

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 39/08
5088134

BETWEEN WILLIAM BRIAN PLEACE
 Applicant

AND TREVOR CUNNINGHAM
 Respondent

Member of Authority: James Crichton

Representatives: Jenny Guthrie, Counsel for Applicant
 Jarrod Lovely, Counsel for Respondent

Investigation Meeting: 16 October 2007 at Dunedin

Determination: 11 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Pleace) alleges that he was unjustifiably dismissed by his employer who he says was the respondent (Mr Cunningham).

[2] Mr Cunningham denies that he employed Mr Pleace in his personal capacity and says that at all times Mr Pleace was employed by TM Cunningham Panelbeaters Limited (now in liquidation).

[3] Mr Pleace says that he worked at Hillside Engineering in Dunedin for three years when he says he was contacted by Mr Cunningham. In actual fact, it is clear from the evidence that Mr Pleace had worked from time to time in Mr Cunningham's premises apparently doing cash jobs on an *as and when* required basis.

[4] However, as a consequence of a formal approach from Mr Cunningham, Mr Pleace left Hillside Engineering and commenced full time employment in Mr Cunningham's business on 19 June 2006.

[5] Mr Pleace says that he always understood and believed that he was employed by Mr Cunningham personally. He gave this evidence notwithstanding that his lawyer's initial letter was addressed to the firm and referred to the firm as the employer and the unchallenged evidence that the premises in which Mr Pleace worked with Mr Cunningham were labelled on the front door with the name of the company and that he was initially paid by cheques drawn on the company.

[6] In answering questions from Mr Cunningham's lawyer, Mr Pleace acknowledged that he had seen business cards clearly including the full name of the company and that he knew that the building in which he worked with Mr Cunningham was owned by the company.

[7] Notwithstanding those obvious difficulties with his argument, Mr Pleace maintained his position that he thought he was employed by Mr Cunningham. In his oral evidence, Mr Pleace said that he *had always dealt with Trevor* (Mr Cunningham), and the pair of them had *never had any conversation about the nature of the employment just the work that was to be done*. Mr Pleace told me that he was dyslexic and that as a consequence he *didn't read much*.

[8] In September 2006, Mr Pleace was advised by Mr Cunningham that work had fallen off to the extent that it was no longer economic to continue and that Mr Cunningham was himself *getting out*. The consequence was that Mr Pleace would have to be let go and Mr Cunningham gave Mr Pleace two weeks' notice which Mr Pleace mostly worked out, his last day of work being 27 September 2006.

[9] Mr Cunningham says that when he told Mr Pleace that he was forced to terminate his employment, they had a perfectly civil conversation and that Mr Pleace said in effect that he understood the position and that he (Mr Pleace) would never be short of work.

[10] Conversely, Mr Pleace's evidence is that he was in fact aggrieved about the termination of his employment and blamed Mr Cunningham for taking him away from a well paying secure job at Hillside Engineering to what turned out to be an insecure future in the panelbeating business. Mr Pleace told me that Mr Cunningham *should have known the downturn was going to happen before it happened*. However, Mr Pleace acknowledged when I put it to him that panelbeating was a trade which was

up and down, but he still claimed that he *relied on Trevor's judgement when I took the job*.

Issues

[11] The first issue for the Authority to determine is whether Mr Pleace was employed by Mr Cunningham or not and if there are consequences that flow from the determination of that issue.

[12] Next the Authority must determine whether or not Mr Pleace has a personal grievance.

Who was the employer?

[13] I am satisfied on the balance of probabilities that Mr Pleace was never employed by Mr Cunningham and was always employed by TM Cunningham Panelbeaters Limited. I reach this conclusion for a number of reasons which I now enunciate.

[14] Although I have reflected on Mr Pleace's evidence that he is dyslexic and therefore not an avid reader, it seems to me inconceivable that Mr Pleace could not have been clear that he was employed by a limited liability company. The parties had a longstanding relationship. Mr Pleace had been employed by the company over quite a period of time, albeit not continuously, and I accept Mr Cunningham's evidence that Mr Pleace was always employed by the company and never by him personally.

[15] Even during the brief employment relationship which is the subject of this particular dispute, it seems to me more rather than less likely that Mr Pleace knew perfectly well that his employer was the company. He accepted in his oral evidence that he knew of business cards which referred to the company name, that he had seen flyers with the company name, that he knew the building in which the business operated was owned by the company, that he knew and had seen the label on the building which had the company name, and that he knew that he was paid by the company. Further, Mr Pleace said that he knew that the business was called *limited* but he maintained that he had no idea what that meant.

[16] I am satisfied then that Mr Pleace was employed by the company. The issue of who the respondent properly was, was canvassed at a directions conference over

which I presided on 22 August 2007. During that directions conference, I indicated to the parties' counsel, having heard them on the subject, that I considered it *likely* that the employer was in truth TM Cunningham Panelbeaters Limited (in liquidation), rather than Mr Cunningham in his personal capacity. Having heard the evidence of the witnesses at the investigation meeting, I now confirm that earlier intimation.

[17] However, notwithstanding that indication, Mr Pleace at no stage amended his application to join TM Cunningham Panelbeaters Limited (in liquidation) to his proceedings.

[18] On a narrow view of the present claim, having reached the conclusion that Mr Cunningham is not personally liable in any way because he was not the employer, one could determine that the matter was therefore at an end.

[19] However, the Authority has wide statutory powers to remedy any want of form in proceedings brought before it and I now do that by determining that the respondent is in truth TM Cunningham Panelbeaters Limited (in liquidation) which I now refer to as *the company*.

The dismissal

[20] Mr Pleace alleges that he was unjustifiably dismissed and his argument appears to rest on the footing that:

- (a) The company ought to have known that there was a downturn coming and therefore ought not to have employed him; and
- (b) The company continued to trade notwithstanding what Mr Pleace was told that the company was in fact shutting up shop.

[21] Dealing with each of these matters in turn, I must say that I am completely unmoved by the first contention. Mr Pleace is an experienced panelbeater himself and has been in the industry for many years. He acknowledged to me that it was an industry which had its ups and downs and I would have expected that he should use his own judgement in making determinations about whether an employment opportunity was a good one or not. It certainly seems to me unfair and unreasonable of Mr Pleace to assume that all of the risk of a new employment opportunity should be borne by the employer.

[22] The second issue that I have identified is Mr Pleace's contention that, by reason of the continuation in business of the company, he was unjustifiably dismissed. Mr Pleace says that he was told that the company was closing up and that Mr Cunningham himself was ceasing work and the implication is that, had Mr Pleace felt that was the position, he would have accepted the situation.

[23] Mr Pleace draws my attention to the fact that Mr Cunningham and his son, who also worked in the business, continued to work albeit at another location. Mr Pleace alleges that that work was a continuation of the company business.

[24] That is not factually the position at all, on the evidence I heard. I am satisfied that the company ceased to trade when Mr Pleace was told by Mr Cunningham that that was the position. Mr Pleace says that he was told by Mr Cunningham Senior that the latter was indeed going to cease work and that may well have been Mr Cunningham's original intention, but nothing turns on that particularly.

[25] Mr Cunningham Junior gave evidence that, through a friend, he had found some work in Kaikorai Valley which is physically remote from the South Dunedin location at which the company had previously traded. The nature of the work in Kaikorai Valley was fixing small blemishes to the bodies of Japanese import cars for a small Kaikorai Valley dealership that specialised in Japanese import vehicles. Mr Cunningham Junior was able to introduce his father to that business and they worked together until around Christmas time 2006.

[26] According to Mr Cunningham Junior's evidence, which on this point I accept, the business between himself and his father was a partnership and was not the company continuing to trade from new premises. Mr Cunningham Senior confirms that evidence by saying that it is true that he continued to work, but from the Kaikorai Valley site and that that work had *nothing to do with the company*.

[27] It follows that I am not persuaded that Mr Pleace has made out his claim that he was in fact unjustifiably dismissed from his employment by the company. In my opinion, the evidence discloses that the company genuinely ceased trading when Mr Cunningham told Mr Pleace that that was what was to happen and that in the circumstances Mr Pleace has no claim against the company.

[28] There was graphic evidence of the financial position of the company and the doubt its banker had about continued support over the rapid growth of the debt as a consequence of falling revenue.

The chassis pots

[29] One final matter remains to be disposed of. During the short period that Mr Pleace was employed by the company, there was an order placed for chassis pots. These are panelbeating tools that are bolted to a floor and used for pulling out small dents in sills of vehicles.

[30] Mr Pleace ordered a number of chassis pots during the employment, some for himself personally and some for the company. In the result, the chassis pots were not constructed until after the company ceased trading, and accordingly the company was not in a position to pay Mr Pleace for those that were ordered by Mr Pleace on behalf of the company.

[31] However, in the statement in reply filed in this matter, it is indicated that if the three chassis pots are supplied by Mr Pleace, then they will be paid for.

[32] I have considered the submission of the company that the Authority is not in a position to order the settlement of the chassis pots issue, but I do not accept that submission. I think the correct view is that the chassis pots matter was an outstanding issue from the employment relationship between the parties, where Mr Pleace clearly undertook an obligation on behalf of his employer (and that is not denied), but because of the delay in the supply of the chassis pots, Mr Pleace ended up paying for all the chassis pots from his own resources.

[33] In those circumstances, I think Mr Pleace is entitled to recover from either the company or Mr Cunningham personally, as a sign of good faith, the value of the three chassis pots that were destined to go to the company on the basis that Mr Pleace supplies those chassis pots to Mr Cunningham.

Determination

[34] I have reached the conclusion that Mr Pleace was employed by the company and that Mr Pleace has no personal grievance by reason of an unjustified dismissal, the company having got to a point where it simply could no longer continue to trade,

its bank having expressed doubt about its continued enthusiasm for funding the operation. Given the closure of the business, which I found as a fact to have happened, there can be no requirement on the company to continue to provide employment.

[35] I have also decided that the company or Mr Cunningham (as a sign of good faith), ought to pay Mr Pleace for the three chassis pots that the company ordered, on the basis that Mr Pleace provides those three chassis pots to either the company or Mr Cunningham.

Costs

[36] Costs are reserved.

James Crichton
Member of the Employment Relations Authority