

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 212
5448130

BETWEEN

DAE HYUNG CHOI
Applicant

A N D

HAGFISH NZ LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
No appearance for Respondent

Investigation Meeting: 3 June 2014 at Auckland

Date of Determination: 4 June 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Dae Hyung Choi, was employed by Hagfish NZ Limited (Hagfish)**
- B. The Employment Relations Authority has jurisdiction to deal with Mr Choi's claim that he is owed wages by Hagfish.**
- C. Hagfish is ordered to pay Mr Choi the sum of \$23,098.80 net within 14 days of the date of this determination.**
- D. Hagfish is to reimburse Mr Choi for the filing fee of \$71.56**

Non appearance of the respondent

[1] Hagfish failed to file a statement in reply and failed to attend the investigation meeting.

[2] Being satisfied that Hagfish had been properly served with the statement of problem and subsequent correspondence from the Authority together with a notice of investigation meeting, I proceeded to investigate the matter in the absence of Hagfish.

Employment relationship problem

[3] Mr Choi was employed for nine years until 2010 as a boilermaker and welder for Aimecs Marine Engineering Limited. Mr Choi retired in approximately 2010.

[4] After approximately three years in retirement, Mr Choi was contacted by Mr Peter Coleman, managing director of Hagfish. Mr Coleman had heard about Mr Choi's engineering experience and wanted him to work on, and repair, a fishing vessel owned by Hagfish, called *Barbara J* which was located in Nelson.

[5] Mr Choi and Mr Coleman met to discuss terms of engagement. No written employment agreement was signed but Mr Choi says there was a verbal employment agreement that he work for Hagfish for approximately three months from 25 June to 28 September 2013 to repair the *Barbara J*. It was a fixed term employment agreement which was to end once the repair job was complete. Mr Choi says he and Mr Coleman agreed that Hagfish would pay him \$50 per hour net each week, would provide and pay for Mr Choi's accommodation and travel expenses to Nelson where the *Barbara J* was located and would pay for any motor vehicle expenses and other work related expenses such as parts and tools required to perform his duties.

[6] In accordance with this arrangement, Mr Choi travelled from Auckland to Nelson on 23 June 2013. Mr Choi stayed at the Anchor Lodge Motel from 23 June until 31 August before moving to another motel for the remainder of his employment. Mr Choi produced a letter from the Anchor Lodge Motel confirming that Mr Peter Coleman of Hagfish had made the reservation for Mr Choi and had requested that all accommodation expenses were to be sent to Hagfish for payment for Mr Choi.

[7] Mr Choi worked on the *Barbara J*. in Nelson for the three month period in order to complete the project.

[8] Hagfish made a number of payments into Mr Choi's bank account and the bank accounts were produced to the Authority for inspection. The total payments made by Hagfish to Mr Choi totalled \$14,000. Mr Choi says the arrangement was that any PAYE was to be paid by Hagfish and he confirmed that he performed the

work as instructed by Mr Coleman. Mr Choi says he came out of retirement in order to do the work on the *Barbara J* and understood he was an employee of Hagfish.

[9] Mr Choi says he did not invoice Hagfish and is not GST registered. Mr Choi says he did not do any other work for any other organisation during the time he was employed by Hagfish.

[10] The statutory test for determining this preliminary jurisdictional issue is set out in s.6 of the Employment Relations Act 2000 (the Act). Section 6 of the Act states:

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;*
...
- (2) *In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract for 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*
...
 - (b) *must consider all relevant matters including any matters that indicate the intention of the persons; and*
 - (c) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[11] The leading case on s.6 of the Act is the Supreme Court decision of *Bryson v. Three Foot Six Ltd*¹. Chief Judge Colgan in *Singh v. Eric James & Associates Ltd*² states at para.[16] that the inquiry in each case involving s.6 of the Act is *intensely factual*, and at para.[17] sets out a number of principles derived from the *Bryson* decision. The Employment Court in *Poulter v. Antipodean Growers Ltd*³ summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:

- (1) *The Court must determine the real nature of the relationship.*
- (2) *The intention of the parties is still relevant but no longer decisive.*

¹ [2005] 3 NZLR 721

² [2010] NZEmpC 1

³ [2010] NZEmpC 77, 17 June 2010 at para.[20]

- (3) *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
- (4) *The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the fundamental “test”.*
- (5) *The fundamental test examines whether a person performing the service is doing so on their own account.*
- (6) *Another matter which may assist in the determination of issue is industry practice, although this is far from being determinative of the primary question.*

[12] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s.6 is for the Authority or the Court, to gain an overall impression of the underlying and true of the relationship between the parties.

[13] Mr Choi understood he was being employed for a specific purpose in order to repair the fishing vessel, *Barbara J.* That was his intention.

[14] Mr Choi is not GST registered, did not issue GST invoices. Mr Choi expected to be paid the hourly rate agreed to with Mr Coleman and expected and understood that Hagfish was responsible for the PAYE on his wages and for payment of his work related expenses. Mr Choi in a letter dated 30 October 2013 to Hagfish, set out the terms of his employment and requested payment of outstanding wages.

[15] The work undertaken by Mr Choi required him to repair the fishing vessel in order to make it seaworthy. This required that he work regularly and under instruction from Mr Coleman. It was not the type of work undertaken, for example, by fishermen who contract their services.

[16] My overall view is that the underlying and true nature of the relationship between Mr Choi and Hagfish was that of an employment relationship. It is my finding that Mr Choi was an employee.

[17] Mr Choi says he should have been paid \$35,400 in wages for the hours he worked and for work related expenses of \$1,698.80. Mr Choi was only paid \$14,000 by Hagfish and has requested payment of the balance on numerous occasions. Mr Coleman has made many promises to pay Mr Choi but to date has not done so. I find Mr Choi is owed \$23,098.80 net in respect of his employment by Hagfish.

[18] I order Hagfish to pay Mr Choi the sum of \$23,098.80net within 14 days of the date of this determination. Mr Choi is entitled to reimbursement by Hagfish of the filing fee of \$71.56.

[19] Pursuant to regulation 26 of the Employment Relations Authority Regulations 2000, Mr Choi is to be provided with a certificate of determination, sealed with the seal of the Authority recording that Hagfish is ordered to pay to Mr Choi the sums set out in this determination within 14 days of the date of the determination.

Anna Fitzgibbon
Member of the Employment Relations Authority