

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 264  
5625025

BETWEEN                      GRANT WU  
   Applicant  
  
A N D                              DAUBER LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon  
  
Representatives:              Applicant in person  
   No appearance by or for Respondent  
  
Investigation Meeting:      3 August 2016 at Auckland  
  
Date of Determination:      3 August 2016

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**DETERMINATION OF THE AUTHORITY**

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**Non-appearance of respondent**

[1]      Dauber Limited (Dauber) failed to file a statement in reply to the statement of problem and also failed to attend the investigation meeting today.

[2]      I am satisfied that Dauber was properly served with the statement of problem and subsequent correspondence from the Employment Relations Authority together with a notice of the investigation meeting.

[3]      Being satisfied that Dauber was properly served with the proceedings and notice of investigation meeting , I proceeded to investigate the issue as to whether or not Mr Grant Wu was an employee of Dauber, in the absence of Mr Jonathan Sommers, Director of Dauber or any other representative from Dauber.

## **The investigation meeting**

[4] Mr Wu attended the investigation meeting and confirmed by way of affirmation that his evidence was true and correct. An interpreter proficient in the Mandarin language attended the investigation meeting to assist the Authority.

[5] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence; relevant facts and legal issues are set out, along with the Authority's conclusions.

## **Employment relationship problem**

[6] Mr Wu says he saw an advertisement on Trade Me placed by Dauber seeking a house painter. Dauber is in the business of house painting. Mr Wu applied for the job.

[7] Mr Sommers, the sole director and shareholder of Dauber rang Mr Wu to arrange an interview. During the phone call Mr Sommers told Mr Wu that the hourly rate for the contract painter position would be \$25. Mr Wu subsequently met with Mr Sommers at the registered office of Dauber in Ponsonby Road, Auckland.

[8] Mr Sommers offered Mr Wu and Mr Wu accepted the job of "contract painter" at the rate of \$25 an hour. Mr Wu says he understands the difference between being an employee and a contractor. Mr Wu says there are two types of "contractor", one in which the contractor takes full responsibility for the job and is a "self employed" contractor. The other type of "contractor" is one in which the painter simply provides "labour" and all equipment is provided by the company.

[9] Mr Wu says he fell into the second category when he worked for Dauber and understood he was therefore employed by Dauber.

[10] Mr Wu worked for Dauber as a house painter for one week from 2 November 2015 until 6 November 2015. Mr Wu says he agreed to an hourly rate of \$25.

[11] No employment agreement or any other record in writing of terms and conditions of employment was provided to Mr Wu by Mr Sommers or any other representative of Dauber. Mr Wu was simply offered \$25 an hour to undertake house painting for Dauber, for which he would issue an invoice.

[12] There was no discussion about the deduction of PAYE by Dauber nor any discussion about Kiwisaver, holiday pay, sick leave or hours of work.

[13] An issue arose between Mr Wu and Mr Sommers concerning the ordering by Mr Wu of a 4 litre tin of “lumbersider” paint on the first painting job he was assigned to undertake.

[14] On 6 November 2015, Mr Sommers told Mr Wu to pack up, leave his materials and leave. Mr Wu tried to contact Mr Sommers on numerous occasions by phone and text message but his calls and texts were not replied to.

[15] Finally, Mr Sommers sent a text to Mr Wu that he was going to deduct the cost of the tin of lumbersider paint from any monies owing to Mr Wu. Mr Wu felt this to be most unfair as there was no agreement that he was responsible for the payment of paint on his jobs.

[16] Mr Wu says he is owed \$850 by Dauber and seeks payment.

### **The issues**

[17] The issue for the Authority to determine is whether Mr Wu was employed by Dauber.

### **Was Mr Wu employed by Dauber?**

[18] The statutory test for determining this jurisdictional question is set out in s.6 of the Employment Relations Act 2000:

#### ***Meaning of employee***

- (1) *In this Act, unless the context otherwise requires, **employee-***
  - (a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
  - (b) *includes-*
    - (i) *a home worker; or*
    - (ii) *a person intending to work; but*
  - (c) *excludes a volunteer who-*
    - (i) *does not expect to be rewarded for work to be performed as a volunteer; and*
    - (ii) *receives no reward for work performed as a volunteer...*
- (2) *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 ... must determine the real nature of the relationship between them.*

### **Intention of the parties**

[19] Mr Wu was not provided with a written employment agreement. Other than agreeing an hourly rate of pay, there was no discussion between Mr Sommers and Mr Wu about terms of employment including when payment would be made to Mr Wu, PAYE, holiday pay, sick leave or Kiwisaver which one normally expects to occur in discussions regarding an employment agreement.

[20] The Statement of Problem filed by Mr Wu, refers to being a “contract painter”, that Dauber should pay him “the full amount of my wage, plus interest...” and that Mr Wu did not sign an employment agreement, because “...We have a verbal agreement that I worked for him as a contract worker and he pay me \$25 per hour.”

[21] Mr Wu understood, in my view, at the outset of the relationship that he was not an employee of Dauber and this is confirmed by the Statement of Problem.

[22] Mr Wu had no set hours of work. In response to a request from the Authority, Mr Wu provided a copy of the times he worked for Dauber in the week of 2 November 2015. Mr Wu worked 7 hours on Monday, 7.5 hours on Tuesday, 8 hours on Wednesday and Thursday and 3 hours on Friday, the day he was asked to leave.

[23] Mr Wu provided the Authority with a copy of an invoice in the sum of \$850 for 34 hours worked for Dauber.

[24] Mr Wu provided the Authority with a Notice of Assessment from the Inland Revenue Department (IRD) which provided details of earnings until 31 March 2016 and tax assessed to be paid by him on 7 February 2017. This notice appears to strongly suggest self employment. If Mr Dauber was an employee there would be no notice of assessment as PAYE would be deducted from his earnings.

### **The law**

[25] The leading judgment giving guidance on the interpretation of s.6 of the Act is that of the Supreme Court in *Bryson v. Three Foot Six Ltd*<sup>1</sup>. Section 6 requires the

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<sup>1</sup> [2005] ERNZ 372

Authority to consider and determine the real nature of the relationship between Dauber and Mr Wu. The inquiry in each case is intensely factual.

[26] In this case, there was no written employment agreement which could give some guidance as to what the parties' intention was. Mr Wu was taken on by Dauber as a contract painter at the rate of \$25 an hour. Mr Wu was not offered an employment agreement because this was the arrangement. Mr Wu's evidence is that at the outset of the relationship he did not think he was an employee, he thought he was a "contract painter". Other factors including hours of work and financial arrangements appear to suggest Mr Wu was a contractor not an employee.

### **Overall impression**

[27] Overall my impression is that the relationship between Mr Wu and Dauber, was not an employment relationship, rather it was a contract for service.

[28] The Authority accordingly has no jurisdiction to deal with Mr Wu's claim that he was an employee and has employment entitlements as such.

[29] This may be a matter that Mr Wu is able to seek relief in the civil jurisdiction, perhaps in the Disputes Tribunal.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**