

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Roger Brott (Applicant)  
**AND** Green Contracting & Hire Limited (Respondent)  
**REPRESENTATIVES** Roger Brott In person  
Claire Nickalls, Counsel for Respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**INVESTIGATION MEETING** 6 December 2005  
**DATE OF DETERMINATION** 21 December 2005

**DETERMINATION OF THE AUTHORITY**

***Employment relationship problem***

[1] Roger Brott was engaged by Green Contracting and Hire Limited to perform work for clients of the company. Mr Brott commenced about May 2003 and Green Contracting terminated the relationship in February 2005. Mr Brott is disgruntled about the termination of the relationship and in July 2005 he lodged a statement of problem with the Authority regarding his alleged personal grievance and arrears of wages or salary due for work performed.

[2] Green Contracting is owned by Mary Green and Gordon Green. Their company provides contracting services in the agricultural sector such as the establishment of vineyards. The company then contracts with various individuals to perform that work for company clients. Green Contracting says that the Employment Relations Authority does not have jurisdiction to deal with Mr Brott's problem because he was not an employee.

***The law***

[3] The Employment Relations Act 2000 defines an employee as any person employed by an employer to do any work for hire or reward under a contract of service: see s 6(1)(a). The Authority must determine the *real nature* of the relationship between the parties. That involves considering all relevant matters, including matters that indicate the parties' intentions. The Authority is not to treat as a determining matter any statement by the parties that describes the nature of the relationship.

[4] The Supreme Court of New Zealand considered the application of these provisions in *Bryson v Three Foot Six Limited* 16/6/05, SC CIV24/04. There, the Supreme Court affirmed the earlier judgment of the Employment Court and overturned the contrary Court of Appeal judgment. The

Supreme Court held that ... *the Authority should consider the way in which the parties have actually behaved in implementing their contract.* How a relationship operates in practice is crucial to determining its real nature. The Authority must consider features of control, integration and whether the person has been effectively been working on his or her own account in assessing the *real nature* of a relationship.

### ***The relationship in practice***

[5] I accept Angela Brott's evidence about how Mr Brott heard that Green Contracting might have work available. Mr Green did some work for Mrs Brott. As part of a general discussion, Mrs Brott said that her husband was a bankrupt and was working in a mussel factory as an employee. Mr Green invited her to get Mr Brott to contact him about work with Green Contracting. There was no mention about contracting arrangements at that point.

[6] Mr Brott contacted Mr Green and they discussed terms of engagement. I accept that Mr Green did explain that they engaged people as contractors rather than as employees. The significance of this was not lost on Mr Brott, formerly a Union representative. He knew he was entering an arrangement that, on its face, precluded the normal incidence of employment such as holiday pay and grievance rights. Mr Brott tried out the work and the two men agreed to commence the relationship in late May 2003. The terms were not put in writing at that stage.

[7] The work done by Mr Brott was fully integrated into the business of Green Contracting. It was by engaging people such as Mr Brott that Green Contracting provided its services to its clients. Green Contracting provided most of the machinery used by Mr Brott in his work, although he provided various hand tools. The work done was controlled by Green Contracting and Green Contracting invoiced its clients for the work. Mr Brott was simply paid an hourly or a piece rate for the work, depending on its nature. The work was allocated and supervised by Green Contracting. Mr Brott generally worked in a team with others who also worked for Green Contracting. Mr Brott was required to fill in a daily time sheet in the manner of an employee. However, Mr Brott completed a monthly invoice and was then paid for the amount claimed subject to adjustments by Green Contracting. Initially, Green Contracting deducted withholding tax. Mr Brott was not GST registered so no GST was claimed or payable on Mr Brott's invoice. The amount of work varied depending on the work Green Contracting had available from its clients but Mr Brott did several times make himself unavailable without objection from Green Contracting when he wanted to go fishing or for other reasons. Mr Brott claimed expenses related to his work when his tax return was completed as if operating his own business. That said, he had no business income other than that derived from the association with Green Contracting.

[8] At this point, it is fair to say that the real nature of the relationship that emerges from the above picture is more that of employment than not. However, there are two factors not yet mentioned which must be considered.

[9] Green Contracting requires those who it engages to hold an Inland Revenue Department certificate of exemption from withholding tax. Mr Brott applied for a certificate but that was declined by Inland Revenue on the basis that Mr Brott, then an undischarged bankrupt, required leave from the Official Assignee to enter into business on his own account. To obtain leave, Mr Brott swore an affidavit dated 17 November 2003 in which he deposed that he was establishing a business as a self-employed subcontractor to Green Contracting. He obtained leave to enter into that business on 20 November 2003 and the appropriate documents were filed in the High Court. Inland Revenue eventually issued a certificate of exemption in March 2004.

[10] The second factor is that Mr Brott and Green Contracting entered into a written agreement in July 2004. The agreement is drafted on the basis that the relationship is that of principal and independent contractor. For example, it provides for arbitration in the event of dispute, for the contractor to have indemnity insurance, and indemnify Green Contracting for certain losses and for Mr Brott not to be entitled to benefits such as sick leave and holiday pay.

### ***Discussion***

[11] As mentioned above, consideration of the aspects of control and integration point towards employment. Nor could it be said that Mr Brott was operating his own business except in conjunction with his work for Green Contracting. Accordingly that feature does not point strongly towards self-employment.

[12] However, the striking feature of this problem is that Mr Brott sought and obtained leave of the Official Assignee supported by his affidavit to operate his own business as a contractor with the respondent company. At that point, he was fully aware of the way in which his association with Green Contracting worked in practice.

[13] Less striking, but still significant, is the written agreement setting out the terms of the relationship in a manner largely inconsistent with an employment relationship. The agreement was headed *Contract for Services Agreement* and Mr Brott is described as a *contractor*, but that is insignificant. In practice, the relationship was conducted in accordance with the terms contained in the written agreement. The agreement also expressly says that it supersedes all previous agreements and contracts between Mr Brott and Green Contracting.

[14] Weighing these matters, I conclude that the real nature of the relationship, consistent with Mr Brott's affidavit, was not that of employer and employee.

### ***Conclusion***

[15] It follows that the Authority has no jurisdiction and Mr Brott's claims must be dismissed.

[16] Costs are reserved.

Philip Cheyne  
Member of Employment Relations Authority