

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 59
5400642

BETWEEN PETER COUMBE
 Applicant

A N D PAINTWORX LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Peter Coumbe in person
 Chris Constantinos, Advocate for Respondent

Investigation meeting: 22 February 2013 at Christchurch

Submissions Received: 22 February 2013 orally from both parties

Date of Determination: 22 March 2013

DETERMINATION OF THE AUTHORITY

- A. The Applicant’s claims for unpaid wages and holiday pay fail as the Authority is not satisfied that he was ever an employee of the respondent.**
- B. Costs do not arise as the respondent was not professionally represented.**

Employment relationship problem

[1] Mr Coumbe claims that he has been underpaid in respect of a period of working as an employee between around 2 September and 6 October 2012. He also claims that he is owed holiday pay in respect of this period. He claims that he is owed a total of \$1,204.50 gross in respect of unpaid wages, together with a further \$461.76 gross in respect of holiday pay.

[2] The respondent denies that Mr Coumbe ever worked for the company as an employee and claims, therefore, that the Authority does not have the jurisdiction to consider Mr Coumbe's complaint.

Brief account of the events leading to the dispute

[3] The respondent company operates a painting and decorating business in Christchurch and, at the material time, employed eight people and engaged another three contractors. Mr Coumbe accepts that, until 2 September 2012, he was a contractor carrying out work on behalf of the respondent, submitting GST invoices.

[4] Mr Coumbe states that, when he was first interviewed by Mr Constantinos, who manages the respondent company, they discussed Mr Coumbe working as an employee at the rate of \$26 per hour, but mutually decided that he would start off as a contractor. Mr Coumbe says that it was agreed that he could ask to become an employee later if he wished.

[5] Mr Coumbe showed the Authority a copy of a timesheet that he had completed in respect of the period ending 9 September 2012 on which he had written the following:

*If ok Chris can I go back to employee status on paye as with previous employer. Perhaps back to contractor if/when do contracts jobs.
Thanks, Peter*

[6] Mr Coumbe states that Mr Constantinos telephoned him and said that *that was fine* and that it would be arranged the following week. Mr Coumbe says that, the following week, he had another telephone conversation with Mr Constantinos who said that he had changed him to employee status. Mr Coumbe says that Mr Constantinos confirmed this another time as well. Mr Coumbe stated to the Authority that *I was under no illusions that I was an employee.*

[7] Mr Coumbe said that he had requested to become an employee partly because he was being treated like one anyway; (for example, he said, being asked why he had gone home on one occasion when he was supposed to be an independent contractor) and partly because he thought he would be better off financially as an employee. This was partly based on the fact that the company was withholding tax at 20% from his invoices whereas, he understood, he would be taxed under the PAYE system at

17.5%. Mr Coumbe was also aware that, as a contractor, he was not entitled to sick pay and holiday pay.

[8] Mr Coumbe acknowledged that, after the date when he says that Mr Constantinos agreed that he would become an employee, nothing changed in the way that he carried out his work or in the arrangements under which he worked. Mr Coumbe said that he supplied most of his own materials, both before and after the point when he became an employee, but stated that, after he had become an employee, materials should have been provided to him. By materials, he meant brushes, tape, No More Gaps, sandpaper, fillers, etc.

[9] Mr Coumbe said that he noticed that he was not being paid in accordance with the agreement, and that, although GST was no longer being accounted for by the respondent, the withholding tax of 20% was still being taken off his payments. On two occasions, deductions were also made for half hour breaks each day although, Mr. Coumbe said, he had already deducted his breaks from the timesheets.

[10] Mr Coumbe also states that his final timesheet, for the period ending 7 October 2012, amounting to \$897 gross, was not paid at all. Mr Coumbe said that he advised Mr Constantinos on 27 September that he wished to leave and agreed to work a week as notice. His last day of work was on 6 October.

[11] Mr Constantinos, together with his colleague Ms Eade, gave evidence to the Authority. Mr Constantinos denied that he had ever agreed with Mr Coumbe that he would become an employee. He said that this was because he did not think that Mr Coumbe had the right demeanour to be an employee of his company. He said that this is why he continued to deduct 20% from the payments due to Mr Coumbe in respect of the timesheets that he submitted. He states that he did not account for GST on those payments simply because Mr Coumbe did not submit a GST invoice. Mr Constantinos pointed out that it was up to Mr Coumbe to deal with the tax authorities in respect of GST.

[12] Mr Constantinos also explained that he did not give Mr Coumbe an employment agreement because he did not agree to him becoming an employee. He explained that all his other employees had been given an employment agreement.

[13] Mr Constantinos explained that the final payment was withheld completely because of remedial work that had to be carried out on a property, at the cost of the

company, putting right work that he said had been carried out by Mr Coumbe and which had been unacceptably shoddy. Mr Coumbe denied that his workmanship had been shoddy, but it was agreed that this issue was not one that the Authority needed to investigate given that it did not assist in deciding whether or not Mr Coumbe was an employee or an independent contractor. If it turned out that Mr Coumbe was an employee, as Mr. Coumbe had not agreed orally or in writing to have what would be his wages withheld because of shoddy workmanship, the withholding of his wages would be in breach of the Wages Protection Act 1983, even if the workmanship had been substandard.

[14] During the investigation meeting Mr Constantinos pointed out an invoice number 868615 submitted to the respondent company by Mr Coumbe dated 27 September 2012 (after the date when Mr Coumbe stated that he had become an employee) which stated *on a/c contract work* and which was for a total of \$1,000 including GST. Mr Constantinos argued that this was proof that Mr Coumbe continued to be a contractor and states that the invoice had been rendered in respect of work that Mr. Coumbe had carried out after the date when, according to his evidence, he had become an employee.

[15] Mr Coumbe stated in the investigation meeting that this invoice had been rendered because he had been underpaid on two previous invoices he had submitted when he had been working as a contractor. Mr Coumbe was not able to explain why he chose to chase unpaid invoices by way of a further GST invoice, nor why he had written the words *on a/c contract work* on the invoice rather than, something like – *in respect of unpaid invoice No.xx*. A few days after the investigation meeting, however, Mr. Coumbe emailed the Authority to say that this invoice had actually been a receipt for a part payment received in respect of contract work done prior to him becoming an employee.

[16] Mr. Constantinos and Ms Eade agreed at the investigation meeting that they would produce further evidence that they said would show that Mr. Coumbe was mistaken and that he had been doing work as a contractor after the date that he said he had become an employee. Unfortunately, they did not produce this evidence, saying initially that they had not had time. Being a small business, I accepted this and gave the respondent a further two and a half weeks to produce the evidence. However, after this second deadline lapsed without any further communication from the

respondent, I have proceeded to determine the matter without that additional information.

[17] Having considered the issue of the invoice 868615, I note that it is dated 27 September 2012 and that it also states the words *paid 27/9/12*. I believe, therefore, that Mr. Coumbe's second explanation about the invoice is correct, and that it represents a receipt. There is a corresponding receipt into Mr. Coumbe's bank account on 27 September 2012 for \$800 from the respondent company. This is the sum that remained after 20% withholding tax had been deducted.

Determination

[18] Whilst I accept that Mr. Coumbe's invoice number 868615 does not prove that he continued to be a contractor after the date when he stated that he became an employee, I still have to determine whether or not there was a binding agreement between Mr. Coumbe and Mr. Constantinos that Mr. Coumbe would be an employee. If the parties had so agreed, then Mr. Coumbe would be an employee by dint of that agreement. If they did not so agree, as Mr. Coumbe accepts that he was an independent contractor prior to the alleged agreement, and as there were no material changes in the way that he worked after the alleged agreement, then he would have remained a contractor. Therefore, an analysis of the relationship in terms of the traditional tests set out in *Bryson v Three Foot Six Limited* [2005] ERNZ 372 is not necessary.

[19] However, there is a straight conflict of evidence between the two men. It was not obvious that either man was telling falsehoods, and so I must analyse the evidence to determine which account, on balance, is most likely to be true. That analysis leads me to conclude that Mr. Coumbe is mistaken, and that no binding agreement was reached between the men that Mr. Coumbe would become an employee. This is for the following reasons:

- a. Mr Constantinos made only one change to the way that he paid Mr. Coumbe despite his apparent agreement that Mr. Coumbe had become an employee. That one change was to not account for GST, but that was because Mr. Coumbe stopped rendering GST invoices.
- b. There were no changes in the way Mr. Coumbe was expected to work.

- c. Mr. Constantinos did not issue an employment agreement although, he says, his other employees all have one.
- d. Mr. Constantinos had an explanation for why he did not agree to Mr. Coumbe becoming an employee. Although I make no findings as to whether that explanation was fair (that Mr. Coumbe did not have the right demeanour to be an employee of the company), Mr. Constantinos was able to put forward an explanation for him declining the request.
- e. In his note to Mr. Constantinos, Mr. Coumbe referred to reverting to a contractor status *if/when [I] do contracts jobs*. It is not clear exactly what Mr. Coumbe meant by this. However, if he meant when he did contract jobs for other companies, he would not have had to revert to being a contractor of the respondent, unless the respondent had expressly prohibited its employees to do contract jobs, which was not Mr. Coumbe's evidence. On the other hand, if he meant doing contract jobs for the respondent, that is not how a normal employment relationship works, with some jobs carried out as an employee and some carried out as an independent contractor. A normal employment relationship is permanent, or for an agreed fixed term, but does not flip between employee and non employee status.

[20] There is a very significant difference in law between an employee and an independent contractor, and the Authority has to be satisfied that there was a meeting of minds between the parties when an applicant asserts that there was an express agreement that his status would change from that of an independent contractor to that of an employee. On balance, for the reasons given, I am not satisfied that there was such a meeting of minds.

[21] Therefore, I decline to accept Mr. Coumbe's application on the grounds that he was not an employee of the respondent and that the Authority does not, therefore, have the jurisdiction to investigate his complaints.

Costs

[22] The respondent was not legally represented, and so the issue of legal costs does not arise.

David Appleton
Member of the Employment Relations Authority