

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 400
3231139

BETWEEN HAMISH HOGG
Applicant

AND KOTITI LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person
Peter Jolly for the Respondent

Investigation Meeting: 4 June 2024 by audiovisual link

Submissions Received: 4 June 2024 from the Applicant
4 June 2024 from the Respondent

Date of Determination: 4 July 2024

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Hamish Hogg was engaged as a farm worker for Kotiti Limited from September 2020 until 8 September 2023. Mr Hogg initially worked as a casual employee and was not the subject of an employment agreement. Mr Hogg says he invoiced Kotiti Ltd for his services up to 30 September 2020.

[2] From 26 September 2020 the arrangement changed as Mr Hogg agreed to move into a newly vacant farm cottage and to continue as a full-time farm worker. The second phase of Mr Hogg's engagement was not documented.

[3] The arrangement appeared by consensus to be that Mr Hogg's company (Hoggie Holdings Limited) would be paid \$65,000 a year with free accommodation and additional specific sum, phone, and power allowances.

[4] Mr Hogg has previous experience in Australia of working as a contractor and an employee in the farming sector. Upon his return to New Zealand in 2020 prior to working for Kotiti Ltd, he utilised his existing company which he incorporated on 30 March 2016 as a vehicle to lease a holiday park operation with his partner that struggled due to the COVID-19 environment and they had to relinquish the lease.

[5] Mr Hogg conceded and provided evidence, that he invoiced Kotiti Ltd for his named company's services on a casual basis and when it became permanent, he continued to invoice Kotiti Ltd for his services through the company. The services are described in monthly invoices as being for "Contract work". The company was GST registered and Mr Hogg paid his own ACC levies.

[6] Mr Hogg's IRD returns showed his annual income being derived from his company as a "Shareholder-employee." Disclosed company information demonstrated Mr Hogg's company derived tax advantages from this arrangement.

[7] However, after the engagement with Kotiti Ltd ended at Mr Hogg's volition, he seeks a declaration pursuant to s 6(2) Employment Relations Act 2000 (the Act), that the real nature of the relationship between the parties was an employment relationship and not a contracting one. Mr Hogg claims he lacked the autonomy of being a contractor as Kotiti Ltd's director, Peter Jolly controlled his work allocation and he says the work ended after Mr Jolly said he was intending to wind down part of his Farming operations.

[8] In contrast, Mr Jolly says although terms of Mr Hogg's engagement were not documented, it was Mr Hogg who sought a contracting relationship and throughout the engagement that is how the relationship operated. Mr Hogg confirmed in evidence that he sought to be a contractor and explained he preferred to deal with farmers this way as it was easier to get regular payments. Mr Hogg conceded at no time did he raise the issue of him potentially becoming an employee.

[9] An unusual feature of the relationship was Mr Hogg was paid when on annual leave and sick leave (including his first week of absence when he had a spell on ACC due to a workplace injury) but upon the ending of the relationship no accumulated leave was paid. Mr Jolly says he was not confused about the relationship in paying leave, he just considered it a fair thing to do.

[10] Mr Jolly confirmed that in mid-May 2023, he met with Mr Hogg to signal he was intending to sell part of his farm and would no longer require Mr Hogg's services. Mr Jolly recalled indicating this would not happen until late September 2023 and that he could be flexible if Mr Hogg need to work awhile longer and occupy the farm accommodation. However, on 8 September after a discussion with Mr Jolly over how work was progressing, Mr Hogg told him he was finishing that day and gave a week's notice of vacating the farm accommodation.

[11] Mr Hogg says he later found alternative employment on a local farm from the end of October 2023.

Issue

[12] The issues I must determine are:

- (i) What was the real nature of the relationship?
- (ii) Costs of these proceedings.

The Authority's investigation

[13] At the investigation meeting I heard evidence from Hamish Hogg, Peter Jolly and Debbie Jolly. Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on identified issues. Whilst I record that I have carefully considered all material placed before me, I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses draws from their written statements, submissions, and disclosed documentation.

What was the real nature of the relationship?

[14] Despite not being documented, the evidence overwhelmingly points to an initial common intention that the relationship was intended as being between Mr Hogg's registered company and Kotiti Ltd. Mr Hogg asked for this arrangement and he already had the experience of operating on this premise with an established company that he had previously used as a contracting vehicle. Disclosed tax and company accounts show Mr Hogg benefited from the relationship being structured as a contract for services. In addition, Mr Jolly for Kotiti Ltd despite being under no obligation to do so, afforded Mr Hogg the benefit of paid annual and sick leave.

[15] Notwithstanding the above, the Act sets out a test to determine the real nature of the relationship¹ that requires that the Authority examine the true nature of the relationship and assess all relevant factors including applying the relevant legal tests set out and affirmed by the Supreme Court in *Bryson v Three Foot Six Limited*².

[16] The following matters from *Bryson* require my attention:

- [i] The intention of the parties.
- [ii] Whether there was any written documentation setting out the terms of the relationship or 'label' attached to such.
- [iii] An examination of how the relationship operated in context including looking at issues of control and integration.
- [iiii] Whether overall, it could reasonably be established that Mr Hogg was operating a business on his own account; and:
- [iiv] Whether there is overwhelming evidence of any industry practice defining contractual relationships.

[17] Applying the above factors involves carefully assessing the evidence of both parties and weighing up various considerations with none being singly determinative.

¹ Section 6(3) Employment Relations Act 2000

² *Bryson v Three Foot Six Limited* [2005] NZSC 34 (SC).

Intention of the parties

[18] As above, I find that the intention of the parties was clear that the relationship was envisaged and established as a contract for services and no issues of imbalance of bargaining power arose. On the contrary, Mr Jolly gave evidence that he was not seeking a contracting relationship but Mr Hogg insisted upon it.

The control test.

[19] Applying this consideration requires the Authority to examine where the ultimate authority in the relationship lies.³

[20] Due to the nature of the work (operation of a farm) requiring working full-time including during peak and busy periods, Mr Hogg 'on the surface' did not have the choice to turn work down and he was the subject of control compromising his independence. In practice however, Mr Hogg and Mr Jolly worked collaboratively although Mr Jolly's role at times was to allocate specific tasks. In this context, Mr Hogg was acknowledged by the Jollys' as experienced in his role and capable of working independently.

[21] I find that applying the control test is not particularly determinative in the overall context of the party's situation.

The Integration Test

[22] This test requires a consideration of whether Mr Hogg could be viewed as an integral part of the business. It is easy to determine this test as Mr Hogg operated on the same basis as another farm worker employee and conducted all the work using equipment belonging to Kotiti Limited and he had 'on paper' no flexibility to work elsewhere given the farm requirements and the hours he agreed to be contracted to do. Mr Hogg also lived on site in provided accommodation.

[23] I find Mr Hogg was integrated into Kotiti Ltd.'s business operation and the nature of his work was not peripheral to the business.

³ See discussion in Gordon Anderson and John Hughes, *Employment Law in New Zealand* (1st ed, Lexis Nexis, Wellington, 2014) at 121: *Humberson v Northern Timber Mills Ltd* (1949) 79 CLR 389 (HCA).

Fundamental test

[24] The application of this test is a consideration of whether Mr Hogg could reasonably be considered in business on his own account or performing services on his own account.

[25] In this regard I find that Mr Hogg ran a business operation of contracting his expertise as an experienced farm worker and he gave the setting up and utilisation of the business in this context some thought. The arrangement entered was a conscious choice and Mr Hogg chose to structure his affairs as working for his own business – an arrangement he had previously undertaken.

[26] In applying the fundamental test, I am also obliged to take into consideration the objectives set by legislation that at s 3(a)(ii) of the Act mandates that I acknowledge and address “the inherent inequality of power in employment relationships”. In this context I have not found an inequality existed – Kotiti Ltd did not ‘force’ the contracting choice and appeared willing to consider the alternative of an employment relationship.

Taxation Issues

[27] I was provided with evidence that Mr Hogg benefited from arranging his affairs by using his company and impliedly chose this option.

Industry Practice

[28] I have nothing before me to determine what industry practice was.

Assessment

[29] Section 6 of the Act allows the Authority to determine the true nature of the relationship and in these circumstances for reasons discussed above, in taking the totality of the relationship and how it was formed into account, I conclude Mr Hogg was not an employee and that the relationship was between Mr Hogg’s company and Kotiti Limited. It would be inequitable to find otherwise given Mr Hogg has chosen to structure his affairs utilising Hoggie Holdings Limited.

Finding

[30] I have found that the real nature of the relationship was a contract for services between Hoggie Holdings Limited and Kotiti Limited.

Costs

[31] Costs are not an issue in this situation as both parties were self-represented.

David G Beck

Member of the Employment Relations Authority