



# Employment Court of New Zealand

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## D'Arcy-Smith v Natural Habitats Limited [2015] NZEmpC 123 (28 July 2015)

Last Updated: 1 August 2015

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2015\] NZEmpC 123](#)

ARC 57/14

IN THE MATTER OF a challenge to a determination of  
the  
Employment Relations Authority

BETWEEN GRAHAM D'ARCY-SMITH Plaintiff

AND NATURAL HABITATS LIMITED  
Defendant

Hearing: 7-8 May 2015  
(Heard at Taupo)

Appearances: Plaintiff in person  
L Herzog, counsel for  
defendant

Judgment: 28 July 2015

### JUDGMENT OF JUDGE CHRISTINA INGLIS

#### Introduction

[1] Graham D'Arcy-Smith carried out work with Natural Habitats Limited (NHL) for just over one month. He claims that he was unjustifiably dismissed at the end of this period. NHL contends that he was engaged through a company as a labour-only contractor. If that is so it is a complete answer to his claim.<sup>1</sup>

[2] The matter originally came before the Employment Relations Authority (the Authority). The Authority dismissed Mr D'Arcy-Smith's grievance on the basis that he had not been in an employment relationship with NHL.<sup>2</sup> He challenges that

determination on a de novo basis. It was agreed that the Court would determine the

<sup>1</sup> That is because the personal grievance procedures contained in the Employment Relations Act

2000 only apply to "employees".

<sup>2</sup> *D'Arcy-Smith v Natural Habitats Ltd* [2014] NZERA Auckland 237.

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issue of employment status first and, if necessary, a further hearing would take place to resolve the plaintiff's personal grievance.

#### Background

[3] NHL specialises in landscape work. It was contracted to carry out landscaping work for Mighty River Power. The project was initially for a three-month term, beginning on 18 May 2013. It subsequently fell behind time and was extended. NHL engaged subcontracted labour, primarily through a company called

1st Call, for the project. It also employed a number of workers. Mr Stevenson was project manager for NHL and was involved in Mr

D'Arcy-Smith's engagement. The events surrounding Mr D'Arcy-Smith's engagement occurred three weeks into the project, before it had been extended.

[4] At the relevant time Mr D'Arcy-Smith was unemployed and looking for work. He had heard through a group he was involved with at Work and Income New Zealand that there may be work on the Mighty River Power project. He made contact with NHL through its managing director, Mr Cleary, on 11 June 2013. Mr D'Arcy-Smith's email stated:

I understand that you have a three month planting project in Taupo for Mighty River Power & was wondering if you need a foreman or something similar to help run the project.

[5] Mr Cleary responded the same day inviting Mr D'Arcy-Smith to send in a copy of his curriculum vitae. He advised Mr Stevenson about Mr D'Arcy-Smith's interest in a role on the project. Mr Stevenson contacted Mr D'Arcy-Smith and met with him on 12 June 2013. This initial meeting took place at the marina, which is where Mr D'Arcy-Smith was living in his car. Mr D'Arcy-Smith's evidence was that during the course of the meeting Mr Stevenson offered him employment for a three-month fixed term. Mr Stevenson denies this and says that it was a general discussion about the project and the type of work the company did. I preferred Mr Stevenson's evidence in relation to this and later discussions, for reasons which will become apparent.

[6] Mr Stevenson says that he left the meeting and went to the work site, calling Mr D'Arcy-Smith later in the day to arrange a second meeting. This meeting took place in a local restaurant that evening. Mr D'Arcy-Smith gave Mr Stevenson a copy of his curriculum vitae and sent a copy of his curriculum vitae to Mr Spencer, of NHL, the following day. This document records Mr D'Arcy-Smith's current occupation as "Casual Consultancy/Contractor". It also makes reference to Mr D'Arcy-Smith having been managing director of a company, Conservation Property Ltd (CPL), for the period June 2004 to November 2010 and his other (extensive) experience in business.

[7] Mr Stevenson says that he advised Mr D'Arcy-Smith that the company was engaging contract workers through 1st Call and that there might be a role for him on a similar basis, that he would only be paid around \$18 per hour and that invoices would need to be provided for the work done. He says that Mr D'Arcy-Smith indicated his agreement to the proposal. Mr D'Arcy-Smith disputes Mr Stevenson's recollection of the conversation and says that he made no reference to other contract workers and no mention of manner of payment.

[8] Mr Stevenson gave evidence that he called Mr D'Arcy-Smith later in the week, on 17 June 2013, and confirmed the offer of casual labour-only contract work, at \$18 per hour and on the same nominal hours as other contract workers on the site. The requirement to provide an invoice was reiterated and Mr D'Arcy-Smith was advised that he would need to take care of his own tax arrangements. Mr Stevenson says that Mr D'Arcy-Smith agreed to this proposal. Mr Stevenson says that there was a further discussion about invoices after Mr D'Arcy-Smith had started work, during which he asked what mechanism Mr D'Arcy-Smith had to provide invoices and Mr D'Arcy-Smith advised that he would invoice NHL through a company.

[9] Mr D'Arcy-Smith commenced work with NHL on 18 June 2013. Difficulties subsequently arose and Mr D'Arcy-Smith's last day of work was one month later.

## Analysis

[10] Mr D'Arcy-Smith does not fall within any of the statutory exceptions to "employee" set out in [s 6 of the Employment Relations Act 2000](#) (the Act). Accordingly consideration must be given to "the real nature of the relationship."<sup>3</sup> In determining the real nature of the relationship, regard must be had to all relevant matters that indicate the intention of the parties. It is important to have regard to the way in which the relationship operated in practice. This, in turn, requires an assessment of the whole of the factual matrix. As the Supreme Court observed in *Bryson v Three Foot Six Ltd (No 2)*:<sup>4</sup>

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 determination of its real nature. "All relevant matters" equally clearly requires the Court or 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 by 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 the light of the control, integration and fundamental tests.

[11] The inquiry is not always easy, particularly in borderline cases. In the present case there are indicia which point both ways.

[12] There was no written agreement from which the parties' intention about the nature of their relationship might be gleaned.

[13] In cross-examination Mr D'Arcy-Smith accepted that he had a significant amount of business experience, including as a chief executive officer and as project manager. However, he did not accept the proposition that he had a clear understanding of the requirements of employment law, including the need for a written employment agreement. Mr Stevenson took issue with this assertion, saying that it had been a topic traversed by the Authority member and that Mr D'Arcy-Smith had ultimately accepted that he had been aware of the requirement for written

agreements. This capitulation, it was said, was reflected in the Authority's

<sup>3</sup> [Employment Relations Act 2000, s 6\(2\)](#).

<sup>4</sup> *Bryson v Three Foot Six Ltd (No 2)* [\[2005\] NZSC 34](#), [\[2005\] ERNZ 372](#) at [\[32\]](#).

determination and the factual findings recorded in it. Mr D’Arcy-Smith contended that he had given no such evidence in the Authority and he was not cross-examined on the point. No record of evidence is taken in the Authority.

[14] While I was invited to have regard to the factual findings of the Authority to bolster the defendant’s case, I do not consider it appropriate to do so, despite the apparently broad powers to accept and admit evidence contained within [s 189\(2\)](#) of the Act. It provides that:

The Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[15] The first point is that [s 189\(2\)](#) does not *require* the Court to receive any evidence. Rather it confers a discretion on the Court. While the discretion is broad it is to be exercised in a principled manner. If it were otherwise, the interests of justice (which must be the touchstone) run the risk of being sacrificed to the interests of expediency. In weighing the interests of justice, including the interests of the opposing party, the Court is likely to be assisted by the principles underlying the rules of evidence contained within the [Evidence Act 2006](#). Relevantly for present purposes, [s 50\(1\)](#) of the [Evidence Act](#) provides that:

### **Civil judgment as evidence in civil or criminal proceedings**

Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in ... another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.

...

[16] [Section 50\(1\)](#) is directed at ensuring that fact finding is not relegated to other Courts or bodies. It precludes reliance on judicial reasons in other cases as evidence of facts in issue in a proceeding.<sup>5</sup> The concern has equal application in this jurisdiction, particularly on a de novo challenge. I am not persuaded to admit the evidence relating to the Authority’s factual findings in the present case. Even if I had, I would have been disinclined to give them any weight, having regard to the

evidence that was before the Court.

<sup>5</sup> *Simunovich Fisheries Ltd v Television New Zealand Ltd* [\[2008\] NZCA 350](#) at [\[96\]](#); *APN New*

*Zealand Ltd v Simunovich Fisheries Ltd* [\[2009\] NZSC 931](#); [\[2010\] 1 NZLR 315](#) at [\[33\]](#).

