

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Maia Crawford Rongonui (First Applicant)
The Amalgamated Workers' Union New Zealand (Southern
Incorporated) (Second Applicant)

AND Pessiman Pehimana Te Whata and Vanessa Alison Te Whata
(Respondents)

REPRESENTATIVES Stephen Howard and Jills Angus Burney, Advocate for Applicants
Mana Te Whata and Ken Brown, Advocates for Respondents

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING Wellington 13 December 2006

DATE OF DETERMINATION 15 February 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Maia Rongonui was engaged to work as a presser with a shearing gang in Southland. Maia is now about 17 and lives in Masterton. He began working with shearing gangs when he was about 14. About March 2006, Maia travelled to Mossburn with his brother (Lee Rongonui) to work in the shearing gang operated by Mana Te Whata and Vanessa Te Whata. Mr Te Whata's uncle (Uncle Kena) runs a shearing gang in Masterton and it was Uncle Kena who invited Maia and Lee to go to Mossburn in Southland for work for his nephew during the second shear season.

[2] Several days after the young men arrived at Mossburn, Mr Te Whata spoke to them and gave them some documents about the way his shearing gang worked. There are two documents, one headed up *NZ Contracting Solutions Inc – The Independent Contractors Guide – The Agency Contracting System*. The second document is entitled *Te Whata Shearing Ltd Policies*.

[3] After less than two weeks work there occurred two incidents on the same day between Maia and Mr Te Whata. The second incident ended with Maia leaving the shearing shed and the engagement was terminated. Several days later, Maia and Lee returned home to Masterton. In a letter dated 9 May 2006 the Amalgamated Workers Union raised a personal grievance on behalf of Maia.

[4] Maia's statement of problem identifies Mana Te Whata and Vanessa Te Whata as the respondents. It says that Maia was threatened with violence causing him to be unjustifiably disadvantaged in the employment. It also says that the respondents unjustifiably dismissed Maia. Remedies are claimed for the grievances. The statement of problem recognises there is an issue about whether Maia was engaged as an employee and another issue about the correct identify of his alleged employer.

[5] The position of the respondents is not so easy to discern partly because of the unnecessary volume of irrelevant material that they lodged with the Authority. Also at the investigation meeting Mr Te Whata would not give clear answers to straight forward questions. However, reading between the lines, I take it that the respondents say that the arrangement with Maia was never employment and he was an independent contractor with NZ Contracting Solutions Inc. They also appear to be saying that the entity that engaged Maia is a Maori incorporation and that the Employment Relations Authority has no jurisdiction to inquire into its affairs. Finally, there appears also to be a dispute about what happened between Maia and Mr Te Whata on 18 March 2006, the last day of Maia's engagement.

[6] To resolve the problem I need to review the real nature of the relationship between Maia and the respondents to assess whether he was to do work under a contract of service. It is also necessary to consider the correct identify of whoever engaged Maia. If the respondents are found to be employers of Maia under a contract of service, I will then need to make findings of fact about what happened on 18 March 2006 by assessing the disputed evidence.

Identify of the respondents

[7] The document signed by Maia refers to *NZ Contracting Solutions Inc.* There is no registered company or incorporated society by that name. At the investigation meeting I was told by Mr Te Whata that *NZ Contracting Solutions Inc.* is a Maori incorporation and reference was made to *Te Ture Whenua Maori Act 1993*. The documents lodged with the Authority by the respondents refer to that Act and *Te Ture Whenua Maori Incorporation Constitution Regulations Act 1995*. That is possibly meant to be a reference to both the Act and the *Maori Incorporation Constitution Regulations 1994 (SR1994/60)*. In any event, I explained to Mr Te Whata that I had not been able to find any evidence to prove incorporation or registration of a legal entity by the name of *NZ Contracting Solutions Inc.* Mr Te Whata said that he would provide certification of its incorporation within seven days. Nothing has been received by the Authority since the investigation meeting. My own research has not disclosed any evidence of a Maori Incorporation by that name. Accordingly I conclude that there is no such legal entity.

[8] The shearing gang with which Maia worked is plainly controlled by Mr Te Whata and Vanessa Te Whata. Mr Te Whata spoke to Maia and Lee on 8 March 2006 about the conditions of engagement. He signed the *Agreement to Contract*. There is another document that was given to Maia about safe working conditions. It refers to *Te Whata Shearing* and is signed by Vanessa Te Whata as *Director*. There exists a registered company called *Te Whata Shearing Limited* with Mr Te Whata and Vanessa Te Whata as the Directors and Shareholders. However there was no attempt by either the company or the respondents to say that the company was the legal entity that engaged Maia. From all this, I find that Maia entered into a legal relationship with Mr Te Whata and Vanessa Te Whata trading as *NZ Contracting Solutions Inc.*

[9] Mana Te Whata and Vanessa Te Whata's full names are Pessiman Pehimana Te Whata and Vanessa Alison Te Whata as shown on Companies Office records. I make an order identifying the respondents by their full names.

True nature of the relationship

[10] The document signed by Maia is headed *Agreement to Contract*. It starts with an acknowledgment that there is no relationship of employer/employee between the contractors, states that Maia is self employed and that he is not bound to accept any work. Maia agrees to work for an agreed amount per unit or per hour. The next two clauses exclude any liability by *NZ Contracting Solutions Inc.* towards Maia. Claims for holiday pay, sick leave and bereavement leave are specifically excluded. *NZ Contracting Solutions Inc.* is instructed to deduct 21% of Maia's payment each week as a *Charitable Tax Deduction* with *NZ Contracting Solutions Inc.* providing full medical and work cover insurance on Maia's behalf. Maia is required to carry out all work in a workmanlike manner and guarantees *NZ Contracting*

Solutions Inc. against faulty work. He also agrees to supply his own plant and equipment. Finally the *Agreement To Contract* says:

The Maori Incorporation of the Agency [NZ Contracting Solutions Inc] hereby guarantees to protect myself and my privacy governing the collection, holding, use, correction, disclosure, accessibility, security and transfer of my personal information from any person inquiring into my business and deems me a shareholder in terms of Section 264 and 262 of Te Ture Whenua Maori, Maori Land Act 1993 – 95.

[11] In addition to the above document there is also a form about providing a safe working environment and a page headed *Contractors Information Form*. The form requests contact details and some information about whether the contractor has previously made a claim for *work cover* or any other *accident and fitness insurance*. It includes a *General Deduction Authority* instructing *NZ Contracting Solutions Inc.* to make deductions from remuneration due for *Charitable Tax at 21%, equipment, food and accommodation costs for those staying at client's quarters and performance penalties*.

[12] While the written documentation generally is in language of a contract for services and specifically negates several of the usual incidents of employment, it could not be said that Maia was doing the work as part of his own business. The respondents or an entity controlled by them contracted with farmers to shear the farmers sheep and employed Maia in that work. Maia had no part in those arrangements. He invoiced no one. He was not registered for GST. He sought no deductions for any business related expenses. During the relevant period Maia worked for no one else. He did not keep any business accounting records or pay any tax on his own account to the Inland Revenue Department. Maia supplied nothing more than his willingness to work as part of the shearing gang.

[13] Maia was not employed in his own business, but his work was integral to the respondents shearing contractor business. A shearing gang is a tightly organised productive unit with clear roles and expectations of its members. Maia was a presser. He gathered the shorn wool into the press, compressed it into bales then marked the bales. He also helped keep the sheep up to the shearers to keep them shearing and performed odd jobs as required by the ganger, including making the tea for smoko breaks. The respondents supplied a team to ensure efficient shearing of their clients' sheep. Maia was engaged as part of, and his work was integral to the efficiency of, that gang. The tools used by Maia were either supplied by the farmer or by the respondents. Maia supplied himself and his clothing.

[14] It is touched on above, but more should be said about control. Short of resignation or default, Maia had no ability to control when he worked or how he performed his tasks. He was required to comply with the directions of Mr Te Whata, the ganger and others in the gang who called on his assistance. He attended work at a specified farm and at a specified time and was transported there by the gang at the respondents' expense. The respondents had written rules regarding lateness, work performance for pressers and conduct after work in the shearers quarters. All these matters establish that Maia performed his work under the control of, or on behalf of the respondents.

[15] The only factors pointing towards self employment are the terms of the *Agreement to Contract* and associated documents. Even with regard to those written terms, I conclude that the real nature of the relationship was employment rather than self employment.

[16] The applicant's representative made well founded submissions about the fairness of the terms set out in the *Agreement to Contract* and the circumstances in which it was signed. The Minors Contract Act 1969 provides that contracts with minors that are contracts of service (ie employment) shall have effect as if the minor was of full age unless there was unconscionably inadequate consideration or it contains a harsh or oppressive obligation. If I had found that the relationship was not employment, s.6 of the Minors Contract Act 1969 would apply since Maia was 16 at the time. However, given the finding that the relationship was that of an employer and employee it is not necessary to consider this point any further.

What happened on 18 March 2006?

[17] By this time both Lee and Maia had shifted out of the shearers quarters and were living with an Auntie in Mossburn. There had been a number of incidents of theft/burglary and vandalism around Mossburn (including at the shearers quarters) which Mr Te Whata thought Maia was involved in. He never raised that suspicion with Maia. However, as part of the Authority's investigation the respondents referred to these matters by way of suggesting that Maia had a reason to leave the employment and go back to Masterton. There is no evidence linking Maia to any of these incidents. I should also note that Maia has never been interviewed by Police in connection with them. I do not accept the respondents' position that Maia had a reason to leave town quickly.

[18] On 18 March Maia got a ride from the shearers quarters as usual to their first shed about five minutes out of town. They were working there for about three and a half hours. During the middle of that run, Maia got on an empty stand and did some shearing. Mr Te Whata came into the shed. He told Maia *you're fucking too rough*. Maia finished that sheep, got his bag and walked out the shed because he was not going to have Mr Te Whata swearing at him. Maia started walking back to town. Soon after, Mr Te Whata drove after him. Maia was about half way back to town when Mr Te Whata caught up with him. Mr Te Whata apologised to Maia for swearing at him. Maia got into the car and Mr Te Whata took him back to the shed. Maia returned to his work as a presser and the gang finished that shed without further incident.

[19] Mr Te Whata in evidence generally answered my questions by referring me to parts of the documents previously lodged in the Authority. The relevance of the references was often not clear but Mr Te Whata resisted my invitation to expand or explain. It seems from some of the material that he accepts that he swore angrily at Maia. His justification appears to be that he was annoyed that Maia interrupted him and was reluctant when told to clean up the lamb that had been roughly shorn. He also asserts that Maia's work ethic was poor and that Maia over-reacted. However, in light of Mr Te Whata's refusal to properly answer my questions I am not able to accept his evidence where it differs from Maia's on these events.

[20] Once the gang had finished at the first shed they travelled a further 45 minutes away from town to another shed. When they arrived, there were no sheep in the shed. The farmer was not around so the gang had lunch. Dave Edmonds is an experienced shearer who was engaged by Mr Te Whata at the time and was present during these events. He attended the investigation meeting, gave sworn evidence and answered questions in a straight forward manner. There is no reason to doubt his evidence. He said that after Maia had eaten lunch he went to leave the shed to get the sheep from the yard. However, the ganger (Dennis) called after Maia, saying *get back inside, its not your bloody job [to shed the sheep] – that's the farmer's job!* Maia did as he was told. The gang waited for the farmer to show up. After an hour or so, Dennis rang Mr Te Whata to tell him about the problem. Mr Te Whata apparently acknowledges receiving a phone call but appears to blame the gang for getting to this second shed two hours late as the reason for the delayed start.

[21] At some point Mr Te Whata arrived at the shed presumably as a result of the call from Dennis. He seems to claim that there was another rousie getting the sheep into the shed and Maia was not helping. He claims he asked Maia to help but Maia told him that Dennis had told him not to. He admits getting angry with Maia after Maia told him that Dennis said it was not his job to get the sheep but he says that he only swore at Maia after Maia was leaving. However, Dave Edmonds' evidence which I accept is that Mr Te Whata told Maia to get out of the yard and bring the sheep up. Maia told Mr Te Whata *that's not my job, that's the farmers job*. Mr Te Whata then said to Maia *what did you say you fucking little bastard – you can fuck off and don't come back*. To the extent that Mr Te Whata's account is inconsistent, I prefer the evidence of Dave Edmonds.

[22] Having been told to go and not come back, Maia gathered up his gear and left. He walked all the way back to his Aunt's house in Mossburn. Maia and Lee returned to Masterton a day or two later. (Maia's Aunt was able to get his final pay for him.)

Unjustified dismissal?

[23] Dismissal involves a sending away at the employer's initiative. The initiative for the termination of employment came from Mr Te Whata. The words used can constitute a dismissal and clearly did in the present circumstances.

[24] The dismissal is unjustified. Maia was not getting sheep up to the shed because he had been told by his ganger that it was not his job. There was nothing about Mr Te Whata's response in the circumstances that could constitute the actions of a fair and reasonable employer. Accordingly, Maia has a personal grievance against the respondents.

[25] In light of that finding, it is unnecessary to deal with the related grievance claim about unjustified disadvantage.

Remedies

[26] There is a claim for \$2,000 compensation for hurt, humiliation and injury to feelings suffered by Maia. I accept Maia's evidence that he was upset by the pre-emptory dismissal. The claim is modest and it is awarded in full. I do not accept that Maia contributed to the grievance in any blameworthy manner.

[27] In response to my question, Maia told me that he had not lost any remuneration as a result of the dismissal. He was able to find other employment when he got home. Accordingly, there is no award for lost remuneration. There is also a claim for compensation of \$500 related to Maia's travel expenses to return home. The job was always only for a short duration and Maia would have travelled home afterwards. I have not been given any details about what costs were incurred that would not have been incurred by Maia in any event. Accordingly no award is required.

[28] Maia is entitled to holiday pay and the *21% Charitable Tax* deduction. The final pay slips shows \$239.42 was deducted as *Charitable Tax*. That sum is to be paid to Maia or the respondents may prove that they have paid this sum to Inland Revenue as PAYE deducted from Maia's wages. Leave is reserved if there is any difficulty.

[29] The final pay slip shows a gross of \$1,140.10. Maia is entitled to \$68.41 holiday pay.

[30] The statement of problem is lodged with the Amalgamated Workers Union of New Zealand as a second applicant and a remedy is claimed for the Union's benefit, being a declaration that the respondents are employers bound by applicable legislation. This problem was about Maia's dismissal and it has been necessary to make a determination about his status as an employee as part of that. In the circumstances of Maia's engagement at work, the written *Agreement to Contract* and associated documents are a poorly devised attempt to avoid legal obligations. That is resolved by the determination of Maia's grievance. It is not appropriate to make a general statement about the circumstances of others who have not been involved in these proceedings.

Summary

[31] The respondents are to pay Maia \$2,000.00 compensation pursuant to section 123 (1)(c) (i) of the Employment Relations Act 2000

[32] The respondents are to pay Maia the sum of \$239.42 withheld as *Charitable Tax* or are to account for it by proving payment to IRD.

[33] The respondents are to pay Maia \$68.41 holiday pay.

[34] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority