

Issues

[4] The preliminary issue for determination before the Authority is whether Mr D’Arcy-Smith was an employee or an independent contractor during the period he carried out work for Natural Habitats.

Background Facts

[5] Natural Habitats is a company providing garden design, landscape design, build and on-going care services throughout New Zealand. During 2013 it obtained a contract with Mighty River Power (MRP) for a 3 month contract in Taupo.

[6] Mr Stevenson, Project Manager for Natural Habitats, said that the usual procedure followed in regards to projects of a similar nature to that of the MRP project in Taupo was for Natural Habitats to send down one or two Auckland based employees to provide supervision for the subcontract labour which was usually engaged locally throughout the duration of the project.

[7] The MRP contract specified the start date for the Taupo project as: *“13th May 2013 or 3 Days after acceptance whichever is the later”* and completion as 3 months thereafter: *“The period to be used for calculation of the Due Date for Completion shall be 3 Months”*.

[8] On 11 June 2013 Mr D’Arcy-Smith contacted Natural Habitats by email with regard to the possibility of obtaining some work as a result of hearing about the MRP project via contacts at a WINZ group. At that time Mr D’Arcy-Smith was not in employment following a failed land development project through his company, Conservation Property Ltd (CPL).

[9] Mr Stevenson subsequently met with Mr D’Arcy-Smith on 12 June 2013 in a public car park, adjacent to a boat ramp and the truck in which Mr D’Arcy-Smith claimed to be residing. Mr D’Arcy-Smith said he had understood from that meeting that he was being employed on a 3 month fixed term basis.

[10] Mr Stevenson denied that fixed term employment had been discussed with Mr D’Arcy-Smith and at the Investigation Meeting he confirmed that he did not have the authority from Natural Habitats to employ or make offers of permanent or fixed term employment. He said that he had agreed that Mr D’Arcy-Smith would work as a labour-only subcontractor to Natural Habitats, invoicing it for the amount of work carried out.

[11] Mr D’Arcy-Smith said that on his first day of employment he had been provided with a lift to the work site by Mr Chris Oertel, the Natural Habitats Site Supervisor. He had been

provided with documentation in relation to the site induction procedures required by MRP, including criminal and medical information forms, a Health and Safety Manual and IRD forms.

[12] I note that such induction programmes are applicable to all personnel who work on the site irrespective of their employment status.

[13] Mr Stevenson said that the majority of the subcontract labour at the MRP site had been supplied by the agency, 1st Call Recruitment (1st Call), who provided all the required documentation on behalf of their labourers. Other contractors on site included fencing and irrigation contractors, and they also provided the required documentation on behalf of their labourers.

[14] However as Mr D'Arcy-Smith was not registered with 1st Call it had been necessary for Natural Habitats to provide him with the required site induction documentation. A pack of information as was provided to employees in Auckland had been given to Mr D'Arcy-Smith by Mr Oertel. Included in the standard pack were IRD forms, but these were not required to be completed in the case of Mr D'Arcy-Smith.

[15] At the Investigation Meeting Mr D'Arcy-Smith said he had not been provided with an individual employment agreement, and confirmed that he had not asked for one.

[16] When questioned at the Investigation Meeting, Mr D'Arcy-Smith, who had at one time worked as CEO of a computer supply company employing approximately 20 employees prior to working at CPL, confirmed that he understood the requirements of employment law in respect to the provision of written employments to employees, however because he had understood what employment terms had been agreed, he had not considered it necessary to ask for one.

[17] I note that the documentation submitted to the Authority by Mr D'Arcy-Smith contains numerous references to employment law in general, in addition to indicating a familiarity with Authority determinations, thereby supporting Mr D'Arcy-Smith's claim to be familiar with employment law requirements.

[18] During his time working for Natural Habitats Mr D'Arcy-Smith said he had been supervised by, and worked under the control of, Mr Oertel who provided him with a regular lift to and from the site, and that his equipment and tools had all been supplied by Natural Habitats.

[19] Mr Stevenson confirmed that as Mr D’Arcy-Smith had no means of transportation to or from the MRP site, Mr Oertel had provided him with a lift at the beginning and end of his own working day.

[20] He explained that the subcontractors on site had their own hard hats, clothing and basic tools, but as Mr D’Arcy-Smith had no hard hat or all the basic tools required and claimed that he could not afford to purchase any, Natural Habitats had loaned him these during the time he had worked on site. All large equipment, such as loaders and trucks, were supplied for the use of all contractors on site by Natural Habitats.

[21] Mr D’Arcy-Smith said he had been allowed to take a Natural Habitats truck home on occasion, and Mr Stevenson explained that this had been permitted only after Mr D’Arcy-Smith had worked additional hours in order that he had transport to get home. This was not necessary if the 1st Call or other subcontract labour worked additional hours as they had their own transport.

[22] Mr D’Arcy-Smith said that after he had commenced working at the site, Mr Stevenson had approached him and explained that Natural Habitats would like to pay him without paying income tax. Mr D’Arcy-Smith said he had agreed to the proposal because he had a tax credit. He had not asked Mr Stevenson if Natural Habitats would be paying PAYE because *“it didn’t seem relevant”*.

[23] Mr Stevenson said that all the subcontract labour on site was paid in accordance with, and on receipt of, GST invoices. He had discussed this requirement with Mr D’Arcy-Smith and asked if he had an entity that could provide Natural Habitats with the required invoices. Mr D’Arcy-Smith had confirmed that he had such an entity, being CPL the company he controlled, and that he would provide such invoices.

[24] On 24 June 2013 Mr D’Arcy-Smith sent an email attaching an invoice in the name of CPL to Ms Anne Curtis, who paid the subcontract invoices received by Natural Habitats, stating: *“Please find attached an invoice for my last weeks (sic) work as per my discussion with Don”*.

[25] The invoices supplied by Mr D’Arcy-Smith were in the name of CPL and headed: *“Invoice for services: Contract for landscaping & admin services”*.

[26] Mr D’Arcy-Smith said he had used the name of CPL on the first invoice supplied to Natural Habitats and included his personal IRD number on it. Because he had subsequently been asked to provide an invoice which included a GST number, he said he had made one up and included it on the invoices submitted.

[27] Mr D’Arcy-Smith said he had not informed Natural Habitats that the GST number provided had been false on the basis that he had not considered it to be an issue.

[28] Mr Stevenson said he had not been aware that the GST number included on the invoices submitted by Mr D’Arcy-Smith had been false, and said that Natural Habitats would not have had any reason to check the validity of the GST number provided.

[29] On the 5 invoices as supplied by Mr D’Arcy-Smith weekly for the period from 18 June to 15 July 2013, Mr D’Arcy-Smith claimed for hours worked from 7.30 a.m. until 4.00 p.m. on 5 days a week, apart from:

- the first invoice for the period 18 June to 24 June 2013 which included a claim for a Sunday which Mr D’Arcy-Smith said he had been offered as extra work; and
- the second invoice for the period 25 June to 1 July 2013 when Mr D’Arcy-Smith did not claim for the Thursday as he did not work that day.

[30] Mr Stevenson explained the reason for regular hours being claimed was that Mr D’Arcy-Smith was provided with a lift each day by Mr Oertel, he worked the hours he (Mr Oertel) did, being 7.30 a.m. until 4.00 p.m.

[31] During week commencing 25 June 2013 when Mr D’Arcy-Smith had not worked on the Thursday, Mr Stevenson said that this had been his prerogative as an independent contractor, and he had not been expected to do so or to make the hours up as would have been expected of an employee.

[32] Mr D’Arcy-Smith also said that although the invoices claimed payment on most of the days he worked until 4.00 p.m., frequently he did not carry out any work beyond 3.00 p.m. but had claimed for this time on the understanding that those were his agreed contractual hours in accordance with the alleged verbal employment agreement.

[33] Mr Stevenson said that he had not been aware that Mr D’Arcy-Smith was not working the hours he had claimed, and that Natural Habitats had trusted him to claim only for the hours actually worked. As he had no reason to doubt that the invoices presented a true claim on the basis of payment for hours worked, he had not checked Mr D’Arcy-Smith’s claimed hours with Mr Oertel.

[34] Mr D’Arcy-Smith’s period of engagement with Natural Habitats came to an end on 17 July 2013. There is no invoice provided for 16 & 17 July 2013, however Natural Habitats evidence that these two days were paid is not disputed.

Determination

[35] Mr D’Arcy-Smith claims that he was an employee whilst carrying out work for Natural Habitats. There was no offer letter, or employment agreement provided to him by Natural Habitats and he did not receive any pay slips.

[36] In deciding whether Mr D’Arcy-Smith was employed by Natural Habitats as an employee, I apply s.6 of the Act which provides:

“s.6 Meaning of employee:

1. In deciding ... whether a person is employed by another person under a contract of service, the Authority-... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2)... or the Authority-

(a) must consider any relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[37] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

“‘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 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

¹ [2005] 1 ERNZ 372

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 in common law. It is not until the Court or the 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 test”.

Control and Integration

[38] Mr D’Arcy-Smith stated that he worked under the control of Natural Habitats, specifically under the supervision of Mr Oertel who told him what to do, and set his hours of work.

[39] Mr Stevenson agreed that Mr Oertel would have supervised Mr D’Arcy-Smith in the work he carried out on site on the basis that all the subcontract labour on the site was supervised by Mr Oertel.

[40] I accept that it would be necessary for Natural Habitats to provide a level of supervision by Mr Oertel, or another Natural Habitats employee, to oversee the services provided by the subcontract labour to ensure the satisfactory quality of work on projects it had been contracted to carry out to the customer’s satisfaction. I do not find this fact of itself determinative of an employment relationship, but rather a normal commercial on site contracting function.

[41] Nor do I find the fact that Mr Oertel provided a lift on a regular basis to and from the site to Mr D’Arcy-Smith, or that Natural Habitats allowed Mr D’Arcy-Smith on occasion to use of one of its trucks and/or provided basic equipment, to be determinative of an employment situation. Rather I find it to indicate that Natural Habitats had been responding cooperatively to the alleged financially precarious situation in which Mr D’Arcy-Smith found himself by trying to assist with his transportation and basic equipment issues.

[42] I find from the evidence provided to the Authority that Mr D’Arcy-Smith was subject to the control of Natural Habitats in the provision of services. I further accept that the work he carried out whilst on the MRP site was integral to the project carried out for MRP by Natural Habitats.

[43] However I also note that Mr D’Arcy-Smith was able to absent himself from the site on Thursday 27 June 2013 for his own personal reasons without Natural Habitats taking any

form of disciplinary action or requiring him to make up the hours. This is consistent with an independent contractor position.

[44] I find that these circumstances are not of themselves determinative and have to be balanced against considerations of contractual intention between the parties and examination of the question of whether Mr D’Arcy-Smith was in business on his own account, the fundamental test.

Contractual basis

[45] There are no written terms and conditions of employment on which to establish the contractual nature of Mr D’Arcy-Smith’s relationship with Natural Habitats

[46] In *Cunningham v TNT Express Worldwide (NZ) Ltd*² the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship. This broad approach in *Cunningham* was held by Chief Judge Goddard in *Muollo v Rotaru*³ to apply to orally agreed terms, in that the relevant intention could be inferred from words or conduct at the time the contract was formed or subsequently varied.

[47] Mr D’Arcy-Smith said he had understood from his discussions with Mr Stevenson on or about the second week of June 2013 that he was being offered employment on a fixed term basis for 3 months on the MRP project.

[48] Mr Stevenson refuted this, and in support pointed to the fact that the MRP project in Taupo was contracted for a 3 month period which commenced on 13 May 2014. At the time of speaking with Mr D’Arcy-Smith it was therefore already one month into the contractual term with only 2 months to run, a fact of which Mr D’Arcy-Smith was aware, and even if he (Mr Stevenson) had wished to do so, he would have been unable to offer employment for 3 months on the then current MRP project.

[49] I observe that in Mr D’Arcy-Smith’s letter dated 13 June 2013 addressed to Mr Brian Spencer of Natural Habitats, he refers to the meeting with Mr Stevenson on 12 June 2013 and states: “*I met with Don yesterday and he may have some casual/gopher work on the Mighty River Power site ...*”

[50] I find that this statement does not support Mr D’Arcy-Smith’s contention that Mr Stevenson discussed and then offered him a 3 month’s fixed term employment. Rather I find it to support Mr Stevenson’s written evidence that Mr D’Arcy-Smith was to work as a labour only subcontractor, invoicing Natural Habitats for the work he had carried out, particularly in

² [1993] 1 ERNZ 695

³ [1995] 2 ERNZ 414 (WEC64/95)

light of Mr Stevenson's verbal evidence at the Investigation Meeting that he was not authorised by Natural Habitats to engage employees.

[51] Mr D'Arcy-Smith had not been issued with a written employment agreement. From his previous work experience and his self-confirmed knowledge of employment law requirements, Mr D'Arcy-Smith confirmed that he was aware that as an employee, he should have been provided with a written employment agreement, yet he had failed to ask for one.

[52] I find this significant in light of the fact that when asked to provide a GST invoice for services provided, Mr D'Arcy-Smith did not query the request. Indeed he provided invoices as requested, each in the name of CPL and stating that it was an: "*Invoice for services: contract for landscaping and admin services*".

[53] Given his business acumen and self-confirmed knowledge of employment law, which I reasonably hold in light of his written submissions to have included the requirements in respect of fixed term employment agreements in accordance with s 66 of the Act, I consider that it must have been clear to him at that point that Natural Habitats considered him to an independent contractor.

[54] Even when the first invoice he presented was rejected because it did not provide a GST number, Mr D'Arcy-Smith did not query the request on the basis that he was an employee rather than an independent contractor, and most extraordinarily, he invented and provided a false GST number on the substitute and subsequent invoices.

The Fundamental Test

[55] Natural Habitats did not calculate, deduct or pay PAYE on behalf of Mr D'Arcy-Smith. Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*⁴ that: "*Taxation arrangements, both generally and in particular are a relevant consideration.*"

[56] As previously observed, I do not accept that Mr D'Arcy-Smith was not aware that Natural Habitats considered his position to be that of independent contractor in light of the discussion about his providing it with a GST invoice, albeit false, in order to claim payment.

[57] Mr D'Arcy-Smith was an experienced business man who stated that he had agreed to the proposed payment process because he allegedly had 'a tax credit' situation. He had agreed to provide invoices in the name of CPL, a business of which he was the sole director. When asked to provide a GST invoice, he had done so in the name of CPL, albeit with a false GST number.

⁴ [2010] NZEMPC 1

[58] Mr D’Arcy-Smith did not query the personal taxation position, specifically why Natural Habitats was not calculating, deducting or paying PAYE and ACC contributions on his behalf, which I would have expected him to do had he genuinely believed his status to be that of an employee.

[59] At the Investigation Meeting Mr D’Arcy-Smith said, in support of his position that he was an employee, that he had provided his personal IRD number on the first invoice supplied to Natural Habitats.

[60] However I observe that in the evidence he provided to the Authority which included an annotated letter in response to her email dated 14 August 2013 addressed to Ms Carolyn Ransom, a lawyer acting for Natural Habitat at that time, Mr D’Arcy-Smith said he had contacted the IRD and obtained the IRD number for CPL.

[61] I find that there is sufficient evidence to indicate that Mr D’Arcy-Smith was in business on his own account.

[62] I determine that Mr D’Arcy-Smith was an independent contractor whilst working for Natural Habitats.

Costs

[63] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority