

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 226
5586570

BETWEEN AUNDREY MATHEW MOANA
 BRISTOWE
 Applicant

A N D CHAMPAGNE HOMES
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Stephanie Aitken for Applicant
 Ayla Ronald for Respondent

Investigation Meeting: 8 November 2016 at Christchurch

Submissions Received: 2 November 2016, from the Applicant
 2 November 2016, from the Respondent

Date of Determination: 21 December 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Aundrey Bristowe claims to have been unjustifiably dismissed, both substantively and procedurally, by Champagne Homes Limited (CHL) on 23 June 2015. Mr Bristowe seeks compensation, lost wages and costs.

[2] CHL denies Mr Bristowe was ever its employee. It says he was a contractor who was engaged as a hammer hand to assist one of its contractor builders, at that builder's request. As he was a contractor, CHL says the Authority has no jurisdiction to determine Mr Bristowe's claim.

[3] Alternatively, if the Authority finds Mr Bristowe was an employee, CHL says he is not entitled to remedies because it did not cause his loss and/or his conduct is blameworthy to the extent that any monetary relief should be reduced by 100%.

[4] By agreement, the investigation meeting encompassed both the preliminary issue of whether Mr Bristowe was in an employment relationship with CHL and the substantive employment claim he made against it.

Background and evidence

[5] Mr Bristowe relocated to Christchurch from Nelson in May 2015. Two to three weeks later he obtained work as a scaffolder for \$18 an hour, working 20 hours per week. His previous experience was 15 years working as a butcher at a meat works.

[6] An acquaintance of Mr Bristowe's, whom he knew from his time living in Nelson, offered him work as a hammer hand with CHL. The acquaintance, John Kelly, had also relocated to Christchurch and was working for that company.

[7] CHL operates as a building and renovation company. According to its sole director, Yvonne Parker, who has been a property developer for around 20 years, the company never employs construction workers: it engages them as contractors. It was Ms Parker's evidence that she has only employed one person in the past 20 years, and that was her office manager.

[8] Ms Parker also said she did not have written agreements with her contractors. Her practice is to call contractors when she has work for them and provide the details of the job. It is up to the contractors to accept or decline the work. Ms Parker said she was still using 80% of the contractors who have been with her over the last 20 years.

[9] She said Mr Kelly was one of the builders CHL contracted. During his time contracting to CHL four different people had worked with him at different times. Ms Parker said when Mr Kelly wanted someone to work with him he would call her to negotiate an hourly rate for that person. She was unsure of the arrangements Mr Kelly had with those people because CHL was not directly involved with that. Mr Kelly and the person working with him would invoice CHL to be paid.

[10] Ms Parker said Mr Kelly had informed her in early June 2015 that he needed a hammer hand to help him on work he was undertaking for CHL. He said he knew a person with the experience required for the job. Ms Parker said a hammer hand needed at least two years' experience with a builder and that on Mr Kelly's

representations she negotiated an hourly rate of pay of \$25 per hour with him for the hammer hand (Mr Bristowe).

[11] Ms Parker had not met Mr Bristowe when she negotiated his pay rate with Mr Kelly. Nor did she know the hours he would be working. Ms Parker said this was quite normal and she did not need to know that information as it did not concern CHL. She met him on 16 June 2015 on a building site she was inspecting while Mr Kelly was working there. Mr Bristowe was on the site but not working. Ms Parker said that, apart from being introduced to Mr Bristowe, she had no other conversation with him.

[12] Mr Bristowe's evidence was that there was a discussion between them over an hourly rate on 16 June but there was no employment agreement or formal interview process with CHL. Mr Kelly had already told him he could expect \$25 an hour and that rate was confirmed during the meeting. Mr Bristowe contacted Ms Parker by telephone later and asked her to write a letter for WINZ for him so he could obtain a grant to buy tools he was required to provide for the work with CHL.

