authority. The matter is now before me for determination.

Issue

[16] Victor has raised a personal grievance of an unjustified disadvantage and unjustified dismissal, and a separate wage arrears claims. The unjustified disadvantage claim relies upon the same facts as the unjustified dismissal. It is an unnecessary duplication of an existing personal grievance. It is dismissed.

[17] As a consequence, this leaves the following issues for determination:

- a) Was Victor Wharemate was an employee of the New Zealand Forests Limited?
- b) If so, was he a casual employee or did he have ongoing employment?
- c) Did Victor Wharemate raise his personal grievance within 90 days?
- d) Was Victor Wharemate constructively and unjustifiably dismissed?
- e) What remedies should be awarded (if any)?
- f) What wage arrears are owed (if any)?

Was Victor Wharemate was an employee of the New Zealand Forests Limited?

[18] The respondent maintains the real nature of the relationship between the parties was initially as a person hired by an independent contractor (James Wharemate). This was evidenced in James Wharemate's independent contract agreement dated 19 September 2012 which allows him to hire others to assist him with his tasks and duties for the respondent. Over time the applicant also became an

independent contractor of the respondent. It denies there was a relationship of employment between them at any time.

[19] The respondent denies the applicant was interviewed or offered permanent employment. The applicant's work was irregular and he was never dismissed because he gave up and obtained alternative work. The applicant's evidence was inconsistent and lacked credibility. There is no employment agreement and Victor could not identify any oral terms of an employment agreement with any certainty.

[20] The respondent submits the onus is upon the applicant to prove on the balance of probabilities that he was an employee. The company did not need to employ a driver because truck driving was not an integral part of the respondent's business. Transporting timber was not the respondent's business, it was an ancillary and ad hoc requirement. It denies the respondent exercised control over the applicant because he was not required to attend the company's site each day and had no set hours or days of work. He was free to accept or decline driving work. The respondent was unable to direct Victor to do the driving work as if he was a permanent employee.

[21] The applicant assisted occasionally with water blasting stumps of his own volition. He was not directed to do so by the respondent. There was no supervision or control over the way in which Mr Wharemate undertook his driving work.

[22] It refers to the 26 "contractor driver daily log" forms and seven invoices as evidence he was an independent contractor. Any variation in the rate paid did not affect his status.

[23] The applicant was responsible for his own personal income tax and payment of GST, if registered. He was not GST registered and therefore not allowed to charge GST on services he supplied. It also referred to an approach by Mr Wharemate's partner, Erina Ahpene, to purchase the trucks as an indication he was in business on his own account.

[24] Section 6(1)(a) to (b) of the Employment Relations Act 2000 (the Act) defines an "employee" as "*any person of any age employed by an employer to do work for hire or reward under a contract of service*".

[25] In deciding for the purposes of subsection (1)(a) whether a person is employed the Authority must determine "*the real nature of the relationship between them*"

(s6(2) of the Act). In determining the real nature of the relations the Authority “*must consider all relevant matters, including any matters that indicate the intention of the persons*”. However the Authority “*is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*”

[26] In considering “*all relevant matters*” under s6, the Authority shall have regard to:¹

- (a) The written and oral terms of the contract, usually containing indications of their common intention.
- (b) Any divergences from those terms and conditions in practice.
- (c) The way in which the parties have actually behaved in implementing their contract.
- (d) Features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

[27] The Authority must examine the terms and conditions of the contract and the way in which it actually operated in practice. 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. Industry practice may assist but this is far from determinative of the primary question.²

The contract

[28] The respondent alleged it had a pattern of entering into written agreements with both independent contractor and employees, but this did not occur here. There is no written agreement between these parties. In absence of a written record of engagement it is not possible to establish any common intention about the working arrangement as there is no evidence of any mutual turning of minds to the true nature the parties engagement at the outset.³ The terms of the parties agreement are matters of fact to be determined by reference to conduct and secondary evidence in the form of invoices and contractor driver daily logs.

¹ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [32]

² See above at [20] and [32]

³ *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [34] to [36] (ultimately upheld in *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372)

[29] There was no dispute about the services provided, hourly rates or days worked. Victor provided truck driving and water blasting services to the respondent over a 12 month period from August 2012 to July 2013. He was paid varying hourly rates for the work from \$15 to \$20 to \$25. The contractor driver daily logs set out the dates, times and work undertaken.

[30] The respondent relies upon its contracting arrangements with James Wharemate to evidence the terms of Victor's engagement for services. This overlooks the fact Victor started working for the respondent in August 2012. James Wharemate's independent contract was not signed until 19 September 2012. He could not have been hired in August 2012 to assist James under the independent contract when it had not been signed. The hire clause in the independent contract also requires those hired to be employees of James Wharemate.⁴ There was no evidence he was an employee of James. The contractor driver daily logs and the invoicing did not refer to James Wharemate. Victor was also paid directly by the respondent.

[31] I do not accept Victor was interviewed and offered employment of 20 to 40 hours by Mr Zhou. That evidence lacked credibility because it was inconsistent and prevaricated. The alleged commencement/interview date and the terms of employment changed. His letter raising the personal grievance alleged he commenced work on 29 April 2013 and was offered 40 hours per week at \$18 per hour.⁵ In his sworn brief of evidence he alleged he had been offered "20 hours per week" minimum by Mr Zhou and started work the same day in Katikati.⁶ This date was in August 2012 according to his bank accounts which showed a payment from the respondent.⁷ Under examination by the Authority Victor changed his position (again) to allege he had been offered 40 hours per week.

[32] Victor also continued to receive an unemployment benefit until 18 February 2013. At hearing he produced a printout from the WINZ records showing his start date of 18 February 2013 with a work trial from 14 February 2013 and different hourly rates (\$23 when working in Kaitaia; \$28.70 outside of Kaitaia).⁸ The hourly

⁴ Bundle of documents Agreement New Zealand Forests Ltd and James Wharemate p40

⁵ Letter Employment Dispute Services to New Zealand Forests Ltd dated 21 November 2013

⁶ Brief of Evidence V Wharemate para 7

⁷ Applicant Exhibit B produced V Wharemate 7/10/14 Kiwibank Account No 389001052161800 Bank statement dated 20 Aug 2014

⁸ Applicant Exhibit A produced V Wharemate 7/10/14

rates appear to be \$20 plus GST when working in Kaitaia and \$25 plus GST outside of Kaitaia.

[33] The days and hours actually worked never amounted to 20 to 40 hours per week and the amount of work was inconsistent. The evidence does not support an agreement for 20 to 40 hours work per week in August 2012 with Mr Zhou.

Control test

[34] This test looks at the degree of control or supervision exercised by the employer over the alleged employee's daily work.⁹ I accept the respondent did not physically oversee his truck driving from the worksite to yard, but that would not normally be required. He would have been supervised at the worksite when loading the truck and at the respondent's yard when unloading the truck.

[35] Victor's evidence (corroborated by the respondent employees Shawn Dong and Miranda Dong) was that the respondent would call or text him to advise where and when work was required. The respondent also supplied the trucks and any other equipment required. The respondent also set the hourly paid rates. It produced the invoices with the various pay rates. The evidence showed the respondent controlled how, where and when work was done and how much was paid to Victor.

Integration test

[36] This 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".¹⁰

[37] I accept the respondent's evidence they were not in the business of truck driving. That did not mean it did not require truck driving services for its core business. The respondent was in the forestry business. Part of it required transportation of cut logs to their yards. They provided the trucks for transportation. The evidence shows truck driving was "part and parcel" of the respondent's business, even if it was not its primary focus.

⁹ [Bryson v Three Foot Six Ltd](#) [2003] 1 ERNZ 581 (EmpC) at (ultimately upheld in [Bryson v Three Foot Six Ltd](#) [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372)

¹⁰ [Bank voor Handel en Scheepvaart NV v Slatford \(No 2\)](#) [1953] 1 QB 248 (CA) at 295

Fundamental test

[38] Under 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.¹¹

[39] The respondent relies upon the contractor daily logs for the work from December 2012 and the invoices as evidence Victor was an independent contractor. The contractor driver daily logs and invoices were the respondent’s documentation, not Victor’s. They did not include GST or any other indica to show this was an independent contractor relationship. These documents were only produced from December 2012 onwards. There is no documentation relating to the payment in August 2012.

