

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 152
5363906

BETWEEN

SIMON HENDRY
Applicant

A N D

ANDRE JORNA
First Respondent

BOLDERWOOD
INVESTMENTS LIMITED
Second Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Ross Henderson, Advocate for Respondents

Investigation meeting: On the papers

Date of Determination: 7 May 2012

INTERIM DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Hendry, alleges that he was unjustifiably dismissed from his employment and that he was employed by either the first respondent (Mr Jorna) or by the second respondent (Bolderwood).

[2] The statement of problem from Mr Hendry was filed on 21 November 2011 and a statement in reply together with a counterclaim was filed on behalf of the respondents on 12 December 2011.

[3] There was a lengthy delay in progressing the matter in the Authority (although not of the Authority's making) and the matter eventually proceeded to a case management conference on 16 April 2012. In the course of that conference, the

parties each agreed to the Authority dealing with the preliminary issue on the papers. The preliminary issue is the question of whether Mr Hendry was ever employed by either of the respondents. Clearly if the answer to both of those questions is in the negative, then the Authority has no jurisdiction and the substantive issues which remain between the parties must be dealt with in another forum.

[4] Mr Hendry says that he commenced work with the employer as a labourer on 3 December 2007. He admits there was no formal written contract but maintains that the engagement was one of employment rather than the relationship between a principal and its contractor.

[5] Mr Hendry confirms that he was *held out to be an independent contractor* by the employer and he says that the employer *did not meet all of the duties of an employer in an employment relationship*.

[6] He says that in September 2008 Mr Jorna went on holiday and left him (Mr Hendry) in charge of the job site and that for much of that period, Mr Hendry received no income. This forced him to seek alternative employment on a part-time basis but he returned to the relationship with the present respondents on 27 November 2008 only to allegedly be dismissed the following day.

[7] Mr Hendry says that he is owed outstanding wages and holiday pay totalling \$1,080.00 and that his dismissal was procedurally and substantively unfair.

[8] Mr Hendry relies on a letter received from the Inland Revenue Department dated 28 August 2009 which concludes that for two periods, Mr Hendry was employed by Bolderwood Investments Limited, the second respondent. However, the letter also makes the following comment:

Inland Revenue's view is taken from a tax perspective only, any questions you have regarding your status as an employee will need to be addressed to the Department of Labour.

[9] Mr Hendry maintains that the reasons that he has not prosecuted his claim against his employers more vigorously is that he had various personal problems to deal with and also had ongoing disputes with the alleged employers relating to tenancy matters. Notwithstanding that explanation, it is still a fact that the

proceedings were filed fully three years or thereabouts after the employment relationship came to an end.

[10] Mr Jorna wrote to the Authority by letter dated 23 November 2011 and sought to be removed from the proceedings as first respondent on the basis that he was never Mr Hendry's employer. But he reached that conclusion by relying on the Inland Revenue Department's letter of 28 August 2009 which concluded that Mr Hendry was employed by Bolderwood. Mr Jorna agreed with that conclusion and told the Authority in his letter that indeed Bolderwood was Mr Hendry's employer. Then in the statement in reply filed on 12 December 2011, Mr Jorna sought to resile from his 23 November 2011 letter not in so far as his request to be removed from the proceedings was concerned but in respect to his statement that Bolderwood was Mr Hendry's employer.

[11] Mr Hendry also wrote to the Authority about this time by letter dated 5 December 2011 and he indicated that he was opposed to Mr Jorna being removed as a party to the proceedings and he went on to say that he had no knowledge of Bolderwood prior to the end of his employment. In that letter, Mr Hendry attaches a tax invoice which appears to relate to his employment, to have his Inland Revenue Department number on it, and to state that he was employed from 3 December 2007 down to 8 February 2008. These dates are included within one of the periods that the Inland Revenue Department, in its letter of 28 August 2009, considers that Mr Hendry was in the employment of Bolderwood.

[12] To assist the Authority in the consideration of the real nature of the relationship, submissions on behalf of the respondents draw the Authority's attention to an order by the Tenancy Tribunal in respect of an application by Mr Hendry against Bolderwood. The Tenancy Tribunal concluded that the relationship between these two parties *fell well short of being that of employer and employee*. The Tribunal went on to make findings that Mr Hendry had rendered an invoice for his labouring work and that when those invoices were paid, Bolderwood did not account for tax on behalf of Mr Hendry. The Tribunal was satisfied that there were none of the unusual incidences of employment such as holiday, annual or sick leave.

[13] In addition to the question of whether this is an employment relationship or not, there is another issue about whether if this is an employment relationship, there was ever a personal grievance raised. Yet another issue is whether Mr Hendry has

prosecuted his “grievance” within the three years required by law pursuant to s.114(6) of the Employment Relations Act 2000 (the Act).

[14] What that sub-section says is that a party may not commence an action in the Authority in respect of a personal grievance more than three years after the date on which the grievance was raised. It seems the nearest that Mr Hendry can get to evidence of having raised a grievance is a letter which is clearly written by him dated 2 December 2008 and addressed to Mr Jorna, but there are two issues with that letter that need to be referred to briefly. The first is that it is by no means clear to the Authority that this letter raises a personal grievance and the second is that the evidence before the Authority at this point suggests that neither respondent received this letter when it was written and dated and that Mr Jorna received it on 21 February 2009. It is also suggested for Mr Jorna that he thought that the reference to mediation in the letter of 2 December 2008 was mediation relating to tenancy issues and that he complied with that request and went to mediation in relation to the tenancy issues.

Issues

[15] It will be convenient if the Authority considers the following questions:

- (a) Was a personal grievance ever raised by Mr Hendry?
- (b) Was Mr Hendry employed by either respondent?

Did Mr Hendry raise a personal grievance?

[16] There is no evidence before the Authority to suggest that Mr Hendry ever raised a personal grievance. As the Authority has just noted, the nearest that he gets to that is his letter of 2 December 2008 but that was apparently not received by Mr Jorna until 21 February 2009 and in any event does not in the Authority’s opinion comply with the law in relation to the raising of a personal grievance. It does not make clear that a personal grievance is raised, it does not say what the nature of that grievance is and it does not say what the applicant seeks to put matters right. At best, the letter is ambivalent and capable of being read (as Mr Jorna apparently did) as referring to tenancy matters rather than employment matters.

[17] If there is no evidence before the Authority that Mr Hendry raised a personal grievance with anyone then there is a sense in which the present preliminary issue

about whether he was employed or not is almost academic because he can only raise a personal grievance after this length of time with the permission of the Authority and, given the passage of time, it would be difficult to persuade the Authority that it was just to allow a grievance to be raised so long after the events complained of.

Was Mr Hendry employed by either respondent?

[18] Notwithstanding the foregoing conclusions, the Authority is not persuaded that Mr Hendry was employed at all during the period in question. Like the Tenancy Tribunal, and for similar reasons, the Authority is not persuaded that any of the usual incidences of employment are present. Certainly, the Authority declines to take account of Mr Jorna's apparent admission that Bolderwood was the employer just as the Authority is not prepared to be influenced by Mr Hendry's view that he was employed by Mr Jorna or by Bolderwood.

[19] Indeed, the representations of the principal protagonists are so confused as to be completely unhelpful. Mr Hendry says that he thought he was employed by Mr Jorna and only heard of Bolderwood in the Tenancy Tribunal proceedings which followed the "employment". Mr Jorna, relying on the Inland Revenue Department's view, says that Bolderwood was the employer thus letting him off the hook and of course the Inland Revenue Department itself has concluded that for reasons to do with the interpretation of its own statutory enactments, Bolderwood is in truth the employer.

[20] But the Inland Revenue Department quite properly makes the proviso in its letter that for employment law purposes, reference should be to the Department of Labour and its processes rather than placing an unnatural reliance on the revenue statutes.

[21] And employment law requires the Authority to determine the *real* nature of the relationship. In the statutory framework set out in s.6 of the Act, the Authority is required to consider all relevant matters including those that go to intention but importantly ... *it is not to treat as a determining matter any statement by (the parties) that describes the nature of their relationship.* This is the statutory underpinning of the Authority's decision, already communicated in this determination, to not rely on the views of the parties.

[22] The leading case on the determination of whether a relationship is one of employment or not is the decision of the Supreme Court of New Zealand in *Bryson v. Three Foot Six Limited* [2005] 3NZLR 721. In that decision, the Court considered all of the traditional common law tests for identifying whether a relationship was one of employment or not but concluded:

The Court must determine the real nature of the relationship. The intention of the parties is still relevant but no longer decisive. Statements by the parties, including contractual statements, are not decisive of the nature of the relationship. The real nature of the relationship can be ascertained by analysing the tests that have historically applied such as control, integration and the 'fundamental test'. The fundamental test examines whether a person performing the services is doing so on their own account.

[23] The control test seeks to establish the degree of control the principal has over the other party. Here, the relationship seems loose, to say the least so much so that it is difficult to attribute any control by one party over the other.

[24] The integration test tries to measure the extent to which the person providing the services is integrated into the organisational structure of the principal party. In the present case, it seems that Mr Hendry worked reasonably independently of the other party and in a real sense, on the evidence before the Authority was not “integrated” into the principal’s business activities. The very fact that Mr Hendry was left alone at the workplace for a period, apparently with minimal duties and substantially without income, seems to confirm that view.

[25] Finally, applying the fundamental test, it seems clear to the Authority that, Mr Hendry rendered invoices and those invoices were paid. Thus, whether he was registered for GST or not, the expectation was that Mr Hendry himself would account for tax in relation to those payments. Nor was there any provision during the employment for the payment of annual leave or sick leave. It seems extraordinary that if there was an expectation of those normal incidences of employment, that Mr Hendry would not have taken vigorous steps to seek to recover his rightful entitlement when the relationship came to an end rather than leaving it fully three years before he sought to bring a claim. That delay in itself, despite Mr Hendry’s attempts to explain that, tends to suggest that the relationship was a contractual one and that the categorisation of the matter as one of employment, is an after thought.

[26] Even Mr Hendry's own statement of problem filed in the Authority acknowledges there was no employment agreement, acknowledges that the employer always treated him as a contractor and acknowledges that there was never payment of any of the normal incidences of the employment relationship.

[27] The obvious retort to this body of evidence is to say that the reason the employer is behaving in this way is precisely because it was not an employment relationship.

Determination

[28] The Authority is satisfied on the material before it that Mr Hendry was not employed by either Bolderwood or by Mr Jorna and in any event, Mr Hendry has not properly raised a personal grievance so would have no right to have his alleged grievance heard in the employment jurisdiction in any event, if the decision had gone the other way.

[29] It follows from the foregoing conclusion that the Authority has no jurisdiction in the matter and any continuing dispute between the parties must be dealt with elsewhere.

[30] It is also a consequence of the foregoing conclusion, just expressed, that the Authority cannot consider the counterclaim raised on behalf of the respondents as it has no jurisdiction, the matter being not one of employment at all.

Costs

[31] In the particular circumstances of this case, given the matter was dealt with in a most cost effective way by the parties, costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority