

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

2017 NZERA Christchurch 33  
5636045

BETWEEN            JOSHUA COLEMAN  
                                 Applicant  
  
A N D                HARBOUR HOLDINGS  
                                 LIMITED  
                                 Respondent

Member of Authority:     Peter van Keulen  
  
Representatives:         Steven Zindel, Counsel for Applicant  
                                 Dean Russ, Counsel for Respondent  
  
Investigation Meeting:    15 December 2016 at Nelson  
  
Submissions Received:    Submissions from both parties on 15 December 2016  
  
Date of Determination:    14 March 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Coleman was not an employee of Harbour Holdings Limited, he was an independent contractor and the Authority does not have jurisdiction to determine his claim.**
- B.     I reserve costs with a timetable set for submissions if required.**

**Employment relationship problem**

[1]     This employment relationship problem arises out of an unfortunate set of events. Mr Coleman only worked one day for Harbour Holdings Limited (Harbour Holdings) as a share fisherman, on a fishing trip, before he sustained a serious injury to his hand. The skipper had to abandon the fishing trip so the vessel could head back to land for Mr Coleman to receive urgent medical treatment.

[2] Because of the injury he sustained on the fishing trip, Mr Coleman never returned to work for Harbour Holdings.

[3] Mr Coleman claims that Harbour Holdings unjustifiably dismissed him and it acted in an unjustifiable manner causing disadvantage to a term or condition of his employment.

[4] Harbour Holdings says Mr Coleman was a contractor and the Authority does not have jurisdiction to hear his claims. In the alternative Harbour Holdings says that if Mr Coleman was an employee then his personal grievances were not raised within the 90-day time period<sup>1</sup> and there are no exceptional circumstances that would warrant the Authority allowing the grievances to be raised outside the 90-day period<sup>2</sup>.

[5] The parties have agreed that I should determine the issues raised by Harbour Holdings as a preliminary matter.

### **The issues**

[6] This preliminary matter has three issues:

- (a) Was Mr Coleman an employee or an independent contractor?
- (b) If Mr Coleman was an employee was his personal grievance raised within the requisite 90-day period?
- (c) If Mr Coleman's personal grievance was not raised within the requisite 90-day period are there special circumstances that mean I should allow his grievance to be heard by me?

### **Independent Contractor**

[7] The legal test for ascertaining whether a person is an employee is set out in s 6 of the Employment Relations Act 2000 (the Act). Section 6 provides:

- (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
  - (b) Includes –
    - (i) A home worker; or

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<sup>1</sup> Section 114(1) of the Employment Relations Act 2000.

<sup>2</sup> Section 114(4) of the Employment Relations Act 2000.

- (ii) A person intending to work; but
- (c) Excludes a volunteer who –
  - (i) Does not expect to be rewarded for work to be performed as a volunteer; and
  - (ii) Receives no reward for work performed as a volunteer; and
- (d) ...
- (1A) ...
- (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 the relationship.
- ....

[8] The leading case on how the Authority or the Court should determine the real nature of the relationship and what are relevant matters for the purpose of that consideration is *Bryson v Three Foot Six Ltd*<sup>3</sup>. Subsequent decisions of the Employment Court have provided guidance on applying the *Bryson* principles<sup>4</sup>.

[9] In summary, based on the relevant case law, s 6 of the Act requires me to consider the real nature of the commercial relationship between the parties broadly and realistically, rather than narrowly and artificially or legalistically. In doing so, I must make a realistic assessment of the reality and all the circumstances of work performed in the working relationship.

[10] From the relevant case law<sup>5</sup>, the steps I should take and the relevant circumstances I should consider in this assessment are:

- (a) First, I must consider the terms of engagement in any contract between the parties. From this contract, I can establish if there is a common

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<sup>3</sup> *Bryson v Three Foot Six Ltd* [2003] ERNZ 581 (EmpC) and *Bryson v. Three Foot Six Ltd (No 2)* [2005] NZSC 34

<sup>4</sup> See *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 and *Narinder Singh v Eric James & Associates Ltd* [2010] NZEmpC 1

<sup>5</sup> Applying *Bryson* and following the Employment Court decisions in *Atkinson* and *Singh*.

intention, which may indicate the nature of the relationship but will not be determinative.

- (b) I must then consider any divergences in the agreed terms by assessing how the work was carried out in practice.
- (c) Once I have assessed how the work was carried out in practice I can then apply the three relevant common law tests:
  - (i) Control, being an analysis of who decides what work is done and how it is done;
  - (ii) Integration, being an analysis of how integrated the individual is into the business of the alleged employer; and
  - (iii) The fundamental test, being an analysis of whether the individual is in business on his own account.
- (d) I should consider industry practice as this remains relevant but it is not determinative.
- (e) Similarly, I should consider the tax treatment on any payments noting however that it is not determinative and that the tax treatment may be misapplied based on the intention of one of the parties such that the tax treatment is merely a mistake and not indicative of what the relationship is.