[40] Where parties held relatively equal bargaining positions when negotiating the agreement and negotiated the agreement for a lengthy period, more weight will be accorded to any provision labeling the parties’ intentions.¹²

[41] This was not an arrangement involving equal bargaining positions. The labelling of this documentation was done by the respondent only. Victor’s evidence was he was given the forms to sign. His evidence showed he had limited knowledge of independent contractor arrangements. He had never been in business for himself. He had only ever been an employee. He had little knowledge of taxation for independent contractors and did not understand the significance of the contractor’s daily logs and invoicing arrangements. He was not registered for GST. He had no office or accountant or other incidences common to persons operating businesses on their own account. In contrast the employer was experienced and had existing independent contractor and employee relationships.

[42] Victor received no benefit from any taxation arrangement as an independent contractor. The only benefactor of the taxation arrangement was the respondent. It did not include GST in the invoices and consequently was not required to pay it. It alleges this occurred because it was aware Victor was not registered for GST. Victor denied any discussion with the respondent about taxation or his status as an independent contractor.

¹¹ [Bryson v Three Foot Six Ltd](#) [2003] 1 ERNZ 581 (EmpC) at [52] (ultimately upheld in [Bryson v Three Foot Six Ltd](#) [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372)

¹² [Clark v Northland Hunt Inc](#) (2006) 4 NZELR 23 (EmpC)

[43] I cannot see how an (unsuccessful) approach by another person to purchase the respondent's trucks infers Victor was in business on his own account.

[44] The evidence shows Victor did not engage himself to perform services for the respondent as a person in business on his own account. He believed he was employed and acted as such. In the circumstances I determine Victor Wharemate was employed by New Zealand Forests Limited.

Was Victor Wharemate employed as a permanent or casual employee?

[45] The respondent submits if he was not an independent contractor, the applicant was a casual employee, engaged for short periods to do a specific driving job. No termination process is required because there was an agreed period of work.

[46] There is no statutory definition of a casual employee in the Act. The question of whether a person is employed as a casual employee depends on the mutuality of the intention at the outset of the employment and the nature of the work including its regularity, its hours and obligations imposed on the employee. The Courts have assessed whether employment is casual against the following characteristics¹³:

- (a) Engagement for short periods of time for specific purposes;
- (b) A lack of regular work pattern or expectation of ongoing employment;
- (c) Employment is dependent on the availability of work demands;
- (d) No guarantee of work from one week to the next;
- (e) Employment as and when needed;
- (f) The lack of an obligation on the employer to offer employment or on the employee to accept any other engagement; and
- (g) Employees are only engaged for the specific term of each period of employment.

[47] The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between

¹³ *Lee v. Minor Developments Ltd t/a Before Six Childcare Centre* EmpC Auckland AC52/08, 23 December 2008 at [43]-[45]

periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship. The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work.¹⁴

[48] There was no written agreement setting out the nature of this employment. The evidence did show mutual employment related obligations over the 12 month period of employment. He was consistently offered work in August and December 2012 and February to July 2013. There may have been variable hours and days but this did not negate an ongoing employment relationship.

[49] Victor made himself available for work. He slept in his car outside the Kaitaia yard in anticipation of work being allocated. He may not have presented himself at the respondent's Penrose yard on a daily basis, but this did not detract from his belief he was required to be available to undertake work. The respondent also had several work sites. There was no evidence Victor sought or obtained alternative work until October 2013.

[50] There was no evidence the respondent expressly told him he should not expect any further work. The period of engagement was open ended. The respondent had extensive experience in both employment and independent contracting. By contrast Victor had no experience of independent contracting. He believed he was an employee. The respondent cannot expect to benefit from its failure to clarify Victor's employment or contracting status in the circumstances.

[51] Based upon the above evidence, Victor's belief he had ongoing employment was reasonable in the circumstances. Victor Wharemate was not a casual employee but was employed on an ongoing basis. However the evidence also supports his employment was for unspecified days and hours.

¹⁴ *Jinkinson v Oceana Gold (NZ) Ltd [2009] ERNZ 225 (EmpC) at [40] and [41]*

Did Victor Wharemate raise his personal grievance within 90 days?

[52] The respondent submits the time taken by the applicant to raise a personal grievance of constructive unjustified dismissal was outside the time limitation of 90 days given his last working day was 30 July 2013. The personal grievance was raised on 21 November 2013, 114 days later and outside of the 90 day time limit prescribed by s114 Employment Relations Act 2000. The respondent does not consent to the personal grievance being raised out of time.

[53] The evidence was Victor became aware the respondent stopped giving him work in early September 2013. Prior to that date he would turn up at the 'yard' presumably in Kaitaia and help out.¹⁵ Victor continued to receive payments from a respondent employee, MT Fleet, until 23 August 2013 for this work.¹⁶

[54] I accept Victor's evidence that the respondent stopped offering work in early September 2013, not 30 July 2013. The earliest date the respondent stopped offering work would have been 1 September 2013. He raised his grievance on 21 November 2013. This was 82 days from the date on which the personal grievance arose. This is within the 90 day time limit prescribed by s114 Employment Relations Act 2000.

[55] Given my above findings, I determine I have jurisdiction to determine the personal grievance of unjustified dismissal.

Was Victor Wharemate constructively and unjustifiably dismissed?

[56] As an employee, Victor had an expectation he would continue to be offered work. The non-provision of work in September 2013 operated as an actual not constructive dismissal.

[57] None of the requirements of s103A were met. The dismissal was abrupt. It was not minor and did result in Victor being treated unfairly. In the circumstances he was unjustifiably dismissed.

¹⁵ Brief of evidence V Wharemate paras 26 to 30

¹⁶ See above n7

Remedies

[58] Given I have determined Victor has a personal grievance, he is entitled to seek remedies under s123 of the Act. Mr Wharemate seeks lost wages, compensation for hurt and humiliation and costs.

[59] I accept the respondent's evidence Victor was paid \$3,402.50 over the 12 months of his employment. This equates to an average of \$283.54 per month.

Lost Wages

[60] Where an employee has a personal grievance and has lost remuneration as a result of that grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration pursuant to s128.

[61] In considering an order for remuneration under s128, the employee has an obligation to mitigate loss by seeking alternative paid employment.¹⁷ Victor found employment in Tauranga in October 2013 after months of looking. Under cross-examination he confirmed he was paid at a better rate than he received from the respondent. Assuming he started in October 2013, he has lost two months remuneration or \$567.08.

Compensation for hurt and humiliation

[62] Mr Wharemate seeks compensation under s.123(1)(c)(i) of the Act for hurt and humiliation.

[63] The amount of compensation for injury to feelings or other distress must be referable only to the harm done by the employer's behaviour¹⁸. Victor gave evidence of depression, having to sell property such as cars to survive, anger and hurt. He referred to lost self-esteem due to his inability to support his whanau. The evidence was sparse and primarily relied upon Victor's oral evidence. There was no corroborating medical evidence. The evidence of hurt appeared to be temporary because he found new employment. There may also have been other causes given an

¹⁷ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

¹⁸ *New Zealand Institute of Fashion Technology v. Aiken* [2004] 2 ERNZ 340 at 344

unrelated leg injury which currently prevents him from working. A nominal award of \$1,000 is appropriate in the circumstances.

[64] An employee's conduct may be relevant to remedies. Section 124 requires the Authority "consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance" in deciding the nature and extent of remedies to be provided in respect of a personal grievance. There is no contributory behaviour here requiring a reduction in remedies.

What wage arrears are owed (if any)?

[65] Given my determination Victor had ongoing employment for unspecified days and hours, there are no wages owed for the work undertaken.

[66] There is the matter of holiday pay. Because his last pay period was 19 August 2013 and his employment ended within a 12 month period, he is entitled to 8 % of his gross earnings of \$3,402.50¹⁹ totalling \$272.22.

Determination

[67] The following determination is made:

- a) Victor Wharemate was unjustifiably dismissed by New Zealand Forests Limited.
- b) An order that New Zealand Forests Limited pay Victor Wharemate wage arrears in the form of holiday pay pursuant to s.131 of the Employment Relations Act 2000 totalling \$272.20.
- c) An order that New Zealand Forests Limited pay Victor Wharemate lost remuneration of \$567.08 pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.
- d) An order that New Zealand Forests Limited pay Victor Wharemate compensation of \$1,000 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

¹⁹ Section 23(2) Holidays Act 2003

- e) Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority