

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 337/09  
5142203

BETWEEN SHANNON PAUL BERRIDGE  
Applicant

AND KEVIN HOPKINS T/A KSH  
ENTERPRISES  
(PERMASHINE)  
Respondent

Member of Authority: Robin Arthur  
Representatives: Applicant in person  
Respondent in person  
Investigation Meeting: 25 March 2009  
Determination: 16 September 2009

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] Shannon Berridge worked as a car groomer between July and November 2008. He says he was employed by Mr Hopkins and then dismissed following an argument about a drug test.

[2] Mr Hopkins insists Mr Berridge was engaged as an independent contractor, not an employee. Mr Hopkins says he was entitled to terminate Mr Berridge's contract for services due to unsatisfactory conduct and performance.

[3] The issues for investigation and determination were:

- (i) was Mr Berridge working as an employee or an independent contractor;  
and
- (ii) if he was an employee, was he unjustifiably dismissed?

## Was Mr Berridge an employee or a contractor?

[4] In September 2008 – after having worked for around two months – Mr Berridge signed a “*contract for services*” identifying him as “*the contractor*” and Mr Hopkins as “*the business owner*”. This document stated both parties agreed that “*the contractor is providing an independent car grooming service and is not in any way forming a relationship as an employee of the business owner*”.

[5] Mr Hopkins points to this contract, arrangements for Mr Berridge to provide a weekly invoice for work done, and the deduction of withholding tax as confirming the role was one of an independent contractor.

[6] In determining “*the real nature of the relationship*” between Mr Berridge and Mr Hopkins, the Authority must consider all relevant matters, including any matters that indicate their intention, but not treat any statement by either as conclusive.<sup>1</sup> In doing so, the Authority applies various ‘tests’ developed by the courts to help determine whether Mr Berridge was truly an employee or contractor. Industry practice may also be a relevant factor.

[7] For the following reasons I find that Mr Berridge was an employee and not a contractor.

[8] The evidence of both men differed strongly about their respective intentions. Mr Hopkins says he made it clear from the start that Mr Berridge was to work as a “*sub-contractor*”. Mr Berridge was equally emphatic that he started work for Mr Hopkins because he came looking for a job as an employee. The contract was signed under protest by Mr Berridge two months into the job and only after he was told there would be no more work and no pay unless he did so. I find its declaration of no employment relationship does not determine the true state of affairs.

[9] Under the ‘fundamental’ or ‘economic reality’ test Mr Berridge was not in business on his own account. All his work was provided by Mr Hopkins who is more properly described as a contractor. Mr Hopkins has a contract through the owner of a

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<sup>1</sup> Section 6(2) of the Employment Relations Act 2000.

'Permashine' car grooming franchise to clean cars for a Honda dealership and service centre in Newmarket. A large part of the work was cleaning the cars that Honda customers left for servicing. To cope with the volume of work Mr Hopkins engaged up to eight car groomers. Each was paid on a piece rate of \$4 for a "wash and vac" of a car and \$15 for a "re-groom".

[10] All work was done at a cleaning facility on Honda premises. Honda supplied all necessary products and equipment – from the cleaning materials to clothes, brushes, high pressure hoses and water. While Mr Hopkins said it was theoretically possible for Mr Berridge to have engaged his own staff to do work assigned to him, in practice this did not happen and Mr Hopkins would have had to approve any substitute staff. In short Mr Berridge had no opportunity to profit from sound management or alternative arrangements for the performance of his work.

[11] The terms of his employment – assessed under the 'control' test – were plainly more akin to an employee than contractor. He was expected to arrive at work by 8.30am and continue until 4.30pm. He needed Mr Hopkins' permission to leave early. He was required to provide a job sheet for each car cleaned rather than generally control and organise the day's work as he saw fit. Further he had no control over the volume or availability of work – that was determined by Mr Hopkins who allocated the cleaning jobs as they were made available by Honda.

[12] Under the organisation or integration test, Mr Berridge was clearly part of Mr Hopkins' business. He had no personal or independent clients and no sources of work other than the cars allocated to him by Mr Hopkins. While he did provide a weekly invoice for work done and withholding tax was deducted at the IRD rate for contractors who clean vehicles (20 per cent), this was not an arrangement of his making. Mr Hopkins provided the invoice book and required an invoice – in reality just a piece work tally – before providing net weekly pay by direct credit to Mr Berridge's bank account.

[13] There was no evidence about wider industry practice on whether car groomers were generally engaged as contractors or employees. Mr Hopkins' evidence that other groomers worked for him as independent contractors is not sufficient to negate my finding that Mr Berridge's relationship with him was, in reality, as an employee.

**Was Mr Berridge unjustifiably dismissed?**

[14] One day in late October Mr Berridge had left his jumper in the office and Mr Hopkins heard another car groomer comment that it “*smelt of marijuana*”.

[15] Mr Hopkins says he decided to let everyone working for him know about his concerns about any drug use. He had a receptionist prepare a memo with the heading “*Random drug test*”. It stated there would be “*a random drug test carried out on Monday 3<sup>rd</sup> November at 11.30*”. Mr Hopkins says he gave a copy to each groomer on Friday, 31 October but Mr Berridge believes only he was given the memo.

[16] Mr Hopkins oral evidence was that he had “*no intention*” of going ahead with any requirement for a drug test at the time of giving the memo to Mr Berridge.

[17] On the Monday morning Mr Berridge initiated a conversation with Mr Hopkins about whether he could be required to undertake a drug test. In Mr Hopkins words Mr Berridge “*started having a go at me about it*”. Shortly afterwards Mr Berridge left a glass of liquid on Mr Hopkins’ desk and said words to the effect: “*There you go, there’s my urine sample*”. It was a glass of apple juice which Mr Berridge then picked up and drank in front of Mr Hopkins.

[18] Mr Hopkins responded by saying Mr Berridge needed to prove he was not taking any drugs and would not be given any more work until he had done so. Mr Berridge says he then realised his “*joke*” with the glass of apple juice had gone too far but Mr Hopkins could not be dissuaded from his demand for proof. Mr Berridge then left work and went to a GP’s clinic where he provided a urine sample for testing.

[19] He returned to work the following day with a doctor’s note saying he had taken the test. Mr Berridge told Mr Hopkins he was waiting for the result.

[20] He and Mr Hopkins then argued about whether there was any work available for him. Mr Berridge says he was told there was no work for him whatever result the drug test showed. Mr Hopkins disagrees he said this but says he told Mr Berridge there would be no work until the matter was resolved.

[21] I prefer Mr Berridge's evidence on this point. Mr Hopkins says work volumes at the time had fallen because of the automotive recession and he did not have enough work for all the car groomers working for him – and I consider that was, more likely than not, a strong ulterior motive in what he said to Mr Berridge.

[22] In responding to Mr Berridge's subsequent application to the Authority, Mr Hopkins also made a number of allegations about Mr Berridge's performance and conduct – including that he had offended and argued with other car groomers about work and personal matters, he had "*drifted*" a customer's sports car when returning it from cleaning, used Honda facilities and tools after hours and without authority, had annoyed a Honda supervisor with "*back chat*" and he had disrupted work of Honda staff by talking to them.

[23] Because Mr Hopkins considered Mr Berridge was a contractor, he decided he was entitled to "*no longer offer [Mr Berridge] any work*". However, because of the finding that Mr Berridge was in reality an employee, Mr Hopkins' actions in withholding work from him have to be judged by the standard set by s103A of the Employment Relations Act – that is, were they what a fair and reasonable employer would have done in all the circumstances at the time?

[24] I find they were not. A fair and reasonable employer would:

- (i) have talked directly with Mr Berridge about the supposed marijuana smell on his jumper and asked for his comments before considering any action about it; and
- (ii) not have issued a memo announcing a drug test with "*no intention*" of going ahead with it; and
- (iii) have sought agreement to a drug test, if appropriate, rather than demanding it without any contractual right to do so; and
- (iv) put other performance or conduct concerns to Mr Berridge for comment (and possible correction) before withholding work from him; and
- (v) waited for the results of the drug test before taking any further action; and
- (vi) if there were any real safety concerns about Mr Berridge's work being affected by drug use, have discussed whether he should stand down from work while the results were awaited.

[25] Because Mr Hopkins failed to take any of those fair and reasonable actions, I find that withholding work from Mr Berridge was an unjustified dismissal.

[26] Mr Hopkins never saw the Laboratory services report issued on 5 November 2008 to the GP about Mr Berridge's urine drug screen test on 3 November. It was provided at the Authority meeting. It reported that cannabinoids and various other illegal drugs were "*not detected*".

### **Remedies**

[27] Having found Mr Berridge has a personal grievance for unjustified dismissal, I have considered suitable remedies of lost wage and distress compensation.

[28] Mr Berridge was unemployed for at least two months after his dismissal by Mr Hopkins before he got a building job. That work dropped off and by the time of the investigation meeting he was enrolled in a full-time business studies course.

[29] Although there was little evidence on Mr Berridge's efforts to mitigate his losses in those two months, I accept he is entitled to lost wages for eight weeks. Because he was paid on a piece rate basis – a set amount for each car cleaned – he had no set weekly wage. From bank statements and copies of invoices I have found his weekly payments over 19 weeks averaged \$426.42 (gross). That is the amount on which lost wages are awarded for eight weeks.

[30] I also accept Mr Berridge suffered humiliation, loss of dignity and injury to feelings from the circumstances of his dismissal, including an unwarranted requirement to undergo a drug test and the abrupt cessation of any work being provided to him. However I also observed him in giving his evidence to be a robust young man now set on a new career path and with no apparent ongoing effects from those circumstances. A modest award of compensation under s123(1)(c)(i) of the Act is called for which I set at \$3000.

[31] Section 124 of the Act requires the Authority to consider whether actions of Mr Berridge contributed towards the situation giving rise to his unjustified dismissal,

and, if so, whether remedies should be reduced. I find no such reduction is required in the particular circumstances of this case.

[32] I would have considered a reduction in remedies for the apple juice “*joke*” played by Mr Berridge – drinking the glass in front of Mr Hopkins after leading him to believe it was urine – but for the lack of good faith shown by Mr Hopkins in issuing a memo about drug tests which he later said he had never intended carrying out any way. I would also have considered a reduction if Mr Berridge’s test results showed drugs were detected. However those results suggest there was no reason to disbelieve Mr Berridge’s evidence that he had not used marijuana.

[33] There were some performance concerns that Mr Hopkins should properly have addressed with Mr Berridge, including if necessary a disciplinary meeting and possibly issuing a written warning. They concern the allegations about ‘drifting’ a customer’s car, ‘back chatting’ a Honda supervisor, and arguing with some of the other car groomers. There was some evidence about comments exchanged between Mr Berridge and another groomer about their respective girlfriends which was, frankly, immature banter by young men in their twenties who should have known better. I find Mr Hopkins did not properly deal with those matters at the time or provide sufficiently compelling evidence about them to the Authority so as to warrant a reduction of remedies.

## **Orders**

[34] Within 28 days of the date of this determination, Mr Hopkins is to pay to Mr Berridge the following sums:

- a. \$3411.36 (gross) in lost wages under s123(1)(b) of the Act; and
- b. \$3000.00 (without deduction) in compensation under s123(1)(c)(i) of the Act; and
- c. \$70.00 in reimbursement of Mr Berridge’s fee for lodging this matter in the Authority.

Robin Arthur  
Member of the Employment Relations Authority