

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 365
5399525

BETWEEN

MOHAMMED HARUN
Applicant

A N D

CHARLETON PLUMBING &
DRAINAGE LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
Peter Charleton, Director of Respondent

Investigation Meeting: 30 July 2013

Date of Determination: 15 August 2013

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Mohammed Harun was an independent contractor, not an employee of the respondent, Charleton Plumbing & Drainage Limited.**
- B. Both parties were unrepresented and therefore there is no order as to costs.**

Employment relationship problem

[1] The applicant Mr Mohammed Harun, claims he is owed wages for work performed by him for the respondent, Charleton Plumbing & Drainage Limited (“Charleton”) between 1 and 8 October 2012 totalling 74 hours at \$16.50 gross per hour.

[2] Charleton says Mr Harun was not its employee, he was an independent contractor. Charleton accepts it owes monies to Mr Harun for work performed by him between 1 and 8 October. However, Charleton says Mr Harun was a contractor and he owes Charleton monies as a result of damage caused by him to a client's property and this sum it is claimed exceeds the money owed by Charleton to Mr Harun.

Issues for determination

[3] The first issue for determination by the Authority is whether an independent contractual relationship or an employment relationship existed between Mr Harun and Charleton.

[4] If an employment relationship existed then the question is whether Charleton is liable to pay Mr Harun wages for the final two weeks of his employment.

[5] If no employment relationship existed then the Authority has no jurisdiction to investigate Mr Harun's claim that he is owed monies by Charleton for work he performed for it.

Issue

Was Mr Harun an employee or an independent contractor?

[6] Whether Mr Harun was an employee or a contractor is to be determined under s.6 of the Employment Relations Act 2000 (the Act).

[7] Section 6 of the Act states:

Meaning of employee

(1) *In this Act, unless the context otherwise requires, **employee** –*

(a) *means any person or any age employed by an employer to do any work for hire or reward under a contract of service; ...*

(2) *In deciding for the purposes of sub-section 1(a) whether a person is employed by another person under a contract for 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 sub-section (2), the court or the Authority – ...*

- (a) *must consider all relevant matters including any matters that indicate the intentions 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.*

[8] The leading case on s.6 of the Act is *Bryson v. Three Foot Six Limited*¹. The Employment Court in *Poulter v. Antipodean Growers Limited* summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions at para.[20] as follows:

- [1] *The Court must determine the real nature of the relationship.*
- [2] *The intention of the parties is still relevant but no longer decisive.*
- [3] *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
- [4] *The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the ‘fundamental’ test.*
- [5] *The ‘fundamental’ test examines whether a person performing the service is doing so on their own account.*
- [6] *Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.*

[9] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s.6 is for the Authority, or the Court to gain an overall impression of the underlying and true nature of the relationship between the parties.

[10] Charleton is a plumbing and drainage company. Mr Peter Charleton is the sole director and shareholder. At the time Mr Harun was engaged by Charleton in late 2011/ early 2012, there were 2 employees, Mr Mohammed Kahn and Mr Troy Myers. Mr Kahn is a drainlayer and Mr Myers is an apprentice. According to Mr Charleton, Mr Harun was taken on as a “labour only” contractor at \$15 an hour to operate the digger and was responsible for his own taxes, GST and ACC. Mr Harun disputes this

¹ [2005] 3 NZLR 721

saying he was employed as a truck driver/ digger operator at \$16.50 an hour pursuant to an individual employment agreement dated 19 March 2012.

[11] The first consideration is the intention of the parties. Mr Charleton says he intended Mr Harun to be a contractor, Mr Harun says he signed an employment agreement thinking he was an employee. Mr Charleton says he never saw the employment agreement until Mr Harun filed his personal grievance claim in the Authority and did not sign it. Mr Charleton says the signature on the employment agreement is not his.

[12] Mr Harun has held a number of employment positions, including as a panelbeater/painter in 2009 for Aims Panel & Paint Limited and in 2010 for Deluxe Compliance & Mechanical Services Limited. Mr Harun was aware that as an employee his employer deducted PAYE from his wages and he had entitlements to paid sick leave, holiday pay and payment for public holidays which were not available to independent contractors.

[13] In early 2012, Mr Harun was introduced to Mr Charleton by Mr Kahn who he had known since he was young from the time they were both in Fiji. Mr Charleton says he is always looking for digger operators and so when Mr Kahn told him Mr Harun may be available, he asked him to bring Mr Harun in to Charleton to see if he was suitable.

[14] Mr Kahn says he told Mr Harun that the role available at Charleton was for a contractor, driving the digger at a rate of \$15 an hour and that this was accepted by Mr Harun. Mr Harun denies this. Mr Harun produced his passport which includes a work visa dated 5 April 2012 allowing him to work as *“truck driver/digger operator for Charleton Plumbing and Drainage Limited, in Auckland”*. Mr Harun says the visa was obtained after he produced the employment agreement signed by him and Mr Charleton on 19 March 2012. I have checked Mr Harun’s immigration file and have seen the original of the employment agreement produced by Mr Harun at the investigation meeting. The signature on it is not identical to that of Mr Charleton’s on the other forms of identification produced by him, but there were similarities. I have doubts over whether the written employment agreement dated 19 March 2012 was signed by Mr Charleton. Even if the employment agreement was signed by Mr Charleton, the labelling of Mr Harun’s status in an employment agreement, is not determinative of the relationship between the parties. An employment agreement

signed by both parties to it, is one relevant factor when determining the real nature of the parties' relationship.

[15] Mr Charleton says he hired Mr Harun on 17 October 2011 as a labour only contractor and that on Mr Harun's first day of work, he showed him how things were done. Mr Charleton gave Mr Harun a timesheet, showed him how it was to be completed and provided Mr Harun with a petrol card for the digger he was to operate. Mr Charleton produced timesheets which he says were completed by Mr Harun and are in his handwriting. The timesheets are dated from 17 October 2011 and detail hours worked each day by Mr Harun.

[16] Mr Charleton produced GST invoices he says were issued by Mr Harun. The invoices appear to be in Mr Harun's handwriting and appear to be in the same handwriting as the timesheets.

[17] Charleton's bank statements show payments by Charleton in January 2012 which match the invoice amounts of the invoices Mr Charleton says were issued by Mr Harun.

[18] Mr Harun denies issuing any GST invoices. I find it hard to believe that the large number of invoices which appear to be in Mr Harun's handwriting were "forged" by Mr Charleton. Mr Charleton produced the bank statements and cheque butts which matched up with amounts allegedly invoiced by Mr Harun. Further, the payments were made in December 2011 and January 2012 before Mr Harun says he began work at Charleton and before he signed the employment agreement in March 2012. I find Mr Charleton more credible than Mr Harun.

[19] I find that Mr Harun issued GST invoices to Charleton and was paid by cash cheque for work performed. The issuing of invoices by Mr Harun is an indication that the real relationship was that of an independent contractor and not that of an employee-employer.

[20] The control test is one of the tests considered when ascertaining the true nature of the parties' relationship. Mr Kahn gave evidence for Charleton and explained the working situation. Mr Kahn says he and Mr Myers are both employees and report to work between 7 and 7.30am each morning. Mr Charleton distributes the work for the day and directs who goes to what job. Mr Kahn says he does not speak to Charleton's

clients about the jobs being performed, that is for Mr Charleton. Mr Myers gave similar evidence which was accepted by Mr Charleton.

[21] It is clear that Mr Charleton controlled work flow and work distribution. The employees and Mr Harun followed his instructions. Mr Charleton had the control. This suggests an employment relationship. However, Mr Harun had quite a degree of control as to when he discharged tasks assigned to him by Mr Charleton.

[22] Mr Kahn and Mr Myers both work between 40 and 45 hours a week. Mr Myers and Mr Kahn receive holiday and sick pay and PAYE is deducted from their wages. Mr Harun did not get paid when he had time off for holidays or for sickness, and no PAYE was deducted from his remuneration.

[23] Mr Harun's work pattern was that he worked on average 43 hours a week, Mondays to Fridays. Mr Charleton says Mr Harun took time off whenever he wanted to and he was unable to dictate whether Mr Harun worked particular days and hours because Mr Harun was a contractor. Mr Harun accepted taking time off, for example to go to Fiji for 2 weeks for which he was not paid and when he needed to do so during the working week.

[24] Mr Kahn and Mr Myers also worked a similar work pattern but did not have the same flexibility to take time off as Mr Harun. These are all relevant factors in determining the real nature of the relationship between Mr Harun and Charleton. The flexibility Mr Harun had in his work seems to suggest an independent contract.

[25] Mr Charleton supplied the work equipment. Mr Harun was provided the digger to operate, Mr Harun did not provide the digger or any other equipment. Mr Harun supplied his labour only when he was available.

[26] Mr Harun says he resigned from his employment on 29 September because he discovered Mr Charleton had not been deducting PAYE from his wages. Mr Charleton denies this and says Mr Harun approached him saying he was in difficult financial circumstances and asked if Mr Charleton could do him a "favour" and pay his taxes. I prefer the evidence of Mr Charleton for the reasons given earlier.

[27] Having considered all of the evidence, I find that Mr Harun was an independent contractor, not an employee. Mr Harun supplied his labour when he was available, if he was not available he did not work and was not paid. I find that

Mr Harun issued GST invoices, he did not have PAYE deducted from payments made to him and did not receive holiday or sick pay as in the case of Mr Kahn and Mr Myers. The overall impression, from all of the facts in this matter of the underlying and true nature of the relationship between Mr Harun and Charleton was that their relationship was that of an independent contract.

[28] For the above reasons, the preliminary issue of the status of Mr Harun is determined in favour of Charleton. The underlying and true nature of the parties' relationship was one of independent contractor. Therefore, the Authority does not have jurisdiction to investigate Mr Harun's claim that he is owed wages by Charleton.

Costs

[29] Neither party was represented and so I do not make an order as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority