

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2024] NZERA 702
3213639

BETWEEN	GERRY CAREY Applicant
AND	ALAN SMITH First Respondent
AND	PETER WALSH Second Respondent
AND	OUCH-IE POWDER COMPANY LIMITED Third Respondent
AND	BRINNSON RESEARCH LIMITED Fourth Respondent

Member of Authority:	Shane Kinley
Representatives:	Gerry Carey, Applicant in person Simon Greening, counsel for the Respondents
Investigation Meeting:	7 August 2024 by AVL
Submissions and further information:	Up to 12 September 2024
Determination:	25 November 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Gerry Carey raises claims he was unjustifiably dismissed from employment with one or more of Alan Smith, Peter Walsh, Ouch-ie Powder Company Limited (Ouchie), Brinnsion Research Limited (BRL) or one of BRL's subsidiaries.

[2] All of the named respondents deny there being an employment relationship between them and Mr Carey, and say any relationship was as a contractor.

[3] Ouchie was removed from the Companies Register on 20 March 2024 and various subsidiaries of BRL¹ have also been removed from the Companies Register. As a consequence, I advised the parties at the investigation meeting no findings could be made in relation to Ouchie.

The Authority's investigation

[4] A case management conference was held on 2 June 2023 with Mr Carey representing himself and Mr Walsh representing the respondents. I directed at the conference a preliminary issue be investigated and determined of whether Mr Carey was an employee or contractor. This matter was initially timetabled to be investigated on 17 October 2023.

[5] I indicated should I determine Mr Carey was a contractor, there would be no jurisdiction for the Authority to consider this matter further. However, should I determine Mr Carey was an employee, then I would also need to determine which of the respondents he was employed by and would proceed to investigate and determine the remainder of Mr Carey's claims. A further case management conference call would have needed to be scheduled to discuss the process for any such investigation.

[6] Following the conference witness statements for Mr Carey were not received in accordance with the timetable directions and the scheduled investigation meeting was vacated on 12 September 2023.

[7] Mr Carey, and separately Mr Smith and Mr Walsh then corresponded with the Authority Officer, which drew my attention to other proceedings between some of the parties to this matter, including an Order of Judge Rowe of the District Court under the Harmful Digital Communications Act 2015 restricting Mr Carey from communicating with or commenting about Mr Smith.

[8] As a consequence on 7 November 2023 I made updated timetable directions, with the matter then timetabled to be investigated on 19 March 2024. I also made an order under clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act) that the parties and/or witnesses providing or being provided with witness statements

¹ The subsidiaries were not clearly named as parties in the Statement of problem.

in this Authority matter must not share contents of those documents with anyone else (either in writing or orally), except for anyone directly involved as a party or witness. Further orders were made about the method for parties to lodge evidence and to communicate about this matter, in order to give effect to the order of Judge Rowe.

[9] Affidavits of Truth were provided on behalf of Mr Carey from Ashleigh Dari and Robert Dari in November 2023, along with several recordings or videos provided on a USB. Information was then provided on behalf of the respondents in a range of formats. While the information was not provided in the format of witness statements, having reviewed all information provided, I directed on 15 February 2024 the investigation meeting scheduled for 19 March 2024 proceed.

[10] In early March 2024 the respondents advised they were now represented by Mr Greening, with an adjournment granted at the respondents' request on 13 March 2024. While an investigation meeting was scheduled for 4 June 2024, this also needed to be vacated for medical reasons. Eventually the investigation meeting date of 7 August 2024 was confirmed. A witness statement was provided for Mr Smith on 7 August 2024, prior to the investigation meeting commencing.

[11] The investigation meeting on 7 August 2024 was attended by Mr Carey, with his supporting witnesses Dale Hudson, Jo Ockey and Baz Howie. Mr Smith and Mr Walsh attended for the respondents. I was advised at the commencement of the investigation meeting there were no live orders of Courts which would impact on the hearing of this matter. All witnesses answered questions, under affirmation, from me, counsel for the respondents and Mr Carey. By agreement this included witnesses who had not provided formal witness statements.

[12] Following the investigation meeting the representatives provided written submissions and further information in accordance with timetable directions made at the conclusion of the investigation meeting.

[13] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[14] The preliminary issues requiring investigation and determination were:

- (a) Whether Mr Carey was an employee or contractor;
- (b) If Mr Carey was an employee, which of the respondents was he employed by; and
- (c) Should either party contribute to the costs of representation of the other party?

Preliminary issue: Whether Mr Carey was an employee or contractor?

[15] To determine whether Mr Carey was an employee of or a contractor to one or more of the respondents I need to apply the test in s 6 of the Act, the relevant provisions for this determination of which are set out below:

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 ...
- (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.

[16] A broad approach is required to assess employment status including consideration of any verbal and written agreement, control, integration in the business, who benefits from the work and whether the person claiming employment status was really in business on their own account. This is reflected in the Supreme Court's judgement in *Bryson v Three Foot Six Ltd*, which stated:²

“All relevant matters” certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a

² *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [32].

determination of its real nature. “All relevant matters” equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests.

[17] The Employment Court has observed:³

Employee status is an important issue. It provides gateway access to a range of statutory entitlements, including minimum wages and holiday pay, redundancy, parental leave, KiwiSaver contributions, and the personal grievance procedures and remedies provided for under the [Act]. ...

... Whether a particular worker is an employee is an intensely fact-specific inquiry. ...

As the Act makes clear, the fact that a working relationship is described in a particular way is not to be treated as determinative. That largely reflects a Parliamentary acknowledgement of the dynamics inherent in workplace relations, and the vulnerabilities of some workers. A document describing the relationship in a particular way is less likely to carry a status argument across the line where one of the parties is at a disadvantage, has not been given a fair chance to understand what they are being asked to sign, and has no or limited knowledge of the implications of agreeing to the use of the label selected by the other contracting party. In circumstances such as these, the way in which the relationship operated in practice is likely to be more revealing of its true nature.

There is no doubt that it will sometimes suit a person to work on their own account, unhampered by the strings that attach to being an employee. This is often true of highly skilled, and sought-after, workers. There is no doubt too that it will sometimes suit a company to engage services in this way, avoiding the obligations and legal liabilities that attach to being an employer. Such a model provides a company with a degree of flexibility it would not otherwise have. There is also no doubt that in some cases the perceived benefits of characterising a worker as an independent contractor are decidedly lopsided, and that a degree of cynicism has likely informed the way in which the relationship was described from the outset. ...

[18] The Court has also observed:⁴

... it is important in carrying out the required analysis under s 6 to identify and, if appropriate, challenge long standing assumptions about what may or may not signify volunteer status and employment/non-employment status.

[19] I consider the following factors are relevant to determining whether Mr Carey was an employee or contractor:

- (a) What were the intentions of Mr Carey and the respondents?

³ *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [2], [3], [6] and [7]. Citations omitted.

⁴ *Pilgrim v Attorney-General* [2023] NZEmpC 105 at [29].

- (b) Was Mr Carey working under the control of the respondents or integrated into the respondents' operations?
- (c) Was Mr Carey effectively working on his own account (the fundamental test)?

[20] The remainder of this determination is structured around these factors.

What were the intentions of Mr Carey and the respondents?.

[21] Mr Carey claims on a number of dates in May and June 2022 he had contractual conversations with Mr Smith including at a meeting held in Ohakune with Mr Smith, Mr Walsh and Mr Howie present. Mr Carey acknowledged there was no written contract but claimed there were verbal agreements including he would be paid \$150,000 per annum, receiving 20% of the shares of BRL and then being paid \$5,000 per month "while the business was getting off the ground" with Mr Smith to be responsible for all tax obligations. When asked at the investigation meeting why he thought he was an employee and not a contractor Mr Carey said this was because he was never asked for an invoice, which was what would normally happen from his previous contracting jobs. This position was reiterated in submissions from Mr Carey.

[22] Mr Hudson and Ms Ockey, supporting witnesses for Mr Carey, both thought he was working for Mr Smith, with Ms Ockey describing it as employment. Mr Howie, another supporting witness, was not clear about employment issues. I have placed no weight on these witnesses in relation to the intentions of Mr Carey and the respondents as their evidence was of general perceptions rather than about specific knowledge they had of the intentions of the parties.

[23] Mr Smith said he engaged Mr Carey as a contractor on 24 June 2022. At the investigation meeting he described a conversation including options involving PAYE or contracting, though this evidence was lacking in specifics. Submissions for the respondents said prior to this Mr Carey was promoting and selling Ouchie Powder at markets on the basis of a 50% share of proceeds, paid in cash by Mr Smith. Mr Walsh said he understood Mr Carey to be a contractor. Both Mr Smith and Mr Walsh agreed there was no written agreement with Mr Carey.

