

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 372
3084635

BETWEEN JEREMY HOEBERIGS
 Applicant

AND MOBILE BOAT PAINTING
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Lawrence Anderson, advocate for the Applicant
 Dale Pennington, for the Respondent

Investigation Meeting: 2 September 2020 at Auckland

Submissions [and further 2 September 2020 from the Applicant
Information] Received: 8 September 2020 from the Respondent

Date of Determination: 15 September 2020

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Hoeberigs voluntarily resigned from his employment, he was not dismissed. Accordingly, he does not have an employment relationship problem.**
- B. The respondent successfully defended Mr Hoeberigs' claims. It was not represented. Accordingly, costs lie where they fall.**

Employment Relationship Problem

[1] The Respondent, Mobile Boat Painting Limited (Mobile Paint), is an incorporated company operating a boat painting business in the regions of Auckland and North Auckland.

Mr Dale Pennington and his wife, Mrs Helen Pennington, are joint shareholders in Mobile Paint. Mrs Helen Pennington is the sole director of Mobile Paint.

[2] The applicant, Mr Jeremy Hoeberigs, was employed as a painter by Mobile Paint. Initially employment was on a casual basis and from 13 February 2019, Mr Hoeberigs was employed in a permanent role.

[3] During December 2019, Mr Hoeberigs and Mr Pennington discussed the possibility of Mr Hoeberigs changing his status from that of an employee of Mobile Paint to becoming an independent contractor, providing services to Mobile Paint.

Mr Hoeberigs' claims

[4] Mr Hoeberigs says that he and Mr Pennington were not able to agree on an hourly rate that would make it viable for him to pursue the contractor option, and so he remained an employee of Mobile Paint. Mr Hoeberigs says that when they were not able to agree on an hourly contractor rate, Mr Pennington became angry, offensive and swore at him. Up until that time, Mr Hoeberigs says he and Mr Pennington had enjoyed a good relationship and he described them as friends.

[5] Mr Hoeberigs says following Mr Pennington's behaviour towards him, he decided to resign. Mr Hoeberigs gave one month's notice of resignation in writing and specified that his last day of work would be 6 January 2020.

[6] Mr Hoeberigs says that following his resignation, Mr Pennington immediately paid him his final pay without discussing it with him. When he went into work on 6 December, the day after his resignation, Mr Hoeberigs says he was told by Mr Pennington to "*Pack your shit up*" and "*Fuck off*". Mr Hoeberigs says he asked Mr Pennington if he could work out his one month's notice but was told by Mr Pennington that he was no longer wanted in the company and to leave. Mr Hoeberigs left and says he was paid one week's wages in lieu of notice.

[7] Mr Hoeberigs claims that he was unjustifiably dismissed by Mobile Paint. Mr Hoeberigs seeks compensation in the sum of \$20,000 for the humiliation, loss of dignity and injury to feelings he says he suffered, together with loss of remuneration for the period of time he was unable to secure employment following his alleged unjustified dismissal.

Mobile Paint's response

[8] Mr Pennington disputes Mr Hoeberigs' version of events. He says Mr Hoeberigs began talking to him in November 2019 about the possibility of becoming a contractor to Mobile Paint. The idea of contracting to Mobile Paint was Mr Hoeberigs. Mr Pennington says he was happy for Mr Hoeberigs to contract to Mobile Paint if that suited him or to remain as an employee. It became clear to him that Mr Hoeberigs was keen on the contractor arrangement and so they discussed a suitable hourly rate. They were not able to agree on a rate. Mr Pennington denies becoming angry or swearing at Mr Hoeberigs. He says he was happy for Mr Hoeberigs to remain an employee.

[9] A few hours after their meeting Mr Pennington says he received a text message from Mr Hoeberigs attaching an image of a handwritten note from Mr Hoeberigs giving one month's notice of his resignation. Mr Pennington says this came out of the blue.

[10] When Mr Hoeberigs reported to work on the morning of 6 December 2019, Mr Pennington informed Mr Hoeberigs that he was not required to work out his notice. Mr Pennington denies swearing at Mr Hoeberigs or telling him to leave.

[11] Mr Pennington arranged for Mr Hoeberigs to be paid one week's wages in lieu of notice, in accordance with the terms of his employment agreement. The payment was deposited by Mobile Paint in to Mr Hoeberigs' ANZ bank account.

[12] Mr Pennington says there was no dismissal; Mr Hoeberigs resigned, he was not required to work out his notice and was paid notice in accordance with his employment agreement. Therefore, Mobile Paint denies it is liable to pay any remedies to Mr Hoeberigs.

Investigation meeting

[13] The investigation meeting took just over a half-day in the Authority. Mr Hoeberigs filed a witness statement in the Authority. Mr Dale Pennington filed a witness statement for Mobile Paint. Each of the witnesses swore on oath that their evidence was true and correct. Each of the witnesses had the opportunity to provide any additional comments and information to the Authority and did so.

[14] As permitted under s 174E of the Employment Relations Act 2000 (the Act) this determination does not set out all the evidence and submissions received. The determination

states findings of fact and law and makes conclusions on issues necessary to determine the claim of unjustified dismissal brought by Mr Hoeberigs.

The issues

[15] The issues for the Authority to investigate and determine are as follows:

- (a) Was Mr Hoeberigs unjustifiably dismissed? If so, what remedies are available to him?

Credibility

[16] This matter is to be determined on matters of credibility. On a number of occasions the evidence of Mr Hoeberigs was in stark contrast to that of Mr Pennington. I have carefully evaluated the evidence I heard and have considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration there is.

[17] The onus of proof is the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. There are some areas of Mr Hoeberigs evidence that were inconsistent and not plausible.

[18] Two examples follow. Mr Hoeberigs told the Authority that he was not given a copy of his written employment agreement as a casual employee before he started work at Mobile Paint, and nor was he given the written employment agreement before he took up a permanent role with Mobile Paint. Mr Hoeberigs also says he was not told by Mr Pennington to seek independent advice and did not do so, before he signed the agreements. However, following questioning by the Authority he accepted that Mr Pennington had flagged up certain provisions in the permanent employment agreement to him. He also accepted that he had initialled each page of the employment agreement and had agreed the terms. Mr Hoeberigs told the Authority he had kept a copy of the employment agreement in his house.

[19] Mr Pennington told the Authority it is his practice to give employees their employment agreements to read before they start work, and before they start work he goes over the employment agreement with them. If both parties are satisfied, the employment agreement is signed, each page initialled and the employee starts work. The employment agreement provided to the Authority was signed and each page was initialled by both Mr Hoeberigs and Mr Pennington.

[20] In my view it is more likely than not that Mr Hoeberigs was given the permanent employment agreement by Mr Pennington to consider before he started work. However, he chose to “skim read” it and chose not to seek independent advice on its contents. Mr Hoeberigs signed and initialled the employment agreement acknowledging he had been given it to read, had been given the opportunity to seek independent advice and accepted the terms.

[21] Another example of Mr Hoeberigs’ evidence which I consider to be inconsistent relates to his actions following his resignation. Mr Hoeberigs informed the Authority that one to two weeks after his resignation, he sought professional advice about the circumstances of his departure from Mobile Paint. Following questioning by the Authority it became clear that Mr Hoeberigs sought advice immediately following his resignation, from a friend experienced in business. He then engaged his current representative on 6 December 2019, the first working day after he left his employment. This is supported by documentary evidence.

[22] Overall I found the evidence of Mr Pennington to be more credible and I have preferred his evidence to the evidence of Mr Hoeberigs. Accordingly, where there is a dispute in the evidence, I prefer Mr Pennington’s evidence.

First Issue

Was Mr Hoeberigs’ unjustifiably dismissed?

Mr Hoeberigs’ employment

[23] Mr Hoeberigs was happy with his terms of employment and his rate of pay while at Mobile Paint. He and Mr Pennington had a good working relationship.

Mr Hoeberigs told the Authority that he had a lot of friends who were contractors, rather than employees in industries such as scaffolding, landscaping and building. He had been told by them that there were benefits in being a contractor, such as tax benefits. For example when a room in your house is used as an office, that can be claimed as a business expense. He had also been told by his friends of the pitfalls of contracting, such as paying provisional tax.

Discussions about being an employee or a contractor – November 2019

[24] In November 2019, Mr Hoeberigs initiated conversations with Mr Pennington about the advantages and disadvantages of being a contractor. Mr Hoeberigs was aware that Mr

Pennington was experienced in running his own business, had engaged both employees and contractors, and would be a good person to talk to about it.

[25] Mr Hoeberigs accepted that Mr Pennington spent a great deal of time with him explaining the differences between being an employee and a contractor and the various “pros and cons”. At Mr Pennington’s suggestion, Mr Hoeberigs sought advice from an accountant who was very positive about Mr Hoeberigs changing his status from that of an employee to that of an independent contractor. The parties agree that Mr Pennington was happy with either arrangement chosen by Mr Hoeberigs. Both parties agree that Mr Pennington’s attitude was “it was no skin off his nose” whether Mr Hoeberigs was an employee or a contractor.

[26] It is my view that following his own research, discussions with Mr Pennington and after receiving advice from an accountant, Mr Hoeberigs decided to become an independent contractor and to contract his services to Mobile Paint. The issue between Mr Hoeberigs and Mr Pennington became what the contractual hourly rate would be in such an arrangement.

Meeting on 5 December 2019

[27] On 5 December 2019, Mr Pennington and Mr Hoeberigs had a coffee at a local café and discussed a suitable hourly rate if Mr Hoeberigs was to be an independent contractor. Mr Pennington says they discussed hourly rates and after some discussion he offered Mr Hoeberigs a contract rate of \$44 an hour. Mr Pennington says Mr Hoeberigs did not negotiate and would not budge from a rate of \$45 an hour. Mr Pennington says he and Mr Hoeberigs reached a stalemate and the outcome of the meeting was that Mr Hoeberigs remained an employee of Mobile Paint.

[28] Mr Hoeberigs says that when he told Mr Pennington that he would not accept less than \$45 an hour and would stay as an employee, Mr Pennington “lost it”, swore and insulted him. Mr Hoeberigs says he was very embarrassed by this. Mr Pennington denies this.

[29] I do not accept Mr Pennington swore at or insulted Mr Hoeberigs when they reached a stalemate in their negotiations. Why would he? Mr Hoeberigs accepted that Mr Pennington was happy for him to either remain employed by Mobile Paint or to become a contractor to it. Mr Pennington had already told Mr Hoeberigs during their discussions that “it was no skin off my nose” which option he chose. There was no reason for Mr Pennington to become angry and

abusive at the café as claimed by Mr Hoeberigs. I prefer Mr Pennington's evidence that they reached a stalemate, there was no swearing or abuse by him and they returned to work.

Mr Hoeberigs' resignation – Thursday, 5 December 2019

[30] Mr Pennington says a few hours after their meeting he received Mr Hoeberigs' notice of resignation.

[31] Mr Hoeberigs did not make contact with Mr Pennington to discuss his decision to resign. Rather, he sent Mr Pennington a photo of his notice of resignation which read as follows:

I, Jeremy Hoeberigs hereby give one months' notice of cease[sic] of employment. My last day will be the 6/1/20. I would like to thank you for the opportunity[sic] and the time I have been with your company.

[32] Mr Pennington did not reply to the notice of resignation. He says he felt as if he had been "dumped" by Mr Hoeberigs who he believed had decided to become a contractor providing landscape services, an option he had mentioned to him during their discussions during November 2019.

Final pay

[33] Mr Pennington arranged for Mr Hoeberigs to be paid his final pay, including wages in lieu of working out notice for a period of one week in accordance with the employment agreement.

Friday, 6 December 2019 – Mr Hoeberigs' final day at work

[34] When Mr Hoeberigs went to work on 6 December 2019, Mr Pennington told him he accepted his resignation and he was not required to work out his notice. Mr Hoeberigs says he was sworn at and told to leave by Mr Pennington. Mr Hoeberigs says this amounted to an unjustified dismissal. Mr Pennington denies swearing at Mr Hoeberigs and denies Mr Hoeberigs was dismissed.

[35] Mr Hoeberigs sent a text to Mr Pennington at 1.42pm on 6 December 2019 thanking him for his final pay and asking if it included his notice period.

[36] Mr Hoeberigs representative helpfully provided the Authority with legal submissions. The thrust of the submissions were that the parties to an employment agreement may agree to

shorten the notice period, if, for example the employee is taking up other employment. An employee leaving before the end of a notice period would be in breach of the employment agreement, unless he or she had the employer's agreement. However, if the employer cut the notice period short then the employee may take a personal grievance for unjustified dismissal and must be paid for the full notice period. Mr Hoeberigs' representative relied on the Authority decision of *Hobson v The Corner Store*¹.

[37] Mr Pennington denies dismissing Mr Hoeberigs. He relies on clause 17.3 of the employment agreement with Mr Hoeberigs. Mr Pennington says that clause meant Mobile Paint was not obliged to accept notice of resignation of more than one week from Mr Hoeberigs. Mr Hoeberigs had given one month's notice.

Employment agreement

[38] The relevant terms of the employment agreement are contained in clause 2 which states that the employment agreement will come into force on 13 February 2019 and "shall remain in force until terminated by other party".

[39] Clause 6 states that Mr Hoeberigs was employed in the position of painter. Clause 17 sets out the provisions when either party wish to terminate the employment agreement. Clause 17.1 states:

17.1 Either party may terminate this agreement on giving one week's notice to the other party. On receiving or giving notice of termination, the employer may, at its sole discretion, elect to pay wages in lieu of notice for all or any part of the notice period.

...

17.3 If the employee gives notice which is longer than one week, the employer shall not be obliged to accept such longer notice period; neither shall the employer be liable to pay more than one week's wages if the employer does not require the employee to work out the notice period.

[40] This clause is quite different to that contained in *The Corner Store v Hobson*² and relied on by Mr Hoeberigs' representative to support his argument that Mr Pennington cut Mr Hoeberigs' notice short and in doing so unjustifiably dismissed him.

¹ [2013] NZERA Christchurch 21.

² Supra at para[7].

[41] The clause in *The Corner Store v Hobson* is as follows: “*The employee shall give or receive two weeks’ notice of termination of employment.*”

[42] In that determination there was no provision which entitled the employer not to accept a period of notice longer than stipulated in the employment agreement. Clause 17.3 entitled Mobile Paint to elect not to accept more than the minimum period of one week’s notice from Mr Hoeberigs. In not accepting more than one week’s notice, Mr Hoeberigs’ representative submitted that Mobile Paint had given Mr Hoeberigs one week’s notice of dismissal, which was not justified. I do not agree. Clause 17.3 is very clear and Mobile Paint complied with it.

[43] I find that Mr Hoeberigs resigned voluntarily from his employment by Mobile Paint giving one month’s notice of resignation on 5 December 2019 to expire on 6 January 2020. Mr Pennington accepted Mr Hoeberigs’ notice of resignation and invoked clauses 17.1 and 17.3 of the employment agreement. Firstly, on behalf of Mobile Paint, Mr Pennington elected to pay Mr Hoeberigs wages in lieu of notice and as per clause 17.3 Mr Pennington took the view that Mobile Paint was not liable to pay Mr Hoeberigs more than one week’s wages when it did not require Mr Hoeberigs to work out his period of notice. Mr Hoeberigs was paid one week’s wages in lieu of working out his notice period. I find that this was a lawful action by Mobile Paint. Further, I find that Mobile Paint was within its rights, under clause 17.3 not to accept more than one week’s notice from Mr Hoeberigs.

[44] Mr Hoeberigs was not unjustifiably dismissed and does not have an employment relationship problem.

Costs

[45] Mobile Paint was not represented. Costs lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations