

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 57  
5581091

BETWEEN ANTHONY COCKBURN  
Applicant

AND MORNING DANCE FISH CO  
LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Mike Harrison, Advocate for the Applicant  
John Farrow and Sarah McClean, Counsel for the Respondent

Investigation meeting: 29 March 2017

Submissions received: At the investigation meeting

Determination: 24 April 2017

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Anthony Cockburn says that he was unjustifiably dismissed from his role as a deck hand for Morning Dance Fish Co Limited (Morning Dance) in August 2015.

[2] Morning Dance says that Mr Cockburn was an independent contractor, and never an employee. Therefore, Morning Dance says Mr Cockburn's claim is outside of the Authority's jurisdiction.

[3] If I find that Mr Cockburn was not an employee I cannot go ahead and determine his claim of unjustified dismissal. However, if I find he was an employee I will direct the parties to mediation.

### The relevant law

[4] Mr Cockburn bears the onus of establishing on the balance of probabilities that he was an employee.

[5] Section 6 of the Act defines an ‘employee’ as:

- (1)(a) ... any person of any age employed by an employer to do work for hire or reward under a contract of service, and
- (b) includes –
  - (i) a homemaker; ...
- (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...

[6] The law requires the Authority to determine the “real nature of the relationship” between the parties. That requires considering all relevant matters including any that indicate the parties’ intentions.

[7] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd*.<sup>1</sup>

[8] The Employment Court in *Poulter v Antipodean Growers Limited*<sup>2</sup> summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- 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.

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<sup>1</sup> [2005] ERNZ 372.

<sup>2</sup> [2010] NZEmpC 77 at [20].

- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice, although this is far from determinative of the primary question.

[9] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice then to apply the three tests known as the control, integration and fundamental or economic reality test.

[10] In *Poulter*, the Court concluded that ultimately it is necessary to gain an overall impression of the underlying and true nature of the relationship between the parties.<sup>3</sup>

### **The parties' intentions and the work in practice**

[11] In late July 2012, Christopher Cooper, Morning Dance's director and skipper of the Morning Dance fishing vessel, heard that Mr Cockburn was an experienced deck hand who was looking for work. He telephoned Mr Cockburn and asked him if he was interested in work. Mr Cockburn came and met Mr Cooper and went out on the boat with him.

[12] After that, they agreed that Mr Cockburn would work for Morning Dance. There is no written employment agreement or contract. At the beginning of the relationship there was no specific discussion about whether Mr Cockburn was to be an employee or an independent contractor.

[13] Since there was no document outlining the parties intentions I need to try and discern their intentions from how they acted. I will look at the whole relationship from the beginning.

[14] Morning Dance paid Mr Cockburn as a share-fisher, which means he was paid a share of the value of the catch landed from each trip. Mr Cockburn received an 18% share after Morning Dance deducted the cost to it of leasing quota.

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<sup>3</sup> Ibid at [21].

[15] Mr Cooper says he always intended Mr Cockburn to be a contractor, and to his mind that is what all share-fishers are. I accept it was Morning Dance's intention to engage Mr Cockburn as an independent contractor.

[16] Morning Dance deducted tax at 20% off Mr Cockburn's 18% share before paying him. Mr Cooper says that 20% was withholding tax that the IRD required Morning Dance to deduct. Morning Dance paid the tax to the IRD every month.

[17] Mr Cockburn says he always understood the tax taken off by Morning Dance was PAYE. That is at least partly because Mr Cooper used to record the tax deduction as PAYE on his desk blotters on which he worked out Mr Cockburn's pay. However, on the invoice book Mr Cooper later used he referred to the tax deducted simply as "tax".

[18] Mr Cockburn either gave Mr Cooper his tax number, or filled in an IRD Tax Code Declaration form (IR330). If he filled in the form, it is no longer available. However, on what appears to have been 9 September 2012 Mr Cooper filled in the first employer monthly tax schedule since Mr Cockburn began working for Morning Dance. Mr Cooper noted that Mr Cockburn's tax code was WT, which stands for withholding tax.

[19] Withholding tax is also known as schedular payments and is the kind of tax that the IRD requires employers to withhold from independent contractors, and pay on the contractors' behalf to the IRD. Mr Cooper's recording of the WT code demonstrates that at the beginning of the engagement Morning Dance intended Mr Cockburn to be an independent contractor.

[20] However, for a reason that no one can now identify, in monthly employer tax schedules after September 2012 IRD sent Morning Dance forms in which the IRD noted Mr Cockburn's tax code as M. The M tax code is used by employees for their main, or highest, source of income. The IRD considered that Mr Cockburn was paying tax as if he was an employee.

[21] Morning Dance intended that Mr Cockburn was liable to pay his own ACC levies. It did not intend to pay them on his behalf. Mr Cockburn never received a levy demand from ACC and did not pay his own ACC levies.

[22] However, it appears that Morning Dance paid Mr Cockburn's ACC levies because the levies are calculated by the IRD on the number of employees an employer has, and the amount of wages it pays.

[23] In May 2013, Mr Cockburn suffered an injury that put him off work for a few weeks. ACC sent Morning Dance an "employee earnings certificate" to be completed online. Jacqueline Cooper, Mr Cooper's wife, assists with Morning Dance's administration and filled in the ACC form. In the form, completed on 28 May 2013, Mr Cockburn's tax code is noted as M, not WT. Mr Cockburn is referred to as an "employee" a number of times. For example, in answer to the question "on what date did this employee begin employment with your organisation?" Mrs Cooper answered "22 July 2012". Mrs Cooper did not write anywhere that Mr Cockburn was not an employee but an independent contractor. Mrs Cooper acknowledged at the end of the form that to the best of her knowledge all the information she supplied was true and correct.

[24] Mr Cockburn received ACC weekly compensation for the time he was off work as if he was an employee. ACC's decision was based at least in part on the information supplied by Mrs Cooper on behalf of Morning Dance.

[25] Mr Cockburn's advocate, Mr Harrison, submits that Mrs Cooper's filling in the ACC form and thereby identifying Mr Cockburn as an employee is clear evidence that Morning Dance considered Mr Cockburn to be an employee at that time.

[26] I heard evidence from Mrs Cooper and questioned her. Mr Harrison cross-examined her. Mrs Cooper says that it meant nothing to her that Mr Cockburn was described as an employee in the ACC form. She filled in the form simply because she knew that Mr Cockburn expected to be paid weekly compensation while he was unable to work. She says the form was emailed directly to Morning Dance:

so I do not think I would have thought twice about it ... I expected we have to fill this out so he could get ACC payments.

[27] Mrs Cooper's evidence is that a lot of the fields she had to complete were from drop-down menus and she was not able to type freely into all of the boxes. However, she was freely able to type in a lot of information about the hours and days of work

and she did so because “the form did not really fit for the way Anthony worked for us”.

[28] I do not accept that the form being filled in the way it was by Mrs Cooper is conclusive evidence that Morning Dance treated Mr Cockburn as an employee by representing that to the ACC. That is because Mrs Cooper had never filled in such a form before and was not familiar with it. I accept that she filled it in because she understood she had to do that. I also take into account that it was ACC that referred to Mr Cockburn as an employee and Mrs Cockburn simply did not correct that, as opposed to Morning Dance holding out to ACC that Mr Cockburn was its employee.

[29] It is my strong impression that Mrs Cooper was a very truthful witness, and is not a sophisticated businessperson. She lacks a nuanced understanding of the legal significance of Mr Cockburn being described as an employee in an ACC form.

[30] I also accept that Mr and Mrs Cooper expected that Mr Cockburn was paying his own ACC levies and were not aware that the ACC levies Morning Dance paid included levies for Mr Cockburn. Certainly, as at May 2013 they were unlikely to have noticed that the levy bill had gone up.

[31] Mr Cooper and Mr Cockburn understood that Mr Cockburn would only ever be paid after a day out fishing. Mr Cockburn was not paid for days that the weather was too bad to go out, or for the occasional days he assisted with pots or ropes on land when the weather was not suitable for fishing. The fact that Mr Cockburn worked from time to time on land<sup>4</sup> in repairing pots and ensuring ropes were in good condition without expectation of pay tends to indicate that he did not expect to be paid for work done outside of a fishing trip. That tends to indicate that he did not consider himself to be an employee, who would have been entitled to have been paid the minimum wage for every hour of work.

[32] Mr Cockburn did not get paid for any days he had off work, for example, he was not paid when he was unable to work because of illness. He did not take any paid annual holidays in the approximately three years he worked for Morning Dance. This tends to suggest that he did not consider himself an employee as he did not expect to be able to take paid leave.

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<sup>4</sup> The parties disagree about how often this happened.

[33] Mr Cockburn had worked as a contracted share-fisher previously as well as an employed fisherman.

### **The control and the integration tests**

[34] The control test seeks to establish the nature and extent of control of the work performed and who exercised that control.

[35] All control over Mr Cockburn's work while on board the Morning Dance was exercised by Mr Cooper, as the skipper. Mr Cooper made the decisions about where and when the Morning Dance would sail and would fish.

[36] Once Mr Cockburn was on board and the vessel had left Port Chalmers he had no real control over what work he did, when he did it or for how long. Mr Cooper determined those things, although Mr Cooper's decisions were dictated by the amount and timing of fish caught and the weather conditions.

[37] Significant lack of control over his own work when crewing on the vessel tends to suggest Mr Cockburn was an employee of Morning Dance. That is because Mr Cooper is the controlling mind of the Morning Dance company, and at all times when fishing he controlled Mr Cockburn's work. That means that at all times the company controlled Mr Cockburn's work.

[38] However, control is not always indicative of an employee relationship. In all cases of seafaring workers the practical reality of the type of work done is that the skipper is ultimately in control of all work done while at sea. That is because of safety considerations and the necessity to comply with specific legislation. However, not all seafarers are employees.

[39] It is usual in some industries for a contractor to be controlled in a number of aspects of their work and yet not be an employee, they can be referred to as dependent contractors<sup>5</sup>. That is perhaps a more precise definition of what Mr Cockburn's role was in relation to the fishing enterprise of Morning Dance.

[40] In addition, although Mr Cooper says that he would encourage his crew to prioritise their availability to work on the Morning Dance, it is clear that Mr Cockburn

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<sup>5</sup> Such as in *Narinder Singh v Eric James & Associates Ltd* [2010] NZEmpC 1

was free to accept or refuse work on any given day that the Morning Dance was going fishing. Occasionally, Mr Cockburn turned down the chance to go out on a fishing trip. Mr Cockburn had control over what fishing trips he would accept. This suggests a degree of independence that an employee does not have. In addition, Mr Cockburn was free to work on other vessels if he chose to do so. Once or twice he crewed on other vessels, sometimes on days the Morning Dance was not going out.

[41] Some aspects of the control test tend to indicate that Mr Cockburn was an employee, but overall it is consistent with him being a dependent contractor.

[42] The integration test examines the extent to which a worker is integrated into the business.

[43] There is little to suggest Mr Cockburn was integrated into the business. He did not wear a uniform and provided his own knives, at the beginning, as well as his own boots and wet weather gear. If Morning Dance provided work clothing, which it did at times, it charged Mr Cockburn for this and he was aware that the cost was deducted off his share before it was paid out to him, making provision of his gear his own cost, as if he was a contractor.

[44] The fact that Mr Cockburn could turn down work, and did so, and that he could crew on other vessels, and did so, indicates that he was not an integral part of Morning Dance's business, but was more likely a contractor.

### **Industry practice**

[45] In the Employment Court case of *Sealord Group Limited v Aaron Pickering*<sup>6</sup> Judge Ford considered fishing industry practice. The Morning Dance is engaged in in-shore fishing. In paragraph [12] Judge Ford set out the type of arrangement typically used in small inshore fishing operations

In the fishing industry generally, share-fishing arrangements are common practice. Two typical such arrangements were described in evidence. First, there is the arrangement whereby all parties share in the risk and reward. This is typically used in small inshore fishing operations where the management of the vessel, its operations and crewing, is not complex. The crew's share of the catch tends to be a higher percentage number because the share is

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<sup>6</sup> [2015] NZEmpC 76

related to the amount that is left over after paying all the vessel expenses. This method can mean that if there is no catch the crew can end up owing the owner money for expenses incurred.

[46] I heard evidence from Antonie Smith, the President of the Port Chalmers Fisherman's Co-operative, which is a representative body of owner-operator commercial fishermen. Mr Smith has been in the fishing industry for about 35 years, first as a share-fisher crew, then as a share-fisher skipper and since 2005 as an owner-operator of vessels. He engages share-fishers to crew and skipper his vessels.

[47] In his experience, the majority of crew and skippers on inshore fishing vessels are engaged as share-fisher contractors. In preparation for giving his evidence, Mr Smith spoke to eight other Port Chalmers owner-operators. They all engage their crew under sharefishing arrangements as contractors, as he also does. It was also his understanding that most of the vessels based in Timaru and Bluff also engaged share-fisher contractors.

[48] His evidence is that owners prefer to engage crew and skippers under sharefishing arrangements as income earned by a vessel varies so much from week to week and is very unpredictable. The hours of work also vary greatly from day to day as the industry is totally weather dependent. He says:

While this may first appear harsh, the reality is that sharefishing arrangements are fair to both owner-operators and sharefishers. When a vessel is catching lots of fish, there is a lot of hard work involved and lots of money to be earned. When a vessel is not catching as much, there is less work to be done and although the owner operator may not be making a profit, due to their negligible expenses, the sharefishers are still making an income.

[49] In Mr Harrison's submissions, he says that the three dominant fishing companies in New Zealand Sanfords, Talleys and Sealord between them have 7,155 employees of which Sanford employs 503 staff in its fleet and Sealord's fleet has 1,100 employees. Therefore, he asks me to conclude the industry practice is to employ fishers and not to engage them as contractors. However, from the *Pickering v Sealord*<sup>7</sup> case we know that even in the offshore fisheries Sealord engages contractors on share fishing arrangements as well as employed fishers.

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<sup>7</sup> Mr Pickering was found to be an employee.

[50] Mr Harrison is unable to give evidence, as his submissions seek to do on this point. I note he has not provided the context or the source of his information. It may be that most of the operations of the three biggest fishing companies are in offshore fishing, and not on small inshore fishing vessels such as the Morning Dance.

[51] I prefer Mr Smith's evidence as it is more relevant to the situation Mr Cockburn was working in.

[52] Industry practice is not determinative, but is useful in this case and tends to indicate that Mr Cockburn was not an employee but a contractor.

### **Economic reality or fundamental test**

[53] I accept that Mr Cockburn did not make income tax returns during the years he worked for Morning Dance, and so did not take any tax advantage from a contracting status, such as claiming the cost of his clothing and knives he provided as tax deductions. He made an income tax return for the year ended 31 March 2016 as if he had been an employee and received a tax refund of \$1,527.98 in May 2016. However, also in May 2016 the IRD reclassified his personal tax summary as an IR3, meaning it changed its mind and considered that he had not been an employee, but a contractor.

[54] I do not find any assistance in considering how Mr Cockburn saw his tax status.

[55] I consider that Mr Cockburn knew that he took on some risk when agreeing to work as a share-fisher. For example, he knew that the risk of poor weather would mean he could not earn.

[56] Conversely, the way he worked could increase his ability to earn by maximising Morning Dance's chances of having large catches. He had an interest in ensuring ropes and pots were in good condition to ensure greater efficiency and efficacy of effort on a fishing trip. I consider Mr Cockburn was well aware of that and that is why he worked from time to time when the weather was against a fishing trip on making sure pots and ropes were in peak condition for future fishing trips. He did not expect to be paid for those days, as his reward was in the potentially bigger catch values.

[57] Overall, I conclude that although Mr Cockburn was not a sophisticated business person he was aware he was engaged in a shared enterprise with Morning Dance aimed at maximising his income and Morning Dance's income simultaneously.

### **Conclusion**

[58] The real nature of the relationship between Mr Cockburn and Morning Dance was that of a contractor and not an employee. Therefore, I do not have the jurisdiction to determine Mr Cockburn's claim of unjustified dismissal.

### **Costs**

[59] Costs are reserved. Morning Dance, as the successful party, is entitled to a contribution towards its actual legal costs. The parties are encouraged to resolve costs by agreement.

[60] However, if that is not possible then Morning Dance has 28 days in which to file its cost submissions, Mr Cockburn has a further 14 days to respond.

[61] The Authority is likely to adopt its notional daily tariff-based approach costs so the parties are invited to identify any factors they say should result in the notional daily tariff, of \$4,500, being adjusted. The meeting went from 11 am until 4 pm, so lasted not quite a full day.

Christine Hickey  
Member of the Employment Relations Authority