Employment Court of New Zealand

Yang v L E Builders Limited [2012] NZEmpC 185 (29 October 2012)

Last Updated: 5 November 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 185

ARC 90/09

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN ZHANPING YANG Plaintiff

AND L E BUILDERS LIMITED Defendant

Hearing: 24 September 2012 (Heard at Auckland)

Counsel: Mr R Hucker and Ms D Lang Siu, counsel for plaintiff

No appearance for the defendant

Judgment: 29 October 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] This is a de novo challenge from a determination of the Employment Relations Authority (the Authority).1 The Authority dismissed a personal grievance filed on Mr Yang's behalf, finding that he was a contractor rather than an employee. The challenge proceeded by way of formal proof hearing. Counsel acting for the defendant company had previously been granted leave to withdraw, and the company failed to appear.

[2] The primary issue before the Court is whether, at the time Mr Yang's

engagement with the defendant company ceased, he was an employee under a contract of service or an independent contractor under a contract for services. A

1 AA 358/09, 9 October 2009.

secondary issue was also raised on Mr Yang's behalf. It was submitted that if Mr Yang was held to have been an employee, the Court had jurisdiction on the challenge to consider whether he had been unjustifiably dismissed and to grant appropriate remedies.

The facts

[3] Mr Yang is a carpenter by trade. He was looking for work in May 2008 when he saw an advertisement in a Chinese language newspaper. Translated, the advertisement read: "We would like to employ a few experienced building carpenters, good pay, need tax code, long time work, start immediately".

[4] Mr Yang responded to the advertisement and was interviewed on 28 May

2008. The interview was conducted by Mr Lu, director of the company. No one else was present. Mr Yang was asked about his

previous work experience. Mr Lu told Mr Yang that he had 2 to 3 years of work available, and that he would like Mr Yang to work for him on a long-term basis. His starting rate was to be $15 per hour, but this would increase over time if Mr Lu was happy with Mr Yang's performance.

[5] Mr Yang's evidence (which I accept) was that he specifically raised the issue of his employment status with Mr Lu and told him that he was only interested in working as an employee. He said that he likes to be employed because he cannot speak English, and communication is difficult. It was for these reasons that he sought to clarify the position with Mr Lu. Mr Lu told him that the company would be paying tax on his behalf, and that all the tax that he needed to pay would be deducted from his wages.

[6] Mr Yang's hours of work were discussed, and he was told that he would work

6 days a week from 7 am to 5 pm. He was to be at the office before 7 am to load tools into the company trucks from the storage shed with a view to leaving for the site at 7.30 am. It was anticipated that work at the site would finish at 5 pm and that Mr Yang would return to the office and unload the tools at the end of the day. The bulk of the tools were to be provided by the company. Mr Yang provided his own tool belt and a few simple tools, which he described in evidence.

[7] Mr Yang was offered and accepted a role with the company, and commenced work on 3 June 2008. No written agreement was entered into between the parties. On 4 June 2008 Mr Yang was asked to sign a form by Mr Lu's secretary. He was told that the form needed to be signed to enable his wages to be paid. The form was an Inland Revenue Tax Code declaration form. Mr Yang does not speak, or read, English. He says that he relied on what he was told and signed the form, which at that stage only had his name and IRD number recorded on it. Mr Yang asked for a copy of the form but that request was declined, on the basis that as he did not read English it would be pointless, and all he had to worry about was whether he was getting paid.

[8] Mr Yang obtained a copy of the form during the course of the Authority's investigation. He became concerned that a number of insertions on the form had been made by someone else, including the reference to his tax code. His evidence is that the letters "WT" (withholding tax) and the writing under the heading "Tax Code" are not his. The point is relevant because the Authority's determination was based, in part, on inferences that could be drawn from the form that Mr Yang had

apparently filled in and the reference to the payment of withholding tax.2

[9] The Chief Judge ordered that the declaration form be subject to forensic examination on the plaintiff's application. A report was provided by the Document Examination Section of the New Zealand Police. The report supports Mr Yang's concerns that someone else inserted the text complained about in the form,3 and supports his evidence that he did not fill in the form (other than his signature) and that he was unaware of what it said.

[10] During the course of his time with the defendant company, Mr Yang's pay was paid into his bank account on a fortnightly basis. It is evident that the amounts he was paid varied. The documentation reflects a relatively consistent pattern of hours of work, generally 9 hours a day with fewer hours being worked on Saturdays. The evidence was that Mr Lu and the foreman controlled the hours that Mr Yang worked. Occasionally, work would finish before 5 pm when the work for that day

ran out. The workers would then return to the office and put the tools away. Mr Yang had no control over what work he did. The foreman directed him as to what to do and when. Nor did he have any control over who he was working with, either on his own or with various combinations of other workers.

[11] Mr Yang did not fill in timesheets, but was required to sign a "signature list" each day on arrival, which was then handed to the foreman. Mr Yang believes that the site foreman recorded the hours worked on this list and that the list was then given to payroll. Deductions were made from Mr Yang's pay, which he took to be PAYE deductions.

[12] Mr Yang's pay was increased to $17 per hour during the course of his time with the company. He says that this reflected his performance. At this time he was working around 45 hours per week and receiving approximately $600 after tax was deducted by the defendant. He did not receive any pay slips during his time with the company, and he did not issue any invoices for work done.

[13] Mr Yang worked for L E Builders Limited from 3 June 2008 to 30 August

2008. He had an accident on 16 July 2008 and was unable to work. He applied for, and received, ACC coverage. He was informed by ACC that as he was self employed, rather than an employee, his entitlements were reduced. Mr Yang tried to speak to Mr Lu about this, but was unable to do so.

[14] Mr Yang returned to work on 22 August. On 30 August he was called to a meeting with Mr Lu, along with another worker. At the meeting both men were advised that they were not to come back the following week. No explanation was offered for this turn of events.

The law

[15] Section 6 of the Employment Relations Act 2000 (the Act) defines

"employee" as follows:4

6 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;

...

(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 (as the case may be) *must determine the real nature of the relationship between them.*

(3) For the purposes of subsection (2), the Court or the 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.

...

[16] The leading authority on this section is *Bryson v Three Foot Six Ltd (No 2).*5

[17] The inquiry in each case is intensely factual.6 The way in which the relationship operated in practice, including features of control and integration, will be relevant, together with an assessment of the common intention of the parties as to the nature of the relationship (if that is ascertainable). Taxation arrangements are a relevant consideration.

[18] As counsel for the plaintiff pointed out, there are a number of factors that indicate that the parties intended that Mr Yang would be an employee. This was reflected in the conversation that took place between Mr Yang and Mr Lu at the initial interview, during which Mr Yang made it clear that he was only interested in working as an employee. Mr Lu told Mr Yang that there was long term work available for him, and that his pay would rise depending on his performance over time (consistently with what occurred). Mr Yang was advised that his hours would be 7 am to 5 pm, six days per week. His records reflect that he consistently worked nine hour days (Monday to Friday), with some relatively minor exceptions, and worked on Saturdays (albeit for fewer hours than had originally been proposed).

[19] The IRD tax declaration form is filled in noting WT (withholding tax) under the heading "Tax Code". That may, in ordinary circumstances, be taken to indicate a contract for services7 and point away from a common intention between the parties that Mr Yang was to be engaged as an employee. However, Mr Yang's evidence was that he did not fill in any of the form other than his signature. It appears from the Police report that Mr Lu did not fill in the form either. It remains a matter of conjecture as to whether the unidentified person who did fill in the form was acting under direction from Mr Lu or on their own initiative. There is no evidence that Mr

Yang has sought any reimbursement of business expenses or tax advantages for himself.

