

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 274
3259659

BETWEEN QUENTIN RODGERS
Applicant

AND J.S. WRIGHT CONTRACTING
LIMITED (In Liquidation)
Respondent

Member of Authority: Lucia Vincent

Representatives: Paul Mathews, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 24 January 2024 in Christchurch

Submissions Received: 24 January 2024 from the Applicant
Further information received from the Applicant on 26
January and 15 April 2024 and from the Respondent on
30 January and 9 February 2024

Determination: 9 May 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Quentin Rodgers, claims the respondent, J.S. Wright Contracting Limited (In Liquidation)¹ (**JSW**), unjustifiably dismissed him from his full-time role as a truck driver and failed to pay him his wages for work completed. JSW claims it did not employ Mr Rodgers but engaged him as a contractor.

¹ The Companies Office Register records the company went into liquidation on 8 February 2024.

The Authority's investigation

[2] For the Authority's investigation a written witness statement was lodged by Mr Rodgers, he answered questions under oath, and his representative gave oral closing submissions.

[3] As permitted by s 174E of the Employment Relations Act 2000 (**the Act**) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[4] JSW did not participate in the investigation meeting. Although director and sole shareholder for JSW, Mr Jeffrey Wright, provided some information by email and telephone, he did not lodge a statement in reply nor provide a statement of evidence to support his assertions about contractor status.

[5] Several attempts were made to contact Mr Wright to ensure he was aware of and offered the opportunity to participate in the investigation meeting. This included sending correspondence confirming the date, time and location for the meeting to the registered office and address for service for JSW. Mr Wright responded to an email containing the date of the investigation meeting.² Attempts were made to contact him by telephone shortly before starting the investigation meeting. Despite this, Mr Wright contacted the Authority on the day of the investigation meeting claiming he had not been notified.

[6] I am satisfied sufficient steps were taken to ensure Mr Wright was aware of the investigation meeting. I find Mr Wright's absence for JSW did not have good cause. I proceeded in the absence of JSW as a party.³

[7] Mr Wright's communications included a claim JSW would be going into liquidation. The company remained registered as at the date of the investigation meeting but before writing my determination went into liquidation. The liquidator later gave permission to publish my determination.⁴

² Email dated 24 January 2024.

³ As provided for by clause 12, Schedule 2, Act.

⁴ As required by section 248 of the Companies Act 1993 and notified by the Applicant on 15 April 2024.

The issues

[8] The issues requiring investigation and determination were:

- (a) What kind of worker was Mr Rodgers – contractor or employee?
- (b) If Mr Rodgers was an employee:
 - (i) What type of employee was he – permanent, fixed term or casual?
 - (ii) Did JSW unjustifiably dismiss Mr Rodgers?
 - (iii) Did JSW fail to pay Mr Rodgers his wages and holiday pay?
 - (iv) If JSW’s actions were not justified, what remedies should be awarded, and should any remedies be reduced for any blameworthy conduct?

What kind of worker was Mr Rodgers – contractor or employee?

[9] Before starting work, Mr Rodgers and Mr Wright did not directly discuss whether JSW would employ Mr Rodgers or whether he would work within an independent contracting arrangement. Even if they had, I must examine the real nature of the relationship to determine which status applied.⁵

[10] The Supreme Court has summarised relevant principles when assessing whether a worker is a contractor or employee using the real nature definition:⁶

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analysing the tests that have been historically applied, such as control, integration and the “fundamental” test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice, although this is far from determinative of the primary question.

⁵ As required under section 6 of the Act.

⁶ *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [5], referring to the Employment Court’s decision.

[11] After the relationship ended and concerns were raised, Mr Wright claimed JSW engaged Mr Rodgers as a contractor who paid his own PAYE and not an employee.⁷ Because Mr Wright did not attend the investigation meeting, I was unable to ask him any questions, making it difficult to test his assertions about contractor status, especially where it was at odds with the evidence of Mr Rodgers. Consequently, I could only place limited weight on Mr Wright's claims.

[12] At the investigation meeting, Mr Rodgers said he always understood he was an employee because he would have asked for more money if he was a contractor. He frankly acknowledged he was unhappy with selling himself short in terms of the financial arrangements (particularly provision for food and accommodation). He said his price would have been higher again if he was contracting because he would have paid for fuel and road user charges too.

[13] Mr Rodgers' advocate submitted relevant tests pointed to an employment relationship because Mr Wright had overall control and direction of Mr Rodgers' work, and the arrangements did not support Mr Rodgers being in business on his own account.

[14] How the relationship started is a useful starting point for determining this issue. Mr Rodgers recalled seeing a Facebook post asking for someone willing to do floating work.⁸ Mr Rodgers messaged Mr Wright on or around 18 September 2023 in response to this post saying, "Hey man see you need a driver I can start asap in chch tho." Mr Wright responded saying, "Ok Kool bro um truck needs b in Hamilton bye Wednesday to load." Further messages discussed it being "about 5 weeks work," and Mr Rodgers noted "something better than nothing" as his current role only gave him one day. The two discussed pay of \$1,550 weekly (or \$3,100 fortnightly) in the hand. Mr Rodgers understood from all this that he would have up to five weeks work and would be paid even if he had to be parked up en route. Mr Rodgers acknowledged work was uncertain between locations.

[15] Consistent with their communications, Mr Rodgers started driving from Christchurch, making his way to Hamilton via Wellington. Messages after Mr Rodgers started driving then changed his next location - he would be going to Auckland after

⁷ Email to the Authority dated 6 November 2023.

⁸ Mr Rodgers said he could no longer find this post which may have since been taken down.

arriving in Hamilton. Mr Rodgers had previously understood he would be heading South sooner. Once down South, Mr Wright had wanted Mr Rodgers to meet him in Queenstown for a feed, beer and chat at the end of the floating stint to discuss future working arrangements.⁹ This was before a series of messages about work, perks and payment before the relationship rapidly deteriorated,¹⁰ resulting in a call from Mr Wright to Mr Rodgers saying he was letting him go on or around 26 September 2023.

[16] The messages Mr Rodgers provided copies of confirmed his recollections he started work on or around 20 September 2023 driving from Christchurch to Hamilton, before being flown home on 27 September 2023 at 6:15pm – about a week later. Logbook excerpts support this general timeline although like the messages, it was unclear from the copies provided what the exact timeline was including dates and times.

[17] After considering the evidence, I have found the real nature of the relationship was one of employment:

- (a) The financial arrangements were indicative of an employment relationship. Mr Rodgers depended on JSW for wages and work related expenses not typical of someone running their own business. For example, JSW provided accommodation and paid for fuel, road user charges and a flight home – incidentals someone running their own business (such as an owner driver) would tend to cover. Mr Wright and JSW covered these expenses, like an employer would. Mr Rodgers would have negotiated more money had he been working for himself. He had no ability to increase his income beyond an agreed rate for his work with JSW, consistent with his status as an employee.
- (b) JSW controlled Mr Rodgers' work including instructing him to change travel plans at short notice. Mr Wright directed Mr Rodgers where to go and when. The degree of control was evident from the messages and

⁹ Mr Wright said in a message, "I'll meet you when you bring the load down to queenstown I'll come up and sew ya, if you like it and work out all good I may just keep you in it for the duration of the contract, we can discuss that when you come down any way meet up at pub for a feed and beer in queenstown and chatt." The time and date of all of the messages was not immediately clear from the copies provided, however this particular message appeared to be on 20 September 2023.

¹⁰ For example, in a message on or before 23 September 2023, Mr Rodgers was "starting to get tad pissed" about not having received any payments from Mr Wright in his bank account.

Mr Rodgers' deference to Mr Wright's instructions including going to Auckland and parking up instead of heading South sooner (even if he expressed discontent about the change). Mr Rodgers had no flexibility to control his work how he saw fit like a contractor could.

- (c) Mr Wright's belated claims of contractor status should be treated with caution. He only claimed contractor status after the relationship had ended and concerns were raised by Mr Rodgers. He claimed Mr Rodgers paid his own PAYE which was odd given JSW did not pay Mr Rodgers for his work despite repeatedly promising to (and later refusing to).
- (d) JSW held Mr Rodgers out as a representative to others. For example, Mr Rodgers communicated with a representative from the company contracting JSW. This representative recognised Mr Rodgers as someone employed by JSW who would be impacted by the decision to supply their own driver and leasing the truck from JSW instead.
- (e) Mr Wright referred to "letting go" Mr Rodgers due to a lack of work, then denied having fired him and belatedly referred to a trial or probationary period. These phrases are typically associated with employees – not contractors. Although labels are not determinative, these phrases tend to suggest Mr Wright thought about Mr Rodgers as an employee of JSW and only later claimed contractor status.

What type of employee was Mr Rodgers – permanent, fixed term or casual?

[18] Having established Mr Rodgers was an employee, I must now consider what type of employee he was – permanent, fixed term or casual?

[19] On Mr Rodgers' own evidence, he had not secured a permanent job yet – he and Mr Wright would discuss that in Queenstown at a meal that never eventuated.

[20] There are elements of fixed term employment in the arrangements Mr Rodgers described. He thought he would work for up to five weeks although exactly how long and where within that period remained uncertain. A fixed term employee would require a

written employment agreement documenting the reasons, how it will end and why,¹¹ which JSW did not provide.

[21] Casual employees typically have no pattern of work, no expectations of guaranteed hours nor any obligation to accept any offers of work. The Employment Court has summarised common characteristics of casual employment relationships as follows:¹²

- Engagement for short periods of time for specific purposes;
- A lack of regular work pattern or expectation of ongoing employment;
- Employment is dependent on the availability of work demands;
- No guarantee of work from one week to the next;
- Employment as and when needed;
- The lack of an obligation on the employer to offer employment or on the employee to accept another engagement; and
- Employees are only engaged for the specific term of each period of employment.

[22] The Court also noted as an “important factor” in determining whether someone is permanent or casual, “The nature of the obligations owed by each party to one another and, in particular, an absence of any obligation on the employer to offer employment and, conversely, the employee to accept any particular engagement.”¹³

[23] When asked about what work he expected, Mr Rodgers said he expected five weeks’ work as a floating truck driver – a concept common in the transport industry. Mr Rodgers accepted it was uncertain with location and length of job varying and dependant on what an employer required at any given time. Mr Rogers’ advocate attempted to characterise a floating truck driver as someone who works permanently with solely location changing. Mr Rodgers’ evidence did not support that however.

[24] Mr Rodgers recalled that after a five week stint, he would be shouted a few beers by Mr Wright over a meal in Queenstown and he expected he would have a full-time

¹¹ Section 66 of the Act.

¹² *Baker v St John Central Regional Trust Board* [2013] NZEmpC 34 at [20].

¹³ At [23], *Baker*.

contract in front of him. When asked about when he would work within those five weeks Mr Rodgers said, “if they needed me to work, then I’d work.” When asked about whether they discussed hours, Mr Rodgers said not really, but that even if parked up he would still be paid, although logbook rules affected when he could work. Although his last floating arrangement had lasted a year, that was for a bigger employer able to offer more consistent work. He accepted he could have said no to a text asking him to drive to a particular location and completed several different floating jobs. He described a key difference between floating and full-time work as being guaranteed to be sleeping in the truck for floating whereas he would have had a set run and full-time work for a permanent role.

[25] I accept the submission that if I found the floating truck driver role was for a fixed term, it would not have met the requirements of section 66 of the Act. The concept of a floating driver as described by Mr Rodgers is not a comfortable fit, however. Mr Rodgers expected up to five weeks work but conceded Mr Wright might change plans, and he could say no to any engagement, albeit he may have to find his own way home.

[26] I find the arrangements described by Mr Rodgers best fit the characteristics for casual employment – he drove the truck where and when required as and when he was available. That the engagements were up to five weeks but depended on where he might be required after reaching the next location supports this. Mr Rodgers accepted he did not know where he would be going for that full period which was subject to contingencies like location and JSW’s contract requirements. It could have ended earlier, and did.

[27] I find that Mr Rodgers was a casual employee.

Did JSW unjustifiably dismiss Mr Rodgers?

[28] Having decided Mr Rodgers was a casual employee of JSW, I must now consider whether JSW unjustifiably dismissed him.

[29] As well as claiming contractor status, Mr Wright claimed he did not fire Mr Rodgers. He said he had no more work for him and did no wrong by letting him go. However, at that time, Mr Rodgers had accepted an engagement that would take him to Auckland (even if he was unhappy about it). Mr Wright’s call cut this short when JSW’s contract for work ended prematurely and he told Mr Rodgers he was letting him go on 26

September 2023. Another phone call between Mr Rodgers and Mr Wright followed. Mr Rodgers says Mr Wright told him he did not have a job and referred to a 90-day trial period.

[30] I find JSW dismissed Mr Rodgers when Mr Wright told him he was let go on 26 September 2023. This was reinforced the next day by a further message from Mr Wright to Mr Rodgers on 27 September 2023 at 8:17am that said “booking u a flight bro today” as the company are putting their own employee in his rig or they will lease it. Mr Rodgers replied at 8:30am saying “so I have no job now cheers.” Mr Rodgers flew home at 6:15pm that night as a message snapshotting flight details confirmed.

[31] Following the above timeline, Mr Rodgers’ dismissal occurred during an agreed engagement as an employee going to Auckland, which would have last at least beyond his dismissal on 26 September 2023. Although the engagement had some variables in that it would only have lasted as long as it took to drive to Auckland, Mr Rodgers was entitled to be treated fairly during that engagement including if it was to end prematurely before driving to Auckland. JSW should have followed a fair process before telling Mr Rodgers his employment had ended. It did not.

[32] Once an engagement is in place for a casual employee, an employer must act in a fair and reasonable way before deciding to dismiss including having a good reason and after following a fair process. A casual employee can succeed in a personal grievance for unjustified dismissal if they are dismissed without substantive and procedural justification during an agreed engagement.¹⁴

[33] JSW did not follow any process before ending Mr Rodgers’ engagement as required by section 103A of the Act and the duty of good faith. JSW unjustifiably dismissed Mr Rodgers in terms of section 103(1)(a) of the Act.

Did JSW fail to pay Mr Rodgers his wages and holiday pay?

[34] JSW did not pay Mr Rodgers wages for his work between 20 and 26 September 2023. It follows JSW did not pay Mr Rodgers his holiday pay either.

¹⁴ See for example, *Surplus Brokers Limited v Armstrong* [2020] NZEmpC 131 at [20].

[35] JSW owes Mr Rodgers \$1,550 (net). Mr Rodgers has sought holiday pay on these unpaid wages. This amounts to eight percent totalling \$124 (net).¹⁵

[36] JSW owes Mr Rodgers the following amounts:

- (a) Payment for one week's work totalling \$1,550 (net); and
- (b) Holiday pay of 8% on the above amount totalling \$124 (net).

[37] Mr Wright was the sole director and shareholder managing JSW when it employed Mr Rodgers. I find he was a person involved in the breach of the failure to pay Mr Rodgers his wages and holiday pay in terms of section 142W of the Act. I grant leave under section 142Y of the Act to Mr Rodgers to recover his wages and holiday pay from Mr Wright personally to the extent that JSW defaults in payment to him.

What remedies are owing?

Compensation

[38] Mr Rodgers described the impact of his dismissal as significant. He has issues trusting others and fears history repeating itself with his new employer causing considerable anxiety. He said that he got back to work after four to five weeks and has a full-time job now which he is happy in. He talked about having to get an extension on his credit card and using KiwiSaver to help him with basics like food and making payments on his Ute. He recalled being short with his father and reflected on having felt he was treated like “a load of crap at the side of the road.”

[39] I may award payment of compensation for humiliation, loss of dignity and injury to feelings of the employee.¹⁶ I have considered the extent of the harm Mr Rodgers suffered, where it sits when compared with other cases, then stepped back and assessed what I consider a fair and just amount in the circumstances.¹⁷ I am satisfied an award in the sum sought of \$10,000 is appropriate.

¹⁵ Section 23 of the Holidays Act 2003.

¹⁶ Section 123(1)(c)(i) of the Act.

¹⁷ See for example, *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [153] to [164]. General trends in recent compensation levels can be found at Compensation for personal grievance claims: Jul - Dec 2023 » Employment New Zealand.

Remuneration lost

[40] Mr Rodgers seeks another four weeks wages based on his employment being up to five weeks work, totalling another \$6,200 (net). I may award reimbursement of a sum equal to the whole or any part of the wages or other money lost by Mr Rodgers because of his grievance.¹⁸

[41] Having found Mr Rodgers worked casually for JSW, he cannot claim for remuneration beyond his engagement at the time of his dismissal. Arrangements for and driving to Auckland were likely to have lasted less than one week (the basis on which he was paid). I award wages for the engagement of \$1,550.

Contribution?

[42] I have considered whether Mr Rodgers contributed to the circumstances giving rise to his personal grievance.¹⁹ I find he did not.

Penalty

[43] Mr Rodgers sought a penalty of \$3,000 with 75% payable to him for JSW's breach of section 4 of the Wages Protection Act 1983 by withholding his wages amounting to an unlawful deduction.²⁰ I agree there was a degree of deliberateness by Mr Wright who was recorded saying in a voicemail and in writing that he would hold back Mr Rodgers pay because of what he had done.

[44] Section 133A sets out compulsory considerations when determining an appropriate penalty. These include the object of the Act (including recognising the inequality of power in employment relationships), the nature and extent of any breach, whether it was intentional, inadvertent or negligent, the nature and extent of any loss or damage suffered by any person, whether the person in breach paid compensation, reparation, restitution or taken other steps to avoid or mitigate any actual potential adverse effects of the breach, and the overall circumstances of the breach, including the vulnerability of the employee and any prior offences. This is a non-exhaustive list of

¹⁸ Section 123(1)(b) and 128 of the Act.

¹⁹ As required by section 124 of the Act.

²⁰ Pursuant to section 13 of the Wages Protection Act 1983.

considerations that are potentially relevant when determining an appropriate penalty for any breach. I have also had regard to case law relevant regarding penalties generally.²¹

[45] Deliberately withholding wages warrants a penalty. Although I accept JSW may have a problematic financial situation that could have resulted in payment delays (and may also affect any ability to pay a penalty), the deliberate disregard of a fundamental requirement to pay wages to an employee who has performed work is concerning. Mr Rodgers has been unable to obtain payment except through the Authority. Mr Rodgers performed work in good faith and has been without payment for a significant period. Weighing against this are factors such as JSW appearing to have had no prior offences and a likely limited ability to pay. In all the circumstances I consider it appropriate to award the amount sought of \$3,000 with 75% paid to Mr Rodgers.²²

Costs

[46] Mr Rodgers' advocate sought costs. The investigation meeting took less than half a day. I award costs based on our usual approach and assess an appropriate amount at approximately one third of the daily tariff of \$1,500.²³

Summary of Orders

[47] I order JSW pay Mr Rodgers:

- (a) Payment for one week of wages totalling \$1,550 (net);
- (b) Holiday pay of 8% on the above amount totalling \$124 (net);
- (c) Payment for a further week of wages totalling \$1,550 (net);
- (d) Compensation of \$10,000; and
- (e) Costs of \$1,500.

[48] I order JSW to pay a penalty of \$3,000 with 25% to the Crown and 75% to Mr Rodgers.

²¹ See for example *A Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143.

²² Section 136 of the Act.

²³For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

[49] I have granted leave to Mr Rodgers to seek payment of wages and holiday pay from Mr Wright personally to the extent that JSW cannot pay the amounts set out in paragraph [47](a)-(b) above.

Lucia Vincent
Member of the Employment Relations Authority