[13] Ms Parker provided and signed a letter of confirmation to enable him to obtain the grant. The letter stated:

TO WHOM IT MAY CONCERN

I would like to advise that Aundrey Bristowe has been contracted by Champagne Homes to work as a Hammer Hand on all future builds and renovations. It is expected that he supplies all his own tools and protective clothing. We anticipate work of up to 40 hours per week going forward.

His hourly rate will be \$25.00.

I understand that Aundrey wishes to apply to Work & Income for assistance for protective clothing.

Yours sincerely
etc

[14] Mr Bristowe said Mr Kelly had arranged for him to start work on Monday 22 June. However Mr Kelly then told him Ms Parker was upset about the slow progress on the project and he asked Mr Bristowe to work on Saturday, 20 June and Sunday, 21 June 2015. Mr Bristowe agreed and worked for four hours on each of those days. Ms Parker said she had no knowledge of this at the time.

[15] On Monday 22 June Mr Kelly had arranged to pick up Mr Bristowe at 6.30am and take him to the work site. When he did not arrive, and failed to answer texts, Mr Bristowe telephoned Ms Parker directly. Her evidence is that he told her Mr Kelly had not contacted him and asked her if he could go to support his brother in court that day. Ms Parker said she told him he could do whatever he wanted. She said she found his contact strange as it was unusual for a contractor to be contacting her in that way as the builder normally took care of the contractors working for them.

[16] She said she visited the site to see what they had been working on over the weekend and was unhappy about the small amount of progress that had been made. She described it as approximately one fifth of what should have been accomplished over two days' work. As a result Ms Parker said she contacted Mr Kelly and told him she no longer wished to contract him as he was proving unreliable.

[17] Ms Parker said that, approximately an hour after her conversation with Mr Kelly, Mr Bristowe contacted her again asking the implications for him. She told him to carry on with the GIB fixing work he had been doing over the weekend, whereupon Mr Bristowe advised her he did not know what to do.

[18] Ms Parker subsequently met Mr Bristowe at the CHL office where he made her aware he had no building site experience and was not an experienced hammer hand. She said she could pay him \$20 an hour as a trainee working to a contracted builder. Ms Parker said she was not offering him employment as a trainee but an alternative role as a contractor that was more suited to his lack of experience.

[19] Mr Bristowe declined the offer. He asked Ms Parker for payment for the two days he had worked and for a letter he could give to WINZ. Regarding the payment, Ms Parker said she told Mr Bristowe she would pay him when he submitted an invoice but he kept telling her he did not know how to do that.

[20] After receiving a number of texts from Mr Bristowe over the following days, Ms Parker paid him \$200, being \$25 an hour for the 8 hours he had worked. She also provided him with the letter he wanted for WINZ, and said she wrote exactly what he had asked her to put in the letter so he would stop bothering her.

[21] The letter was addressed TO WHOM IT MAY CONCERN and stated:

I would like to advise, that further to my letter of 16 June 2015, I am no longer able to offer Aundrey Bristow work as a Hammer Hand.

Unfortunately, I was misinformed by a previous employee of mine, as to Aundrey's suitability for the position. His qualifications do not meet my required level.

This mis-understanding is no fault of Aundrey's.

Yours sincerely

etc

[22] Mr Bristowe said he had never misrepresented his experience and Mr Kelly was aware of his circumstances, skill and employment history. He said this included knowing that Mr Bristowe's only building experience was in constructing a dog box and a fence.

[23] He also said there had never been any discussion between himself and Mr Kelly or Ms Parker about his employment status. Ms Parker agreed there had never been such a discussion and noted that, if she had been intending to employ Mr Bristowe, she would have interviewed him for the position and undertaken reference checking. She said these were the actions she had undertaken when she employed her office manager nine years earlier.

The issues

[24] The issues for the Authority to determine are

- (a) Whether Mr Bristowe was an employee of CHL; and, if he was,
- (b) Whether Mr Bristowe was unjustifiably dismissed.

Was Mr Bristowe an employee of CHL?

[25] To decide Mr Bristowe's status it is necessary to determine the "real nature of the relationship" as provided by s. 6 of the Employment Relations Act 2000 (the Act) which provides the meaning of "employee" at s.6(2) as "...any person of any age employed by an employer to do any work for hire or reward under a contract of

service".¹ This includes "homeworker" or "a person intending to work" but excludes a volunteer.

[26] To determine the real nature of the relationship the Act provides that the Court or Authority²:

- 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.

[27] In the Supreme Court's judgment in *Bryson v. Three Foot Six Ltd (No 2.)*³ the Court held that "all relevant matters" included the written and oral terms of the contract between the parties which would usually contain indications of their common intention concerning the status of their relationship. It would also include any divergences from, or supplementation of, those terms and conditions which were apparent in the way in which the relationship operated in practice.

[28] It was important the Court or Authority should consider the way in which the parties had actually behaved in implementing their contract. How their relationship operated in practice was crucial to a determination of its real nature. "All relevant matters" also required the Court or Authority to:

...have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test)...⁴.

[29] If I find Mr Bristowe was an employee I will need to determine on an objective basis whether he was unjustifiably dismissed. The applicable test is set out at s. 103A of the Act and is whether what the employer did, and how it did it, was the action that a fair and reasonable employer could have taken in all the circumstances at the time.

What was the intention of the parties?

[30] The parties' claims over their respective intentions differ and there is only a limited documented record of the arrangement between them. This consisted of the letter to WINZ dated 16 June 2015 which I will return to below.

¹ Section 6(1) of the Act

² Section 6(3) of the Act

³ [2005] ERNZ 372

⁴ n3 at [32]

[31] Mr Bristowe had limited contact with CHL before he commenced working on one of the company's sites on 20 June 2015. His contact had been mainly with Mr Kelly, who did not attend the investigation meeting and whose employment status Mr Bristowe said he did not know or ask about. He had no discussion with Mr Kelly about what was intended in terms of what his own relationship with CHL would be.

[32] When Mr Bristowe met Ms Parker, initially by chance when she inspected a project site Mr Kelly was working on, she did not raise the issue of his intended employment status and nor did he. I am not persuaded Mr Bristowe had turned his mind to the issue before he accepted Mr Kelly's offer to work on CHL projects.

[33] Ms Parker was unequivocal that she does not employ people on CHL development projects. She contracts them and they, in turn, might sub-contract other contractors or employ staff to assist them. She had agreed an hourly rate for Mr Bristowe with Mr Kelly and expected to be invoiced either through Mr Kelly or directly by Mr Bristowe for the time he worked for CHL.

[34] In Mr Bristowe's evidence he has referred to requesting confirmation of his employment from Ms Parker directly. He said this resulted in a letter from Mr Parker confirming that he was employed to work for her. I understand this to be the letter Ms Parker wrote to WINZ at Mr Bristowe's request on 16 June 2015 to assist him obtain a grant to purchase work tools.

[35] I find that letter, which does not refer to employment, but to Mr Bristowe having been "contracted by Champagne Homes...", confirms that CHL did not intend to enter into an employment relationship with Mr Bristowe. I also find it relevant that CHL expected Mr Bristowe to supply his own working tools and I will return to this later.

[36] I find there was no common intention over Mr Bristowe's employment status. This was because Mr Bristowe had not turned his mind to the issue, while CHL had no intention of entering into an employment relationship with him.

What agreement did the parties reach?

[37] Mr Bristowe did not receive a written contract from either Mr Kelly or CHL. He did not have a formal interview with Ms Parker for a position with CHL whom he did not meet until after he had given notice for his scaffolding employment. She

made no inquiry into his skills and experience, although her evidence is she accepted Mr Kelly's advice that Mr Bristowe was an experienced hammer hand. There was no discussion about taxation or about annual leave or working conditions. The only discussion Ms Parker had with Mr Bristowe before he commenced work was to confirm he was happy with the hourly rate of \$25 she had communicated to Mr Kelly.

[38] Mr Bristowe was aware he was expected to supply his own tools and protective clothing and sought a letter from Ms Parker confirming he had work to enable him to obtain those items. That letter confirmed he was contracted as a hammer hand to work on all future builds and renovations undertaken by CHL and work of up to 40 hours per week was anticipated but not guaranteed.

What control was exercised over Mr Bristowe's work?

[39] Mr Bristowe had agreed a starting date of Monday 22 June 2015 with Mr Kelly. However, he said Mr Kelly later contacted him and asked him to do some work on the weekend before that date. Ms Parker's evidence, which I accept, was that she had no knowledge until after the event that Mr Bristowe worked that weekend.

[40] Those two days were the only days Mr Bristowe undertook any work on a CHL site. Ms Parker did not supervise the work or directly control Mr Bristowe's activities.

Was Mr Bristowe integrated into the business of CHL?

[41] The integration test entails examining factors such as whether the person was performing a role that was part and parcel of the business or whether the role was more of an adjunct to it. Where the person is performing the former type of role they are more likely to be considered to be an employee.

[42] CHL undertakes property development work, both new builds and renovations. It requires a range of qualified trades personnel to carry out the work it undertakes. I accept Ms Parker's evidence that the company contracts trades personnel to undertake the work. The trades people CHL engages will arrange people to work with them and CHL will either negotiate a rate for the entire job or will negotiate hourly rates for the people working on the project.

[43] In the former situation, CHL will not know how many people are going to be involved in the work, or how much they are paid as it is up to the contractor CHL has engaged to organise that. In the latter situation, as happened with Mr Bristowe, CHL will negotiate with the contractor (Mr Kelly) an hourly rate for the people who will be involved on the job. CHL's discussion with the contractor will include who will be doing the work and the rate they will be paid.

[44] The work undertaken by each contractor, and by any workers the contractor either engages or employs, is necessary for CHL to operate as a new build and renovation company. However, because of the project nature of the work undertaken by the company, none of those personnel could be described as being integrated into the business of CHL. If a trades person/contractor declined an offer of project work from CHL, the work would be offered to someone else. Accordingly I conclude Mr Bristowe was not integrated into CHL's business.

The fundamental test

[45] This test examines how the person engaged him/herself to perform the duties undertaken, and whether they did so as a person in business on their own account.

[46] Mr Bristowe submitted he received only one payment of remuneration and he took issue with CHL's failure to deduct tax from the payment. He said there was no evidence to support his operating as a sole trader: he had no business plan to do so; did not provide services on more than one contract; had no means of deriving a profit or loss from work he completed; and the WINZ grant he received would not have allowed him to purchase enough tools to support his own business venture.

[47] CHL submitted the following factors supported its view that Mr Bristowe did not undertake work for it as an employee:

- he had not provided CHL with his bank account details;
- he had not been provided with, or provided CHL with an employee tax code declaration form; and
- he had not been provided or returned a KiwiSaver deduction form.

[48] CHL also submits it expected Mr Bristowe to be responsible for his own personal income tax and GST and it referred to the company's practice of engaging contractors.

[49] I accept CHL's submissions and am not persuaded it was Mr Bristowe's understanding he would be an employee of CHL. A factor I have taken into account is that he did not expect CHL to provide him with the tools necessary to carry out the work of a hammer hand. This was the reason for his asking Ms Parker to write a letter on his behalf to WINZ supporting his application for a grant to enable him to purchase tools.

[50] Another factor is that, under questioning, Mr Bristowe confirmed he had been required to provide documentation regarding his bank account and tax code when he accepted employment in May that year as a scaffolder. He had also been provided with an employment agreement before starting employment. He was therefore familiar with the documentation required when a new employment relationship commenced. I find it notable that Mr Bristowe did not ask about such documentation, or offer to supply any of the details an employer would require, before starting work on 20 June 2015.

[51] I conclude from the evidence of the parties and an application of the tests referred to above that Mr Bristowe was not an employee of CHL.

Determination

[52] For the reasons given above, I find Mr Bristowe was not an employee of Champagne Homes Limited and he is therefore unable to progress his claim in the Authority.

Costs

[53] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority