

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 414
3091553

BETWEEN

BRENNAN PITTS
Applicant

AND

PRO LINE INTERIORS LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Paul Mathews, advocate for the Applicant
Daniel Ford, advocate for the Respondent

Investigation Meeting: 15 September 2020

Date of Determination: 12 October 2020

DETERMINATION OF THE AUTHORITY

A. Pro Line Interiors Limited is to pay Brennan Pitts arrears of holiday pay of \$1,954.72.

B. Pro Line Interiors Limited is to pay Brennan Pitts costs of \$2,321.56.

Employment relationship problem

[1] Brennan Pitts was engaged by Pro Line Interiors Limited from July 2018. In a statement of problem, Mr Pitts says that he was unjustifiably dismissed on 9 October 2019.

He claims compensation and reimbursement as remedies for his personal grievance. Costs are also sought.

[2] Dan Ford is the sole director and shareholder of Pro Line Interiors Limited. Although there was some contact between the Authority and Mr Ford, Pro Line did not lodge a reply following service on it of the statement of problem. After a case management conference, the applicant amended his claim to include arrears of \$2,233.76 for holiday pay. Mr Pitts also claimed he worked on Waitangi Day and Anzac Day, but did not quantify a claim based on this.

[3] Pro Line later sent an email to the Authority. I grant leave and treat it as Pro Line's statement in reply. Mr Ford says that Mr Pitts worked as a sub-contractor for Pro Line, that Pro Line stopped contracting with Mr Pitts and that Mr Pitts and two other sub-contractors were at the time his work ended starting their own team, rather than sub-contracting to Pro Line.

[4] Despite mediation, matters were not resolved.

[5] The Authority has exclusive jurisdiction to make determinations about employment relationship problems, including personal grievance and holiday pay claims. Personal grievance and holiday pay claims are by an employee against their employer. For the claims to be within the Authority's jurisdiction, Mr Pitts must show that he was employed by Pro Line under a contract of service. In deciding whether Mr Pitts was an employee, I must consider the real nature of the relationship between Mr Pitts and Pro Line.¹ If Mr Pitts was not an employee, I will dismiss the claims as they would not be within the Authority's jurisdiction. If Mr Pitts was an employee I will consider and determine his claims for remedies.

[6] The issues are:

- (a) Was Mr Pitts employed by Pro Line under a contract of service?
- (b) If yes, did Pro Line unjustifiably dismiss Mr Pitts?
- (c) If yes, what are the appropriate remedies?

¹ Employment Relations Act 2000 s 6(2).

(d) If yes, are any arrears payable?

Was Mr Pitts employed by Pro Line under a contract for services?

[7] Pro Line operated a contracting business, doing gib-fixing and similar work in residential and commercial buildings. This was generally but not always on a labour only basis.

[8] Samuel Ford is Mr Ford's brother. He worked as a sub-contractor to Pro Line. Samuel Ford knew Mr Pitts through sport. Mr Pitts also knew another person who worked for Pro Line. He had heard positive things about the company. Pro Line had extra work. Samuel Ford sent Mr Pitts a txt as follows:

Can offer you a job if you would like it? Kind of works as like a self employed style job Like start on a wage and the wage is inclusive of holiday pay/public holidays then once you are more capable with the work I'll bump your wage up. Start you on \$18 then once...

[9] In other txt exchanges Samuel Ford said that his brother was looking to "get few more guys on" and Mr Pitts described his current situation as "sub contracting as an arborist...atm so happy to turn him away whenever I can".

[10] By txt Samuel Ford also asked Mr Pitts whether he had a "site safe", referring to the commonly required certificate for work on building sites in the industry. When Mr Pitts said he did not, Samuel Ford offered to pay half of the course cost. He also explained the work that Mr Pitts would perform and offered to "get you all necessary tools". Samuel Ford also provided some protective gear to Mr Pitts.

[11] The exchanges resulted in Mr Pitts starting work from 23 July 2018. No formal written agreement² was offered by Pro Line. All his work was done for Pro Line's clients. Mr Pitts was paid by the hour but did not complete a timesheet. Start times and days of work were generally arranged by Samuel Ford or discussed and agreed by the Pro Line contractors and Mr Pitts during work. Pro Line paid Mr Pitts regularly³ by direct credit into his bank account, based on the work hours reported, generally by Samuel Ford to his brother. Sometimes Mr Pitts notified his work hours to Dan Ford. Pro Line treated the payments to

² Mr Ford says that the txt exchanges are an agreement in writing. I accept they form part of the agreement between Mr Pitts and Pro Line.

³ The first payment was on 10 August 2018. Payments were generally but not always fortnightly.

Mr Pitts as scheduler payments and deducted tax on that basis from the gross amount payable each period. Before the first payment, Samuel Ford asked Mr Pitts for his IRD number. Scheduler tax treatment is applicable if the legal status of the payee is a contractor.

[12] Mr Pitts did not invoice Pro Line for his work and is not GST registered. He did not treat his income from Pro Line as business income, did not declare any business expenses for tax purposes, did not separately pay ACC levies or treat the engagement as self-employment.

[13] Based on the txt from Samuel Ford and Mr Pitts' evidence, I find Mr Pitts had no prior experience of the work required. I accept that Mr Pitts was told and shown what was required by Samuel Ford and other Pro Line contractors on the job. In effect he learnt the work on the job from others who were experienced. Dan Ford knew of and expected this. It assisted Pro Line to meet its contractual obligations to clients.

[14] Mr Ford says that Mr Pitts was advantaged by being paid an hourly rate rather than a per square metre rate at the outset. He says Mr Pitts should have been moved onto a square metre rate, which was the payment method for Pro Line's other contractors. The payment method was set at the start by Samuel Ford. There was a later increase to the hourly rate. Pro Line might have intended to move Mr Pitts to a per square metre rate for payment, but never did so. The method of calculating payment for the work for the duration of the relationship points to Mr Pitts being an employee.

[15] Mr Ford points to the initial txt from his brother which describes the work as "self employed" together with Mr Pitts' txt describing his (then) current position as "sub contracting". I accept Mr Pitts' evidence that he incorrectly described his existing position. Mr Pitts had worked as an employee for an arborist. The employment ended, but the arborist then engaged him for casual work paid on a cash basis. Mr Pitts used "sub contracting" to describe that arrangement. Although Pro Line accepted at face value Mr Pitts' incorrect description, the statements in the txts by Samuel Ford and Mr Pitts about the nature of the working relationship cannot be treated as a determining matter in establishing the real nature of the relationship.⁴

[16] In effect, Mr Pitts worked personally for Pro Line supplying only his labour. He could not employ or subcontract others to perform his work. Most tools and protective equipment

⁴ Employment Relations Act 2000 s 6(3)(b).

were provided by Pro Line. Some were marked “Pro Line” but I place little weight on that. I accept Mr Ford’s evidence that this was spare equipment. However, that does not detract from the point. Mr Pitts provided no supplies or materials and almost no tools to the job. He bore no risk of loss or profit from his labour. Any business goodwill that arose from his work accrued to Pro Line. These factors point strongly to Mr Pitts working as an employee under a contract of service.

[17] Mr Pitts was not paid holiday pay, sick leave or for public holidays. That reflected the txt from Samuel Ford before Mr Pitts started work. There was a txt exchange between Samuel Ford and Mr Pitts about Show Day. On 15 November Samuel Ford sent a txt with the start time for the next day. Mr Pitt responded saying it was a public holiday. Samuel Ford referred to the “Self employed pay scheme”. Mr Pitts said he could not be self-employed without signing a contract. He said that he had not been told about no public holidays. He said he was missing out on employee benefits and “I’ll need a pay rise to make it worthwhile”. Samuel Ford referred him to Dan Ford. There is no evidence that Mr Pitts took the matter any further.

[18] There was a further txt exchange in February 2019. Mr Pitts had taken time off to attend a wedding in Wanaka. Samuel Ford by txt advised the start time for the following day “if you... are coming in tomorrow”. Mr Pitts replied that he preferred not to but would if really needed. That led on to him complaining about being paid \$20.00 per hour “which equates to basically minimum wage” taking account of not receiving employee benefits. Samuel Ford’s response included:

I can’t run a business when I have two unreliable workers. The rate of pay is reflective of your skill level and... the amount of time you have off... if you... aren’t happy it’s like I’ve said... return the tools and go and work for another company...⁵

[19] Later in this exchange Samuel Ford said:

I’m just trying to run a business with dan and it’s incredibility hard when people don’t work. Dans not impressed with it all. Well I need everyone in that job needs to be finished by the end of Wednesday or we are not in a good position with plaster services.

[20] Dan Ford refers me to an August 2019 txt exchange he had with Mr Pitts. Mr Ford asked why Mr Pitts had not been at work that day, Mr Pitts said he was sorting out his car and

⁵ It is not necessary to refer to the circumstances of the other person included in Mr Ford’s txt.

Mr Ford asked if he had let anyone know. Mr Pitts had not attended work but had not sought permission for his absence, only responding when messaged by Samuel Ford.

[21] Generally, Dan Ford says that Mr Pitts' work attendance record was "terrible", often not attending work on a Monday.⁶ His point generally and by reference to the foregoing messages is that Mr Pitts took time off on his own accord and was never subject to warnings or the other disciplinary consequences normally faced by an employee, supporting the view that Mr Pitts was an independent contractor.

[22] To summarise, Pro Line set the days and hours although there was some flexibility. Pro Line expressed concern when Mr Pitts' unarranged non-availability affected its work for its clients. Mr Pitts did not consider he was being paid sufficiently to be self-employed. The absence of employee benefits indicates independent contractor status. However, if the real nature of the relationship is employment as an employee under a contract of service, non-compliance with statutory obligations owed to an employee cannot change that status. Attempts to control Mr Pitt's availability to meet Pro Line's contract obligations indicate employee status, but the absence of warnings indicates independent contractor status.

[23] Dan Ford says that Mr Pitts was engaged by his brother but was just paid by Pro Line as a matter of convenience. The txt exchanges before Mr Pitt started were with Samuel Ford. Dan Ford's first txt exchange with Mr Pitt produced in evidence was on 5 November 2018. I accept that the arrangements with Mr Pitts which resulted in him starting work for Pro Line were with Samuel Ford. However, Samuel Ford had said "my brothers looking to get few more guys on". I find that Samuel Ford in making arrangements with Mr Pitts was acting with Pro Line's authority. The payment arrangements from August 2018 and later communications between Mr Pitts and Dan Ford support that finding. I find that the agreement from the outset was between Pro Line and Mr Pitts.

[24] On review of the information and evidence provided about the work relationship between Pro Line and Mr Pitts from July 2018, I find that its real nature was that of employment. Mr Pitts did not perform any of this work as part of operating a business on his own account. His work was integrated into Pro Line's business and was to meet the company's obligations to its clients. Pro Line exercised a substantial degree of control over

⁶ Mr Ford speculates about the reason, but it is not necessary to make any findings on that point.

Mr Pitts' daily work. The company also exercised a degree of control over Mr Pitts' attendance, although it tolerated some unreliability on his part. Pro Line did not intend to engage Mr Pitts as an employee. While Mr Pitts was aware of that from the txt messaging before he started work, his intention was just to obtain work and an income and he did not intend one type of legal relationship in preference to another. Pro Line's intention, its tax treatment and non-provision of benefits such as holiday pay does not detract from the view I have reached about the real nature of the relationship.

[25] I find that Pro Line employed Mr Pitts under a contract of service. Mr Pitts claims are within the Authority's jurisdiction.

Did Pro Line unjustifiably dismiss Mr Pitts?

[26] In about August 2019 circumstances developed for Dan Ford which resulted in some communication from Simon Smith to Mr Pitt that Dan Ford had retired from Pro Line, leaving "us lads are on our own. we got a few contacts and hopefully we can secure work for all of us as of next week".⁷ Simon Smith was one of the subcontractors who Mr Pitts had been working with. Mr Pitts replied asking "without proline would we just get paid individually by whoever we are working for". Mr Smith responded that "the house out in oxford is the last job we will do for Dan but it's been put on hold... so could be a week or two away. Payment is something that will have to be sorted within the next few days. dan will still be paying us this week". He went on to say "we'll make sure everyone has an opportunity to keep working". Mr Pitts asked to be kept in the loop.

[27] On 31 August Mr Pitts asked Dan Ford "are the wages still coming from you this week?" Mr Ford responded "They will be but just a bit delayed". This is the last txt exchange with Mr Ford in evidence until December 2019 when Mr Ford received the email from Mr Pitts' representative raising a personal grievance. Messaging for work arrangements from September was principally between Mr Smith and Mr Pitts, with limited work messaging from Samuel Ford. Dan Ford says that Simon Smith, Mr Pitts and a third subcontractor (Andrew Storer) were starting their own team contracting directly with clients rather than contracting through Pro Line.

⁷ Txt message to Mr Pitts on 28 August 2019.

[28] As explained, there was no written agreement, aside from the arrangements documented in the txt exchanges. Nothing was documented about what were the agreed hours of work. Nothing in writing conveyed an indication of the arrangements relating to the times Mr Pitts was to work. Pro Line's work requirements of Mr Pitts depended on demand for its services. The IRD records provided by Mr Pitts show Pro Line's gross payments to him varied significantly over time. Net payments during the period covered by bank records produced by Mr Pitts also show significant variation. For example, in May 2019 Mr Pitts received \$566.40. He received \$516.00 in June and \$1,988.80 in July 2019. Mr Pitts did not produce bank statements covering net payments after 19 July. However, the IRD records show gross payments of \$1,700 reported in August 2019. Mr Pitts' evidence is that work was quite sporadic and if you did not work you did not get paid. I find that his work was not regular as to hours or days although it was on-going.

[29] After the messages at the end of August 2019 referred to above, Mr Pitts worked as required in September but 2 October was his last day of work. On 31 August Mr Smith in a txt said "You're back in the game on Monday mate". There were exchanges about the "new job". Mr Pitts' said "Loving this new proline leadership". The "new job" appears to have started in early September. Mr Smith continued to arrange Mr Pitts' work. On 4 September Mr Smith asked Mr Pitts for his hourly rate. On 12 September Mr Pitts asked "How'd you get on with the Ford's?" and Mr Smith responded that he would update Mr Pitts in the morning "but you won't be paying any money to Sam". There is also a txt message produced by Mr Ford between Samuel Ford and Andrew Storer which includes Mr Storer saying "We are not working for proline anymore." His txts includes an assertion "we are all out on our own...We've had to find our own work and sort out our own way of paying wages over". Later in September Mr Smith asked Mr Pitts to send him his hours of work. He also asked "you still want to come to the accountants later?" Various messages were exchanged about work. Then on 3 October Mr Smith told Mr Pitts "...the other job we had for tomorrow had fallen through. ...So... take the day off..." Mr Pitts sought and received confirmation that there would be no work on Saturday either. On 7 October Mr Smith told Mr Pitts that "we've lost the big house on redcliffs". There was mention of payments agreed with the principal contractor. Mr Pitts' response indicates he was familiar with that payment dispute.

[30] On 9 October Mr Smith sent a message asking if Mr Pitts was available for a call. Mr Smith rang him a little later. Mr Pitts' evidence is that he was told "they" were "letting

him go”. Dan Ford’s evidence is that Simon Smith rang to tell Mr Pitts that there was no more work due to “them” losing the work with Elite Interiors.