[17] I am satisfied that Mr D’Arcy-Smith downplayed his appreciation of basic employment requirements when giving evidence in support of his challenge. It is notable that in cross-examination he accepted that he had significant experience hiring both employees and contractors, and that he knew the difference between the two (although he said that he has a greater appreciation of the distinction now). While he later retreated from the position, it is evident that he has had considerable experience in business. His curriculum vitae is extensive and the covering email to NHL sent before his engagement makes particular mention of his experience in hiring staff, noting that:

... I have experience in running, hiring & organising teams of all shapes & sizes, including all the financial components that it entails, including time sheets.

[18] Despite Mr D’Arcy-Smith’s lengthy experience he took no steps to raise any issues with Mr Stevenson about the mechanism for payment, tax arrangements and the absence of a written agreement. I consider this omission significant, and reflective of Mr D’Arcy-Smith’s clear understanding of the basis on which he was being engaged. Indeed no issues were raised in respect of his employment status until after NHL had advised him that it no longer required his services.

[19] While there was no written employment agreement there was, conversely, no written agreement evidencing a relationship in the nature of a contract for services. Mr D’Arcy-Smith submitted that this was relevant as there was provision under the company’s policy documentation for contractors to fill in various forms. It was common ground that Mr D’Arcy-Smith had not been provided with, or invited to fill in, these forms.

[20] Mr Stevenson accepted that it did not appear that any of the contractor forms had been given to Mr D’Arcy-Smith. He also accepted that the agreement with Mighty River Power required that enquiries be made as to any prospective contractor’s past health and safety performance and whether it had a health and safety system in place. He acknowledged that no such enquiries had been made prior to allowing Mr D’Arcy-Smith on to the site. Rather, the documentation that Mr D’Arcy-Smith was provided included an induction manual which referred to the

following computer file tree: “staff/staff employment pack/ 12 08 03 induction manual”.

[21] Mr Stevenson said that a staff pack was given to Mr D’Arcy-Smith on his first day because that was the material that was available when he arrived. As he also pointed out, the staff pack contained information in relation to NHL’s standards and methods of operation, which was important for both staff members and contractors. Because Mr D’Arcy-Smith had confirmed that he had been inducted, and had viewed the company’s health and safety material, that was regarded as sufficient to allow him on to the site as a labour-only contractor.

[22] Mr D'Arcy-Smith also gave evidence that he was given a health and safety manual, an IR3 form, a personal medical history and a personal criminal history form by the on-site supervisor, Mr Oertel, on 18 June. He says that he completed the forms and returned them to Mr Oertel. Mr Stevenson said that he had taken steps to locate the documentation that Mr D'Arcy-Smith said he had been given but that it had not been found. Mr Oertel was not called to give evidence, despite an earlier indication that he would be and despite his apparent involvement in aspects of the process. In the circumstances I accept Mr D'Arcy-Smith's evidence as to what he was given, what he signed and what he returned to Mr Oertel.

[23] In *Kiwikiwi v Maori Television Service* the Court observed that:<sup>6</sup>

The absence of a written agreement is critical ... If an organisation is entering into an agreement with an independent entity it is to be reasonably expected that such an agreement would be formalised in writing to acknowledge and name the contractor and to set the parameters of the contractual arrangements entered into.

[24] Insofar as the Court was suggesting that the absence of contractual documentation is decisive in determining the parties' intention, I respectfully disagree. If the absence of a written employment agreement is not to be viewed as determinative (even though there is a statutory requirement to have one), I can discern no logical reason why the absence of a written agreement recording a contract for services would have that effect. Much will depend on the particular

circumstances as to the inferences that can appropriately be drawn from the absence of documentation that might otherwise be expected to have been completed by the parties to record the nature of their relationship.

[25] In the particular circumstances surrounding Mr D'Arcy-Smith's engagement, as they emerged from the evidence, I regard the absence of contract documentation as a neutral factor.

[26] As I have said, Mr D'Arcy-Smith gave evidence that he was offered fixed-term employment for a three-month period on 12 June, and that this offer was communicated to him during their initial meeting at the marina. This evidence was plainly inconsistent with his email to Mr Gilmore of 13 June 2013, which refers to the meeting with Mr Stevenson on 12 June and records:

I met with [Mr Stevenson] yesterday & *he may have some casual gopher/admin work* on the Mighty River Power site, but if you have anything else, I'm willing to consider anything & almost any location.

(emphasis added)

[27] As Mr Herzog pointed out, the email is couched in terms of a possibility of work rather than a firm offer, and there is no reference to fixed-term employment of any duration.

[28] Mr Stevenson made the point in evidence that he had no authorisation to employ staff. Mr D'Arcy-Smith sought to make something of the fact that the constraints on Mr Stevenson's powers of recruitment had not been identified at an earlier stage. I accept Mr Stevenson's explanation that it had not previously been raised with him, which is why it had not earlier come to light. While it is clear that Mr Stevenson was doing what he could to assist Mr D'Arcy-Smith, it is inherently unlikely that he would have offered Mr D'Arcy-Smith employment when he had no authority to do so.

[29] I have had regard to the fact that Mr D'Arcy-Smith was keen to get back to work and was in difficult personal circumstances. However, it is clear that he had a very well developed sense of the value he could bring to the project and is an articulate, forceful and intelligent person. I have no doubt that he entered into

discussions with Mr Stevenson on a relatively equal footing, and I did not understand him to be suggesting otherwise.

[30] I preferred Mr Stevenson's evidence as to the nature of the discussions prior to 18 June 2013. While the records for 17 June 2013 suggest that the telephone conversation on that date was relatively brief, the parameters of the proposal had previously been detailed and the conversation was simply to confirm what had already been traversed. I am satisfied that Mr Stevenson made it clear to Mr D'Arcy-Smith that the offer was on a contract labour-only basis, that he would be paid an hourly rate of \$18, would work similar hours to others on-site, and that invoices would need to be rendered through an entity setting out the hours worked. Mr D'Arcy-Smith accepted the offer that was made to him. The basis of the engagement was consistent with the way in which Mr D'Arcy-Smith was marketing himself at the time in his curriculum vitae, as a "casual consultancy contractor".

[31] The parties' common intention is not, however, conclusive as to the real nature of the relationship. As was recently observed in *Atkinson v Phoenix Commercial Cleaners Ltd*:<sup>7</sup>

[Section 6](#) of the Act is broader and requires more than simply determining the common law contractual question of the parties' common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a [s 6](#) analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix's employee.

[32] Mr D'Arcy-Smith issued invoices for work on 24 June, 1 July, 8 July and 5

July 2013. It is apparent that the first invoice followed contact from Mr Stevenson requesting advice as to the identity of the company that he was proposing to invoice NHL through. I do not accept that during the course of this discussion Mr Stevenson said that he did not want to take tax from Mr D'Arcy-Smith, or that he said that it did not matter whether the entity chosen for invoicing purposes was registered or not. The request that Mr Stevenson made was consistent with the earlier discussions as to payment.

[33] Mr D'Arcy-Smith responded to Mr Stevenson's request by advising that he would be invoicing NHL through CPL. He emailed an

invoice to NHL in the name of CPL in respect of work undertaken from 18 June later that evening. It is revealing that Mr D’Arcy-Smith did not raise any concerns about the request for an invoice, despite his prior experience in business and despite his asserted belief that he was an employee.

[34] The invoice for work performed during the first week was said to be an “invoice for services: Contract for landscaping & admin services”. It was forwarded to NHL under cover of an email entitled: “Invoice from Conservation Properties”. In the event Mr D’Arcy-Smith retracted the first invoice and replaced it with a second one with a GST number. These steps suggest a contract for, rather than of, service.

[35] As it transpires, Conservation Properties Ltd is a non-existent company and the GST number was fictitious, although Mr Stevenson was unaware of this at the time. Mr D’Arcy-Smith says that he rang Inland Revenue and was advised that he could not issue an invoice through CPL (Conservation Property Ltd) and so he chose to make up a fictitious reference to Conservation Properties Ltd.

[36] Mr D’Arcy-Smith said that he was not registered for GST, that no GST was claimed on the invoices supplied to NHL and that he has not deducted expenses for tax purposes. He also said that the invoices that were issued were not tax invoices. However it is difficult to reconcile this evidence with the reference to “tax/GST” that appears at the top of each of the invoices presented for payment by him.

[37] I was not drawn to Mr D’Arcy-Smith’s evidence in relation to payment issues, and it was apparent that his recollection was vague and at times confused. He was, for example, unable to recall why he had requested in subsequent invoices that “PROC” be inserted by way of payer detail rather than NHL. And his evidence as to what had prompted a reissue of the first invoice was less than straightforward.

[38] Mr D’Arcy-Smith referred to *Bryson*,<sup>8</sup> pointing out that Mr Bryson was found to have been an employee despite having rendered invoices in relation to the

work he had undertaken. While that is so, it was the evidence as a whole which led to a finding in his favour. In his case there was no evidence other than tax arrangements to indicate that Mr Bryson was operating a business on his own account.<sup>9</sup> As has been observed in *Singh v Eric James & Assocs Ltd*:<sup>10</sup>

Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.

[39] In the present case there was no “contractual labelling” of Mr D’Arcy-Smith as an independent contractor in the sense referred to in *Singh*, and so the consequential dangers identified by the Court in that case (and earlier alluded to by the Employment Court in *Bryson*<sup>11</sup>) do not arise.

[40] Mr D’Arcy-Smith gave evidence that he had provided his personal IRD number because of advice he received from Inland Revenue that he was an employee. There was no corroborating evidence to support this but even if there had been, the views of another organisation as to Mr D’Arcy-Smith’s status would be of little probative value.

[41] There were no payslips and no PAYE was paid by NHL on behalf of Mr D’Arcy-Smith. When asked why he would need to issue any invoices under the name of a company, Mr D’Arcy-Smith said in cross-examination that it was because Mr Stevenson had asked for one. He went on to say that he was comfortable with the arrangement because he had a tax credit and that he had made it clear to Mr Stevenson that he could take care of his own tax. When asked why he would need to issue an invoice if he was an employee, he responded by saying that it kept track of his time, because his hours were stated on the invoice. I found his evidence strained. The way in which payment was organised points away from an employment relationship.

[42] Mr D’Arcy-Smith worked five days a week, on average approximately eight hours a day, exclusively for NHL. There was little scope to increase his

<sup>9</sup> *Bryson v Three Foot Six Ltd* [2003] NZEmpC 164; [2003] 1 ERNZ 581 (EmpC) at [56].

<sup>10</sup> *Singh v Eric James & Assocs Ltd* [2010] NZEmpC 1 at [17].

<sup>11</sup> At [55].

remuneration absent negotiating a higher hourly rate of pay, given the hours that he was working.

[43] Mr D’Arcy-Smith was picked up each morning by NHL in an NHL vehicle and taken to the worksite. He also said that he was permitted to take an NHL vehicle home on occasion. Mr D’Arcy-Smith was not required to provide any tools or equipment. All of the tools required to carry out his work were supplied by the company. Nor was he required to provide his own personal protective gear.

[44] Mr D’Arcy-Smith was allocated various tasks by Mr Oertel, including planting, fertilising, delivering and raking mulch, spraying and loader work. It was not disputed that Mr D’Arcy-Smith worked under close supervision and as directed. He was put on, and taken off, tasks as required by Mr Oertel or Mr Stevenson.

[45] Mr D’Arcy-Smith worked fairly regular hours, as the invoices reflect. On occasion he would finish early, but this was at the direction of Mr Oertel. The documentation before the Court indicates that Mr D’Arcy-Smith did not work one Thursday. He gave evidence, which was not challenged, that he had spoken to Mr Oertel about this and that he had agreed to him not working the Thursday, on the basis that he would work the preceding Sunday.

[46] It is clear that Mr D’Arcy-Smith did not exercise autonomy as to how his working day was organised, what he did or how he did it.

Rather NHL exerted a high degree of control over these matters.

[47] The level of control and integration in the present case would generally point squarely towards an employment relationship. However, as Judge Travis made clear in *Garden City Helicopters*, an application of these tests ultimately depends on an assessment of the particular circumstances.<sup>12</sup>

[48] Mr Stevenson acknowledged that 1st Call contractors provided their own personal protective equipment but that such equipment was provided to Mr D’Arcy-

Smith by NHL. He gave evidence, which I accept, that this reflected a concern for

12 *Brunton v Garden City Helicopters Ltd* [2011] NZEmpC 29, [2011] ERNZ 504 at [71]- [72].

the difficult position Mr D’Arcy-Smith was in and a genuine desire to assist him. He also made a similar point in relation to the transportation assistance that was provided, and said that the same sort of arrangement (in terms of transportation to and from the site) was extended to other workers who lived nearby.

