

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 439/10
5165549

BETWEEN BERT AH MU
 Applicant

AND EAST COAST RESIDENTIAL
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Michael Wolff, Counsel for Applicant
 No appearance by Respondent

Hearing 19 April 2010 at Gisborne

Witness Interview: 30 June 2010

Submissions received: 12 July 2010 from Applicant

Determination: 12 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Bert Ah Mu, says he has been unjustifiably dismissed by the respondent, East Coast Residential Limited. The respondent filed a Statement in Reply claiming Mr Ah Mu was a contractor, not an employee. This decision deals solely with the matter of the status of the working relationship.

[2] The respondent did not appear at the hearing and has provided no evidence. This determination is based upon the evidence from Mr Ah Mu and from Mr Steve Meek, who was the person who employed Mr Ah Mu.

[3] Mr Meek said Mr Ah Mu initially applied for a position as a salesperson. He looked at Mr Ah Mu's CV. Mr Meek needed someone to do preliminary pricing and

design work. He spoke to the owner of the company and subsequently employed Mr Ah Mu to do design work. It was agreed Mr Ah Mu could do his own independent work. Originally he was to be paid in wages and then it became a *contractor type arrangement*. Mr Ah Mu was paying GST and putting the money through his own company.

[4] Mr Meek could not recollect with any certainty whether he had approved the invoices presented by Mr Ah Mu.

[5] Mr Meek said the arrangements regarding the work to be done were reasonably casual. If there was a time limit Mr Meek would tell him and sometimes Mr Ah Mu worked at the weekends. Mr Ah Mu had only done preliminary drawings while Mr Meek was employed.

[6] Mr Ah Mu said he worked from home a lot but his base was the Signature Homes premises. While there was flexibility regarding the work, he had to do the work Mr McNabb told him to do and did not think he could take time off whenever he wanted. He could not decide what work he did; that was decided by Mr McNabb as was the geographical area he covered. He was not personally responsible for the finished work or for correcting faulty work. He was to provide progress reports for Mr McNabb and did not pay any of the costs incurred in doing the work and did not pay business insurance. He did not employ staff personally. Any people he employed were staff of Signature Homes Ltd. He was in a position to supervise other company employees.

[7] Mr Ah Mu said he invoiced his time and he believed he was getting a salary but had to invoice weekly. He paid GST but believed that was part of the arrangement of being an employee. He was given a laptop and a mobile phone to use. The company flew him to Auckland to be trained, which the company paid for.

[8] I was provided with a copy of an employment agreement that was unsigned and details are not filled in. The bottom of the agreement has the date of August 2008 but Mr Ah Mu started work in July 2008. There is handwriting on the agreement which is Mr Ah Mu's. The provisions of this contract were not put into practice. It provides for fortnightly payments of a salary of \$60,000 but Mr Ah Mu invoiced

through his company Peri by Design with the payments to be baked into the Tolaga Bay Motel company account, which he ran with his wife.

[9] The invoices do not match with the salary specified in the employment agreement.

[10] Pursuant to s6 Employment Relations Act 2000 the Authority must, in deciding whether a person is an employee, determine the real nature of the relationship between the parties and in so doing must take into account all relevant matters.

[11] All relevant matters include the written and oral terms of the contract and the way the contract has been implemented.

[12] Although Mr Ah Mu provided an employment agreement it was not signed and payment was not made according to its provisions. Mr Meek was unclear about the relationship, saying that it was an arrangement for payment of wages and then became an arrangement whereby Mr Ah Mu provided invoices. Mr Ah Mu says it was agreed there was an employment relationship. However, s 6 (3) (b) provides that the statements of the parties about the nature of the relationship are not to be taken as determinative. Given that the terms of the employment agreement were not abided by and it was unsigned I am unable to treat this as demonstrating a common intention as to the nature of the working relationship.

[13] The control, integration and fundamental tests have been applied to ascertain the real nature of the relationship.

[14] Mr Ah Mu's work was controlled to a degree. He had responsibility for overseeing staff and he was provided with training and equipment by the respondent. These factors point to an employment relationship.

[15] Was Mr Ah Mu acting as a separate business entity and performing the services on his own account? He did invoice for his services but there was no evidence that he received payments that would indicate he was making a profit from

his work over and above a “salary” in the \$50,000 to \$60,000 range. His income was not linked to the profits or losses of the respondent.

[16] Apart from the manner in which Mr Ah Mu treated his taxation arrangements the relationship is indicative of an employment relationship. He was integrated into the business of the respondent.

[17] Mr Ah Mu was an employee.

Costs

If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicant’s memorandum.

Dzintra King

Member of the Employment Relations Authority