

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 610
3061053

BETWEEN LEONARD GRANT
 Applicant

AND KING BROS WAIROA
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Bree Munro, counsel for the Applicant
 Jeremy McGuire, counsel for the Respondent

Investigation Meeting: 9 September 2020 and 12 March 2021 at Palmerston
 North

Submissions and further 29 March and 7 May 2021 from the Applicant
Information Received: 28 April 2021 from the Respondent

Date of Determination: 21 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Leonard Grant has brought a wage arrears claim against King Bros Wairoa Limited (King Bros). Mr Grant says he was employed as a forestry labourer by King Bros in 2018 but was paid only part of the wages owing to him.

[2] King Bros, through one of its directors, Ms Ngawai King, says the company's understanding is that Mr Grant was an independent contractor. Ms King denies Mr Grant is owed any monies by King Bros and claims he worked for her brother, Mr Turi-John King.

[3] In October 2019 Mr Grant asked for a penalty to be imposed on King Bros. That request was made outside the 12 month timeframe specified in s 135 (5) of the Employment Relations Act 2000 (the Act) for bringing an action for a penalty. Accordingly, that aspect of Mr Grant's claim will not be considered further.

The Authority's investigation

[4] In the course of two investigation meetings, I heard evidence from several witnesses including Mr Grant, Mr Turi-John King, Ms Kurei Grant, Ms Verna Johnson, Ms King and Mr Daniel McEvoy. I also received submissions made by the parties' respective legal representatives.

[5] I have not set out all the evidence and submissions heard but have instead, in accordance with s 174E of the Act, set out the material facts and made findings on issues relevant to the determination of Mr Grant's claims.

[6] The determination has been issued outside the timeframe at s 174C (3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

Issues

[7] The issues for the Authority to determine are:

- (a) Whether Mr Grant was an employee or an independent contractor;
- (b) If he was an employee:
 - (i) what the remuneration terms of his employment agreement were; and
 - (ii) whether he is owed remuneration.

[8] If Mr Grant was not an employee, the Authority has no jurisdiction to consider his claims further.

Legal considerations

[9] Section 6 (1)(a) of the Act defines an employee as "any person of any age employed by an employer to do any work for hire and reward under a contract of service" and provides, at s 6 (2), that:

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.

[10] In order to determine the real nature of the relationship the court or 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.¹

[11] The Supreme Court judgment in *Bryson v Three Foot Six Limited* (No. 2) is the leading case in determining the real nature of the relationship.² The Court held that: “all relevant matters” included the written and oral terms of the contract between the parties and the way it operated in practice.³ The written intention of the parties was relevant, but not decisive, in determining the real nature of the relationship. The court or Authority was 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)”

[12] The test has been applied and discussed in many determinations and judgments in the intervening 17 years since *Bryson*. Recent Employment Court judgments include *Leota v Parcel Express Ltd*⁴ and *Barry v CI Builders Ltd*⁵ where increased scrutiny was applied to particular types of work where independent contracting arrangements are common. Both Mr Leota and Mr Barry were found to have been employees after analyses were made of the real nature of their relationships with the companies that had purportedly engaged them as independent contractors.

Relevant events and evidence of the parties

[13] Mr Grant, who resides in Wairoa, learned about the forestry position from Mr Turi-John King who told him there was work available in Palmerston North. Mr Grant had worked with Mr King previously in at least one forestry role in the Wairoa area and he understood Mr King was now putting together a crew to harvest trees from a forestry block in Palmerston North.

¹ Section 6 (3) of the Act.

² *Bryson v Three Foot Six Ltd* (No 2) [2005] ERNZ 372.

³ Above at 386.

⁴ *Leota v Parcel Express Ltd* [2020] NZEmpC 61.

⁵ *Barry v CI Builders Ltd* [2021] NZEmpC 82.

[14] Ms King had told Mr King, who is her brother, about the Palmerston North forestry block which she was managing for the owner who was overseas. Mr King had more than 20 years' experience in the logging industry. He assessed the block and put together a crew of five, including Mr Grant, to harvest the trees. Mr King reached an agreement with Able Tasman Forestry Services Ltd (ATFS), a company he had previously worked with, through its director, Daniel McEvoy.

[15] Under that agreement, ATFS would supply the harvesting equipment, manage the harvest and sale, and would engage King Bros, as a contractor, to undertake the harvesting, with Mr King managing the operation.

[16] A contract was signed on 16 March 2018 between Mr McEvoy, for ATFS, Ms King, on behalf of the forest owner, and King Bros, through Mr King. The signature page was the only part of the contract made available to the Authority. A Safer Forest Harvesting Letter of Intent dated 13 March 2018 was also signed by Mr McEvoy for ABFS and by Mr King for King Bros.

[17] At that time Mr King believed he was a director of King Bros. He had been one of the original directors when the company was established in June 2017, but had been removed as a director by Ms King in September 2017, without his knowledge. Mr King was not a director of King Bros when the contract with ATFS was signed and nor was he a director for most of the time the agreement was in force.

[18] Mr McEvoy's evidence, which I accept, was that he had also believed Mr King to be a director of King Bros when the three parties signed the contract on 16 March 2018. When he realised that Mr King had been removed as a director, Mr McEvoy asked Ms King to reinstate him. She did so and Mr King became a director effective from 11 June 2018 until his removal, again by Ms King, on 24 October 2018.

[19] Mr McEvoy said it had been agreed between Mr King, Ms King and himself that ATFS would make payments into the King Bros bank account and the workers would be paid by King Bros at rates agreed between Mr King and the crew. According to Mr Grant and Mr King, the agreement was that the money paid for the harvest by ATFS would be divided among the five crew members.

[20] King Bros would be responsible for ensuring tax was paid on the workers' earnings and it was up to Mr King to manage any crew employment issues. Mr McEvoy said it was clear from the outset that Ms King would manage the financial side of ATFS's arrangement with King Bros and Mr King would manage the logging operational side.

[21] Ms King denied that she was the financial administrator and said she acted on direction from Mr King. The evidence does not support that. In the course of the two investigation meetings it became apparent that Ms King held the financial management of King Bros closely and made decisions about withdrawals and transfers of money between bank accounts without reference to Mr King. While she had discussions with Mr King about payments to him and the other crew members, I find it was Ms King who controlled the finances of King Bros at all relevant times.

[22] Mr King's skills and interest lay in the management of the harvesting operation and not in administration. He had no power to make any decisions over King Bros' financial matters as he was neither a director nor a shareholder of the company during the majority of the time the contract between ATFS, King Bros and the forestry owner was in operation.

[23] Mr Grant was unsure exactly what date harvesting commenced on the forestry block and what his start date was with King Bros, but he thought it was January or February 2018.

[24] Ms King referred in her evidence to the forestry workers arriving in Palmerston North in March 2018 and starting work some time after that. I accept that as the more likely scenario for several reasons, the first being that the contract between ATFS, King Bros, and the forest owner was not signed until 16 March 2018. It is reasonable to infer that the work would not have started until after the contract was signed.

[25] The second reason for accepting that the forestry work started after 16 March 2018 is that the first payment from ATFS for the harvesting work was made on 4 April 2018 and was referred to as an "advance payment" by Mr McEvoy.

[26] A further reason supporting that timeframe relates to the daily logs, referred to as "tailgates", kept by Mr King for each day the crew was harvesting. The tailgates record, among other matters, who was working, what they were doing and the start and finish times for the work that day. Tailgates were provided in evidence, the first of which was dated 7 April 2018 and the last was dated 9 July 2018.

[27] According to Mr Grant, he had some disagreements with King Bros over the amount of the payments he received from the company. He says there was a shortfall in his wages for this period and that in reality he was working for less than the minimum wage. He received no payslips and says no KiwiSaver payments were made to his provider during this period. Mr Grant had provided a completed an IR330 form but King Bros did not file it with the Inland Revenue Department.

[28] The relationship between Mr King and Ms King disintegrated within a short time after the logging began due to disputes over payments from ATFS not being paid to the forestry workers. According to Mr McEvoy, King Bros ceased as the contractor for the forestry block sometime in late June 2018. Mr King and those of the crew who remained at that time, including Mr Grant, continued to work on the harvesting of the trees under a separate arrangement with ATFS that did not involve King Bros.

Employee or independent contractor?

Intention of the parties

[29] As noted earlier, Mr Grant was recruited by Mr King. He was unsure of the dates he commenced and ended work for King Bros but had no such uncertainty over his employment status. Mr Grant was adamant that he had agreed to join the crew Mr King was assembling on the basis that he would be an employee of King Bros. His previous experience in forestry with Mr King had been as an employee and that would also be the case when he joined the crew for the Palmerston North block.

[30] Mr King had told Mr Grant that Ms King would provide him and the other workers with employment agreements and payslips from King Bros. Mr Grant said he was present when Ms King told Mr King the crew would receive those documents.

[31] Mr King's evidence supported Mr Grant's understanding: he said Mr Grant and the other crew members were employees of King Bros. That was his understanding when he recruited the crew members, at the time believing himself to be a director of the company. That was also what he had discussed with Ms King who told him she would provide employment agreements for them all and generate payslips each time they were paid.

[32] Ms King denied knowledge of this and said she did not recall talking about employment agreements and payslips to Mr King, Mr Grant, or other members of the forestry crew. She

said her belief was that they were all contractors. When asked in cross-examination, however, whether anyone had brought up the issue of payslips, Ms King asserted that she was the person who had raised that issue with Mr King and he had told her not to worry about it as he would sort it.

[33] I found Ms King's evidence to be less consistent and less convincing than that of Mr Grant and Mr King on this matter and I prefer their evidence. Although Ms King denied Mr Grant was an employee, she also said that she raised the issue of payslips for him with Mr King. If she had believed him to be a contractor, as she asserted, it is more likely she would have asked why Mr Grant was not presenting invoices for payment.

[34] I note also that while Ms King could not recall talking about employment agreements and payslips with Mr Grant or members of the crew, who were all living in her house or on her property at the time, she did not categorically deny such conversations took place.

[35] A further factor I have taken into account are the daily log, or tailgate, records that Mr King kept, one for each day worked on the forestry block (as referred to above). Ms King referred to these in oral evidence and was clearly aware of their existence and purpose. Each document is headed "KING BROS WAIROA LTD – LOG (followed by a number). Immediately underneath the heading are boxes for printing "Employee's name" and boxes for corresponding signatures. Mr Grant signed a tailgate every day he worked on the Palmerston North forestry block, which would have reinforced to him on a daily basis that he was an employee of King Bros.

[36] I find Mr Grant and Mr King intended Mr Grant to be an employee of King Bros in relation to the tree harvesting contract agreed by ATFS, King Bros, and the forest owner who was represented by Ms King. Ms King was aware of that intention and did nothing to convey a contrary understanding either to her brother, as the manager of the harvesting operation, or to Mr Grant.

Control

[37] Ms King denied having any control over Mr Grant's work and I accept she did not set his hours of work or dictate what work he performed on a daily basis. It was Mr King who decided those matters according to the current weather, availability of trucks and other relevant factors. That was his role as the onsite manager of the tree harvesting operation for King Bros.

[38] As I have noted earlier in this determination, Mr King believed himself to be a director of King Bros at the time he signed the three way agreement with ATFS and the forest owner on 16 March 2018. In fact he had no signing rights as a director at that time because he had been removed in September 2017 without his knowledge.

[39] Ms King, who signed the three way agreement as agent for the forest owner, knew Mr King was not a director of King Bros at that time as she was the person who had removed him from that role. She knew, and must be taken to have agreed when she entered into the contract, that Mr King intended to bind King Bros to the arrangement. Despite having the opportunity to raise an objection to Mr King's lack of authority to sign the contract, Ms King did not do so.

[40] That leads me to believe the directors of King Bros at the time, being Ms King and another brother, Mr Edward King, had no issue with King Bros being brought into a three way arrangement over the harvesting of the forest block. The directors agreed that Mr King would deal with the operational side of the arrangement.

[41] According to Ms King, Mr King made all decisions relating to the forestry block, including what was going to be paid to each of the crew members. Those decisions were part of Mr King's role as the on-site manager of the harvest operation.

[42] I find there was a significant element of control over Mr Grant's work, which was exercised by Mr King in his capacity as King Bros' on-site manager of the tree harvesting operation.

Integration

[43] Ms King's evidence is that King Bros was established to accommodate a business set up by her brother, Edward King. That business, according to Ms King, did not take off, and the company was used as the vehicle for the 2018 tree harvesting operation. It appears that was its only business function in 2018 and no evidence was produced to suggest otherwise.

[44] That being so, Mr Grant's role as one member of the crew whose task it was to harvest the trees on the forestry block for which Ms King was the authorised agent, was part and parcel of the business of King Bros at that time.

[45] I find Mr Grant was integrated into the business of King Bros during his relatively brief working relationship with that company.

Fundamental or economic reality test

[46] The purpose of this test is to ascertain whether Mr Grant was performing work for King Bros as a person in business on his own account or not.

[47] I accept Mr Grant's evidence that he had no intention or concept of undertaking the tree harvesting job as a person in business on his own account. He had worked in the logging industry with Mr King before as an employee: that was what he knew and what he was comfortable with. I have found his intention was very clearly to be an employee. There is no evidence that he had ever been in business on his own account or that he was registered for GST. Mr Grant had no opportunity in carrying out his work as a member of the harvesting crew to increase his earnings by his own efforts.

[48] Mr Grant did not dictate when the work would commence or finish on any given day: Mr King and/or external conditions, including the weather and the state of logging equipment and transport, dictated those matters. The remuneration aspect of the tree harvesting agreement, from the evidence given to the Authority, was that the five members of the harvesting crew would receive as wages one fifth of the payments King Bros received from ATFS for the sale of the logs.

[49] The ATFS payments to King Bros were calculated on an agreed tonnage basis. Payments to the crew members were to be made at a rate agreed between them and King Bros.

[50] The Wages Protection Act 1983 provides the definition of wages as:

... salary or wages; and includes time and piece wages, and overtime, bonus, or other special payments agreed to be paid to a worker for the performance of service or work; and also includes any part of any wages:

[51] I find there is nothing about the agreed rate of payment that detracts from a relationship of employment between Mr Grant and King Bros.

Conclusion

[52] The evidence and an application of the above tests supports Mr Grant's claim to have been an employee of King Bros and I accept his claim.

I find Mr Grant was an employee of King Bros from 16 March 2018 up to and including 9 July 2018, which was the last day Mr King completed tailgates for the tree harvesting operation using the King Bros printed log forms.

The remuneration terms

[53] There was no written employment agreement but, as noted above, Mr Grant's agreed rate of pay was one fifth of the payments made by ATFS to King Bros in respect of the tree harvesting job, less tax.

Is remuneration owing?

[54] Mr McEvoy provided a summary of payments ATFS made to King Bros for the logging of the forestry block between 4 April and 19 July 2018. The total was \$64,172.36. One fifth of that is \$12,834.47.

[55] Mr Grant provided bank statements and oral evidence to the effect that King Bros paid him a total of \$3,870 in that period. His claim is therefore for wages owing of \$8,964.47 gross. Mr Grant accepts that tax will need to be deducted from any payments made to him.

[56] Mr Grant has a statutory entitlement to holiday pay calculated at eight percent of his gross earnings of \$12,834.47 which amounts to \$1,026.76. He is also entitled to have the employer contribution to his KiwiSaver scheme paid into his KiwiSaver account. That is to be calculated at the rate of three percent which I calculate to be \$385.03.

[57] It was Mr Grant's evidence, acknowledged by Ms King, that he had repaid a number of cash loans she made to him during the period of his employment. Accordingly I have not considered those loans further.

Conclusion and orders

[58] I have found Mr Grant to have been an employee of King Bros Wairoa Ltd from 16 March 2018 until 9 July 2018. I have found he is owed wages, including holiday pay and KiwiSaver contributions.

[59] King Bros was removed from the company register on 11 August 2021 for failure to file an annual return. This was after the Authority's investigation was completed but before

this determination was completed. I understand Mr Grant has since taken steps to have King Bros company reinstated to the register and those steps have been successful.

[60] I order King Bros Wairoa Ltd to pay:

- (a) To Mr Grant:
 - (i) wages owing in the sum of \$8,964.47 gross; and
 - (ii) holiday pay arrears owing of \$1,026.76 gross.
- (b) To Mr Grant's KiwiSaver account, the employer contribution owing on the wage and holiday pay arrears, being \$385.03.

Costs

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

[62] If they are not able to do so and an Authority determination is needed, Mr Grant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum King Bros Wairoa Ltd would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[63] If the Authority were to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Trish MacKinnon
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.