

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 425
3077892

BETWEEN	DEBORAH FINDLAY Applicant
AND	STEVES PAINTING & DECORATING LIMITED (IN LIQUIDATION) First Respondent
AND	STEVEN MURDOCH Second Respondent

Member of Authority: Helen Doyle

Representatives: Paul Mathews, advocate for the Applicant
No appearance on behalf of the First Respondent (consent
from liquidator to proceed)
Nick Robertson, advocate for the Second Respondent

Investigation Meeting: 20 July 2020 at Christchurch

Submissions [and further 24 July, 7 August and 10 September 2020
Information] Received:

Date of Determination: 15 October 2020

DETERMINATION OF THE AUTHORITY NUMBER 2

- A Deborah Findlay was employed by Steves Painting & Decorating Limited (In Liquidation).**
- B Deborah Findlay was unjustifiably dismissed from her employment.**
- C Steves Painting & Decorating Limited (In Liquidation) is ordered to pay to Deborah Findlay the following:**
 - (a) Unpaid wages in the sum of \$418 gross together with interest in the sum of \$18.24.**

(b) Compensation in the sum of \$23,000 without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000.

(c) Costs in the sum of \$1,950 together with \$71.56 being reimbursement of the filing fee.

D Holiday pay did not appear to have been paid although there was no claim as such. It should be calculated on the basis of 8% on gross earnings less any paid leave. Either party can return to the Authority if there are difficulties about that.

Employment Relationship Problem

[1] Deborah Findlay was employed to work as a painter from in or about 20 November 2018. There is a dispute about who employed her. She was not a party to a written employment agreement.

[2] Ms Findlay says that her employer was Steven Murdoch.

[3] Mr Murdoch says that Ms Findlay was employed by Steves Painting & Decorating Limited (in liquidation) referred to from hereon as Steves P & D or the company. Mr Murdoch was the sole director of the company.

[4] Proceedings in the Authority were lodged against Steves P & D; however, after the matter was set down for an investigation meeting there was a successful application to join Mr Murdoch to the proceedings in order to determine the identity of the employer.¹

[5] The liquidator of Steves P & D, Grant Reynolds, gave consent for the proceedings in the Authority to continue. Mr Reynolds indicated that the company did not intend to take part in the investigation meeting although subsequently supplied some information in respect of the application for joinder lodged in late May 2020. In an email dated 5 June 2020 he stated that Ms Findlay was employed by the company with reference to how she was paid and schedules lodged with the Inland Revenue Department (IRD).

[6] Ms Findlay says that she was unjustifiably dismissed at a point in time between 15 and 17 April 2019 and that such dismissal was without procedural fairness and substantive justification.

¹ *Deborah Findlay v Steves Painting and Decorating Limited (In Liquidation) and Steven Murdoch* [2020] NZERA 245

[7] In a statement in reply lodged on behalf of Steves P& D before its liquidation the company denied that Ms Findlay was unjustifiably dismissed. Its view was that Ms Findlay was asked to leave the worksite on 15 April 2019 because she refused to work and “slandered” Mr Murdoch and his brother Cameron the foreman. It was stated that she did not then return to work and did not contact Mr Murdoch.

[8] The statement in reply lodged on behalf of Mr Murdoch focussed on his view that Steves P & D employed Ms Findlay.

[9] Ms Findlay seeks a finding that she was employed by Mr Murdoch. She also seeks compensation in the sum of \$23,000, reimbursement of lost wages, payment of her final wages and costs.

The issues

[10] The Authority needs to determine the following issues in this case:

- (a) Who employed Ms Findlay?
- (b) How did the relationship end?
- (c) If the relationship ended by way of dismissal, then was the dismissal justified procedurally and substantively?
- (d) Was the decision to dismiss Ms Findlay what a fair and reasonable employer could have done in all the circumstances?
- (e) If the dismissal was not justified, then what remedies should be awarded, are final wages owed and are there issues of mitigation and contribution?

Who employed Ms Findlay?

[11] Steves P & D was incorporated on 9 March 2016 and carried on the business of painting houses. Mr Murdoch in his evidence said that the incorporation of the company occurred after he completed his apprenticeship whilst working for another company and he had taken advice from an accountant about setting up a company.

[12] He said that he was the only employee of the company until June 2018 and then business increased and it became very busy. Further that all the employees knew about the

company being their employer and that he had told Ms Findlay about this. Mr Murdoch said that the process to prepare employment agreements was underway however these were not available when Ms Findlay was employed.

[13] Ms Findlay knew Mr Murdoch from her friendship with his mother and the families had both lived in the same small town previously. She had undertaken painting work for about 15 years and contacted Mr Murdoch in or about November 2019 to see if he had any work available. Ms Findlay was aware that Mr Murdoch had started a company some years previously on completion of his apprenticeship. She said that when she had undertaken work for Mr Murdoch on about two earlier occasions it was always just work arranged between them. Mr Murdoch in his evidence said that Ms Findlay had helped out on one earlier job but that was on a contracting basis.

[14] Ms Findlay sent her hours worked by text message to Mr Murdoch and Mr Murdoch said that he passed the information onto Shikana Curtis who undertook the payroll for the company. The Authority heard from another employee who had been employed after Ms Findlay who I shall call Christopher. He did have an employment agreement. He also said that he provided his hours of work by text to Ms Curtis directly.

[15] Mr Mathews placed some weight on the fact that the hourly rate paid to Ms Findlay was less than that paid to the other painters of \$25 per hour. He said that this was indicative of the personal arrangement made between Ms Findlay and Mr Murdoch.

[16] Mr Murdoch said that those employees on \$25 per hour knew how to plaster, paint and spray. He said that he had agreed with Ms Findlay to review the hourly rate of \$19 per hour and that he was not with her when she worked previously to understand what her skill level was like. He did not accept that Ms Findlay was "highly experienced." The evidence supported after a meeting in early April it was agreed that Ms Findlay's hourly rate would increase to \$23 per hour after a few weeks.

[17] For the first month or so Mr Murdoch would pick Ms Findlay up in the work van and take her to the properties in which she would undertake painting. At that time Ms Findlay did not have a warranted or registered car. Mr Murdoch said that he subsequently lent Ms Findlay some money so that she could get the vehicle registered and warranted.

[18] Ms Findlay recalled that there was some signage on the van that she was picked up in. After the investigation meeting I was provided with photos of the signage on the van. Although the signage had been removed the outline of the letters was still visible. In large capital letters on the side of the van the full name of Steves P & D was visible including “Ltd” together with a mobile number.

[19] Ms Findlay could not recall filling out any forms with respect to her employment. In her bank account payments were shown as coming each week between November 2018 and April 2019 from Steven. The evidence from Mr Murdoch was that payments were made to Ms Findlay through the company bank account.

[20] After the investigation meeting the Authority wrote to the company accountant and asked them to provide copies of the bank statements for Steves P & D for the relevant period of Ms Findlay’s employment. All information on the accounts other than relating to Ms Findlay was redacted. The statements confirm that Ms Findlay was paid by Steves P & D whilst she was employed.

[21] The Authority was provided with monthly pay schedules filed with IRD in the name of Steves P & D. These schedules included Ms Findlay and followed a voluntary disclosure by the accountant on 27 November 2019 to IRD for the PAYE period 30 June 2018 to 21 July 2019. Mr Murdoch said that there had been a failing on the part of his tax agent to deal with this earlier. There was reference in a letter from the accountants to IRD to contractors being engaged and errors on the part of Steves P & D due to a misunderstanding of the New Zealand tax rules and not having the support of their previous tax agents.

[22] No issue was raised by Steves P & D in its statement in reply, by the liquidator or by Mr Murdoch that Ms Findlay was other than an employee. Having heard the evidence I accept employment was the real nature of the relationship.

[23] In support of the joinder application lodged in late May 2020 Mr Mathews submitted that he had erred in assuming the identity of the employer in raising a personal grievance and lodging proceeding against Steves P & D. The Authority asked Ms Findlay about this at the investigation meeting and she said that she did not know why proceedings were commenced against the company.

[24] After the grievance was raised and proceedings were lodged Mr Mathews communicated with Mr Reynolds to obtain consent so that the proceedings could be continued against Steves P & D in the Authority.

[25] There was a statement provided to the Authority by Ms Curtis that she was in charge of the payroll for Steves P & D. She wrote that she had received a copy of a letter from WINZ after Ms Findlay no longer worked for the company asking her to confirm that Ms Findlay had worked for the company. The Authority did not hear from Ms Curtis however wrote after the investigation meeting to the Ministry of Social Development (MSD) to ascertain how Ms Findlay had described her employer to them at the time the relationship ended.

[26] From the information provided by MSD Ms Findlay advised the Ministry her employer was “Steves Painting and Decorating.” That can be contrasted with how she referred to a subsequent employer by his first and last name.

[27] Principles have been developed over the years to be applied when considering who the employer was. In *Wilson v Bruce Wilson Painting & Decorating Limited* Judge Corkill set out the principles which apply when considering the identity of a correct employer that were summarised by the Court in *Colosimo v Parker*.² They are as follows:

- (a) The onus of proving the identity of the employer rests on the employee (where the employee is putting that fact in issue).
- (b) The standard of proof is on the balance of probabilities.
- (c) The question of who the employer was must be determined at the outset of the employment.
- (d) It is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties; the question to be asked is who would an independent but knowledgeable observer have said was the employer?
- (e) Failure to notify or make an employee aware of the identity of the employer is not conclusive.

² *Wilson v Bruce Wilson Painting & Decorating Ltd* [2014] NZEmpC 83 with reference to *Colosimo v Parker* (2007) 8 NZELC 98, 622 EmpC.

[28] Mr Mathews submits that at the outset of the relationship an independent but knowledgeable observer would have said Mr Murdoch was the employer. He says that the longstanding personal relationship between Mr Murdoch and Ms Findlay supported this as well as the level of informality in appointing her.

[29] There was a level of informality at the outset of the relationship. It no doubt reflected Ms Findlay and Mr Murdoch had known each other for a considerable period of time but I could not rule out that Mr Murdoch did hire staff reasonably informally. There was no written employment agreement although I am not satisfied that there were employment agreements provided to other employees at that time. Mr Murdoch said that there was some delay in getting those finalised.

[30] Ms Findlay had performed some other work for Mr Murdoch but there was a dispute as to whether there had been one or more such occasion when the work had been undertaken and how the work was undertaken. The dates it was performed were unclear.

[31] An Employment Court judgment *Jury v Fonseca* was referred to in *Colosimo* where there was also a friendship at the time of employment.³ Judge Colgan, as the former Chief Judge was at that time, stated in *Jury* that it was “not difficult to understand” that Ms Fonseca may have assumed that her employer was her friend Ms Jury.⁴ He then referred to evidence to the contrary including that Ms Jury had operated for some years her manufacturing business as a limited liability company and that Inland Revenue documents generated before the question of the identity of the employer was in issue confirmed it was the company that employed Ms Fonseca and other persons engaged in the business. Ms Fonseca was paid by cheque drawn on the company account. There was also in that case some reliance placed on the employer’s name being endorsed on the IR12.

[32] It was held in *Jury* that it was more probable than not taking all factors into account that the company was the employer. Unfortunately the company in that case was described as a “worthless shell” having been struck off the register of companies.

[33] There was evidence to support that Mr Murdoch operated his painting business as a limited liability company and had done so for about two years before Ms Findlay was employed in or about 20 November 2018. Ms Findlay knew that Mr Murdoch “had a

³ Above n 2 *Colosimo* at [36] - *Jury v Fonseca* [1998] 2 ERNZ 548 (EC).

⁴ Above 3 at 554.

company” but said that her employment was with Mr Murdoch personally because she was a friend and the commencement of the relationship was very informal.

[34] I could not be satisfied that Ms Findlay was treated differently on the work site to the other company employees. Payments were made to Ms Findlay through the company bank account commencing shortly after employment with the first payment on 22 November 2018. I do accept that would not have been apparent to Ms Findlay from her account that reflected such payments were coming from “Steven.”

[35] The company name was also on the van that Ms Findlay was driven to work in for the first period of her employment.

[36] There was a voluntary disclosure of PAYE and withholding tax at a later date on 27 November 2019. Ms Findlay was named on the schedules albeit as a contractor for the company. That was before there was any issue whether Ms Findlay was employed by Mr Murdoch personally and the proceedings were only against Steves P & D. The joinder application was lodged in late May 2020. I am not therefore satisfied that they were created to avoid findings that Mr Murdoch was the employer.

[37] I have considered whether Mr Murdoch held himself out as the employer of Ms Findlay at the outset. The evidence as a whole does not satisfy me of that. Had that been the case then I conclude it more likely that Ms Findlay would have advised MSD that she was employed by Steven Murdoch. She did not do that in marked contrast with how she described a subsequent employer to MSD. How Ms Findlay described her employer to MSD is not inconsistent with who the grievance was raised with. It was raised with “Steven Murdoch (for Steve’s Painting & Decorating Limited).” It is also consistent with how the proceedings were commenced.

[38] When I weigh all of the above I conclude that it was more probable than not that Ms Findlay was employed by Steves P & D.

How did the relationship end?

[39] On 15 April 2019 Ms Findlay arrived at the job site which was a residential home at the same time as another employee who I shall call M. They both noticed that some tools were missing. Ms Findlay sent a text message to Mr Murdoch and he spoke in turn to M.

Mr Murdoch then arrived a short time later on site and said words that suggested Ms Findlay had been involved in the theft and told her “to get her shit and fuck off.” Mr Murdoch in all likelihood suggested that the break in and theft was “a personal attack against him” by Ms Findlay.

[40] Ms Findlay told Mr Murdoch that she knew nothing about the break in. She refused to leave and continued working.

[41] She also attended at work the next day and Mr Murdoch dropped some paint off but did not talk to her. When she got home after work on 16 April 2019 she noticed a Facebook post from Mr Murdoch’s brother Cameron, the foreman at Steves P & D, that referred to her as a thief and gave her two days to return the tools otherwise he would “come for her.” Ms Findlay said that some of his friends offered to help collect and made nasty comments in response to the post.

[42] Ms Findlay went back to work on 17 April and sent Cameron a text message at 8.05am asking him to come to the job site so they could talk. Cameron responded by text and said amongst other matters that “your been told to stay of our sites wtf u still doing there return our shit.” There was then a further text message from Cameron that was threatening in nature.

[43] Mr Murdoch then sent a text asking Ms Findlay not to start “shit” with his brother and “who do you think you are.” Ms Findlay responded that she was “your employee hand sanding the job” and referred to Cameron putting “shit on Facebook”. Ms Findlay said in her text messages that she wanted to clear it up as she had nothing to hide.

[44] Mr Murdoch responded by text and said “get off my job site.” In a subsequent message he threatened to ring the police and advised that Ms Findlay would not be paid until he “got my moter out.” Ms Findlay then left.

[45] I do not accept Mr Murdoch’s evidence that the exchange was in the nature of a stand down with an expectation that the relationship would resume. There was no evidence to support that. The conduct by Mr Murdoch and his brother Cameron was very clear. It amounted to a sending away of Ms Findlay from her employment and included threats. There was no subsequent communication to suggest further steps were contemplated and that the sending away from employment was not permanent.

[46] I find that Ms Findlay was sent away from her employment in the nature of a dismissal. Her last day of employment was Wednesday 17 April 2019.

Was the dismissal justified?

[47] In considering whether Ms Findlay was justifiably dismissed the Authority is required to apply the justification test in s 103A of the Employment Relations Act 2000 (the Act). The Authority is required under the test to consider on an objective basis whether the actions of the company and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal.

[48] The Authority must also consider whether the procedural fairness factors set out in s 103A(3) have been complied with. Allegations need to be sufficiently investigated; concerns should have been raised with Ms Findlay so that she could respond to them and her response should have been taken into account. There are also statutory good faith obligations which a fair and reasonable employer could be expected to comply with.

[49] The reason for dismissal appeared to be a view that Ms Findlay stole items from the site. She denied that she did. There was no investigation into the matter before she was ordered from site. The concern that she had stolen items was publicised by the foreman on Facebook without Ms Findlay ever having a proper opportunity to understand the nature of the concern and respond. None of the procedural fairness requirements in the test of justification have been satisfied.

[50] The dismissal was both procedurally and substantially unjustified.

Could a fair and reasonable employer have reached the decision to dismiss?

[51] The dismissal was without any procedural fairness and this overlaps with the ability of the company to reach any conclusion about substantive justification. There was no adherence to the obligations of good faith.

[52] The decision to dismiss was not one that a fair and reasonable employer could have reached in all the circumstances.

[53] Ms Findlay has made out her personal grievance that she was unjustifiably dismissed and is entitled to consideration of remedies.

Remedies

Final wages

[54] In her oral evidence Ms Findlay says that she is owed payment for her final 22 hours of work. Mr Murdoch did not disagree that an amount is owed. The statement of problem referred to 20 hours however I am prepared to accept Ms Findlay's oral evidence that 22 hours remain unpaid. At that time Ms Findlay was paid \$19 per hour. \$19 multiplied by 22 hours is the sum of \$418 gross.