[31] I take from the various messages that Mr Pitts knew at the end of August that Dan Ford was no longer actively involved in business. Mr Pitts then dealt with Mr Smith. Much of this messaging with Mr Smith supports Dan Ford’s contention that Mr Smith, Mr Storer and Mr Pitts were involved in their own business activity instead of continuing business on Pro Line’s behalf. That is explicit in the 12 September txt from Mr Storer to Samuel Ford.

[32] The only continued involvement for Pro Line was to pay Mr Pitts for the work he performed in September and the beginning of October as arranged with Mr Smith. Mr Ford’s evidence is that Pro Line made these payments because Mr Smith, Mr Storer and Mr Pitts had not at that stage sorted out bank accounts and who would be responsible for managing that function. There is some corroboration of Mr Ford’s evidence in the txt messaging between Mr Smith and Mr Pitts.

[33] I find from the evidence of txt messaging referred to above that the employment relationship between Pro Line and Mr Pitts ended on or soon after 31 August 2019. Mr Pitts’ work from September, arranged between him and Mr Smith, was not pursuant to the contractual arrangement between Mr Pitts and Pro Line. Rather, it was pursuant to an arrangement Mr Pitts, Mr Smith and Mr Storer had between themselves to do work for clients which previously had been done by Pro Line. When Mr Smith told Mr Pitts that “they... were letting him go”, he brought an end to the arrangement between the three of them. Mr Smith did not dismiss Mr Pitts from his employment by Pro Line because it had already ended.

[34] I find that Pro Line did not unjustifiably dismiss Mr Pitts on or about 9 October. The claims for compensation and reimbursement cannot be succeed.

Are any arrears payable?

[35] There is still a claim for arrears of holiday pay based on Mr Pitts’ status as an employee not a contractor of Pro Line.

[36] In limited circumstances, an employer may lawfully pay an employee the holiday pay regularly with their pay.⁸ Despite the txt exchange between Samuel Ford and Mr Pitts before he started, Pro Line cannot satisfy the limited circumstances. Mr Pitts is entitled to holiday pay calculated in accordance with s 23 of the Holidays Act 2003. Mr Pitts received \$24,434.00 gross from Pro Line from July 2018 up to the end of August 2019. There will be an order that Pro Line pay Mr Pitts 8% on that figure, a total of \$1,954.72.

[37] Pro Line paid Mr Pitts a further \$3,488.00 in September and October 2019. I accept Mr Ford's evidence that Pro Line used its bank account to receive client payments on behalf of Mr Pitts, Mr Smith and Mr Storer and to pay those funds to Mr Pitts, Mr Smith and Mr Storer as directed by them, pending their separate administrative arrangements. I find that the September and October payments by Pro Line to Mr Pitts were not wages paid under the employment relationship between Mr Pitts and the company. No holiday pay arises on those amounts.

[38] Mr Pitts was directed to quantify his claim for statutory holidays during the case management conference on 15 July 2020. Despite that, the statutory holiday claim was not quantified. Mr Pitts did not give evidence about which statutory holidays he worked. I am not able to say whether the statutory holidays which were not worked during the period of employment were days that would otherwise have been working days for Mr Pitts. The claim for arrears in relation to statutory holidays has not been established.

Summary

[39] Mr Pitts was not unjustifiably dismissed by Pro Line so does not have a personal grievance against the company.

[40] Mr Pitts was an employee of Pro Line between July 2018 and August 2019 and is entitled to arrears of holiday pay which I fix at \$1,954.72.

[41] Mr Pitts seeks costs. The investigation meeting took about half of a day. Mr Pitts established that he was an employee and entitled to arrears but failed with the personal grievance claim. Most of the preparation and the meeting time was spent on the nature of the relationship. Mr Pitts should be treated as having succeeded with the substance of his claim,

⁸ Holidays Act 2003, s 28.

even though he has recovered a small portion of the total amount claimed. I fix costs at a half day taking the daily tariff rate for the first day. There will be an order for costs of \$2,250.00 and a further \$71.56 for the application fee, a total of \$2,321.56 for costs.

Philip Cheyne
Member of the Employment Relations Authority