

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 75
EMPC 258/2018**

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

BETWEEN HORIZON CONCEPTS LIMITED
Plaintiff

AND SHANE HAYWARD
Defendant

EMPC 366/2018

AND IN THE MATTER of proceedings removed from the
Employment Relations Authority

BETWEEN SHANE HAYWARD
Plaintiff

AND HORIZON CONCEPTS LIMITED
Defendant

Hearing: 13-14 March 2019
(Heard at Auckland)

Appearances: P Swarbrick, counsel for Horizon Concepts Ltd
S Hayward, in person

Judgment: 24 June 2019

JUDGMENT OF JUDGE K G SMITH

[1] Shane Hayward worked for Horizon Concepts Ltd, providing management services to it, from the beginning of June 2016 until mid-July 2017 when the relationship ended.

[2] Mr Hayward considers that he was at all times Horizon Concepts' employee, despite having charged for his services by providing the company with GST invoices. Horizon Concepts considers that he was working for himself as a contractor.

[3] In a preliminary determination the Employment Relations Authority held that Mr Hayward was Horizon Concepts' employee and made a declaration accordingly.¹ That determination was challenged by Horizon Concepts. Subsequently, the Authority removed the remaining matters before it, relating to claims for remedies for an alleged personal grievance, to the Court.²

Beginning of the working relationship

[4] Mr Wood and Mr Hayward have known each other since the late 1980's when they both worked in the printing trade. In about 2000 Mr Hayward began working for a company owned by Mr Wood called Horizon Printing Ltd. He continued to work for Horizon Printing until mid-2006 when Mr Wood sold his interest in the business.

[5] From 2006 onwards Mr Hayward worked for other companies Mr Wood established. Over time Mr Hayward's work evolved into providing administrative services for the companies that employed him, including sending and receiving emails for and on behalf of Mr Wood, who is not computer literate.

[6] By late 2013 Mr Hayward was employed by one of Mr Wood's companies, Riverland Enterprises Ltd. Riverland Enterprises had mixed trading success and sold most of its business activities that year. Despite that sale Mr Hayward remained as its only employee to undertake residual work. He remained employed by Riverland Enterprises until June 2016 when he began working for Horizon Concepts.

[7] Mr Wood had incorporated Horizon Concepts in July 2013, although it did not start trading until Riverland Enterprises' work began to wind down. As Horizon Concepts grew it acquired Riverland Enterprises residual business. While Mr Hayward was employed by Riverland Enterprises he was familiar with Horizon

¹ *Hayward v Horizon Concepts Ltd* [2018] NZERA Auckland 244.

² *Hayward v Horizon Concepts Ltd* [2018] NZERA Auckland 348.

Concepts and two other companies incorporated by Mr Wood in mid-2013, Excitor Fiji Ltd and Excitor New Zealand Ltd, having undertaken some work on their behalf.

Working for Horizon Concepts

[8] From 1 June 2016 Mr Hayward began to work full time for Horizon Concepts and Excitor Fiji and invoiced them both for his management services. Each week he provided the companies with GST invoices. While there were some variations in the hours charged to each company, the combined total of hours worked for them always came to 40 hours per week.

[9] All of Mr Hayward's invoices were on the letterhead of a business owned by his wife. Initially the invoices stated the GST registered number for his wife's business but, with one exception, from the end of June onwards each invoice used Mr Hayward's registered GST number. All of these invoices were paid by Horizon Concepts, once they were approved by Mr Wood. There was an arrangement between the companies for reimbursement to occur.

Relationship breakdown

[10] What had been a convivial relationship over many years came to an abrupt end on 4 July 2017, because of a tenancy dispute. Horizon Concepts' office is in part of Mr and Mrs Wood's home. On the same land they own an apartment which was rented to Mr Hayward and his wife. There was no connection between this tenancy and Mr Hayward's work. For reasons which do not need to be discussed, an altercation took place that day between Mr Hayward's wife and Mr Wood's wife. It was a highly charged encounter and comments were made which, with the benefit of hindsight, the participants may now regret.

[11] Everything came to a head in that confrontation where Mr Hayward and Mr Wood were, possibly, reluctant observers and eventual participants. When the parties went their own ways, statements were made by Mr Wood, and Mr Hayward, that are capable of being interpreted as ending their working relationship. Mr Hayward did not return to work afterwards except briefly the following day when he tidied the office and removed his personal property.

[12] In September 2017 Mr Hayward raised a personal grievance claiming he had been unjustifiably dismissed.

Employee or contractor?

[13] Before Mr Hayward can pursue a personal grievance there must be an employment relationship. Section 6 of the Employment Relations Act 2000 (the Act) defines employee as follows:

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 homemaker; 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; and
 - (d) excludes, in relation to a film production, any of the following persons:
 - (i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer;
 - (ii) a person engaged in film production work in any other capacity.
- (1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.
- (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.

...

[14] Section 6(2) requires the Court to determine the real nature of the relationship when considering if Mr Hayward was Horizon Concepts' employee. Section 6(3) requires the Court to consider all relevant matters, including those indicating the intention of the parties. Any statement by them describing the nature of the relationship is not to be treated as determinative.

[15] What "all relevant matters" means was discussed by the Supreme Court in *Bryson v Three Foot Six Ltd*.³ In that case they were said to include:⁴

- (a) the written and oral terms of the contract between the parties which will usually contain indications of the common intention concerning the status of their relationship;
- (b) any divergences from, or supplementation of, those terms and conditions which are apparent in the way in which the relationship operated in practice;
- (c) the way the parties actually behaved in implementing their contract;
- (d) how the relationship operated in practice;
- (e) having regard to the common law tests of control and integration and to whether the contracted person has been effectively working on his or her own account, commonly known as the fundamental test.

[16] The Supreme Court held that it was not until there had been an examination of the terms and conditions of the contract, and the way in which it operated in practice, that it would usually be possible to examine the relationship in light of the common

³ *Bryson v Three Foot Six Ltd (No 2)* [2005] 3 NZLR 721; [2005] ERNZ 372.

⁴ At [32].

law tests.⁵ There is no presumption that any one of those tests is decisive, although the weight placed on each of them will depend on the overall factual matrix.⁶ In *Clark v Northland Hunt* the Court's conclusion was that the tests will inform the nature of the relationship, but there are some cases where the position will be patently obvious while others may be finely balanced.

The intention of the parties

[17] It was common ground that before working for Horizon Concepts all of Mr Hayward's work for Mr Wood's companies was as an employee earning a salary. The introduction of invoicing in June 2016 was, therefore, a significant departure from previous arrangements. The change was not, however, recorded in writing and there was a disagreement about why Mr Hayward began invoicing for his services.

[18] Mr Wood said Mr Hayward approached him in March or April 2016 with a proposal to become an independent contractor. He said it was clear to him that Mr Hayward had already taken accounting advice before raising the subject.

[19] Mr Hayward's recollection was starkly different. He said the idea came from Mr Wood who was winding down Riverland Enterprises and wanted to discontinue using the payroll company that had been engaged to pay his salary and to stop paying PAYE and ACC levies. Mr Hayward acknowledged taking accounting advice but said when he did so that was to carry out Mr Wood's plan.

[20] I prefer Mr Wood's recollection because it was consistent with what was said by his accountant, Richard Somerville. Mr Somerville met Mr Hayward on 18 March 2016 to discuss some Horizon Concepts business. During this meeting Mr Hayward asked him about becoming a contractor. They discussed the merits and benefits of doing so including the tax position, invoicing arrangements and the option of setting up a company. Mr Somerville said, and I accept, that at the time this meeting took place he understood Mr Hayward had not discussed becoming a contractor with Mr Wood. There was nothing unusual in this subject being raised at the meeting because

⁵ Explaining *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681; [1993] 1 ERNZ 695 (CA).

⁶ See *Clark v Northland Hunt Inc* (2006) 4 NZELR 23 applying *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374; and see *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585.

there was already a connection between Mr Hayward and Mr Somerville's practice. Mr Somerville acts for Mr Hayward's wife.

[21] Later that day Mr Hayward sent an email to Mr Somerville recording what had been discussed. He recorded needing to provide Mr Somerville with an IRD number and raised the possibility of incorporating a company to handle invoicing for his services, referring to them as his "wages". This email noted that Mr Somerville would be able to take care of taxes, and ACC, arising from Mr Hayward's business, and his wife's business, including that there would be some savings for Mr Wood's company in this exercise. Mr Hayward added that he would need to discuss the "pros and cons" with Mr Wood because without his approval it would not happen.

[22] Mr Hayward confirmed to Mr Somerville that the proposed arrangement was satisfactory to him on 1 April 2016. Further confirmation was obtained from Mr Wood when he telephoned Mr Somerville on 15 May 2016.

[23] Mr Somerville took steps to implement what Mr Hayward wanted. He helped Mr Hayward calculate the rate to charge, arranged GST registration, and completed the GST returns. He prepared Mr Hayward's tax return for the income tax year ending on 31 March 2017, where business expenses were claimed for accounting fees, vehicle depreciation, and the use of a home office.

[24] Mr Somerville was in no doubt that, whoever first raised the subject of a contracting arrangement, Mr Hayward and Mr Wood were both content with it. He did not accept Mr Hayward's contention that, when the subject of providing services as a contractor was raised by him, it was merely to seek advice on Mr Wood's behalf. That was because in the years Mr Somerville had advised Mr Wood, or his companies, all significant decisions were discussed directly between them not through an intermediary.

[25] I am satisfied that Mr Hayward proposed to contract his services to Horizon Concepts. The opportunity to re-visit the nature of the previous working relationship materialised as Riverland Enterprises wound down and Horizon Concepts increased its business activity. At that point in time, in early 2016, Horizon Concepts did not

have any staff and was not geared up to become an employer. This situation presented an opportunity for him.

[26] Mr Hayward took that opportunity to make a proposal to Mr Wood that he thought would benefit both of them. He intended to change his status from having always been an employee to being in business for himself and so did Mr Wood. This is not a situation where Horizon Concepts had greater bargaining power which it used to obtain a benefit to the detriment of Mr Hayward. The deal made was to deliver Mr Hayward what he asked for.

[27] I find that the parties intended to create an independent contracting relationship. That is not the end of this analysis, because of the requirement to ascertain the real nature of the relationship and to consider all relevant matters. That said, the parties intentions must be very persuasive, especially given the observation in *Chief of Defence Force v Ross-Taylor*.⁷ In that case the Court cautioned that it is a very serious situation to conclude, despite the clear intentions of capable or knowledgeable persons with equal contracting strength, and sound reasons for the arrangements they have entered into, that the relationship is a different one after it ended.⁸

[28] The intention of the parties points against a conclusion that the real nature of the relationship was employment.

Control test

[29] The Court of Appeal described the control test in *Challenge Realty Ltd v Commissioner of Inland Revenue*.⁹ The concept is the right of control over the putative employee which is generally recognised as a necessary and important condition of a contract of service. The Court concluded that where a person's status as employee or independent contractor is in issue what matters is that the person is aware of the authority to control.¹⁰

⁷ *Chief of Defence Force v Ross-Taylor* [2010] ERNZ 61; [2010] NZEmpC 22.

⁸ At [30].

⁹ *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42.

¹⁰ *Challenge Realty Ltd v Commissioner of Inland Revenue*, above n 9, at 62-63.

[30] In *Bryson* the Supreme Court briefly described the control test but did not interfere with the analysis of the Employment Court on the subject in that case. The Employment Court had found that the control exercised over Mr Bryson by Three Foot Six Ltd was the daily routine set by the company, the training he received, instructions from the directors of photography and a document called a crew deal memo.¹¹ Mr Bryson was required to be at work between specified hours each day of the week, and to perform the duties directed to be carried out on a daily basis.¹² That control was referred to by the Court as absolutely essential, because the movie directors required constant, and often urgent, changes and adaptations for filming. The conclusion was that this sort of control was characteristic of a contract of service.¹³

[31] By comparison with *Bryson*, Horizon Concepts did exercise some control over Mr Hayward by requiring him to be present during the working day. Work started each morning before 9.00 am, with Mr Hayward checking emails prior to Mr Wood arriving at work. He was required to be present until 4:30 or 5:00 pm. Tasks were assigned by Mr Wood, sometimes by leaving notes, and at other times what was required was the completion of routine work. Mr Wood was frequently absent from the office during the day and considered that when he was absent Mr Hayward had some flexibility with his time.

[32] Mr Hayward also considered himself to have some flexibility. That was illustrated by a job application he made, on 26 June 2017, for a further position with a printing business. His application said he would be able to receive and make calls during the day, if needed, because that would just be a “time keeping exercise” with his current job. He referred to his availability to make appointments after 10.00 am most days for a period of up to four hours and said he could attend site visits. He acknowledged consent for working in this way would be needed from Horizon Concepts, without naming the company.

[33] I find that Horizon Concepts exercised control over Mr Hayward but he had some autonomy. This test points towards an employment relationship but only weakly so.

¹¹ *Bryson v Three Foot Six* [2003] 1 ERNZ 581 at [41].

¹² At [48].

¹³ At [49].

Integration test

[34] This test assesses whether the person is “part and parcel” of an organisation.¹⁴ The test, as described in *Clark*, was that under a contract of service a person is employed as part of the business if the work done by him or her is an integral part of it. Under a contract of service, while work is done for a business, the person is not integrated into it but is only accessory to it.

[35] Horizon Concepts needed management support which Mr Hayward provided. He was the company’s only office worker and had some flexibility in performing that work. Those factors could equally describe a person who is integrated into the business or accessory to it. I consider this test to be equivocal.

Fundamental test or economic reality test

[36] In *Challenge Realty* the Court of Appeal approved of the economic reality test, asking whether a worker was genuinely in business on his or her own account or was part and parcel of, or integrated into, the enterprise of the person or organisation for whom the work was performed.¹⁵

[37] In this case there are features capable of pointing to both employment and independent contracting. On the one hand it could be said Horizon Concepts was Mr Hayward’s source of work and income, so he was dependent on the company and was not truly in business for himself. On the other, it could be said Mr Hayward took an opportunity available to him for the personal advantages he perceived would arise and there is no reason to assume that he was doing anything other than operating his own business.

[38] I consider several features in this case point towards the economic reality being that Mr Hayward was in a business on his own account and outweigh anything to the contrary. They have already been discussed. He broached the idea to begin with, took

¹⁴ See *Challenge Realty Ltd v Commissioner of Inland Revenue*, above n 9, at 54; and *Clark v Northland Hunt Inc*, above n 6, at [33]. Relying on *Stevenson Jordan & Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101 at 111.

¹⁵ By considering Adrian Merritt “‘Control’ versus ‘Economic Reality’: Defining the Contract of Employment” (1982) 10 Australian Business Law Review 105 at 118. The references to fundamental test and economic reality are interchangeable.

advice about it, appreciated the financial benefits that might be available to him to be in business for himself, and took advantage of them. An obvious example is that he made claims in his tax returns for the year ending 31 May 2017 which are consistent with being in business.

[39] This test points away from an employment relationship.

Conclusion

[40] When looked at overall, what stands out is the intention Mr Hayward had to be in business for himself, which he was comfortable with until the working relationship broke down. This case is analogous to the situation in *Clark* discussed earlier.¹⁶ The intention of the parties has not been displaced by the common law tests.

[41] I conclude that the real nature of Mr Hayward's relationship with Horizon Concepts was as a contractor to it not as an employee. That conclusion means it is unnecessary to go further and to consider how the relationship ended, or if the way it ended gives rise to remedies for either party. It follows that Horizon Concepts has been successful in its challenge and the Authority's determination is set aside.

[42] Costs are reserved. This case is assigned to Category 2, Band B, in the Court's Practice Direction Guideline Scale.¹⁷ If an application for costs is to be made submissions are required to be filed and served within 20 working days. Submissions in response can be filed and served within a further 20 working days, and if any reply is necessary, within a further 10 working days.

K G Smith
Judge

Judgment signed at 12.45 pm on 24 June 2019

¹⁶ *Clark v Northland Hunt Inc*, above n 6, at [16].

¹⁷ Employment Court Practice Directions, No 16 (<www.employmentcourt.govt.nz/legislation-and-rules>).