Interest on money owing

[55] The Authority has the power to award interest under clause 11 of the second schedule of the Act. It is appropriate that the Authority order interest payable on unpaid wages as Ms Findlay has been without that money for a considerable period of time. I will calculate interest from 19 April 2019.

[56] Interest is payable as calculated under the Interest on Money Claims Act 2016 on \$418 from 19 April 2019 in the sum of \$18.24.

Holiday pay

[57] Although not claimed it did not appear that holiday pay has been paid. If so it is to be calculated as 8% on Ms Findlay's gross earnings. Either party can return to the Authority if there are difficulties about that.

Lost wages

[58] The Authority may, under s 128 of the Act where it finds a personal grievance and lost remuneration results, order reimbursement of lost wages.

[59] In her evidence Ms Findlay referred to health issues resulting in her being unable to work. She referred to a back injury and carpal tunnel resulting in her being put onto a sickness benefit.

[60] In the documents received from MSD Ms Findlay appeared to undertake some further work in April 2019 but only for a short period of about a month. She was paid for that work at a higher rate than she had been paid at Steves P & D.

[61] After that work was completed I am unable to conclude that the remuneration she lost was as a result of her dismissal and not because of her health issues. Her evidence was that her health issues prevented her working.

[62] I do not therefore make an award for reimbursement of lost wages.

Compensation

[63] The sum of \$23,000 is claimed for compensation. Ms Findlay after dismissal found her anxiety increased and struggled with leaving the house, shopping and spending time with friends and family. I also heard from Ms Findlay's son Daniel who confirmed that she had become socially anxious and did not want to go out. He confirmed the dismissal affected Ms Findlay mentally and financially. He said his mother had been treated very disrespectfully given the amount of work she had performed and she has lost confidence in herself.

[64] This is a case where there is evidence of significant humiliation, loss of dignity and injury to feelings. Ms Findlay was treated very disrespectfully and not in accordance with good faith obligations. She was accused of theft and then dismissed with no fair investigation process where she denied any involvement. There were accusations in a Facebook post expressed by Cameron the foreman. This incited others to express views and Ms Findlay was subject to threats. I have weighed with any financial impact the health concerns that may have resulted in her being unable to work in any event. The impact on Ms Findlay's mental health was significant and she has become reclusive and withdrawn. Interestingly against all of that very poor and quite distasteful treatment a significant concern when asked by the Authority was the loss of her friendship with Mr Murdoch and his family.

[65] Subject to contribution the sum of \$23,000 is an appropriate award in all the circumstances.

Contribution

[66] The Authority is required under s 124 of the Act where it determines that an employee has a personal grievance to consider the extent to which the actions of Ms Findlay contributed, if at all toward the situation, that gave rise to the personal grievance.

[67] The high point of any evidence about any causal connection between Ms Findlay and missing tools was that it was “thought things had gone missing.” Further three people knew where the key was. There was a grey car seen and two females got out at midnight at the property.

[68] There was no evidence before the Authority for a conclusion on the balance of probabilities that Ms Findlay was responsible for the break in. Ms Findlay was never questioned about that by the Police.

[69] The compensatory award is not reduced for any contribution.

Costs

[70] The investigation meeting occupied half a day. Ms Findlay was successful with her personal grievance. She was not successful in achieving a finding that Mr Murdoch was her employer. I will start in an assessment of costs with half of the daily tariff of \$4,500 that is \$2,250. Some of the evidence was related to the identity of the employer although most of the difficulty about that was caused by the absence of a written employment agreement. I make a moderate reduction in costs to reflect Mr Murdoch successfully resisted the claim that he was the employer taking all matters into account in the sum of \$300.

[71] Ms Findlay is also entitled to reimbursement of her filing fee of \$71.56.

Orders made

[72] I order Steves Painting & Decorating Limited (in liquidation) to pay to Deborah Findlay the sum of \$418 gross being unpaid wages and interest on that sum in the amount of \$18.24 calculated under the Interest on Money Claims Act 2016.

[73] I order Steves Painting & Decorating Limited (in liquidation) to pay to Deborah Findlay the sum of \$23,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

[74] I order Steves Painting & Decorating Limited (in liquidation) to pay to Ms Findlay the sum of \$1,950 being costs together with the sum of \$71.56 being reimbursement of the filing fee.

[75] The Authority has recorded that holiday pay does not appear to have been paid. That should if that is the case be calculated as 8% of gross earnings less any paid leave. Either party may return to the Authority if there are any difficulties about that aspect.

Helen Doyle
Member of the Employment Relations Authority