

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

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

**[2020] NZEmpC 25
EMPC 125/2018**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BARRY DEANE SEXTON Plaintiff
AND	PHILLIP LOWE First Defendant
AND	PASMR (NZ) PTY LIMITED Second Defendant

Hearing:	14 October 2019 (Heard at Auckland)
Appearances:	B Sexton, plaintiff in person G Denholm, advocate for first defendant No appearance for the second defendant
Judgment:	10 March 2020

JUDGMENT OF JUDGE J C HOLDEN

[1] This judgment resolves Mr Sexton's challenge to the determination of the Employment Relations Authority (the Authority) that found he was not an employee of Mr Lowe or PASMR (NZ) Pty Limited (PASMR).¹

[2] As explained in this judgment, Mr Sexton is unable to proceed with his claim against PASMR, as it would be an abuse of process, given the Disputes Tribunal already has determined a claim in respect of the work undertaken by Mr Sexton.

¹ *Sexton v Lowe* [2018] NZERA Auckland 99 (Member Fitzgibbon).

[3] Further, Mr Sexton was not an employee of Mr Lowe.

[4] His challenge fails.

Mr Sexton undertook work at Auckland Airport

[5] In February 2017, Mr Sexton spoke with Mr Lowe about building work required at the Auckland Airport extension site (the site). The head contractor for the construction work was Fletcher Construction Company Ltd (FCC) and Mr Lowe, through the Jabroli Trust, was a contractor on the site.

[6] Mr Lowe and Mr Sexton agreed that Mr Sexton would work as a builder on the site. No particulars were agreed, apart from an hourly rate.

[7] After work had commenced, there was a further discussion between Mr Sexton and Mr Lowe. They agreed that E. Clean NZ Ltd (E Clean) would send an invoice for work done. Mr Sexton is the sole director and shareholder of E Clean.

[8] Mr Sexton attended FCC's induction course and was issued with a FCC site card. He was also given a security pass.

[9] Mr Sexton recorded his work hours on timesheets and then E Clean submitted invoices for payment on a weekly basis. The invoices were addressed to "Challenger Site Facilitators" (Challenger) and Jabroli Trust paid the invoices for the work done in March 2017.

[10] The invoices referred to "building" and the amounts charged were calculated on an hourly basis. GST was added to that calculation to get the total invoiced.

[11] Invoices sent by E Clean to its other clients also showed fees were calculated on an hourly basis, plus GST, but the work done for those clients was described in more detail in those invoices.

[12] From 1 April 2017, Jabroli Trust (and/or Mr Lowe) ceased to be the contracting party to FCC, replaced by PASMR. Further invoices from E Clean, again made out to

Challenger, were paid by PASMR up to and including an invoice dated 30 August 2017.

[13] There then were several invoices that were initially unpaid, totalling \$18,783.76, (including GST). However, an email from Mr Sexton of 21 September 2017, copied to PASMR records that much of that outstanding money had, by then, been paid. A total of \$7,475 (including GST) remained outstanding, being for work performed towards the end of Mr Sexton and E Clean's involvement on the site.

[14] It was after Mr Sexton became frustrated at the lack of payment that he asserted he was an employee of Mr Lowe, and then PASMR.

Shortfall in payment from PASMR already has been addressed by the Disputes Tribunal

[15] Mr Sexton brought his claim in the Authority, but after he was unsuccessful there, E Clean made a claim against PASMR in the Disputes Tribunal. Mr Sexton appeared for E Clean before the Disputes Tribunal. The Disputes Tribunal found for E Clean and ordered PASMR to pay it \$7,671.91 comprising the outstanding fees (including GST) plus interest. That sum was to be paid on or before 11 July 2018. In its order, the Disputes Tribunal records that Mr Sexton/E Clean had indicated that Mr Sexton did not intend to appeal the Authority's determination.²

[16] Unfortunately, this situation was not apparent until the end of the Employment Court hearing, with the order of the Disputes Tribunal being provided to the Court following the conclusion of the hearing.

[17] This raises an immediate difficulty. Based on evidence provided by Mr Sexton, the Disputes Tribunal accepted E Clean had a contract with PASMR to carry out certain work at the site, pursuant to which it was owed money. In the Employment Court, Mr Sexton argues the work he performed at the site was not pursuant to a contract between E Clean and PASMR, but rather that he was employed by PASMR

² Mr Sexton, however, had filed his challenge in the Employment Court before the Disputes Tribunal hearing.

and carried out the work pursuant to an employment agreement between PASMR and himself.

[18] It would be an abuse of process to allow Mr Sexton to pursue his claim against PASMR. Outside of any right of appeal, the doctrine of res judicata prevents a party that has already been subject to a final judgment, from bringing subsequent proceedings, dealing with matters that have already been determined. There are two public policy considerations underlying this doctrine. The first is to ensure fairness for litigants by preventing a party from being ‘vexed’ more than once by the same claim. The second is that there should be an end to litigation.³

[19] The doctrine of res judicata extends to parties in privity with an original party to the earlier litigation, that is, to parties with such a connection to the original party to make it just to hold that the previous judgment should bind them also.⁴ As the sole director and shareholder of E Clean, and with a clear mutuality of interest, Mr Sexton is a party in privity with E Clean. Mr Sexton’s claim against PASMR cannot proceed.

[20] The same legal barrier does not apply to Mr Sexton’s claim against Mr Lowe.

Mr Sexton points to several factors

[21] In claiming he was Mr Lowe’s employee, Mr Sexton points to a number of factors, the main ones being:

- (a) he was paid on an hourly basis;
- (b) he filled in detailed timesheets and daily worksheets;
- (c) he attended a FCC induction course and a site safe course – neither of which he paid for;

³ *Beattie v Premier Events Group Ltd* [2014] NZCA 184, [2015] NZAR 1413 at [41]; *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [58]; *Lockyer v Ferryman* (1877) 2 App Cas 519 (HL) at 530.

⁴ *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 12-14.

- (d) he was issued with a site pass and a security clearance in his own name;
- (e) he was required to wear Challenger colours;
- (f) he was provided with specialised tools for the work performed (acknowledging he had his own toolbox of standard tools);
- (g) he worked supervised and directed;
- (h) he worked exclusively for the Challenger site during the relevant time; and
- (i) he had no involvement with, or responsibility for the business of Challenger.

[22] In pointing to the control, integration and fundamental tests, Mr Sexton says that the real nature of the relationship was one of employment.

[23] Mr Lowe says that the situation regarding Mr Sexton and E Clean was similar to most of the workforce. The majority of the workers on site were engaged through their own companies which were the contracting parties.

[24] Mr Lowe also points to the company records of E Clean, which he says show that Mr Sexton gained the advantages of contracting (including with respect to tax) and that E Clean's business was run as a true contracting business.

The issue is the real nature of the relationship

[25] In order to advance his case Mr Sexton will need to demonstrate that he is an employee, as defined in the Employment Relations Act 2000 (the Act).⁵

⁵ Employment Relations Act 2000, ss 5 and 6.

[26] While each inquiry is intensely factual, the principles to be applied in determining whether an arrangement is one of employment or pursuant to a contract for services include:⁶

- An employee is 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.⁷
- 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 the principal and that person.⁸
- The Authority or the Court must consider “all relevant matters” including any matters that indicate the intention of the persons.⁹
- 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.¹⁰
- “All relevant matters” include 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.
- “All relevant matters” also will 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).

⁶ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, ERNZ 372 (SC) at [32]; *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1 at [17].

⁷ S 6(1).

⁸ S 6(2).

⁹ S 6(3)(a).

¹⁰ S 6(3)(b).

- Until the Authority or 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 or fundamental tests.
- Industry or sector 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.

E Clean operated as a contractor

[27] The factor that most tellingly counts against Mr Sexton being an employee is the way in which E Clean operated. E Clean issued invoices, collected GST, paid drawings to Mr Sexton and made deductions for expenses.

[28] Mr Sexton saw E Clean as a contractor throughout the period of his working at the site. He only raised his claim of employment after E Clean/Mr Sexton had stopped performing services for PASMR, and with a shortfall in payments.

[29] Mr Sexton had operated E Clean for some years and E Clean had provided Mr Sexton's services as a builder to clients other than Mr Lowe and PASMR. He is not in that category of vulnerability where a person might enter into a contracting arrangement without a genuine understanding of what they were agreeing to.

[30] The Court has been wary in other cases where parties who operate on one basis, claim a different basis when circumstances change.¹¹ It is a very serious matter for

¹¹ *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, [2010] ERNZ 61 at [30].

the Authority or the Court to find that the real nature of the parties' relationship was completely different from the arrangements the parties had mutually entered into, and on which they had operated, for the duration of the engagement.

No factors that preclude contracting arrangement

[31] While Mr Sexton identifies some factors that can apply to employment, nothing raised is inconsistent with E Clean being a contractor to Mr Lowe. As the evidence shows, this was a situation where the lead contractor could, and did, employ people to work on the site, and also entered into contracts with firms that provided experienced workers.

[32] Although Mr Sexton was advised of the work that needed to be done on site, he was largely self-managing as to the way in which he performed that work. Mr Lowe did not have a significant amount of control over the way in which Mr Sexton worked. Because he charged for his services on an hourly basis, a record of the hours worked needed to be kept.

[33] Although it seems that for most, if not all the time that work was being performed on the site, neither E Clean nor Mr Sexton undertook other work, there is no evidence that was a requirement imposed upon Mr Sexton.

[34] As already noted, this is a situation where the work could have been performed by employees, but equally it could have been performed, and was, by independent contractors. There is no suggestion that Mr Sexton was integrated into the way in which Mr Lowe conducted his business.

[35] There is nothing significant in the other matters Mr Sexton raises about the operation of the site. It is to be expected that site and security passes would be to a named individual, rather than a firm; provision of specialised tools and site induction also are not inconsistent with contracting.

[36] As identified, E Clean had clients other than the defendants in this proceeding, albeit Mr Sexton's time was largely committed to work on the site for the duration of

E Clean's time there. E Clean operated as one might expect of a business; it charged GST, offset expenses, and paid Mr Sexton drawings. E Clean was in business on its own account.

[37] In conclusion, when the relevant factors are considered in their totality, they point to a contracting relationship between E Clean and Mr Lowe. Mr Sexton has not established that he was employed by Mr Lowe. For completeness I note that there also was nothing in the evidence before the Court that indicated that Mr Sexton would have succeeded in a claim against PASMR.

[38] He is unable to bring a claim before the Authority or the Court.

Costs

[39] Costs are reserved. It may be that, given the disclosure issues that arose in these proceedings, which led to the earlier interlocutory judgment,¹² the better course would be for costs to lie where they fall. However, if Mr Lowe seeks costs and they cannot be agreed between the parties, he is to file and serve a memorandum seeking those costs within 30 days of this judgment. Mr Sexton's memorandum in response then is to be filed and served within a further 30 days.

J C Holden
Judge

Judgment signed at 2 pm on 10 March 2020

¹² *Sexton v Lowe* [2019] NZEmpC 60.