

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 143  
5442949

BETWEEN            BRIAN THOMAS  
                              ALEXANDER DENHAM  
                              Applicant

AND                    ANTHONY GEORGE SELMES  
                              Respondent

Member of Authority:    T G Tetitaha

Representatives:        Applicant in person  
                              A Holgate, Counsel for the Respondent

Investigation Meeting:    9 April 2014 at Whangarei

Submissions Received:    Oral submissions from applicant 9 April 2014  
                                  Written submissions from respondent 9 April 2014

Determination:            11 April 2014

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**DETERMINATION OF THE AUTHORITY**

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**A. Mr Denham was not an employee.**

**B. The application for personal grievance is dismissed.**

**C. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

**Employment relationship problem**

[1] There is a sole issue for determination, namely whether Mr Denham was an employee or an independent contractor in Whananaki South, Whangarei. Mr Denham alleges he is an employee. Mr Selmes disagrees.

[2] There is a sole issue for determination, namely whether Mr Denham was an employee or an independent contractor.

### **Facts leading to this dispute**

[3] On 6 November 2012 Mr Selmes appointed Mr Denham as his attorney under a power of attorney. Around the same period a consultancy agreement was entered into between the parties. Payment was for \$2500 plus GST per month. During this period an hourly rate of \$28 plus GST was also discussed.

[4] Between the period November 2012 and 16 October 2013 Mr Denham provided consultancy services and managed the farm.

[5] On or about 16 October 2013 the contract between the parties was terminated. Various reasons were given, including lack of finance and value for money. The termination was tense and both parties were unhappy.

[6] On 20 October 2013 Mr Selmes sent a letter to Mr Denham paying various invoices and making a further payment of two week's "notice".

[7] On 31 October 2013 Mr Denham sent an invoice 638347 for labour services totalling \$18,000 approximately. The invoice sets out hours of work and a charge rate of \$28 plus GST. The services were for the period March to October 2013.

[8] The matter has come before me today to determine whether Mr Denham as an employee or whether he was a contractor only. If he is an employee the matter can remain before me for determination of how much money (if any) he is owed. If not, the application shall be dismissed.

### **Was Mr Denham an employee or a contractor?**

[9] To determine the issue whether Mr Denham is an employee or a contractor requires consideration of s6 Employment Relations Act 2000. Section 6 sets out the meaning of an employee. Whether a person is employed requires the Authority to determine "*the real nature of the relationship between them*".

[10] In determining the real nature of a relationship between parties, the Authority will examine the relationship using three tests. These tests are – the control, integration and fundamental tests<sup>1</sup>.

[11] The control test looks at the degree of supervision exercised by an employer over an employee's activities or daily work. In this case I heard evidence from both parties that Mr Denham was never told where he had to be or what he had to do. The impression I have of the evidence is that because of Mr Denham's experience he told Mr Selmes what was required as opposed to the other way around. In short, there was little or any control exercised by Mr Selmes over the work that was undertaken by Mr Denham. He also had his own farm and consultancy business he ran as well.

[12] The integration test focuses on whether work performed by an employee is an integral part of that business. I have determined this test is not particularly relevant to this situation. This is because, as in *Clark v Northland Hunt Inc* (2006) 4 NZELR (EmpC), this involves a single employee and contractor.

[13] The fundamental test looks at whether employees engaged themselves to perform the services with the employer as a person in business on their own account<sup>2</sup>. How an individual structures his self employed business is relevant to considering the fundamental or, as it is sometimes known, the economic reality test<sup>3</sup>. Evidence of the methods of payment, taxation and description of the business in any invoices is relevant to determination of the fundamental test.

[14] In these circumstances, payment was made upon production of invoices. The invoices included GST. Mr Denham's evidence was he expected Mr Selmes would be able to claim back the GST as both are registered for GST. No PAYE was paid nor tax withheld on Mr Denham's behalf. The invoices recorded the payee as a partnership between Mr Denham and his wife Ms Jones (aka Denham). The money was placed in the partnership bank account. GST was paid on those funds from that account.

[15] Mr Denham also wrote a letter to Mr Selmes on 31 October 2013 referring to an hourly rate he received as an independent contractor to Clements Contracting of

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<sup>1</sup> *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC); *Curlew v Harvey Norman Stores (NZN) Pty Ltd* [2002] 1 ERNZ 114.

<sup>2</sup> *Bryson v Three Foot Six Ltd* (ibid)

<sup>3</sup> *New Zealand Greyhound Racing Association Inc* (2006) 3 NZELR 501 (EmpC)

\$28 per hour plus GST. He also noted “*at this rate there is no holiday pay, tax or ACC payable ...*” At hearing he acknowledged this statement was because he thought at the time he was an independent contractor.

[16] It was only after he received the letter dated 20 October 2013 referring to notice that he thought the relationship may be one of employment. He was also claiming for these labour costs because he did not believe the consultancy fee covered all of the work he had done. Unfortunately this evidence does not change his status from one to the other.

[17] Standing back and considering the evidence and the application of the three tests, the Authority concludes Mr Denham was not an employee. In the circumstances the Authority does not have jurisdiction to hear this matter. This matter may be heard by another jurisdiction such as the Disputes Tribunal and/or the District Court but it is hoped that the parties will consider settling this matter to avoid further expense. It is likely the costs of prosecuting this claim further may outweigh any remedy. However, that is a matter for the parties. In the circumstances the application for personal grievance is dismissed.

[18] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

**T G Tetitaha**  
**Member of the Employment Relations Authority**