ARBITRATION AWARD

Arbitrator: Julia Cameron
Case Reference No.: PERFBC 27516
Date of award: 4 December 2013

In the arbitration between:

Frederick Bosch **Union/Employee party**

and

Fast & Furious Distribution (Pty) Ltd **Employer party**

Union/Employee's representative: Ms L Neveling

Union/Employee's address: PO Box 12568
Port Elizabeth
6006
Telephone: 041 365 2841 **fax:** 041 365 2841

Employer's representative: Mr L Vermaak

Employer's address: 137 Grahamstown Road
Deal Party
Port Elizabeth
6001
Telephone: 011 552 4900 **fax:** 086 275 3155

DETAILS OF HEARING AND REPRESENTATION:

1. This matter was scheduled for arbitration in terms of section 191 of the Labour Relations Act 66 of 1995 ("the LRA") at the National Bargaining Council for the Road Freight and Logistics Industry (NBCFRLI) in Port Elizabeth on 4 December 2013. The applicant, Mr Frederick Bosch, was represented by his attorney, Ms L Neveling. The respondent, Fast & Furious Distribution (Pty) Ltd, was represented by Mr L Vermaak of the Guardian Employer's Organisation (GEO).
2. An application by Ms Neveling to represent the applicant at the arbitration was granted at the outset of the hearing.

ISSUE IN DISPUTE:

3. The purpose of this arbitration is to determine whether the NBCRFLI has jurisdiction to arbitrate the dispute referred to it by the applicant and, if so, whether the respondent unfairly dismissed the applicant.

BACKGROUND OF THE DISPUTE:

4. The applicant entered into a Service Level Agreement (SLA) with the respondent in November 2011 whereby he agreed to deliver and collect parcels for and on behalf of the respondent, which service was conducted as a subcontractor in terms of the SLA. On 29 August 2013, the respondent terminated the SLA between it and the applicant, due to alleged serious breaches of the SLA.
5. The applicant thereafter alleged that he had an employment relationship with the respondent and that he had been unfairly dismissed, and he referred a dispute to the NBCRFLI for adjudication.
6. The respondent challenged the jurisdiction of the NBCRFLI to arbitrate the dispute, arguing that the applicant was an independent contractor and not an employee in terms of section 200A of the LRA.

SURVEY OF ARGUMENTS:

7. The respondent argued that it entered into a SLA with Swiftdel Transport CC ("the CC") of which the applicant was not a member (the applicant's wife was the sole member of the CC which had been in business at least from 6 July 2010).
8. The CC used the applicant to provide services to the respondent in terms of the SLA.
9. The respondent had therefore not entered into any contract with the applicant.
10. Furthermore, the SLA between the respondent and the CC was one of an independent contractor, as clearly outlined by the SLA itself.
11. The applicant provided a service on behalf of the CC whereby he delivered and collected parcels in his own vehicle, for which services the CC invoiced the respondent and charged VAT. No other tax payment or deduction was made by either of the parties in terms of the invoice.
12. The respondent has entered into SLA's with a further seven drivers, all of whom have different routes that they service.
13. The parties addressed the council on all of the relevant aspects to be considered when determining whether an applicant is an employee or an independent contractor. In short it is common cause that:
    - The applicant was expected to attend the respondent's premises at 06h30 on Monday, Wednesday, Thursday and Friday in order to collect the parcels that were to be delivered. The applicant did not have to report back to the respondent's premises after delivering the parcels.
    - The applicant was paid per parcel delivered or collected. The time taken to complete the deliveries and collections was dependent on the number of parcels.
    - If a parcel was to be collected from a venue on the applicant's route he was contacted by the respondent and instructed to collect it for which a fee was paid to the applicant.
    - Due to a dispute regarding the actual route of the applicant he refused to collect parcels on a few occasions. No action was taken against the applicant for his refusal to collect the parcels.

- The applicant was on occasion contacted after hours in order to collect parcels. On his own version the applicant collected the parcels as the other drivers did not want to work at that time. (It was the version of the respondent that after hours collections were done on request and not by instruction. The applicant wanted to do more collections in order to increase his income).
- The applicant used his own vehicle, however, he had to wear a shirt provided by the respondent and he had to use a mobile tracking device in his vehicle also provided by the respondent.

14. The applicant argued that he was subjected to the control of the respondent as he had to take instructions from the respondent, and furthermore, because there was a restraint of trade clause in the SLA.
15. The respondent argued that the applicant was not obliged to work only for the respondent, on condition that he did not work in competition to the respondent. It was common cause that the applicant sold second hand vehicles from his home from time to time.
16. The applicant argued that he was an integral part of the organisation as he provided a transport service which was the main purpose of the organisation.

ANALYSIS OF ARGUMENTS:

17. Section 200A of the LRA is relevant to the dispute and needs to be considered. This section states that an applicant is presumed to be an employee regardless of the form of contract, if any one or more of a number of factors are present in the working relationship.
18. Firstly, although the applicant received instructions from the respondent from time to time regarding collections that needed to be done, these instructions were complied with in terms of the SLA obligations of the service provider and the route for which the service was provided.
19. Furthermore, the control of the respondent over the applicant was to the extent that the applicant was contracted to perform specific work that had a specific outcome.
20. Secondly, the applicant's hours were not subject to the control of the respondent, save for the fact that he was expected to attend the respondent's

premises at 06h30 in order to collect the parcels for delivery. The applicant did not have to report back to the respondent's premises when he completed his deliveries, and the time taken to do his work was variable.

21. Thirdly, should the applicant have not been available to perform the task of driving, the task would merely have been passed on to another driver contracted to the respondent. There is nothing before me to show that the applicant was a part of the organisation that could not be done without.
22. Fourthly, it was conceded by the respondent that the applicant did work for more than 40 hours per month. However, I am not convinced that this factor alone can enable one to conclude that the applicant was an employee of the respondent. Rather, the hours worked were determined by the customers of the respondent and the ongoing service that was provided. Furthermore, it was not disputed that the applicant requested to do more deliveries and collections in order to increase his income.
23. Fifthly, although the applicant relied on the income that he received from the respondent, there was nothing precluding him from earning income elsewhere as he did not work a full week or full days for the respondent.
24. Sixthly, the applicant provided his own vehicle for the delivery and collection of the parcels. The shirts provided to him by the respondent would not to my mind be considered as tools, and the mobile tracking device served the purpose of maintaining standards and ensuring the quality of work provided by the applicant.
25. Finally, as has been mentioned above, nothing precluded the applicant from rendering another service to another organisation.
26. Ultimately, the intention of the parties in the current matter must be taken into consideration.
    - The applicant entered into an SLA with the respondent via a CC of which he was not a member.
    - The SLA refers very clearly to the applicant as a "sub contractor", and stipulates that it does not constitute an employer/ employee contract (it is acknowledged that this is not the only indication of the nature of the contract).
    - The applicant used his own vehicle to conduct the task for which he was contracted.

- The applicant invoiced the respondent according to the number of parcels that he delivered and collected.
- The applicant was a VAT vendor and did not pay PAYE.
- The applicant did not enjoy any benefits of an employee.

27. When taking into consideration these factors, I am not convinced that the parties entered into the SLA with the intention to form an employment relationship, and nor can I conclude that the applicant was ever under the impression that he was in fact an employee of the respondent.
28. In light of the above analysis, I must find that the applicant does not fall under the definition of an employee as intended in the LRA.

AWARD:

29. The NBCRFLI lacks the jurisdiction to arbitrate the dispute.

Signed and dated at Port Elizabeth on 4 December 2013

NBCRFI Arbitrator: Julia Cameron