[49] Mr Stevenson made the point that 1st Call contractors were provided with all necessary tools. This reflected the labour-only nature of their engagement. I accept Mr Stevenson’s evidence that it was necessary for NHL to keep a close eye on what was being done by those working on site to ensure that appropriate standards were reached in terms of its contract with Mighty River Power.

[50] I conclude that while the high level of control and integration points towards an employment relationship, it does not do so strongly, having regard to the particular circumstances.

[51] Both parties referred to correspondence exchanged after Mr D’Arcy-Smith’s departure from NHL in support of their respective submissions. I do not draw assistance from this documentation, given its timing and the respective interests of the parties when it was written. Nor am I prepared to draw anything from the description of Mr D’Arcy-Smith as a labour-only contractor in an incident report prepared by Mighty River Power on 16 July 2013, referred to by the defendant. Mr D’Arcy-Smith gave evidence that he met with the report writer but did not tell him that he was a contractor. The report writer was not called to give evidence and there is nothing before the Court to explain the basis for the description used.

[52] Finally, I record that an issue arose at hearing in relation to the admissibility of certain material that the plaintiff wished to refer to, namely recordings of telephone conversations and transcripts of those conversations. The recordings, which involved discussions Mr D’Arcy-Smith had engaged in with a variety of people, had been surreptitiously made at various times from 15 July 2013 (well after he started working with NHL and just a couple of days before his departure). The defendant objected to the plaintiff referring to this material, primarily on the basis of relevance. In the circumstances I decided to allow it in provisionally.

[53] It is not unlawful for a participant in a conversation to record it without the other party’s knowledge.<sup>13</sup> Whether it is unfair to do so will depend on the particular circumstances.<sup>14</sup> The recordings are of conversations that Mr D’Arcy-Smith was party to with various other people, including Mr Stevenson and Mr Oertel. The recordings are marked by an underlying element of deception because of the secretive way in which they were taken. Mr D’Arcy-Smith gave evidence that he

felt compelled to start recording various conversations because he became fearful for his safety.

[54] While I am prepared to admit the recordings under s 189(2) of the Act, I give them little weight. The quality was relatively poor, at times inaudible and incomplete. That means that various conversations, and what was said by the participants to them, may be taken out of context. In any event, as it transpired there were only limited aspects of the material that Mr D’Arcy-Smith sought to rely on, and these had only peripheral relevance to the matters currently before the Court (namely, the issue of whether Mr D’Arcy-Smith was in an employment relationship at the relevant time). Recordings said to reflect the degree of control exercised over Mr D’Arcy-Smith’s work did not advance matters as that issue was not in dispute, as Mr Herzog confirmed. Mr D’Arcy-Smith submitted that other recordings were more broadly relevant to the issue of credibility, but I do not accept that they undermine Mr Stevenson’s evidence on the key points at issue.

## Conclusion

[55] The inquiry into the nature of the relationship is an intensely factual one.<sup>15</sup> It will be apparent from the foregoing that there are factors that point both towards, and away from, an employment relationship. That is not unusual in cases such as this. However I consider that the real nature of the relationship was not one of employer/employee. The parties agreed, at the outset of what was intended to be a short-term relationship (and which ultimately turned out to be even shorter), that Mr D’Arcy-Smith would be engaged as a labour-only contractor. The way in which

payment issues were subsequently dealt with is consistent with such a relationship,

<sup>13</sup> [Crimes Act 1961, s 216B\(2\)](#).

<sup>14</sup> *Talbot v Air New Zealand Ltd* [1995] NZCA 234; [1995] 2 ERNZ 356, [1996] 1 NZLR 414 (CA).

<sup>15</sup> *Bryson* (EmpC), above n 8 at [21].

and consistent with the parties’ agreement reached shortly beforehand. The factors pointing in the opposite direction are relevant, but must be viewed in context.

[56] The challenge to the Authority's preliminary determination is dismissed.

[57] The parties are urged to agree costs. If that does not prove possible, the defendant may file and serve submissions and material in support within a period of

30 days from the date of this judgment, with Mr D'Arcy-Smith filing and serving within a further 15 days. Anything strictly in reply should be filed within a further

10 days.

Christina Inglis

Judge

Judgment signed at 12.45 pm on 28 July 2015

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