IN THE EMPLOYMENT COURT
WELLINGTON

WC 16/09
WRC 36/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	YIANNIS TSOUPAKIS Plaintiff
AND	FENDALTON CONSTRUCTION LIMITED Defendant

Hearing: 8 June 2009
(Heard at Wellington)

Appearances: MV Smith, Counsel for Plaintiff
Michael Gould, Counsel for Defendant

Judgment: 18 June 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The first issue on this challenge from a determination of the Employment Relations Authority is whether Yiannis Tsoupakis was an employee of Fendalton Construction Limited ("Fendalton") entitling him to the rights (and imposing the obligations) of employees under the Employment Relations Act 2000 ("the Act"). If Mr Tsoupakis was Fendalton's employee when dismissed, the Court must determine the justification for termination and, if unjustified, remedies for this personal grievance.

[2] In November 2008 (determination WA 152/08) the Authority determined that Mr Tsoupakis was not an employee and therefore it did not consider whether he had been dismissed unjustifiably. Mr Tsoupakis having elected to challenge this

determination by hearing de novo, the Court must make its own decision on each of the issues on the evidence before it.

The law

[3] The starting points for determining whether Mr Tsoupakis was an employee are the relevant provisions of the Act and the judgment of the Supreme Court in *Bryson v Three Foot Six Ltd (No 2)* [2005] ERNZ 372. Section 6 requires the Court to consider and determine the real nature of the relationship between Mr Tsoupakis and Fendalton. The inquiry in each case is intensely factual.

[4] Section 6 is as follows with words and phrases particularly relevant to the determination of this case underlined:

> ***6 Meaning of employee***
> *(1) In this Act, unless the context otherwise requires, **employee**—*
> *(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
> *(b) includes—*
> *(i) a homeworker; or*
> *(ii) a person intending to work; but*
> *(c) excludes a volunteer who—*
> *(i) does not expect to be rewarded for work to be performed as a volunteer; and*
> *(ii) receives no reward for work performed as a volunteer.*
>
> *(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
>
> *(3) For the purposes of subsection (2), the Court or the Authority—*
> *(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*
>
> *(4) Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 1976 or the Sharemilking Agreements Act 1937.*
>
> *(5) The Court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—*
> *(a) employees under this Act; or*
> *(b) employees or workers within the meaning of any of the Acts specified in section 223(1).*

(6) The Court must not make an order under subsection (5) in relation to a person unless—

(a) the person—

(i) is the applicant; or

(ii) has consented in writing to another person applying for the order; and

(b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.

[5] Next, the most authoritative interpretation and application of s6 was by the Supreme Court in *Bryson*. Principles in deciding cases such as this, identified by the Supreme Court, include:

- Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law.

- The Authority or the Court, in deciding whether a person is employed under a contract of service, is to determine "*the real nature of the relationship between them*": s6(2).

- The Authority or the Court must consider "*all relevant matters*" including any matters that indicate the intention of the persons: s6(3)(a).

- The Authority or the Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship: s6(3)(b).

- "*All relevant matters*" include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship.

- "*All relevant matters*" will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.

- "*All relevant matters*" include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

- Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental tests.

- Industry practice, while not determinative of the question, is nevertheless a relevant factor.

- Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.

- Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.

Background facts

[6] Mr Tsoupakis is a tradesman painter. Between September 2005 and March 2006 he worked for Fendalton and returned to undertake further work for the company between 12 February 2007 and 27 March 2008 when he was told that his services were no longer required. For the first period of his engagement in 2005/2006, Mr Tsoupakis acknowledges he was not an employee but an independent contractor.

[7] Fendalton contracts to the construction industry and, in particular, provides painters, plasterers and decorators pursuant to subcontracts with building construction firms. Much of its work is also insurance repair work under contract to insurance companies but it tenders for and does other painting and decorating. It has a number of property-owning customers including High Commissions and

Embassies. Fendalton has both what it describes as employed staff and non-employed (contractor) staff. I will refer to both groups generically as "staff". The latter are generally paid more per hour than employees to compensate for lost benefits such as holidays and to meet necessary levies such as ACC premiums. Fendalton staff (both employed and independent contractors) work at different sites in the greater Wellington area providing their own basic tools of trade but relying on the company to supply specialist equipment when necessary. Staff (both employees and contractors) are provided with mobile telephones by Fendalton to keep in touch with it.

[8] Although Fendalton's painters are expected to work at least 40 hours per week, they are able to do additional hours if work is available. The level of supervision of painters differs from job to job and may be as minimal as a telephone call to a client after a small job to ensure satisfaction with the work. Travelling time and costs may be reimbursed by Fendalton if that is contracted for with its client. Fendalton instructs each painter about which jobs they will be responsible for and checks the hours claimed by them against its estimates of time for the job.

[9] Fendalton's staff categorised by it as employees are provided with a written employment agreement as required by law. Consistent with its view of his status, no such agreement was provided by Fendalton to Mr Tsoupakis.

[10] Mr Tsoupakis is a Greek migrant who has lived in New Zealand for about 24 years. As well as English still clearly being his second language, he has a very limited understanding of commercial arrangements including taxation. Despite having experienced extended periods of unemployment, almost all Mr Tsoupakis's work experience in New Zealand has been as a tradesman painter. In that role, he has been both an employee and self-employed. Although in part to earn a reasonable income from a modestly remunerated trade, Mr Tsoupakis is a hard worker unafraid to work 7 days per week and on public holidays.

[11] As already noted, between September 2005 and March 2006, Mr Tsoupakis worked for Fendalton. He concedes that he did so as a self-employed contractor and not as an employee. This was the only period of his work in New Zealand arguably

other than as an employee. During that first period of engagement by Fendalton, Mr Tsoupakis was helped by the company to buy an invoice book and to invoice it weekly for the hours he worked. At first, Mr Tsoupakis was unaware that he had to add GST to his invoices and believed that he could claim the costs of travel from Fendalton. It assisted him with advice about adding GST and deducting withholding tax. In the event, Mr Tsoupakis did not then register with the Inland Revenue Department for GST and this caused subsequent tax problems that had to be sorted with the help of a tax adviser.

[12] After that initial engagement with Fendalton, Mr Tsoupakis worked as an employee for another painting company. The circumstances in which he came to be re-engaged by Fendalton are the subject of a stark dispute between Mr Tsoupakis and Fendalton's witnesses but which are not crucial to the outcome of the case. It is agreed that the plaintiff was re-engaged by Fendalton in early February 2007. His hourly rate was $21 but this was increased to $23 within a matter of a few weeks of starting work for the company and subsequently to $25 before the end of that work.

[13] The terms of Mr Tsoupakis's engagement were not recorded in writing despite what I find were the plaintiff's repeated requests for a copy of his contract. At the time, Fendalton had painters whom it said were employees and others whom it said were independent contractors to it. Although Fendalton had standard forms of written agreement for each category of painter, none was ever completed for Mr Tsoupakis. Fendalton's standard written contract with its self-employed painters existed both as a template and in the form of individualised contracts for some painters. However, no evidence of any such writing was produced to the Court. It follows that the terms and conditions of Mr Tsoupakis's engagement by Fendalton must be established by what happened in practice and this is largely, but not completely, undisputed.

[14] Fendalton is a supplier of building services including plastering and carpentry as well as painting. Its work came from a combination of insurance repairs, building maintenance and some new construction work. It was based in Petone and operated throughout the greater Wellington region. Mr Tsoupakis lived in Kilbirnie and although sometimes starting work at Fendalton's Petone base, most often drove in

his own vehicle to and from different jobs assigned to him, sometimes as frequently as on a daily basis, by Fendalton.

[15] The remuneration practices that had applied between the parties when Mr Tsoupakis first worked for Fendalton, resumed and operated throughout this second period of engagement. Mr Tsoupakis filled out a daily work record supplied to him by Fendalton. This included the details of the hours that he worked on particular jobs, the address of the job and, if it was located more than 50 kilometres from Fendalton's base, the distance travelled by him in which cases he was able to re-claim costs of travel if these had been negotiated between Fendalton and the property owner or insurance company to which it contracted for painting work.

Facts affecting work status

[16] The following are the features of Mr Tsoupakis's work for Fendalton that tend to favour a conclusion that he was not an employee of the company.

[17] Mr Tsoupakis had his own business card indicating, at least implicitly, that he was available for contract work. However, this or a predecessor card had been created and subsequently reproduced on the recommendation of Work and Income New Zealand at a time when he was unemployed and, I infer, in an attempt to assist him to obtain income. There was no evidence that he used this card to solicit business for himself whilst working for Fendalton.

[18] Mr Tsoupakis completed his claims for remuneration in an invoice book from which he submitted weekly invoices for payment to Fendalton. The company deducted PAYE tax at the relevant withholding tax rate as calculated by Mr Tsoupakis and referred to expressly in his invoices.

[19] There was no written agreement between the parties as would have been consistent with employment status although this is probably a neutral factor as the evidence establishes that Fendalton also had written agreements with its self-employed contractors.

[20] Mr Tsoupakis worked principally alone and not supervised constantly although, on larger or longer jobs, he was sometimes provided with additional labour by Fendalton. He was also subject to site supervision, especially on longer or more complex jobs, a factor favouring employment status.

[21] Mr Tsoupakis had his own motor vehicle sign-written, advertising his trading name and with his own personal mobile telephone number. Neither his business cards nor his sign-written car referred to Fendalton.

[22] Mr Tsoupakis's business card described him as a *"Director"* of *"TJ Painters and Decorators"*, his own trading entity. The plaintiff had his own accountant who prepared tax returns for him as a sole trader.

[23] Mr Tsoupakis worked on weekends and public holidays for no greater rate of remuneration than during ordinary business hours. He did not report to his employer's premises often but, rather, travelled directly to and from jobs to which he was assigned. Mr Tsoupakis met his own costs of travel to work unless this took place more than 50 kilometres away from Fendalton's base and it had agreed to recover travelling money under its contracts.

[24] The following facts tend to indicate a relationship in the nature of employment.

[25] Mr Tsoupakis's timesheets and invoices were submitted to Fendalton for approval on a weekly basis. Income tax was deducted by Fendalton from the amounts that he invoiced to the company. There was no written agreement between the parties.

[26] Fendalton provided Mr Tsoupakis with some tools of trade and all consumables including paint, thinners, turps, and rags. It provided him with a company mobile telephone and met the charges for this so that Mr Tsoupakis could report regularly from jobs and could be assigned to others as circumstances changed.

[27] Mr Tsoupakis was given work on a daily basis including by detailed work directions faxed to his home. These requirements of him included quite precise

instructions by Fendalton of the methods of preparation and painting to be employed, the materials to be used, the volumes of paint to be used, and the like. Mr Tsoupakis could be redirected to other jobs as and when Fendalton required this for its own purposes including in the midst of other jobs to which he had been assigned. Except where a job involved about 1 day or less work, Mr Tsoupakis's work was inspected and checked for acceptability by Fendalton.

[28] The company estimated in advance the details of particular jobs including time to be taken, volume of paint to be used and the like, and expected the plaintiff to adhere to these criteria of which he was advised.

[29] Mr Tsoupakis was held out by representatives of Fendalton, and presented himself, as a Fendalton staff member. His services had to be performed personally and were not able to be delegated by him to another or others. Mr Tsoupakis's work was full time and he was expected not to undertake other work, whether for others or even for himself as an independent contractor.

[30] There were time limits on the work assigned by Fendalton to him to which he was expected to adhere. Mr Tsoupakis was required to check in with the company when he finished work on a particular job and, if appropriate, expected to be reassigned to other work on the same day to assist Fendalton in meeting its numerous contractual obligations.

[31] Despite Fendalton witnesses claiming that Mr Tsoupakis was free to decline any particular job offered to him, the plaintiff himself felt strongly constrained to accept all work assigned to him by the company and did so.

[32] Mr Tsoupakis purchased materials from paint shops as required for particular jobs and as specified by Fendalton on the company's trade accounts, thereby acting as a representative or agent of the company in this respect.