[20] Mr Yang was provided with the necessary tools to undertake his work. He only provided his own tool belt and a few basic hand tools. The evidence reflects Mr Yang did not exercise any control over the sort of work he did, how he did it, or when. At all times he acted under the supervision and direction of the foreman. He, along with a number of other workers, provided carpentry services as part and parcel of the defendant company's building business. He was not permitted to speak to any of the defendant's customers and/or clients. During his time with the company he had to seek permission to be absent.

[21] There was no evidence before the Court as to industry practice. Mr Yang was unaware of the arrangements under which other workers were engaged by the company.

[22] Balancing all matters before me, I conclude that the real nature of the relationship was that of employee and employer. Mr Yang was not engaged under a contract for services.

Jurisdiction – unjustified dismissal

[23] Mr Hucker, counsel for the plaintiff, submitted that, although the challenge was against a determination of the Authority on the preliminary issue as to whether

or not Mr Yang was an employee, the Court could nevertheless proceed to determine the substantive claim. This was characterised as a claim for unjustified dismissal. Mr Hucker contended that the Court's jurisdiction to do so arises from s 179(1) of the Act, and consistently with the approach adopted by the full Court in *Abernethy v Dynea New Zealand Ltd (No 1).*8

[24] Section 179(1) provides that:

A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.

[25] Section 187(1)(a) provides that the Court has exclusive jurisdiction:

to hear and determine elections under section 179 for a hearing of a matter previously determined by the Authority, whether under this Act or any other Act conferring jurisdiction on the Authority.

[26] In *Abernethy*, the full Court held that where a party has challenged a preliminary Authority determination which has had the effect of resolving the employment relationship problem before it, the entire employment relationship problem is then before the Court for resolution.9 In *Abernethy*, the defendant had successfully pursued an application in the Authority that it lacked jurisdiction, following an earlier settlement agreement. No position had been taken by the defendant on the claim of unjustified dismissal.10 The Court observed:11

... where the Authority has brought a matter to an end by making a dispositive preliminary ruling, such as a strike out on the basis of accord and satisfaction, the matter before the Authority has been determined in the sense that it is at an end.

[27] In the present case the Authority's determination that Mr Yang was a contractor not an employee disposed of the employment relationship problem. Following *Abernethy*, provided the unjustified dismissal claim was a matter before

the Authority it must now be resolved by the Court.

8 [2007] NZEmpC 83; [2007] ERNZ 271.

9 At [59].

10 *Abernethy* at [3]. The full Court also noted that preliminary issues come before the Authority in a number of ways, including (as in the present case) by way of challenge as to whether an employment relationship existed between the parties: at footnote 1 of *Abernethy*.

[28] Was the unjustified dismissal claim a matter before the Authority? If not, the challenge before the Court cannot be expanded to incorporate it.

[29] In *Sibly v Christchurch City Council*,12 a full Court held that:13

... a broad approach to the meaning of "a matter" in s 179(1) is to be taken. If an issue raised in the challenge relates to the employment relationship problem or any other matter within the Authority's jurisdiction, these issues can be raised for the first time before the Court, whether or not they were raised before the Authority.

[30] In *Abernethy*, the Court retreated from this approach, holding that the reference to "any other matter" in *Sibly* in respect of which the Authority had jurisdiction was too broad, and could be taken to include "any matter within the Authority's jurisdiction whether or not it was in fact a matter in the Authority's

investigation into the employment relationship problem."14 This, the Court said,

went too far on a proper interpretation of s 179. I infer that the Court's reference to "a matter in the Authority's investigation" is directed to a matter that is brought before the Authority for investigation, rather than having been the subject of direct investigation by it. Following *Abernethy*, the key issue is whether there was a claim of unjustified dismissal before the Authority for investigation.

[31] It is apparent that the Authority considered that the issue raised by Mr Yang for determination related to his status. This is reflected in the introductory wording of the Authority's determination:15

The sole issue for determination in this matter is whether Mr Yang was an employee or a contractor.

[32] The Authority member records that the issue had arisen because Mr Yang had discovered that, because he was being treated as a contractor, the amount he was

12 [2002] NZEmpC 76; [2002] 1 ERNZ 476.

13 At [47].

14 *Abernethy* at [33]. In *Bourne v Real Journeys Ltd* [2011] NZEmpC 120 at [13] the Court referred to

Abernethy, observing that the Court could hear and decide matters which were not actually determined by the Authority, provided they were part of the Authority's investigation. See too *Patel v Pegasus Stations Ltd* [2011] NZEmpC 129 at [23]; *Newick v Working In Ltd* [2012] NZEmpC 156 at [26].

15 At [1].

paid by ACC was less than it would have been had he been classified as an employee.16

[33] Counsel for the plaintiff contended that there was a claim of unjustified dismissal before the Authority, and that this was evident from the documentation filed by the parties. He provided a copy of the statement of problem (dated 28

November 2008) that had been filed with the Authority. The statement of problem identified five matters that the plaintiff wanted the Authority to resolve, which were expressed as follows:

1. Employment relationship; 2. Kiwisaver; 3. Application fee; 4. Holiday pay; 5. Salary compensation.

[34] There is a document attached to the statement of problem entitled "the facts

that have given rise to the problem are". This document refers to the meeting on 30

August and Mr Yang being told that there would be no more work for him in the following week. The document states that the employer used this as "an excuse to stop [him] from working in the company", and that Mr Yang's work finished without two weeks' notice, causing him and his family great difficulties. Amongst other things, Mr Yang sought two weeks' salary by way of redundancy without notice.

[35] The statement of problem also refers to documentation filed in support which, while not annexed to the statement of problem provided to the Court, is described as comprising bank account[s] (income record); ACC letters; and correspondence to the defendant (apparently relating to a request to Mr Lu to meet, and follow up emails on the same subject matter).

[36] Mr Hucker submitted that the above factors, when taken in combination, were sufficient to bring the unjustified dismissal matter before the Authority in the sense required by s 179(1). He suggested that it was clear that the defendant was on notice that a claim of unjustified dismissal was being advanced and that this could be discerned from the statement in reply that was filed with the Authority on 4

December 2008. However, the statement in reply is squarely focused on the

jurisdictional issue – namely the contention that the plaintiff was a self-employed contractor and not an employee. It was on this basis that the defendant submitted that the Authority had no jurisdiction to entertain the claim.

[37] The documentation does not contain any express reference to unjustified dismissal. It appears that Mr Yang's issues were primarily focused on the assertion that he was a contractor rather than an employee. A statement of problem is required to sufficiently particularise the problem that a grievant wants the Authority to determine, to put the respondent on notice of the case it needs to answer. While the statement of problem (including its annexures) lack specificity, references to concerns about the way in which Mr Yang's time with the company came to an end, the perceived motivations underlying it, and the nature of the relief sought provide support for the proposition being advanced on the plaintiff's behalf.

[38] On balance, I am satisfied that a claim of unjustified dismissal can be discerned from the documentation before the Authority and was a matter before it for investigation.

[39] Mr Yang was summarily dismissed. He had no forewarning of his dismissal or the reasons for it. There was no compliance with the most basic procedural requirements. It remained unclear as to what had motivated Mr Lu to bring Mr Yang's employment to an end. On the evidence before the Court, I am satisfied that Mr Yang's dismissal was both procedurally and substantively unjustified.

[40] Mr Yang seeks reimbursement for lost wages, compensation under s 123, and interest. Reimbursement of 3 months' ordinary time remuneration is sought ($11,016), together with an allowance for holiday pay ($503.04) and ACC levy ($235.63), minus a sum equivalent to the payments received for the alternative work ($4,320), totalling $7,434.67.

[41] Where an employee has a personal grievance and the employee has lost remuneration as a result of the personal grievance, the Court must award the lesser of three months' ordinary time remuneration or the lost remuneration (s 128). Mr Yang was able to secure alternative employment within a month of losing his job (from 22

September 2008) albeit at a lower pay rate. In accordance with Mr Hucker's calculations, the lost remuneration totals $7,199.04 and I award that amount. With regard to the claim for reimbursement of an ACC payment, the evidence contains a credit note from ACC for the amount claimed. I am not satisfied therefore that the amount claimed was paid by the plaintiff and if it was, then any claim for reimbursement can be addressed to ACC.

[42] As to compensation under s 123(1)(c)(i), Mr Hucker referred to a number of cases in which significant compensatory awards were made and suggested that

$10,000 should be awarded.17 As the authorities emphasise, much will depend on

the circumstances of each case. I accept that Mr Yang was upset about the way in which his dismissal was dealt with. He was particularly concerned with the impact that this would have on his ability to support his family. Evidence was given that Mr Yang attended counselling and was in receipt of a disability benefit. These events occurred a year after his dismissal. It was apparent that his attendance at counselling was prompted by a motor accident, although a letter from his counsellor refers to events relating to his dismissal, the outcome of the Authority's investigation, and Mr Yang's attempts to secure a just outcome, as contributing factors causing significant upset. Not all of these factors are sufficiently linked to the defendant's unjustified actions to sound in a compensatory award under s 123.

[43] While I accept that the manner and unfairness of the dismissal caused Mr Yang real distress, the short duration of the employment relationship tells against a high award of the sort allowed in the cases cited by Mr Hucker. In all the circumstances, I award the sum of $3,500 by way of compensation under s 123.

[44] I award interest at the current 90 day bill rate of 5%18 from the date of dismissal on the sum specified in paragraph [41] only.19

17 *Aoraki Corporation Ltd v McGavin* [1998] NZCA 88; [1998] 1 ERNZ 601; *NCR (NZ) Corporation Ltd v Blowes*

[2005] NZCA 372; [2005] ERNZ 932; *Moyle v SGS New Zealand Ltd* (CA 42/05, 1 April 2005, Member Cheyne).

18 Judicature (Prescribed Rate of Interest) Order 2011, cl 4.

19 *Salt v Fell, Governor of the Pitcairn, Henderson, Ducie and Oeno Islands* [2006] NZEmpC 49; [2006] ERNZ 449 at

[133].

Conclusion

[45] The plaintiff's challenge to the Authority's determination holding that the plaintiff was not an employee succeeds. The plaintiff was an employee of the defendant company.

[46] The plaintiff was unjustifiably dismissed. He is entitled to reimbursement for lost wages and interest on that sum, as well as compensation under s 123(1)(c)(i) of

$3,500.

[47] The defendant was awarded $2,000 costs by the Authority in relation to its preliminary determination.20 The plaintiff seeks an order quashing the costs award. Such an order is appropriate in the circumstances.

[48] The Authority's determinations are accordingly set aside.

[49] The plaintiff seeks costs on the challenge. He was legally aided for part of the challenge, and appears to have been funded by the Legal Services Agency in the amount of $10,592.45 in costs and disbursements.

[50] The usual approach to costs in this Court is that costs follow the event and generally amount to 66% of costs actually and reasonably incurred by the successful party (absent any factors that might otherwise warrant an increase or decrease from that starting point). A memorandum should be filed within 20 working days setting out the basis on which an award of more than 66% is being sought, and itemising the disbursements that are claimed.

[51] It is noted that Mr Yang had previously applied for orders joining Mr Lu as a party, in order for costs to be sought against him personally, but this application was adjourned by Judge Travis pending determination of the substantive challenge.21 It

appears that the plaintiff does not seek to pursue the application. However, if he

20 AA 358A/09, 17 December 2009.

21 *Yang v L E Builders Ltd* [2011] NZEmpC 131 at [19].

does, counsel should advise the Registrar without delay, as the application will need to be determined before costs are resolved.

Christina Inglis

Judge

Judgment signed at 1.15pm on 29 October 2012