IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 105
3031772

	BETWEEN	MARCEL SKOMSKI Applicant
	AND	ROD LAMBERTH First Respondent
		QUITE HANDY LIMITED Second Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Applicant in person Rod Lamberth for Respondents
Investigation Meeting:	17 September 2018
Submissions Received:	On the day from both parties
Determination:	26 November 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Marcel Skomski claims to have been unjustifiably dismissed by Rod Lamberth and/or Quite Handy Limited (QHL) on 20 June 2018. He also claims to have been disadvantaged by unjustifiable actions of his employer during his employment which commenced on or around 17 November 2017. Mr Skomski seeks lost wages and wage arrears, including holiday pay, unpaid sick leave, and pay for statutory holidays.

[2] Rod Lamberth is a builder with more than twenty years' experience and is the sole director of QHL. He denies Mr Skomski was ever an employee of his or of QHL. Mr Lamberth says QHL hired Mr Skomski on a labour-only contractor basis. In his

view the Authority has no jurisdiction to make any of the awards sought by Mr Skomski.

Issues

[3] The first issue for determination is whether Mr Skomski's relationship with the respondent or respondents was in reality one of employment or whether he was engaged on a labour-only basis, which is a form of independent contracting. If there was no employment relationship, I have no jurisdiction to consider his claims further.

[4] If I find Mr Skomski was employed by one or other, or both, of the respondents, I will need to consider whether there is any basis to his personal grievance and wage arrears claims.

Legal Considerations

[5] Section 6 of the Employment Relation Act 2000 ("the Act") concerns the meaning of ***employee*** and provides at s. 6(2), that:

> In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

[6] In order to determine the real nature of the relationship the Court or Authority:

> (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.[1]

[7] The leading case in determining the real nature of the relationship is the Supreme Court's judgment in *Bryson v Three Foot Six Limited (No 2).*[2] In that case the Court held at page 386, that *all relevant matters* included the written and oral terms of the contract between the parties and the way it operated in practice. It 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).*

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1 Section 6(3) of the Act.
2 [2005] ERNZ 372.

Intention of the parties

[8] While it is not a determinative factor, it is relevant to explore the intentions of the parties at the outset of their working relationship. There is no documentation recording the agreement they reached about this or about any of the terms and conditions under which Mr Skomski would work.

[9] Mr Skomski and Mr Lamberth are neighbours in Stokes Valley, approximately 26 kilometres from Wellington. They were friends in November 2017 when Mr Lamberth asked Mr Skomski to work for him. Mr Skomski, who had previously worked in car sales, had recently been made redundant from his employment of the past four years.

[10] At the time QHL was contracted to work for a large construction company that was involved in a significant building redevelopment project in Wellington. I will refer to the company with which QHL had a contract as the lead contractor. Mr Lamberth's evidence was that he needed another worker to assist him with his part of the project and he was keen for Mr Skomski to fill that role.

[11] Mr Skomski, who said he had always previously worked as an employee, said he agreed to help Mr Lamberth and accepted terms of remuneration with him of $25 an hour for a 40 hour week. He said he asked Mr Lamberth for a written contract before he commenced work. His evidence was that Mr Lamberth told him he would get a contract soon.

[12] Mr Skomski said he had no doubt he was an employee, his only uncertainty being whether he was an employee of Mr Lamberth personally or of Mr Lamberth's company. He knew from Mr Lamberth that he owned a company but, at that time, he did not know the company's name.

[13] Mr Lamberth rejected Mr Skomski's claim to have asked for a contract. It was his evidence that he had told Mr Skomski he would be a labour-only contractor. Mr Lamberth said he did not talk with Mr Skomski about tax, holidays or contracts and the only discussion they had at this initial stage was over Mr Skomski's rate of pay and the fact he would be paid on a labour-only basis.

[14] In oral evidence Mr Lamberth said he had asked Mr Skomski to invoice him for his remuneration but he did not follow this up when Mr Skomski failed to do so.

Mr Lamberth blamed his own poor record keeping for this. He said if there was any misunderstanding about the employment relationship that was a genuine mistake on his part and was not intended to disadvantage Mr Skomski whom he regarded as a mate.

[15] I find it highly likely Mr Skomski did ask Mr Lamberth for a contract at the outset of the working relationship and that Mr Lamberth agreed to provide Mr Skomski with a contract soon. However, the form of contract Mr Lamberth had in mind was not necessarily one of employment so his agreement to provide a contract does not necessarily support Mr Skomski's claim.

[16] I am not persuaded Mr Lamberth asked Mr Skomski to invoice him for his remuneration. In most matters of credibility between them, I found Mr Skomski's evidence to be the more consistent and plausible.

[17] At the outset of the working relationship in November 2017 I find there was no mutually held intention regarding Mr Skomski's working relationship with either or both of the respondents.

How the relationship operated in practice

[18] Mr Lamberth provided evidence, undisputed by Mr Skomski, that 20 per cent of Mr Skomski's earnings were paid monthly to Inland Revenue. Mr Skomski said he understood he had to pay tax although he did not know how much was being deducted from his wages. Taxation arrangements are not a conclusive factor in determining whether an individual is an employee or a contractor.[3]

[19] Mr Lamberth also provided evidence of an invoice he had submitted to the lead contractor. The invoice, dated 9 January 2018, was in the name of QHL. It listed Mr Skomski as *Labour only* in respect of the column headed *Servies*, which I assume is a misprint for *Services*. Mr Lamberth and one other person were also listed as *Labour only* on the invoice. Hours of work, or *Units,* were listed for each person, along with their *Unit Price ex GST* which, for Mr Skomski, was stated as *45*. The *tax type* for all three persons was *GST*, and the *Amount (ex GST)* due in respect of each of them appeared in the last column of the invoice. That amount represented the multiplication of the Units by the Unit Price ex GST.

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3 *Telecom South v Post Office Union* [1992] 1 ERNZ.

[20] The description of Mr Skomski as *Labour-only* on QHL invoicing could be taken as an indication of how Mr Lamberth viewed the relationship but does not necessarily do so. I note that QHL invoiced the lead contractor for Mr Skomski's services at $45.00 per hour rather than the $25.00 per hour Mr Skomski was actually paid. If the relationship was one of employment, the additional $20 an hour QHL received for Mr Skomski's services would allow a generous margin for payment of the annual holidays, statutory holidays, and other leave to which an employee is entitled. It also would have covered overhead expenses QHL incurred in connection with his employment, such as the provision to Mr Skomski of tools and equipment and any additional insurance costs in respect of his attendance at the building worksite.

[21] For this reason I do not regard QHL's description of Mr Skomski as *Labour only* when invoicing the lead contractor as indicative of the nature of the relationship between Mr Skomski and Mr Lamberth or QHL.

[22] It is clear, however, from the evidence of QHL's invoicing, and from its payment to IRD of monies in respect of Mr Skomski, that whatever the type of working relationship Mr Skomski had, it was with QHL and not with Mr Lamberth personally. There was no evidence, other than Mr Skomski's uncertainty on the matter, to support a contention that the working relationship was with Mr Lamberth in his personal capacity.

[23] It was Mr Skomski's evidence that he had discussions with Mr Lamberth about payment for statutory holidays and annual holidays. Those discussions, which took place shortly after Waitangi Day and shortly after Easter 2018 are relevant to a consideration of how the working relationship with QHL operated in practice.

[24] Mr Skomski said he asked Mr Lamberth on 12 February 2018 about payment for statutory holidays and was told he could only get paid for some of them. His evidence was that Mr Lamberth told him his entitlement was related to the length of time he had worked. Mr Skomski said Mr Lamberth told him he would *fix me up soon*. While Mr Lamberth denied that conversation took place, I prefer Mr Skomski's evidence on the matter.

[25] On 10 April 2018 Mr Skomski said he initiated another discussion with Mr Lamberth, asking him for a contract and about statutory holidays and the amount of

holiday pay he had accrued. He acknowledged this was at the same time as asking for a pay increase. Mr Lamberth responded by asking him for his curriculum vitae (CV).

[26] On the holidays issue, Mr Skomski said Mr Lamberth told him he was a contractor and he did not get holidays. Mr Skomski's evidence was that he would not have accepted Mr Lamberth's offer of work if he had known he would not be paid for statutory and annual holidays. However, he said he felt trapped at this point because Mr Lamberth also told him that, if he stayed with him on the current job until it ended, he would look after him and that Mr Skomski would *get what (he) wanted*. Mr Skomski took this in the context of the discussion to mean that he would receive payment for holidays in accordance with his requests.