[24] Submissions for the respondents said Mr Carey's evidence presented several different dates when he said employment commenced. His evidence was said to be

inconsistent and insufficient to establish employment had commenced on any of the claimed dates.

[25] Mr Carey's submissions in reply denied or rebutted almost all of the points in submissions for the respondents and reiterated his claim to have been employed by Mr Smith, with reference to an agreed salary of \$150,000 and 20% of patent of the company. Mr Carey referred to minutes and his "unrebutted affidavit ... which is truth in commerce" attached to the Statement of problem.

The intentions of Mr Carey and the respondents are not clearly established

[26] I am not satisfied Mr Carey and the respondents clearly reached a common intention as to whether Mr Carey would be engaged as an employee or contractor. There certainly was no written agreement either way. Mr Carey claimed agreement was reached on a number of different dates with different agreements or elements of agreement over time, including a claim Mr Smith "back-dated" his employment as he was satisfied with his work. Most of the meetings where agreement was claimed to have been reached were informal meetings at cafés in Whanganui. While I accept employment or contracting arrangements can be entered in an informal way including verbally, in this case the lack of formality does not support there being a clear intention either to enter an employment or contracting relationship.

[27] Mr Carey provided photographic evidence of his attendance at an Innovate Whanganui presentation with Mr Smith, a "Dragons Den" style event where Ouchie Powder was pitched. Mr Smith accepted Mr Carey assisted him by speaking for him at this presentation as Mr Smith had suffered a stroke. I do not consider this is definitive either way of whether there was an employment or a contracting relationship.

[28] Mr Carey was paid \$5,000 on three occasions in June, July and August 2022. Mr Carey claimed this was his monthly wages while Mr Smith and Mr Walsh said the payments were contractual albeit without invoices. The actual dates of payment in each month were irregular, which would count against these being salary payments as claimed by Mr Carey.

[29] I have treated Mr Walsh's evidence on the nature of payment arrangements with some caution as he described conversations he had with Mr Smith rather than Mr Carey. Mr Walsh is a shareholder in BRL and said he discussed "work" Mr Carey had done including supporting the pitch at the Innovate Whanganui presentation referred to at

paragraph [27] above. Mr Walsh said he supported a payment of up to \$10,000 to Mr Carey although for some reason Mr Smith paid \$5,000 more. I am not convinced Mr Walsh's evidence was clear about whether an employment or contracting relationship was intended, and in any event his evidence could only support what he discussed with Mr Smith, as he did not provide evidence of having direct discussions with Mr Carey.

[30] I consider the intentions of the parties is a neutral factor and does not favour either claims Mr Carey was an employee or contractor.

Was Mr Carey working under the control of the respondents or integrated into the respondents' operations?

[31] Mr Carey said he worked as directed by Mr Smith from 9.30am to 4.30pm or 5pm for six days a week promoting the business. He said he was doing everything directed including arranging meetings, arranging publicity and attending markets.

[32] The respondents said Mr Carey did not report to Mr Smith, but accepted Mr Carey attended various Whanganui markets and was involved in promotional activities for Ouchie Powder. The respondents said there were discussions about a possible shareholding arrangement with BRL but Mr Carey was not integrated "into the life of the company".

[33] Mr Carey's response reiterated he met and worked with Mr Smith six days per week and was "following his orders and directives as my employer".

Mr Carey was not clearly working under the control of the respondents or integrated into the respondents' operations

[34] While I accept Mr Carey spent a reasonable amount of time with Mr Smith over the period he claims to have been employed, it was not clear what was being done during that time. Mr Carey's claims were general in terms of working all day for Mr Smith rather than clearly explaining all of the tasks he was employed to do.

[35] Mr Carey provided a spreadsheet with his records about the amount of time claimed to be spent on different activities for the respondents. Mr Carey's records included references to meeting Mr Smith at a café where they had discussions about non-employment matters including complaints about life and family matters. Mr Carey claimed to have helped Mr Smith with a range of "personal support & assistance" matters as well as helping to fill Ouchie Powder bottles and various promotional

activities. This included investment and promotional meetings, market days and the Innovate Whanganui presentation referred to at paragraph [27] above.

[36] I do not consider the spreadsheet information establishes Mr Carey being in an employment relationship. While, if accurate, it establishes Mr Carey and Mr Smith spent a reasonable amount of time together, the informality of meetings at cafes and the generality of many of the described activities as well as the non-employment matters included, count against the spreadsheet showing Mr Carey was working under the control of the respondents or integrated into the respondents' operations.

[37] Mr Carey also provided pictures of a Ouchie Powder branded name-badge for himself and invoices for the purchase of two uniforms for Ouchie Powder, which he said he was required to wear. I accept there was an Ouchie Powder name-badge and Mr Carey was provided with a uniform. This does not determinatively show he was under the control of the respondents or integrated into the respondents' operations. I consider it equally plausible this was a feature of the promotional activities Mr Carey, Mr Smith and others undertook at the various markets in Whanganui, with Ouchie Powder sold on an informal basis.

[38] Mr Carey and Mr Smith presented divergent accounts of the number of market days attended and the number of bottles of Ouchie Powder sold. Irrespective of whether I accept Mr Carey or Mr Smith's version, in neither case were sales for a substantial volume or value. Both versions of sales volume were indicative of Ouchie Powder being a "cottage industry product" as claimed by Mr Smith. The respondents' submitted sales prior to 23 June 2022 were for a share of proceeds, paid in cash. Such a commission payment arrangement could arise in either an employment or contracting relationship, and does not assist in determining whether Mr Carey was working under the control of the respondents or integrated into the respondents' operations.

[39] On balance, I am not convinced there is sufficient evidence to find Mr Carey was working under the control of the respondents or integrated into the respondents' operations. I consider these are neutral factors and do not favour either claims Mr Carey was an employee or contractor.

Was Mr Carey effectively working on his own account (the fundamental test)?

[40] Mr Carey said payment arrangements were as an employee with Mr Smith assuring Mr Carey "he would sort out tax his end", which Mr Smith denied. Mr Carey

also said he was only working for Mr Smith during the period in question. Mr Carey had been a contractor previously and said he understood what was required to operate his own business but was adamant this situation was employment.

[41] Submissions for the respondents said Mr Carey was never employed by any of the respondents, rather claimed the intention was for him to be a “promoter” who:

... was involved with the company in a “start-up phase” with a view to one-day being a shareholder.

This is essentially a “sweat equity” situation with some commission payments being made in advance.

[42] The respondents also asserted payments were made to Mr Carey’s business. Mr Carey’s response was bank records showed this was the case for one of the three payments only.

Insufficient evidence Mr Carey was working on his own account

[43] I do not consider the evidence supports Mr Carey working on his own account. The relationship between Mr Carey and the respondents was informal and appears to have all been verbally agreed, however, this would not prevent Mr Carey from being a contractor working on his own account. The different views about who was responsible for taxation are not determinative in my view, rather are reflective of the informal and non-specific arrangements Mr Carey and the respondents had.

[44] I consider it more likely than not Mr Carey was working with a view to becoming a shareholder, despite his claims he was promised 20% of the patent of the company as recorded in the minutes of the Ohakune meeting he had with Mr Smith, Mr Walsh and Mr Bowie. Mr Bowie’s evidence was this meeting was to discuss company ownership, which I understood to be of BRL.

[45] I am not convinced however this means Mr Carey was working on his own account. Employees can also be shareholders of companies which they work in. In any event, any discussions about potential company ownership did not progress to the extent they crystallised in shareholdings being vested to Mr Carey.

[46] I am not convinced however this factor demonstrates Mr Carey was employed by the respondents. Rather I consider this is another feature reflecting a lack of common understanding about the basis on which Mr Carey was performing work.

Summary of outcome on the preliminary issue: Mr Carey has not established he was an employee

[47] Standing back and considering all relevant matters as outlined above, I am not satisfied Mr Carey has established the real nature of the relationship he had with the respondents was as an employee. I consider it more likely than not the real nature of any relationship was a contracting one between Mr Carey and either Mr Smith or BRL.

[48] As I have found Mr Carey has not established he was an employee of the respondents, I therefore do not have jurisdiction to consider further the other issues raised by Mr Carey.

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[50] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondents may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Carey will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[51] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.⁵

[52] As the investigation meeting for this matter took half a day, my preliminary view is the notional daily rate for half of the first day is the appropriate starting point for a determination of costs. Given when the respondents’ counsel were engaged and the amount of documentation lodged by the respondents, actual costs may be limited. Should the respondents seek costs, proof of actual costs incurred will be required.

Shane Kinley
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1