

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 152/08
5125949

BETWEEN

YIANNIS TSOUPAKIS
Applicant

AND

FENDALTON
CONSTRUCTION LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Mike Smith for the Applicant
Mike Gould for the Respondent

Investigation Meeting: 9 October 2008

Additional Material: 16 October 2008

Submissions Received: 24 October 2008

Determination: 12 November 2008

DETERMINATION OF THE AUTHORITY

[1] The key issue preliminary issue to determine in this case is whether the applicant, Mr Yiannis Tsoupakis, was an employee of or a contractor to the respondent, Fendalton Construction Limited. Mr Tsoupakis is a commercial painter. He had worked for Fendalton as a contract painter between September 2005 and March 2006, before he left to become an employee of another firm that provided commercial painting services. Mr Tsoupakis came back to work for Fendalton on 12 February 2007, until his services were no longer required on 27 March 2008.

[2] Mr Tsoupakis claims that it was agreed with Fendalton that he would recommence work with them as an employee and that after he raised continued concerns about not being treated as an employee, his services were dispensed with.

[3] Fendalton claims that Mr Tsoupakis had entered into another contracting agreement with it in discussions with Mr Murray Chinnock, its contracts coordinator, after being authorised to do so by Mr Jim McKernan, the managing director of Fendalton.

[4] Mr Tsoupakis claims that he was given no notice or reason for the termination of his services. Fendalton claims that Mr Tsoupakis' services were terminated because it no longer had sufficient work for him.

Issues

[5] The issues before the Authority are whether the real nature of the relationship between Mr Tsoupakis and Fendalton was that of employer and employee; if so, whether Mr Tsoupakis was justifiably dismissed; and if not, what remedies should be awarded to him.

Contractor or Employee?

[6] The Supreme Court of New Zealand in *Bryson v. Three Foot Six Ltd (No 2)* [2005] ERNZ 372 held, at 386, that in deciding whether a person is an employee or a contractor, the Authority:

... must consider "all relevant matters", including any matters that indicate the intention of the persons. But it is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

"All relevant matters" certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship operated in practice. ... "All relevant matters" equally clearly requires 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)...

[7] Mr Tsoupakis is a tradesman, not a businessman. By his own admission, he struggled with the responsibilities of preparing income tax and GST returns while a contract painter at Fendalton the first time. In particular he had failed to account for GST at all. It was for these reasons that Mr Tsoupakis claims that when he was approached by Mr Chinnock to work for Fendalton again he would only agree to do so provided Fendalton paid his tax and ACC and holidays, as well as providing him with a vehicle. Mr Tsoupakis claims that Mr Chinnock agreed to these conditions, except for the vehicle, although Fendalton would reimburse some of his petrol costs. Mr Tsoupakis was prepared to work for the \$21 per hour offered by Mr Chinnock. He was currently earning \$18 an hour as an

employee. He claims he would not have changed jobs and gone onto contract for only an extra \$3 per hour.

[8] Mr Tsoupakis claims that he continually asked Mr Chinnock for his written contract so that he could question why he was not being paid for public holidays. He also says he asked Mr McKernan and Mr Alastair Yee (another director of Fendalton) about his contract, but was never given a straight answer.

[9] Mr Chinnock gave evidence that rather than conduct the hiring discussions with Mr Tsoupakis directly he simply passed on a request from Mr Tsoupakis for work to Mr McKernan, who conducted all the pre-engagement discussions directly. By contrast, Mr McKernan claims (consistently with Mr Tsoupakis) that the two of them never had any discussions, but that he was approached by Mr Chinnock stating that Mr Tsoupakis was looking for work, that there was a vacancy for a contract painter at the time and that he would be suitable. Mr McKernan states that he told Mr Chinnock that Mr Tsoupakis could be re-engaged on his previous terms and authorised such an engagement. I accept that the use of contract painters rather than employees was a policy that Fendalton was moving towards, rather than the direct hiring of staff, such as its recourse to temporary staff through a labour hire firm.

[10] Clearly, Mr Chinnock is wrong about the way Mr Tsoupakis came back to work for Fendalton. That calls into question his other evidence. In that evidence, he backed up Mr Yee and Mr McKernan's evidence that Mr Tsoupakis had approached them all on various occasions asking to become an employee and not to continue on as a contract painter.

[11] Obviously, as I was not there, I can not be certain as to whether the parties had agreed at the inception of Mr Tsoupakis' return to work that he would be a contract painter again, or an employee instead. The Authority is, however, charged with making such a determination on the balance of probabilities, i.e. what is more likely to be correct than not. Mr Chinnock's memory of events over the engagement of Mr Tsoupakis must be seen as mistaken and therefore the rest of his evidence has to be treated with great caution. By contrast, there is nothing in the evidence of Messrs Tsoupakis, Yee or McKernan to lead me to the conclusion that any of them were necessarily mistaken in their recollection of events.

Intention of Parties

[12] I must determine whether Mr Tsoupakis was, as he claims, tricked by Mr Chinnock into coming back to work as a contractor when he thought he was coming back as an

employee, or whether the relationship was founded on a mistake (Mr Tsoupakis thinking he was coming back as an employee and Fendalton thinking he was coming back as a contractor), or whether it was the agreement of both parties that Mr Tsoupakis would come back on the same terms that he had been on originally, namely as a contract painter.

[13] Fendalton operates services to the construction industry. The particular service relevant to Mr Tsoupakis' claim is the provision of contract painters, plasterers and decorators. Much of Fendalton's work is for insurance repairs, but it does other jobs involving painting and decorating. All staff are paid at a flat rate, although contractors are paid more per hour to make up for the benefits they lose in terms of holidays and ACC etc. Staff work at various sites in Greater Wellington. Staff provide the basic tools of their trade but specialist equipment is provided to them when necessary. Staff were given mobile phones to keep in contact with Fendalton.

[14] Staff are able to work as many hours in excess of 40 as they wish. Supervision differs from job to job. Cost and quality is often measured only by a phone call to the client to see if they are satisfied with the work, but if managers happen to be in the area they will check with staff on their work. Travelling time and costs may be reimbursed by Fendalton if they are reimbursed by the client.

[15] The contract coordinator, Mr Chinnock, gave instructions to each of the painters as to what job they were responsible for and checked the hours claimed by them.

[16] Mr Tsoupakis in fact worked as many hours as he wanted to, usually in excess of 50 per week over six days. He wanted to earn good income and the longer he worked the more he got paid. I accept that Mr Tsoupakis could have turned down work with Fendalton, but the situation never arose because he wanted to work as many hours as he could. Similarly, Mr Tsoupakis had a business card and advertised for work as *Y.T. Painters and Decorators*, although during this period advertisements were only made to try and find work for a friend of Mr Tsoupakis.

[17] Mr Tsoupakis' relationship with Fendalton ended when he was simply told that there was no more work for him, without any notice or any of the procedural requirements consistent with the dismissal of an employee, whether for redundancy or cause. He was similarly not paid for public holidays or given an annual or sick leave entitlement.

[18] It is the way that the contract operated in practice that leads me to conclude that the joint intention of the parties was, from commencement, to enter into a relationship for a

contract painter. The main reason for this is the way that the contract operated was exactly the same way as the contract operated during Mr Tsoupakis' first period of tenure, namely (as agreed) as a contract painter. He invoiced the company at a set rate plus GST, being the rate that had previously applied, namely \$21 per hour. Mr Tsoupakis was responsible for his own taxation, other than withholding tax deductions, and had to pay his own ACC. He was not provided with paid holidays such as annual or sick leave.

[19] I also note that all employees of Fendalton are supplied with a written employment agreement, as required by law. Mr Tsoupakis was not. I accept the documentary evidence of Fendalton that no employee with equivalent qualifications and experience was paid at the rate of Mr Tsoupakis. Therefore I am satisfied that an employee with Mr Tsoupakis' skills and experience would have been paid around \$16-17 per hour by Fendalton.

