

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**CC 17/09  
CRC 6/09**

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

BETWEEN JOHN WILLIAM TE AMO  
Plaintiff

AND BECON LIMITED  
Defendant

Hearing: 2 and 3 November 2009  
(Heard at Christchurch)

Appearances: John Shingleton, Counsel for the Plaintiff  
Scott Wilson, Counsel for the Defendant

Judgment: 4 November 2009

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**JUDGMENT OF JUDGE A A COUCH**

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[1] Becon Limited (“Becon”) operates a waste sorting and recycling business in Christchurch. Mr Te Amo has considerable experience in the waste management industry.

[2] Between November 2007 and April 2008, Mr Te Amo carried out work for Becon. The relationship was terminated by Becon. Mr Te Amo says it was an unjustifiable dismissal and raised a personal grievance but he can only pursue that grievance if it is established that he was an employee. Becon denies that he was and says that, at all times, he was an independent contractor.

[3] The Employment Relations Authority determined that Mr Te Amo was not an employee and dismissed his claim accordingly (CA 41/09, 6 April 2009). Mr Te

Amo challenged that determination and the matter proceeded before me by way of a hearing de novo of the preliminary issue whether Mr Te Amo was employed by Becon.

[4] Near the conclusion of the evidence, I told counsel that the nature of my other commitments was such that it would be several months before I could complete a detailed judgment with full reasons and offered the parties the option of a prompt decision with only a brief summary of the reasons. Both parties opted for such an abbreviated judgment.

[5] Whether a person is employed by another for the purposes of the Employment Relations Act 2000 is to be decided in accordance with s6 of the Act applied in a manner consistent with the decision of the Supreme Court in *Bryson v Three Foot Six Ltd (No 2)* [2005] ERNZ 372. I have particular regard to the considerations set out in paragraph [5] and approved in paragraph [32] of that decision.

[6] I find that it was the common intention of the parties that Mr Te Amo be engaged as an independent contractor for a period of 6 months for a fee of \$35,000. Important factors leading to my conclusion are:

- a) Becon was formed as part of a joint enterprise between people previously involved in Meta NZ Limited and Reworks Limited. Those people included Mr Lloyd, Mr Stent, Mr Bain and Mr Te Amo. All became shareholders in Good Stuff Investments Limited which wholly owned Becon. All participated as shareholders in discussions which led to the incorporation of Becon and in which the Becon's purpose and direction were established. I find there was general agreement that no senior staff would be employed during the establishment phase of the company's operations, expected to last for 6 months. Consistent with this, Mr Lloyd, Mr Stent and Mr Bain were engaged by Becon as independent contractors during that establishment phase. I find no reason to conclude that the arrangement for Mr Te Amo's involvement was any different.

- b) The nature of the relationship was recorded in three contemporary documents: the board minutes of 8 November 2007, the staff list dated 18 December 2007 and Mr Lloyd's letter to Ms Day of QED dated 21 January 2008. Mr Te Amo could not suggest any reason why Mr Lloyd would have misconstrued the nature of the relationship on those occasions and I find that there was none.
- c) The documents relied on by Mr Te Amo as evidencing an employment relationship are equally consistent with an independent contractor relationship. In this context, I accept the explanations given by Mr O'Rourke and Mr Stent of the manner in which the accounts for January and February 2008 were set out.
- d) Mr Te Amo's case was that, during a conversation with Mr Lloyd in late September or early October 2007, he was offered and accepted employment by Becon on terms including a salary of \$100,000, a company car and telephone and payment of expenses. Mr Te Amo never received any of those benefits.

[7] Consistent with that common intention, Mr Te Amo was paid as an independent contractor, that is with the addition of GST to the agreed sum and without deduction of any PAYE or withholding tax. I find Mr Te Amo's evidence that he was unaware of the manner in which he was paid improbable. I accept Mr Stent's evidence that his failure to insist that Mr Te Amo provide GST invoices was an oversight rather than indicative of a different understanding of the relationship.

[8] Mr Te Amo was subject to minimal control in the course of his work. His objective was set at a high level. It was to ensure that the main sorting plant was configured and installed correctly and brought into proper operation. How Mr Te Amo achieved that objective was largely left to him. He reported regularly to Mr Lloyd on progress but there was no evidence that Mr Te Amo was subject to direction by Mr Lloyd on a day to day or even a week to week basis.

[9] Mr Te Amo's work was undoubtedly an integral part of Becon's overall operation. The main sorting plant was to be the principal source of revenue for the company. If that plant was not brought into operation successfully and in time, the company would have failed. It may equally be said, however, that the success of Becon also relied heavily on the work being done by Mr Lloyd as managing director and Mr Bain in organising sales and marketing.

[10] The manner in which Mr Te Amo carried out his work for Becon was in many respects consistent with his working on his own account. He determined his own hours of work. He provided his own transport, cell phone and email facilities. He also provided equipment which was used in carrying out the work. On 1 April 2008, Mr Te Amo sought and received a commitment from Becon to pay for the use of this equipment and payment was subsequently made to him.

[11] On the other hand, Mr Te Amo devoted most of his working time to Becon's work. It appears he was involved to some extent in other business interests but I find this was minimal and that he had no other source of income during the period in question. The work directed by Mr Te Amo was carried out by employees of Becon rather than by staff engaged by him.

[12] Having regard to all relevant matters, I find that the real nature of the relationship between Becon and Mr Te Amo was that of principal and independent contractor as opposed to employer and employee. The challenge is therefore dismissed. Mr Te Amo is not entitled to pursue a personal grievance.

[13] I add the following comments:

- a) Consistent with the abbreviated nature of this judgment, I have referred explicitly to only a few aspects of the evidence. In reaching my decision, however, I have had regard to all of the evidence adduced. I have also considered the submissions of counsel.
- b) I have refrained from analysing any of the direct conflicts of evidence between Mr Te Amo on one hand and the witnesses for Becon on the

other hand. To the extent it has been necessary for me to resolve those conflicts, I have generally preferred the evidence of the witnesses for Becon. I record, however, what I said in the course of counsel's final submissions, which was that, while I find some of the evidence given is improbable, I do not find that any witness has been deliberately misleading.

[14] Costs are reserved. The parties are encouraged to agree costs but, if they are unable to do so, Mr Wilson is to file and serve a memorandum within 21 days after the date of this judgment. Mr Shingleton is then to have a further 14 days in which to file and serve a memorandum in response.



A A Couch  
Judge

Signed at 12.15pm on 4 November 2009