[33] Mr Tsoupakis had no opportunity to profit from his special relationship with Fendalton other than by payment fixed for his hourly labour. He took no financial

risk in the parties' relationship, or at least no risk other than employees take in an employment relationship.

Common intention

[34] It is difficult, if not impossible, to discern a mutual intention of the parties as to the nature of their relationship. While Fendalton intended that they resume a previous non-employment relationship, Mr Tsoupakis, including from the outset and repeatedly during the course of his engagement, intended that he be an employee of Fendalton. It follows that there was no discernable mutual intention as to the nature of the parties' contractual relationship as may have been evidenced by an agreement in writing between them. Indicia of performance of the contract consistent with a non-employment relationship were imposed by Fendalton on Mr Tsoupakis and, by a combination of his relative powerlessness in the relationship, his ignorance of business practice, and his wish to earn as much money at modest rates of remuneration as he could, he accepted reluctantly.

[35] I am satisfied that irrespective of who approached whom in early 2007 about Mr Tsoupakis working for Fendalton, there were no express discussions about the nature of their intended relationship. Mr Tsoupakis simply began work as invited to by Fendalton after he had worked out notice of the termination of his previous employment. The only inference able to be drawn in these circumstances is that the re-engagement began on the same terms as those on which Mr Tsoupakis had been engaged previously with Fendalton. Although he accepts that the previous engagement was not as an employee and there were few significant differences between the two periods of engagement in the way that Mr Tsoupakis worked, such a concession is not determinative of the real nature of the relationship between the parties, at least during the second period of engagement. Indeed, if there were substantial similarities between the two engagements, Mr Tsoupakis's concession about the nature of the first period of engagement may be of doubtful accuracy.

Industry practice

[36] Only limited evidence was led by the parties in this regard and largely in relation to Mr Tsoupakis himself. The evidence of industry practice is neutral in the sense that it establishes that companies such as Fendalton both engage self-employed painters and employ others as employees. There is no evidence as to why employers in this industry, including Fendalton, may prefer engagements of self-employed contractors in circumstances in which it had a mixed workforce.

Control test

[37] Fendalton controlled the plaintiff's work activities, not only as to what he did but as to how and when he did it. Mr Tsoupakis worked under a general direction that jobs had to be turned around promptly, he had to account in detail for his hours of work, and he had no ability to organise his work as he chose or to delegate it.

[38] The defendant's core business was, among other building functions, painting and decorating and Mr Tsoupakis's work could not be categorised as an accessory or adjunct to it.

[39] Although the plaintiff provided some of the tools of his trade, this was in the same manner as employed tradespeople do. Other tools and ancillary equipment were provided as required by Fendalton.

[40] Fendalton exercised a high degree of control over Mr Tsoupakis's work, not merely generally but very particularly, including requiring him to comply with detailed directions as to time, quantities, particular materials to be used, and the like. In Fendalton's view and perhaps theoretically, Mr Tsoupakis was in reality constrained from working for anyone else or indeed for himself as a painter. The degree of Fendalton's control of Mr Tsoupakis and his work was more consistent with his status as an employee than as an independent contractor.

Integration test

[41] Despite some elements of independence including such as having his own business cards and the sign-writing on his vehicle, Mr Tsoupakis was an integral part of Fendalton's business in the way that one would expect of an employee. He was held out as a member of Fendalton's staff. Although Mr Tsoupakis may have been invited to Fendalton's end of year contractors' and customers' party rather than to its employees' party, this does not affect materially my conclusion that the degree of integration of the plaintiff into its business was more consistent with employment than not.

[42] Significantly, Mr Tsoupakis was paid for the time that he worked and not a pre-arranged fee for each job.

[43] Mr Tsoupakis was occasionally directed from one job assigned to him to fix or repair other painters' work for which he was paid by Fendalton at his applicable hourly rate.

[44] Although the plaintiff was expected to and did provide his own paint brushes, Fendalton supplied paint roller sleeves that are in many respects the equivalent of brushes, albeit replaced more frequently and, indeed, on occasions Fendalton replaced his paint brushes. Although Mr Tsoupakis had some of his own basic painting and associated gear, Fendalton supplied occasionally required equipment such as scaffolding, wall brackets, additional dust sheets, and the like.

[45] Despite some indicia apparently to the contrary, I am satisfied that Mr Tsoupakis was not in business on his own account vis-à-vis Fendalton. That he may not have been trained by Fendalton is a neutral factor in this case because he was engaged as an experienced tradesman and expected to work only within the range of his capabilities as such.

Decision on status

[46] The real nature of the relationship was that of employer and employee. It follows that Mr Tsoupakis is entitled to the employee benefits of the Act.

Justification for dismissal

[47] Little, if any, justification for Fendalton's termination of its engagement of Mr Tsoupakis was advanced by the company. That is perhaps understandable because, having assumed erroneously that he was not an employee, Fendalton dismissed Mr Tsoupakis summarily, purportedly for redundancy as a result of a downturn in business. Although there is some evidence to support such a general downturn, it is significant that it appears to have emerged only for the first time in legal proceedings after the dismissal that Fendalton had a second motive for dismissing Mr Tsoupakis. This was that he was alleged to have been involved in an altercation with another company tradesman on a site and that one of the company's *"blue chip"* clients, the Canadian High Commission, had indicated its wish that the plaintiff not be present on its premises. This allegation against Mr Tsoupakis was not made known to him nor investigated by Fendalton, at least in a way that involved the plaintiff. Despite the downturn in Fendalton's business at about the time of his dismissal, the company continued to have painters, such as the plaintiff had been, on its staff.

[48] In these circumstances, Fendalton has not met the test of justification for dismissal set out in s103A of the Act, namely that the dismissal and how the employer went about it was what a fair and reasonable employer would have done in all the circumstances at the time. Basic employment law expectations of fairness and reasonableness, well established by case law and now and at relevant times by s4 of the Act, required Fendalton not to simply dismiss summarily on suspicion of misconduct as it did. Nor was summary dismissal for redundancy, without more, in compliance with established case law or, now, s4.

Remedies

[49] So Mr Tsoupakis having been dismissed from employment unjustifiably, it is necessary now to turn to remedies.

[50] Mr Tsoupakis claims distress compensation under s123(1)(c)(i) of the Act although no, or at least no adequate, evidence was led to support this claim. It is well established that the Court cannot, by speculation, assume such consequences of dismissal in the absence of evidence and the plaintiff's claim to s123(1)(c)(i) compensation fails for want of proof.

[51] Turning to Mr Tsoupakis's claim to reimbursement of lost remuneration, there is evidence of these losses. Although the company experienced a downturn in work at about the time the plaintiff was dismissed, it nevertheless retained other painters so that it is not able to establish the inevitability of the loss of Mr Tsoupakis's job if he had not been dismissed unjustifiably as and when he was. The plaintiff did attempt to mitigate his losses and, indeed, obtained alternative work after some time, although not as remunerative as he had with Fendalton.

[52] Mr Tsoupakis claims $18,764.50, being the difference between what he actually earned in the 12-month period after his unjustified dismissal ($41,479) and his earnings during the year 1 April 2007 to 31 March 2008 ($60,243.50). The latter figure of $60,243.50 excludes appropriately GST which, as an employee, would not have been chargeable by Mr Tsoupakis. He has produced evidence of both his replacement work attempts and of his earnings when he did obtain alternative work.

[53] The defendant did not challenge seriously the amount of Mr Tsoupakis's lost remuneration, whether by contending that he did not seek to mitigate his losses, as I accept he did, or otherwise. In these circumstances I find Mr Tsoupakis's claims to be to his actual losses consequent upon his unjustified dismissal and allow recovery of that sum of $18,764.50 accordingly.

[54] Mr Tsoupakis is entitled to costs, both in this Court and in the Authority. If these cannot be settled between the parties within 1 month of the date of this judgment, Mr Tsoupakis may apply by memorandum with Fendalton having 14 days thereafter to respond.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Thursday 18 June 2009