

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC 77
ARC 88/09**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN MARK JAMES POULTER
Plaintiff

AND ANTIPODEAN GROWERS LIMITED
Defendant

Hearing: 27 April 2010
(Heard at Auckland)

Appearances: Plaintiff in person
No appearance for defendant

Judgment: 17 June 2010

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Mr Poulter, the plaintiff, commenced proceedings before the Employment Relations Authority (the Authority) in order that an employment relationship problem between him and the defendant, Antipodean Growers Limited (Antipodean), could be resolved. Mr Poulter alleged that Antipodean, as his employer, dismissed him unjustifiably with unpaid wages owing. A preliminary matter arose before the Authority as to whether there was in fact an employment relationship between the parties. Accordingly, the determination of the Authority issued on 29 September 2009¹ was a determination on that aspect. Following an

¹ AA348/09.

investigation meeting, the Authority Member came to the conclusion that there was no employment relationship between the parties. Accordingly, it was not necessary to then deal with the substantive claim by Mr Poulter because he could not in that circumstance pursue a personal grievance. Costs were reserved.

[2] Mr Poulter has now filed proceedings in the Employment Court challenging the determination of the Authority and seeking a full hearing of the entire matter by way of a hearing de novo. He alleges that his relationship with the defendant was that of employer/employee, that he was unjustifiably dismissed, and he seeks compensation for humiliation, loss of dignity and injury to feelings. In the same way that he applied for arrears of wages in the proceedings before the Authority, he brings a similar claim in this Court, which he has combined with the personal grievance. Both claims are included in the amended statement of claim before the Court.

[3] In addition to arrears of wages, Mr Poulter also claims interest and costs.

[4] As the claim for arrears of wages covers the period 1 April 1998 to 1 July 2009, the six year limitation period pursuant to s 142 of the Employment Relations Act 2000 (the Act) applies.

[5] The defendant has taken no steps whatsoever in respect of the challenge despite being served with the proceedings. Accordingly, once the time limit for the defendant to take steps in the proceedings had expired, they were set down for a formal proof hearing.

[6] The matter proceeded by way of formal proof on 27 April 2010. Mr Poulter himself gave evidence confirming the allegations contained in his amended statement of claim, his brief of evidence and other documentation. In addition he relied upon evidence of three other witnesses, two of whom personally appeared at the hearing and confirmed their sworn affidavits. Mr Poulter relied upon a sworn affidavit from the third witness.

Factual background

[7] The relationship between the plaintiff and the defendant has a lengthy history. A family trust connected to the defendant's directors leased its land to the plaintiff in 1993. The plaintiff also occupied a house on the property and purchased crops and equipment from the defendant. When he took possession the land was undeveloped and Mr Poulter, a horticulturist, cleared the land, enhanced the accommodation, and planted and grew produce which he sold. He traded as Pinalta Farms at that time. Over the three years following his taking possession, the plaintiff expanded his business to three 10 acre leased blocks.

[8] The directors of the defendant resided in Hong Kong but later commissioned the plaintiff to develop a large glasshouse on the land as the directors were planning to return from Hong Kong and live on the property. Prior to this, however, Mr Noel McKenzie, the managing director, visited Auckland and had discussions with Mr Poulter concerning the continuing development of the property. Construction of the glasshouse was completed in 1996. A pack house was also constructed on the property. The glasshouse was initially used to grow flowers but other crops followed.

[9] Once the McKenzie family returned in 1998, substantial developments on the land occurred with the erection of a large residence and other facilities. These were for the use of the McKenzies.

[10] Mr Poulter continued to run his own business on the property but as the glasshouse project developed, he began to spend more and more time on that project. In doing so, he wound down his own business interests and also terminated a lease on other property from which he was also generating income. It appears that even though he was spending more time on the glasshouse project, it was not his intention to enter into a permanent association with the defendant company. At that point he probably saw himself as a contract project manager and was self employed.

[11] While Mr Noel McKenzie's family trust owned the land and was the lessor to Mr Poulter, in January 1995 the defendant company was registered. Mr McKenzie

and his wife were the sole directors and shareholders of the company. The company was incorporated to operate the glasshouse and pack house business. At that point Mr McKenzie remained residing in Hong Kong but asked Mr Poulter to manage the business. Mr Poulter was given a company cheque book for the payment of invoices. He was asked to engage staff and paid them from the same account. Mr Poulter made PAYE returns for the defendant on a required basis in respect of the employees even though at that point, which was in 1996, he did not include himself in the PAYE schedules as an employee.

[12] It was in 1996 that Mr Poulter alleges that the relationship between himself and the defendant changed to that of employer/employee.

[13] Mr Poulter at this point hoped that he would gain some form of proprietary interest in the horticultural business operating from the glasshouse and pack house. Accordingly, matters proceeded between himself and the defendant on an informal basis. He appeared to be working long hours for little remuneration and this is confirmed by the evidence of his two witnesses, his former and present partners. Mr Poulter produced a copy of a letter written by the accountant for the defendant on 19 July 2001. This indicated that the annual turnover of the business for the previous three years had been in excess of \$440,000 and that the company at that stage was investing in ongoing developments. I presume that that turnover was built up from Mr Poulter's efforts from 1996 onwards. It is unclear exactly what income Mr Poulter himself was deriving from the business. He indicates that the McKenzies withdrew substantial sums of money from the business to invest not only in the development of the luxury residence on the property but also in the purchase of a marine brokerage business. It is clear from Mr Poulter's evidence that these withdrawals had a substantial effect on the operation of the horticultural business from which he derived his income. He appears to have simply gone on working and drawing income on a limited basis as the opportunity arose.

[14] The point was reached where Mr Poulter endeavoured to force Mr McKenzie to come to a formal arrangement. Mr McKenzie, on 1 April 1998, wrote a letter to Mr Poulter from Hong Kong. This is significant in two respects. The first is that the letter proposed an annual remuneration to Mr Poulter. It also included a proposal as

to rent which Mr Poulter would pay for occupying the rundown residence in which he had been residing with his family. How this fitted within Mr Poulter's lease of the property is not clear. There was a proposal to pay him a bonus by way of a profit share scheme. The letter also considered the use of the Toyota vehicle and some taxation issues. The second way in which the letter is significant, however, is that Mr McKenzie gave Mr Poulter directions concerning inquiries he was to make as to the possible purchase of another property in Kumeu. This was up for auction by way of mortgagee sale. This property had a glasshouse, a pack house and a water bore supply. It appears that the proposal was to purchase this property to grow lilies as part of the defendant's business. That direction to Mr Poulter is relevant to one of the issues to be decided in this matter, that is the level of control the defendant exercised over Mr Poulter.

[15] In any event, following the discussions between Mr McKenzie and Mr Poulter as to Mr Poulter's level of remuneration, from 1998 onwards Mr Poulter drew money from the business consistent with the remuneration specified in the letter from Mr McKenzie. Apart from one year, however, Mr Poulter did not draw down the full amount of \$37,800 but in some years he did draw down funds approaching that. In one year he drew in excess of that but that was clearly to reimburse him for the under payment in the previous year. Between 1998 and 2009, as against an agreed remuneration of \$37,800 per annum, arrears of payments to Mr Poulter built up to the sum of \$117,785. This is the total sum of unpaid wages he now claims. In addition, he claims interest of "Approx \$23,000". However, it is unclear as to exactly what rate he has used to calculate that interest and whether or not he has calculated it on a compounding basis.

[16] Clearly over this period Mr Poulter, out of loyalty to the McKenzies, worked long hours for inadequate remuneration. Not only did he spend hours in the horticultural business but he also, at the direction of Mr McKenzie, oversaw construction of the luxurious residence being built for when the McKenzies returned, together with the other amenities attached to it. It is clear that Mr McKenzie and the defendant took advantage of Mr Poulter's loyalty by withdrawing large sums from the capital of the business and failing to repay him for his labours.

[17] Eventually in 2009, the defendant and those associated with it hit a decline in their financial position. The decline was so severe that the bank foreclosed on the mortgage over the property on which the luxury residence and horticultural business was located and the property was sold by way of mortgagee sale. On 6 June 2009 Mr McKenzie wrote to Mr Poulter advising him that the defendant company was to cease trading as at 30 June 2009. Directions were given in that letter to Mr Poulter to prepare a plan to wind down the operation so that the glasshouse was clear of crops and that only the items that appeared on the list of chattels in the eventual sale and purchase agreement were left in place for the purchaser. The remaining items not included in the chattels list were to be prepared for sale by Mr Poulter and the area was to be cleared and ready for vacant possession on 29 June 2009. Mr McKenzie asked Mr Poulter to advise the staff that the business was closing and that their positions of employment with the defendant were to be terminated as at 29 June 2009. Again this letter is significant because it indicates that the relationship between the defendant (through Mr McKenzie the managing director in particular) and Mr Poulter was one of master and servant. If Mr Poulter had been carrying out work for the defendant on the basis of him being self employed and providing his labour and oversight under a contract for services, then the responsibility for preparing the site for possession of the new owners and, in particular, terminating the contracts of employment of the employees, would have been the sole responsibility of Antipodean. In that circumstance Mr McKenzie would have simply terminated Mr Poulter's contract and dealt directly with the staff himself. The fact that he asked Mr Poulter to attend to these matters again is evidence of control and that he regarded Mr Poulter as an employee-manager of the business.

[18] In any event, Mr Poulter and his family had to leave the property. To the great discredit of the defendant, Mr Poulter was left to try to remove his own equipment from the property when the settlement with the new owner was effected. The new owner issued a trespass notice against Mr Poulter. There was clearly some altercation arising from his removal from the property because he has submitted evidence that he received an injury to his chest and that is confirmed by a medical certificate he has produced. Apparently substantial assets owned by Mr Poulter still remain on the property and are being used by the new owner. Quite clearly throughout this entire process, Mr Poulter suffered distress and humiliation. His first

partner of many years left him because she simply could not stand the stress and strain of remaining on the property in straitened financial circumstances. It was particularly galling to her, Mr Poulter himself, and his new partner to see the comparative luxury in which the McKenzies were residing on the property in the residence and other facilities to which I have referred. This was while Mr Poulter and his family occupied the rundown residence also situated on the land.

The principles applying

[19] The issue in this challenge of course is whether the decision of the Authority is correct that Mr Poulter was not employed by the defendant in an employment relationship. If the Authority's decision is not correct then Mr Poulter has a personal grievance against the defendant and he is entitled to recovery of wages. Regardless of whether Mr Poulter was an employee or simply an independent contractor, in the circumstances he has substantial remedies against the defendant.

[20] In determining the facts of this matter I rely upon the judgments of this Court and the Supreme Court in *Bryson v Three Foot Six Ltd.*² Judge Shaw, in the decision of this Court, which was upheld by the Supreme Court, established the principles to be applied. These are summarised as follows:

1. The Court must determine the real nature of the relationship.
2. The intention of the parties is still relevant but no longer decisive.
3. Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
4. 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.

² [2003] 1 ERNZ 581; [2005] ERNZ 372 (SC).

5. The fundamental test examines whether a person performing the services is doing so on their own account.
6. Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[21] Also, from the dissenting judgment of McGrath J in the Court of Appeal³ it can be concluded that ultimately it is necessary, having considered the formulaic approach adopted in the Employment Court in *Bryson*, to gain an overall impression of the underlying and true nature of the relationship between the parties. McGrath J held that this was the approach to be taken under s 6(2) of the Act. That is also of assistance in the present case.

Findings

[22] Having considered all of the evidence, and in particular the way that the relationship between Mr Poulter and Mr McKenzie developed over the years, I find that by the time of the closure of the business Mr Poulter was an employee. It is true that he did operate his own business on the land in the early years and he also had other enterprises of his own. He gradually wound these down so that he could concentrate fully on the horticultural business being operated by the defendant. By 1998, when Mr McKenzie wrote from Hong Kong offering remuneration and other conditions to Mr Poulter, it is clear that he regarded him as an employee. As I have indicated, there are small parts of the evidence which indicate that Mr McKenzie regarded himself as having control over the way that Mr Poulter carried out his duties on the land. By that stage Mr Poulter was fully integrated into the business being operated by the defendant and the economic reality, which is part of the “fundamental” test, is that Mr Poulter was fully reliant upon the defendant for the provision of work, duties and income. By that stage it could not be said that Mr Poulter was acting in business on his own account.

³ [2004] 2 ERNZ 526 (CA).

[23] There is no evidence of any industry practice which would assist in this particular case. It is true that Mr Poulter, following the termination of his employment, filed tax returns going back over several years wherein he disclosed that he was self employed. That is not significant in this particular case. That is because, in filing the tax returns in that way, Mr Poulter was simply using the easiest method to comply with his obligations to the Inland Revenue Department to file returns where he was clearly in default in doing so. It was something which occurred after the events from which the employment relationship arose. While under normal circumstances the tax returns might provide assistance, in the particular circumstances of this case I do not regard them as significant.

[24] Applying the reasoning of McGrath J in his judgment in *Bryson*, the overall impression, from all of the facts in this matter, of the underlying and true nature of the relationship between Antipodean and Mr Poulter must be that in the period between 1996 and 1998 their relationship developed into an employment relationship and continued to be so from that time.

Disposition

[25] In view of my findings, Mr Poulter's challenge to the determination of the Authority succeeds. It is unclear whether the Authority in the end made any award of costs against Mr Poulter. If a costs award was made, it is set aside. As far as Mr Poulter's claim for arrears of wages is concerned, it is clear that between 1998 and the year ended 31 March 2010, the defendant was substantially in arrears in payment to Mr Poulter of the agreed remuneration of \$37,800 per annum. I accept Mr Poulter's calculation in his amended statement of claim that the total amount of arrears is \$117,785. However, in view of the limitation period, he is only entitled to claim arrears of salary dating back six years from the time that he commenced his proceedings in the Authority. The Authority's record discloses that date as 23 June 2009. Accordingly, I will allow Mr Poulter his claim for wage arrears dating six years back from 23 June 2009. Mr Poulter will need to file a memorandum with the Court calculating his arrears of wages from that date. When filing that memorandum he should also include the disbursements which he has incurred in these proceedings, both before the Authority and this Court. He will also be entitled to interest on the

outstanding wages at the applicable 90 day bill rate plus 2 per cent as prescribed in cl 14 of Schedule 3 to the Act. He should file that memorandum within 14 days.

[26] So far as compensation is concerned, it is clear that Mr Poulter has a personal grievance against the defendant, not only in respect of the way in which it treated him during the course of the employment, but also when that employment was terminated. The actions of the defendant towards Mr Poulter could not be considered to be what a fair and reasonable employer would have done in all of the circumstances at the time of both the dismissal and when the actions against him occurred. I consider, having regard to the facts of this case, that Mr Poulter's claim for compensation of \$20,000 is somewhat modest. Accordingly, I award him compensation for the full amount of his claim of \$20,000.

[27] So far as costs are concerned, Mr Poulter has admirably represented himself in this challenge. However, in view of the fact that he did not have legal representation, it would not be appropriate to make any award of costs.

ME Perkins
Judge

Judgment signed at 12.30 pm on Thursday 17 June 2010