[27] Mr Lamberth's evidence confirmed he had asked Mr Skomski for his CV in the context of Mr Skomski asking for a $2.00 per hour pay rise. He acknowledged part of the conversation Mr Skomski had referred to, but his recollection was of telling Mr Skomski that, when the current work ended, Mr Skomski would need to *get tooled up* and he required *significant tools.*

[28] I do not find Mr Lamberth's evidence compelling on this matter and again prefer that of Mr Skomski. I conclude Mr Lamberth conceded in the February 2018 discussion that Mr Skomski was entitled to payment for some holidays without specifying what was included and what excluded. In the April 2018 discussion between them, I conclude Mr Lamberth essentially dangled the prospect of being paid for annual and statutory holidays in order to persuade Mr Skomski to keep working for QHL, while overtly denying Mr Skomski had any entitlement to such payment.

[29] After reflecting on the February and April 2018 discussions, I find Mr Lamberth essentially conceded that Mr Skomski was an employee in February 2018 when he acknowledged he was entitled to payment for statutory holidays. In the April 2018 discussion he attempted to make that payment conditional upon Mr Skomski remaining until the end of the current job.

Control Test

[30] Mr Skomksi was required to be waiting at a pickup point each morning to travel with Mr Lamberth to the workplace in Wellington. Initially the pickup time

was 6:00 am each working day but changed to 6:30 am in February 2018. At the worksite Mr Skomski was allocated work by Mr Lamberth.

[31] Mr Lamberth who, in oral evidence, claimed the relationship between QHL and Mr Skomski was casual, said Mr Skomski could, and did, choose when he wanted to work. He provided a number of timesheets to the Authority in support of this assertion. The timesheets covered only part of the time Mr Skomski worked and there were several whole weeks missing. Mr Skomski questioned their validity and said he did not complete those timesheets and had not seen them before the Authority proceedings. I accept his evidence on that matter and find Mr Lamberth completed the timesheets.

[32] Mr Skomski provided a large number of text exchanges he had had with Mr Lamberth during the seven months of their working arrangement. Most of these related to the time Mr Lamberth would be at the pickup point in the mornings before they went to the worksite.

[33] Having analysed both these sets of documents I reject Mr Lamberth's claim that Mr Skomski could and did choose when he wanted to attend work. The days he did not attend appear to have been when he was sick; or when Mr Lamberth was sick and failed to pick him up; or when Mr Skomski had not been paid and refused to work until Mr Lamberth had remedied that situation.

[34] The timesheet and text evidence indicates that Mr Skomski worked regularly between Monday and Friday. It was not disputed that Mr Lamberth allocated work tasks to Mr Skomski and determined when and how they were to be done.

[35] I find the application of the control test supports an employment, rather than a contracting, relationship. However, on its own, it is not conclusive in determining the real nature of the relationship between the parties.

Integration Test

[36] 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.

[37] Mr Lamberth, through QHL, undertakes building-related projects. He performs the work himself and, where the size or scope of the job requires it, arranges others to work with him for the duration of the project. I understand QHL does not employ or engage anyone on a permanent basis. Mr Lamberth's evidence was that he contracted people when needed for a project.

[38] Mr Skomski worked on only one project with Mr Lamberth and there is no evidence that he was integrated into the structure of QHL.

[39] The application of this factor indicates more an independent contracting relationship than one of employment.

Fundamental Test

[40] 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.

[41] Mr Skomski provided some basic tools, such as a hammer, although the majority of those he used on the worksite were supplied by QHL. According to Mr Lamberth, and not denied by Mr Skomski, he provided his own health and safety equipment. He did not regard himself as a person in business on his own account and reaped none of the benefits a self-employed person might expect to gain.

[42] I find the application of the fundamental test indicates slightly more in favour of an employment than a contracting relationship.

Industry practice

[43] It is sometimes useful to examine industry practice to ascertain whether one type of relationship is particularly common in the relevant area of work. Neither party made submissions on this factor. I am aware, anecdotally, of both employment and independent contracting relationships being common in the building and construction industries where work is undertaken on a project by project basis. This factor sheds no useful light on the current situation.

Conclusion

[44] I have found there was no mutual intention regarding the nature of the working relationship between Mr Skomski and QHL before he commenced work in November

2017. However, during the course of the relationship I have found Mr Lamberth made concessions regarding the payment of statutory holidays and annual holidays. I have concluded those concessions indicate an acceptance, albeit conditional, that Mr Skomski could expect to receive payment for statutory and annual holidays.

[45] Applying the control test, an employment relationship is indicated, but an application of the integration test supports an independent contracting relationship. The fundamental test indicates slightly more in favour of an employment relationship while industry practice is inconclusive.

[46] The type of work Mr Skomski performed for QHL could have been performed under either an employment relationship or a contract for service relationship. I find the balance tips in favour of an employment relationship for the reasons I have given above and, specifically, the conclusions I have reached in relation to payment for annual and statutory holidays.

[47] I find Mr Skomski was employed by QHL from 17 November 2017 until 20 June 2018 and will now address the claims he has made against his former employer.

Was Mr Skomski unjustifiably dismissed?

[48] There is no dispute between the parties that Mr Lamberth severed the working relationship with Mr Skomski by text on Wednesday 20 June 2018. In oral evidence Mr Lamberth said this occurred on a day when he was sick and Mr Skomski had *so much anger and aggression* that he (Mr Lamberth) told him they *were done*. His text to Mr Skomski was as follows:

> *Were done find a new job* (sic)

[49] It came after a string of texts which had started the previous morning at 6.52 am with Mr Lamberth texting Mr Skomski that he would pick him up in 10 minutes. He texted again at 9.33 am to advise he was ill and was *pulling the pin*. Mr Skomski texted back asking for confirmation he would be paid from 7 am until 9.30 am in accordance with an agreement Mr Skomski said they had reached that he would be paid from 7 am regardless of what time they left for work or arrived at work.

[50] At 7.28 am on Wednesday 20 June Mr Skomski texted Mr Lamberth that he had been ready to leave since 6 am. He asked when Mr Lamberth would be ready and

again asked for confirmation that he would be paid from 7 am as had been agreed. Mr Lamberth texted back that he was sick and told Mr Skomski to find his own way to work. Clearly dissatisfied with that response, Mr Skomski made his unhappiness and frustration clear to his employer.

[51] He accused Mr Lamberth of taking advantage of his good nature, and raised the non-payment of holiday pay, payment for statutory holidays and sick pay. He reminded Mr Lamberth it was *illegal not to have a contract* and *illegal not to provide a pay slip to your employee.* Mr Skomski said he would *no longer be taken advantage of.*

[52] It was Mr Skomski's evidence that Mr Lamberth then called him on his mobile phone but he refused to answer, instead texting Mr Lamberth that if he had something to say he should put it in a text. That prompted Mr Lamberth to send the text cited above in which he dismissed Mr Skomski, telling him to find a new job.

[53] The test for assessing whether a dismissal is justifiable is set out at s 103A of the Act. It requires an objective assessment of whether the employer's actions and how the employer acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[54] Applying that objective assessment to the current fact situation I find Mr Lamberth's dismissal of Mr Skomski, and the manner in which he dismissed him, was not the action a fair and reasonable employer could have taken in all the circumstances at the time.

[55] In reaching that conclusion I have taken into account that Mr Lamberth was not feeling well at the time and that QHL is a small company in which he, as sole working director, is the only full-time permanent worker. It did not have human resources (HR) personnel on tap, although there was nothing to prevent Mr Lamberth taking legal and/or HR advice on his situation.

[56] I have also considered the timing of Mr Skomski's quite forceful expression of frustration over his unresolved employment issues at a time when Mr Lamberth was clearly struggling with a health issue.

[57] After a consideration of all relevant factors I find there was no justification for dismissing Mr Skomski by text in the manner that occurred. Mr Lamberth made no

attempt to follow any form of process and the dismissal was, as acknowledged by Mr Lamberth, in reaction to texts from Mr Skomski. The texts were not abusive and they represented several months of frustration over issues of remuneration by Mr Skomksi. They deserved to be properly considered and addressed by Mr Lamberth.

Was Mr Skomski unjustifiably disadvantaged?

[58] This claim relates to days, such as 19 June 2018, when Mr Lamberth cancelled a work day by *pulling the pin*. In my view this is a matter better considered in the context of wage arrears rather than as a personal grievance.

Wage arrears

[59] Mr Skomski claims wage arrears relating to days when he was ready to work but for one reason or another Mr Lamberth decided not to go to the worksite. The frustration for Mr Skomski was that at times, as in the 19 June 2018 situation, Mr Lamberth would text to advise he would be arriving at the pickup point shortly, but would not arrive and would not advise until some hours later that he was *pulling the pin*.

[60] Mr Skomski's evidence was that he and Mr Lamberth had agreed he would be paid from 7 am on work days. He said the agreement extended to days on which he was ready and waiting to be picked up to go to work but work was cancelled without prior notice due to Mr Lamberth's indisposition or unavailability.

[61] Mr Skomski said in those situations he was to be paid from 7 am until Mr Lamberth advised he would not be working that day. I do not understand Mr Lamberth to have disputed this. I have identified 5, 19 and 20 June 2018 as days on which this occurred. No payment is due for 5 June as Mr Lamberth advised before 7 am that he was going *to pull the pin.* Payment for two and a half hours is due for 19 June and for half an hour on 20 June pursuant to s 131 of the Act. If there were others days, they were not sufficiently identified.

[62] Mr Skomski has claimed one day's payment for a day on which he did not work due to illness. From the text message evidence he has provided I have identified

6 March 2018 as that day. However, as Mr Skomski had not been working for six months at that stage, he was not entitled to paid sick leave that day.[4]

[63] Mr Skomski received no payment for the nine public holidays that fell within the duration of his employment with QHL. He worked on none of them and all were days he would have otherwise worked. He is entitled to payment for Christmas Day and Boxing Day 2017 and for New Year's Day, 2 January, Waitangi Day, Good Friday, Easter Monday, ANZAC Day and Queen's Birthday in 2018.

[64] Mr Skomski is also entitled to holiday pay calculated at 8 per cent of his gross earnings from QHL during his employment.

Remedies and contribution

[65] Mr Skomski was unjustifiably dismissed and seeks payment of three months' wages based on a 40 hour week as a remedy. When questioned about efforts to find alternative employment, Mr Skomski's evidence was that he had started another job on 16 August. I calculate that he was without employment for eight weeks following his dismissal.

[66] Section 128 of the Act provides that an employee who has a personal grievance and has lost remuneration as a result of that grievance is entitled to reimbursement from the employer of *the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*

[67] Accordingly Mr Skomski is entitled to be reimbursed by QHL for eight weeks' lost remuneration less any contribution he may be found to have made to the situation that led to his personal grievance.[5]

[68] I have already outlined the circumstances under which Mr Lamberth dismissed Mr Skomski by text, after Mr Skomski had vented his frustration via several text messages over his employer's failure to comply with his employment obligations towards him. Mr Skomski's frustration was understandable but ill-timed, coming as it did when Mr Lamberth had made it known he was unwell and unable to work.

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4 In accordance with s 63 Holidays Act 2003.
5 In accordance with s 124 of the Act.

Taking this into account I find Mr Skomski contributed to the situation that led to his personal grievance and I assess that contribution at 40 per cent. The remedy I have awarded to Mr Skomski for his personal grievance will accordingly be reduced by that percentage.

Summary of findings and orders

[69] Mr Skomski was an employee of QHL from 17 November 2017 until he was unjustifiably dismissed on 20 June 2018.

[70] As a remedy for Mr Skomski's personal grievance for unjustifiable dismissal, QHL is ordered to pay him eight weeks' wages based on a 40 hour week at $25.00 an hour ($8,000.00), less 40 per cent contribution ($3,200.00), totalling $4,800.00 gross.[6]

[71] QHL is ordered to pay the following wage arrears to Mr Skomski:

(a) $62.50 gross for two and a half hours in respect of 19 June 2018;

(b) $12.50 gross for half an hour in respect of 20 June 2018;

(c) $1,800.00 gross in respect of the nine public holidays listed in paragraph 63 of this determination.

[72] Mr Skomski is also entitled to annual holiday pay at eight percent of his gross earnings since the commencement of his employment.[7] I have calculated that sum to be $2,247.00. In reaching that amount I have included holiday pay on the arrears ordered in paragraph 71 (a) to (c) above. In the absence of full wages and time records from QHL, I have accepted Mr Skomski's evidence of the hours agreed with his employer in calculating holiday pay due to him.[8]

Costs

[73] As neither party was represented there should be no issue as to costs.

Trish MacKinnon
Member of the Employment Relations Authority

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6 In accordance with s 123(1)(b) of the Act.
7 In accordance with s 23 Holidays Act.
8 In accordance with s 132 of the Act.