[11] I will turn to consider each of these steps in relation to Mr Coleman's role with Harbour Holdings.

### **Contract and terms of engagement**

[12] Mr Coleman was engaged by Harbour Holdings as a share fisherman to undertake a fishing trip on the Jay Elaine, departing from Greymouth on 4 November 2015.

[13] Prior to the 4 November fishing trip, Mr Coleman had worked for Harbour Holdings on a different vessel, the Galatea II, as an ice boy and as a deckhand. The contract that Mr Coleman had for the work he did on the Galatea II included:

- (a) Payment of a daily sum as an ice boy or a percentage of the trip's catch when he was a deckhand;
- (b) From any payment due to Mr Coleman, Harbour Holdings would deduct the cost of groceries for any fishing trip, any personal gear provided to Mr Coleman and any incidentals or additional costs incurred by Mr Coleman;
- (c) Harbour Holdings would also deduct tax at a specified rate – in the case of Mr Coleman, based upon his tax code declaration that was at the scheduler payment rate of 20%;
- (d) Mr Coleman was responsible for ACC payments; and
- (e) Mr Coleman had no entitlement to any leave including sick leave and holiday pay.

[14] Whilst the contract signed by Harbour Holdings and Mr Coleman had a reference to it being an employment agreement I am satisfied this was an erroneous reference as the other references in the contract are to a contract position and are consistent with a contractor role.

[15] Mr Coleman did not sign a contract for the work he was to undertake as a share fisherman, as there was not enough time prior to departure to provide all the required information and sign the contract. However, there was a draft contract that contained identical terms to contract for Mr Coleman's role as an ice boy or deckhand. The only difference in the terms and conditions was the rate of payment. Mr Coleman was to be paid 10% of the catch from the fishing trip.

[16] Mr Coleman did sign a tax declaration form on 4 November 2015 that recorded his tax code for the share fisherman role as WT, the code for an independent contractor, this being the same code used when he was engaged as an ice boy and a deckhand.

[17] Harbour Holdings' intention was to retain Mr Coleman as an independent contractor as this was its normal practice for crew retained to work on fishing vessels.

[18] Mr Coleman's evidence as to whether he considered himself a contractor to Harbour Holdings either under the first engagement or under the second was that he

did not think he was a contractor, as the relationship did not operate on the same basis as other incidences where he was retained as a contractor. For example when he was a courier, he operated his own business rendering accounts, accounting for GST, and essentially working the hours that suited him and his business.

[19] Yet he did not raise any issue with the nature of the relationship under the first engagement, which he knew Harbour Holdings treated as an independent contractor. And, he completed his tax return on the basis that he was self-employed.

[20] From the evidence I heard at the investigation meeting I am satisfied that Mr Coleman knew Harbour Holdings was engaging him as an independent contractor and he accepted this and treated himself as an independent contractor, for example, by signing the tax declaration as an independent contractor and completing his tax return on the basis of being self-employed.

[21] Mr Coleman and Harbour Holdings' common intention was that he was to be an independent contractor.

### **The work in practice**

[22] Mr Coleman only worked one day as a share fisherman.

[23] The way in which the work was carried out reveals relevant circumstances for consideration:

- (a) Three people, a skipper and two crew staffed the Jay Elaine. Mr Coleman was a crewmember;
- (b) The skipper and the crew shared the costs of food for the fishing trip. They each brought their own PPE and wet weather gear;
- (c) All of the necessary equipment for fishing was provided and maintained by Harbour Holdings and it was on the Jay Elaine ready to be used on the fishing trip;
- (d) Mr Coleman had not worked on the Jay Elaine before nor had he worked as a fisherman, so shortly after he commenced working on 4 November, Mr Coleman was given an induction dealing with safety matters and the basic requirements of his role;

- (e) The skipper on the Jay Elaine, Shaun Hart, was responsible for plotting the course and therefore the fishing location. Mr Hart set a course out of Greymouth toward his desired fishing location;
- (f) Mr Hart was also responsible for the work the crew undertook and they followed his instructions;
- (g) Once the Jay Elaine was at Mr Hart's chosen location the crew shot the nets;
- (h) The nets would take some time to fill and the crew were not required to work during this time;
- (i) Once the nets were full the crew began work hauling in the nets;
- (j) It was during the course of hauling in the nets that Mr Coleman sustained a serious hand injury and the fishing trip was then abandoned.

