

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 457/10  
5304833

BETWEEN                      BRADEN WEBB  
   Applicant

AND                              PROFESSIONAL RELIEF  
   SERVICES LIMITED  
   Respondent

Member of Authority:        Alastair Dumbleton

Representatives:            Applicant in person  
   Zeyn Khan, advocate for Respondent

Investigation Meeting:      8 October 2010

Determination:                22 October 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant Mr Braden Webb claims that he was in an employment relationship with the respondent Professional Relief Services Ltd. Mr Webb claims that as an employee he did not receive the statutory entitlements of an employee to paid public holidays and annual holidays.

[2]     Mr Webb also claims that the employment relationship ended suddenly without any warning, when he was summarily dismissed for alleged misconduct or failure of performance.

[3]     There is no dispute that Mr Webb was engaged by Professional Relief Services Ltd to drive a courier van around Auckland. The relationship was formed through Mr Zeyn Khan who is a director of the company.

[4] Mr Webb had previously been employed as a courier/driver in another business and had met and worked with Mr Khan then. Mr Webb was also a despatcher for a firm Mr Khan worked for as an owner-driver, and he has been employed as an owner-driver by a courier business.

[5] Mr Webb's work for Professional Relief Services began in December 2007 and ended in October 2009. There was no written agreement covering the relationship, whatever kind it was. Throughout, Mr Webb received no paid annual holidays or paid public holidays. His remuneration was always at the rate of \$140 per day. He worked most weekdays and was paid monthly by cheque or direct credit. He did not render invoices for his payments.

[6] Mr Webb drove a Transit van supplied by Mr Khan. He was given a fuel card for diesel and oil he filled the vehicle with on the account of Professional Relief Services, and he drove to and from home each day in the van. The company at material times was a contractor to Toll Priority, a courier business based at Mangere. Mr Webb's van was decorated in the livery of Toll Priority and he wore a polo shirt and other corporate dress of that business. He was required to report each day by 6.30am to the despatch centre at Toll Priority where he received his courier assignments.

[7] Central to the disposal of the claims before the Authority of unjustified dismissal and for recovery of arrears of annual and public holiday pay, is the question of Mr Webb's status; was he an employee or a contractor?

[8] The statute law to be applied is s 6 of the Employment Relations Act 2000, under which the Authority must determine the real nature of the relationship between the parties. In doing so it must consider all relevant matters, including any matters that indicate the intention of the parties. The Authority is not to treat as a determining matter any statement by the parties that describes the nature of their relationship.

[9] The leading case on s 6 of the Act is *Bryson v. Three Foot Six Ltd* [2005] 3 NZLR 721. From the judgment of the Supreme Court in that case and from earlier decisions approved of by the Court, the applicable principles have been stated to be;

1. The Authority must determine the real nature of the relationship;
2. The intention of the parties is still relevant but no longer decisive;

3. Statements by the parties, including contractual statements, are not decisive of the nature of the relationship;
4. The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the fundamental test;
5. The fundamental test examines whether a person performing the services is doing so on their own account;
6. Another matter which may assist in the determination of the issue is industry practice, although this is far from determinative of the primary question.

[10] The Employment Court in *Poulter v. Antipodean Growers Ltd* [2010] NZEN PC77, 17 June 2010 concluded that ultimately the approach to be taken under s 6 of the Act is for the Authority to gain an overall impression of the underlying and true nature of the relationship between the parties.

[11] Throughout his engagement by Professional Relief Services, from December 2007 until October 2009, Mr Webb clearly knew that he was not being paid anything over and above \$140 per day for each day he attended work and performed courier driving services. He knew, and did not question until after the relationship had ended, that he was not being paid for public or annual holidays, or for any sick leave. Further, when he delivered items late an urgent courier fee, sometimes \$32, would be deducted from his pay.

[12] The Authority has taken little assistance from the intention of the parties in this case, a matter which is relevant but no longer decisive. In considering Mr Khan's evidence the Authority has taken into account his admission that he was not truthful with Mr Webb about aspects of their work relationship, particularly in relation to paying tax. Mr Khan has admitted to a deliberate breach of tax law, which he persisted in for nearly two years, by not paying to the IRD any tax on the income his company provided Mr Webb.

[13] Before the relationship ended Mr Webb's main concern had been to see that tax from his remuneration was being paid to the IRD by Mr Khan. He soon discovered in early 2008 that it was not. As for Mr Khan, I find that he simply did not

want to make any payment to the IRD or Mr Webb over and above the \$140 per day he paid Mr Webb. It made no difference to Mr Khan whether payment he was required to make for tax was PAYE, GST or withholding tax, as he continually made no tax payments at all.

[14] In a letter he wrote to a Labour Inspector who was investigating Mr Webb's claim for public and annual holiday pay, Mr Khan stated;

*We wish to advise that our company hired Brad as a sub-contractor and that at that time he was advised that he will be paid a flat fee of \$140 per day and that he will be responsible for his taxes and he was happy with that agreement which was agreed verbally at the time. Considering the fact that my company is only a small company and I knew for a fact that I cannot employ someone and also pay their taxes on top of providing motor vehicle with fuel and road user costs for them to travel to and from work everyday. That's why Braden was responsible for his own taxes.*

[15] However on 1 February 2010 at about the same time he made that statement Mr Khan signed an acknowledgement that Mr Webb's remuneration was *\$140 a day + withholding tax at 20%*.

[16] Mr Khan also provided written statements, apparently created well after the periods referred to in them, showing payments for each monthly period. Some of them refer to *withholding Tax (20c)*. Mr Khan's statements clearly imply that he was paying that amount to the IRD, although in fact he was not. His problem with Mr Webb arose because of that omission rather than a dispute about the nature of the work relationship.

[17] I do not consider that Mr Khan was concerned about the differences between employees and contractors, except in so far as he wanted a work relationship in which the way he paid remuneration would draw the least attention of the IRD to his practice of not making tax deductions.

[18] Mr Khan accepted that initially in discussions with Mr Webb and his father the original arrangement was to pay \$140 per day plus GST, but that had changed to \$140 a day plus withholding tax.

[19] I find this was an arrangement that Mr Webb was agreeable to, at least until he found out that the IRD was not receiving any amounts intended to be withheld as tax.

[20] Mr Khan also wrote in his letter to the Labour Inspector:

*As you can see he was paid on a flat daily rate and there are no hours to go with this. Brad was a courier driver and therefore to have him on paye was a little difficult due to the fact that he would never have to clock in or out at work and I'm not always there to make sure of the correct hours. During the day he would also have three or so hours on downtime and he should be grateful that he was paid for not working for that period of downtime.*

[21] Mr Khan's evidence to the Authority was that he was uncertain whether Mr Webb had been an employee. He said that his company had been a contractor to Toll Priority and he had assumed that Mr Webb had the status of sub-contractor.

[22] In considering and applying the principles established in cases such *Bryson v. Three Foot Six Ltd*, I find that Mr Webb was an employee in an employment relationship with Professional Relief Services. The Authority has gained little assistance from the parties' intentions. The real nature of the relationship, as required to be established, can be ascertained by analysing the tests historically applied such as control, integration and the fundamental tests.

[23] The control test is of limited assistance in the case of a courier driver. Mr Webb's job was to drive a van from A to B within the deadlines imposed by the customers of Toll Priority. Road transport law was the major control over his activities. Other controls were imposed by the organisation of Toll Priority, to which Professional Relief Services Ltd was contracted. Toll Priority was not the employer of Mr Webb.

[24] I find that Mr Webb was fully integrated into the business of Professional Relief Services Ltd, which was essentially to provide a courier services vehicle together with a driver to businesses such as Toll Priorities. Mr Webb cannot be regarded as having been in business on his own account. He had no ability to increase his earnings and he had limited opportunity to do that. The nature of his job meant that there was downtime only in the middle of the day, during which he did not work for anyone else.

[25] There is no evidence as to industry practice. The Authority's knowledge of this suggests that there can be different arrangements with different courier firms, depending on what is considered most suitable to the personnel involved.

[26] I therefore conclude that Mr Webb was employed in an employment relationship by Professional Relief Services Ltd from December 2007 until he was dismissed on or about 20 October 2009.

[27] He complained to a Labour Inspector, Ms Rama Yeleswaram, who also concluded that he had been an employee. She made an assessment of his entitlement to public and annual holiday pay which she presented to Mr Khan who rejected it.

[28] I accept the calculations made by Ms Yeleswaram from the information provided to her by Mr Webb. I find that he is owed total annual holiday pay of \$4,995.20 and total public holiday pay of \$3,152.50. The total of those amounts is \$8,147.70 gross. Professional Relief Services Ltd is ordered to pay that amount to Mr Webb.

[29] As an employee Mr Webb would have qualified for statutory sick pay after six months. He has provided no information as to any dates on which he was sick, to support any claim for that.

[30] There is no dispute by Mr Khan that he terminated the work relationship with Mr Webb on about 20 October 2009, by ringing him up and telling him to return the van and its keys immediately and finish work. As Mr Webb was an employee, I find this was a summary dismissal.

[31] Mr Khan has relied on instances, some going as far back as early 2008, of poor driving and complaints from members of the public and customers about this to justify the dismissal. Mr Khan says that he spoke to Mr Webb on each occasion when there was a complaint from the customer. Copies of emails provided to the Authority by Mr Khan do suggest that there were complaints about Mr Webb's driving and his conduct at the premises of customers to which he was delivering couriered items. There were no written warnings given and I am reluctant to accept Mr Khan's oral evidence that he gave such warnings, given his admission of being untruthful about other matters.

[32] Mr Khan I find reacted spontaneously and decided to end the relationship with Mr Webb. There was no opportunity for Mr Webb to provide an explanation if he could, and no consideration was given as to any appropriate disciplinary measures short of dismissal.

[33] Applying the test of s 103A of the Employment Relations Act, I find the dismissal was unjustified. The actions of Professional Relief Services Ltd and how that company acted was not what a fair and reasonable employer would have done in all the circumstances. Mr Webb is entitled to remedies for his unjustified dismissal.

[34] I accept that Mr Webb was not a model driver at all times and I accept that it is likely he did drive in a way that justified complaints from members of the public and customers. On 27 October after being dismissed by Mr Khan he sent an email to the manager of Toll Priority referring to driving of his that had been noticed by the manager, as *a stupid thing to do which I now regret*. I am satisfied there were incidents and instances such as this one that contributed to the situation giving rise to his personal grievance. They should be taken into account to the extent of a 10% reduction to Mr Webb's entitlements.

[35] Mr Webb was not employed following his dismissal and in the circumstances I consider he is entitled to lost remuneration for a period of eleven weeks. The amount owed is 11 weeks x 5 days x \$140, which comes to \$7,700 net. If Mr Webb has received any benefit from the state during his unemployment he must declare the Authority's award for lost remuneration to the provider of the benefit.

[36] I find that Mr Webb suffered hurt feelings and humiliation as a result of the summary dismissal carried out without explanation or opportunity to consider and reply to the reasons. Also I find there was no warning of the dismissal and this too caused humiliation.

[37] Allowing for some reduction for contribution, I award Mr Webb \$3,000 under s 123(1)(c)(i) of the Employment Relations Act. Professional Relief Services Ltd is also to pay \$70 to Mr Webb, to reimburse him the cost of bringing the application to the Authority.

A Dumbleton  
**Member of the Employment Relations Authority**