[20] This finding also leads me to the conclusion that the evidence of the three witnesses for Fendalton that Mr Tsoupakis had approached them personally seeking a change from contractor to employee status is more likely to be correct than Mr Tsoupakis' claims to the contrary. The fact of three witnesses giving the same evidence is also, more importantly, consistent with other aspects of the parties' employment arrangements and therefore inconsistent with Mr Tsoupakis' recollection. For instance, it is unlikely that Mr Tsoupakis would have allowed a misunderstanding over his employment status to have run for so long without direct challenge, including periods when an employee would have expected to have been paid for public holidays. I can only conclude that Mr Tsoupakis' recollection is more likely to be faulty than that of Mr McKernan and Mr Yee.

[21] The next issue is whether or not the parties have achieved their intention as a matter of law. In doing so it is important to remember that any type of employment relationship can also be structured as one of independent contractor (*Koia v. Carlyon Holdings Ltd* [2001] ERNZ 585).

[22] As a general point I note that in practice, other than the payment arrangements, I am satisfied that Fendalton treated employees and contractors virtually alike, except in three particular areas, namely the requirement to be available for work, the existence of a written employment agreement and holidays.

Control

[23] Under the control test the greater the control exercised by the purchaser of services the more likely the provider of those services is to be an employee. *NZ Carpenters Etc*

IUOW v. Construction Development Ltd [1989] 1 NZILR 323 is a case that shows that even without a written contract, a labour-only contractor may not be an employee, although it predates the Employment Relations Act and its recasting of the legal tests. In assessing the issue of control, it was noted that tradesmen required *modest supervision only*. Flexibility and attendance at work was held to be irrelevant. The sort of coordination provided in that case, relating to hammer hands, did not *comprise marked subordination of the tradesman*. In that case, as here, there was no foreman or leading hand, as would normally be expected in an employment relationship. It was also noted, as here, that the labour-only contractors exercised, *individually* control over the hours they worked and the continuity of those hours. Here Ms Tsoupakis was able to take on other work if he wished. In that case, as here, the control test indicates that Mr Tsoupakis was more likely to be a contractor than an employee.

Integration

[24] I conclude that from a revenue and administration perspective there was no integration of Mr Tsoupakis with Fendalton. On the other hand, the people getting the benefit of Mr Tsoupakis' painting would often have known that he represented and acted on behalf of Fendalton. He was treated the same as other contractors and employees and thus the way the contract operated was neutral in relation to whether Mr Tsoupakis was an employee or a contractor.

Own Business

[25] The fundamental test is whether Mr Tsoupakis was in business on his own account. The invoicing and taxation arrangements certainly favour a finding that he was in business on his own account. On the other hand, Mr Tsoupakis' work was all provided by Fendalton; he was treated in basically the same manner as employees; and the only way he could increase his income was to work more hours. Other than the intention of the parties that there be a contracting arrangement, it can not be said that the fundamental test would lead to a conclusion that Mr Tsoupakis was any more in business on his own account than an employee. He was subject to the direction of Fendalton and its supervision to the same extent as employees.

Conclusion

[26] Standing back, it is necessary to collate all this material and determine what the real nature of the relationship between the parties was. As has been said in many cases, anything that can be done by an employee under a contract of service can also be done by an independent contractor under a contract for services. Thus the hammer hands in *Construction Development* could equally have been engaged as contractors or employed as employees.

[27] In this case I conclude that the intention of the parties (as particularly identified by the provision of GST invoices from Mr Tsoupakis to Fendalton on a weekly basis, together with the payment of his own ACC and the lack of usual protections to an employee such as annual or sick leave) pushes the balance in favour of a conclusion that Mr Tsoupakis was an independent contractor, as he had previously freely agreed to work for Fendalton,.

[28] I determine accordingly to dismiss Mr Tsoupakis' claims.

Costs

[29] Costs are reserved.

G J Wood
Member of the Employment Relations Authority