[24] The operation of Mr Coleman's role on that day did not reveal any changes to the terms set out in the draft contract.

### **Control test**

[25] The control test is consideration of the nature and extent of control of the work performed and who exercises that control.<sup>6</sup>

[26] The control that Harbour Holdings had over the way Mr Coleman carried out his work on the Jay Elaine was exercised through the Mr Hart. Mr Hart was an independent contractor to Harbour Holdings and he had the discretion as to where the Jay Elaine would sail and fish. Mr Hart therefore had the discretion to decide when and how the crew would perform the fishing work required. Mr Hart also had the discretion to decide when the Jay Elaine would return to Greymouth.

[27] Once he was on the Jay Elaine and it had left Greymouth Mr Coleman had no real control over what work he did, when he did it or for how long, Mr Hart determined that, although Mr Hart's decisions were dictated by the amount and timing of fish caught.

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<sup>6</sup> *Atkinson v. Phoenix Commercial Cleaners* at [59]

[28] So, the analysis of control in the relationship once Mr Coleman was crewing on a fishing trip suggests Mr Coleman was an employee because of the almost complete control Mr Hart had over how and when his work was performed.

[29] However, three aspects of this form of control displace this conclusion.

[30] First, on one analysis, Harbour Holdings had no control over the work that Mr Coleman undertook on the Jay Elaine. It merely provided the Jay Elaine to Mr Hart and the crew under an agreement to complete a fishing trip, where the return on any catch was split in agreed parts with Harbour Holdings, Mr Hart and the crew bearing differing costs associated with the fishing trip. Once on board, Mr Coleman's work was subject to the control of Mr Hart<sup>7</sup>. All that Harbour Holdings controlled was the offer to be a crewmember on a particular fishing trip and the terms and conditions governing that role, not the actual work done.

[31] The alternative construction of this argument is that Mr Hart is an agent or representative of Harbour Holdings and it is no different to an employee being under the control of a manager or a supervisor rather than the employer, particularly so where the employer is a company. So, in effect Harbour Holdings controls Mr Coleman's work.

[32] On balance, I prefer the first analysis of the control in this relationship. Mr Hart was not acting on instructions from Harbour Holdings when he directed the work to be undertaken he was acting in his own interests and based on his own assessment of where and when to fish.

[33] Whilst it is arguable that Harbour Holdings exercised control over the work being undertaken I think the reality of how the crew performed their work and the relationship between Harbour Holdings and Mr Hart, indicates that Mr Hart controlled the work. He had little or no reference to Harbour Holdings other than perhaps a desire to maximise the return for them and to abide by any safety practices and processes imposed by Harbour Holdings as the owner of the Jay Elaine.

[34] Second, in any event, control is not always indicative of an employment relationship.

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<sup>7</sup> See *Muollo v Rotaru* [1995] 2ERNZ 414 at 428

[35] It is not uncommon for a contractor to be controlled in aspects of the work undertaken. For example in *Narinder Singh v Eric James & Associates Ltd*<sup>8</sup> Mr Singh was a sales advisor with Eric James & Associates, selling personal insurance. The Court noted in Mr Singh's case that Eric James & Associates exercised significant control over the way in which Mr Singh operated, he was not able to delegate his work, he had to attend appointments made for him and he was expected to be available to work certain weeknights and parts of the weekends. There were also comprehensive restrictions placed on Mr Singh's ability to sell competing insurance products. Despite this high level of control, Chief Judge Colgan found the control elements of the relationship did not support a conclusion that the relationship was an employment one. At paragraph [25] Chief Judge Colgan stated:

[25] Such elements of control of Mr Singh's working activities are, although significant, not uncommon in non-employment situations, what have sometimes been described as dependent contractor relationships.

[36] This level of control is also common in labour only contracting relationships and can be seen in other contractor roles such as courier drivers where there are significant restrictions and control placed over the driver's work.

[37] The other aspect of the control exerted is that the manner in which the Jay Elaine operates was dictated not just by the requirements of Harbour Holdings in relation to use of its equipment and Mr Hart in terms of the fishing being undertaken but the statutory requirements imposed on fishing vessels under the Maritime Transport Act 1994.

[38] In these circumstances I am not satisfied that the control exerted over Mr Coleman's work is indicative of an employment relationship but rather it is consistent with the operation of a fishing vessel and the retention of crew as share fishermen in contractor roles, perhaps best described as dependent contractor roles.

[39] Third, Harbour Holdings retained Mr Coleman on a casual contract basis. Mr Coleman did not need to make himself available on demand or instruction by Harbour Holdings, for any fishing trips. If Harbour Holdings offered him a position as a crewmember on a fishing trip, he could decide if he took it or not. Therefore, Mr Coleman had control over what fishing trips he would accept and therefore was not

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<sup>8</sup> [2010] NZEmpC 1

required to work any particular trip or days. This aspect of control suggests Mr Coleman was an independent contractor.

[40] Mr Coleman knew when he accepted a fishing trip on the Jay Elaine that he would be subject to the decisions of Mr Hart and his direction as to when and how any fishing was carried out. Mr Coleman decided whether to be a crewmember on the Jay Elaine and in doing so, he was accepting work as a “dependent contractor”. Mr Coleman cannot now point to the control by Mr Hart and say this means he was actually an employee.

[41] My analysis of the control test is that it does not indicate that Mr Coleman was an employee and it is consistent with Mr Coleman being a contractor.

### **Integration test**

[42] This test determines the extent to which a person is integrated into the business<sup>9</sup>.

[43] There is little to support the suggestion that Mr Coleman was integrated into the Harbour Holdings business. He was not given any particular resources as his to use. For example, he was not given a uniform nor did he have a company mobile phone, laptop, or email as none of this was necessary for his role. Mr Coleman did not attend any staff meetings, have any appraisals or undertake any company training.

[44] On balance, the integration test indicates that Mr Coleman was not integrated into the Harbour Holdings’ business and was a contractor.

### **Fundamental test**

[45] This test is an analysis of whether the person is engaged to perform services on their own account.

[46] Mr Coleman bore the risk of the financial return as did all the parties to the fishing trip undertaken, that is Harbour Holdings, Mr Hart and the two crewmembers. If the fishing trip failed to generate a reasonable catch then there was a risk that after paying his share of costs Mr Coleman might not make any profit.

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<sup>9</sup> *Atkinson v. Phoenix Commercial Cleaners* at [66]

[47] The tax on Mr Coleman's earnings from Harbour Holdings was accounted for on the basis that Mr Coleman was a contractor and he was responsible for ACC levies.

[48] Mr Coleman did not get any leave nor did he have any holiday entitlements. In short, the relationship was premised on the basis that any time not spent fishing for Harbour Holdings was at Mr Coleman's costs regardless of whether this was because he was sick, taking holidays or for some other reason.

[49] Mr Coleman was not prevented from doing other work and was not bound to accept any particular fishing trip from Harbour Holdings. He could choose what work he wanted to sign up for, with whom and when.

[50] The fundamental test suggests Mr Coleman was in business on his own account and therefore a contractor not an employee.

### **Industry practice**

[51] As noted by Judge Ford in *Sealord Group Limited v Aaron Pickering*<sup>10</sup> share fishing arrangements are common in the fishing industry. In paragraph [12] Judge Ford sets out the one of two typical arrangements for share fishing, where all the parties share in the risk and reward. The fishing trip on the Jay Elaine was consistent with that industry practice.

[52] What also follows from industry practice is that share fishermen participating in such an arrangement are normally contractors. Harbour Holdings' practice is to treat all share fishermen acting as crewmembers as contractors.

[53] Industry practice is consistent with Mr Coleman being a contractor.

### **Taxation**

[54] Harbour Holdings would have deducted scheduler payment, at the rate of 20% from Mr Coleman's earnings as a share fisherman. It deducted these payments from his earnings as an ice boy and a deck hand.

[55] Mr Coleman treated himself as self-employed for the earnings he received from Harbour Holdings when he completed his tax return.

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<sup>10</sup> [2015] NZEmpC 76

[56] Mr Coleman also paid his own ACC levies.

[57] The tax and ACC treatment of Mr Coleman's earnings was consistent with a contractor relationship.

### **Broad and realistic assessment**

[58] Overall, when I stand back, and make a broad and realistic assessment of the work that was undertaken and how each party treated the other I am satisfied that Mr Coleman was an independent contractor.

### **Personal grievances raised within 90 days**

[59] As I have determined that Mr Coleman was a contractor and not an employee I do not need to resolve the issue of the personal grievances being raised outside of the 90-day period as I do not have jurisdiction to consider his claim further.

### **Determination**

[60] In all of the circumstances, I am satisfied that the real nature of the relationship between Mr Coleman and Harbour Holdings is that of an independent contractor and not an employee.

[61] Accordingly, I do not have jurisdiction to determine the claims set out in Mr Coleman's statement of problem.

### **Costs**

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

[63] If they are not able to do so and a determination on costs is needed, Harbour Holdings may lodge and serve a memorandum on costs within 28 days of the date of this determination. Mr Coleman will have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority