

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 25
5639917

BETWEEN CHRISTOPHER HUTCHING
Applicant

A N D FOURTH ESTATE HOLDINGS
(2012) LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Jackie Behrnes, Counsel for Applicant
Simon Dench, Counsel for Respondent

Investigation Meeting: On the papers

Evidence Received: Affidavit evidence for Applicant on 23 November and
14 December 2016
Affidavit evidence for Respondent on 9 December 2016

Submissions Received: 22 December 2016, from the Applicant
23 December 2016, from the Respondent

Date of Determination: 15 February 2017

DETERMINATION OF THE AUTHORITY

- A. Mr Hutching was not an employee of Fourth Estate Holdings (2012) Limited, he was an independent contractor and the Authority does not have jurisdiction to determine his claim.**
- B. I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] Mr Christopher Hutching claims that Fourth Estate Holdings (2012) Limited (Fourth Estate) unjustifiably dismissed him.

[2] He also says Fourth Estate breached the duty of good faith, failed to provide a written employment agreement, failed to keep wage and time records for him and failed to pay the correct notice pay and any holiday pay.

[3] As a result, Mr Hutching claims various remedies against Fourth Estate including compensation, reimbursement, wage arrears and various penalties for the alleged breaches.

[4] Fourth Estate says Mr Hutching was a contractor and therefore there is no basis for his claims. It makes various arguments in the alternative if Mr Hutching was an employee.

[5] Both counsel for the applicant and the respondent agreed that I should determine, as a preliminary matter, whether Mr Hutching was an employee or a contractor. They also agreed that I could do this on the papers.

The issue

[6] At its simplest, this preliminary matter has one issue. Was Mr Hutching an employee or an independent contractor?

Law

[7] The legal test for ascertaining whether a person is an employee is set out in s 6 of the Employment Relations Act 2000 (the Act). Section 6 provides:

- (1) In this Act, unless the context otherwise requires, **employee** –
 - (a) Means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) Includes –
 - (i) A home worker; or
 - (ii) A person intending to work; but
 - (c) Excludes a volunteer who –
 - (i) Does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) Receives no reward for work performed as a volunteer; and
 - (d) ...
- (1A) ...
- (2) 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.

- (3) For the purposes of subsection (2), the Court or the 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 the relationship.

....

[8] As Chief Judge Colgan expressed in *Atkinson v Phoenix Commercial Cleaners Ltd*¹ at para.[9]:

Section 6 requires the Court to consider, broadly and realistically rather than narrowly and artificially and legalistically, the real nature of the commercial relationship between the parties.

[9] The leading case on how the Authority or the Court should determine the real nature of the relationship in these circumstances and what are relevant matters for the purpose of that consideration is *Bryson v Three Foot Six Ltd*².

[10] Since this judgment, there have been further judgments of the Employment Court and many determinations in the Authority that have usefully set out and applied the principles in *Bryson*. In particular, I have relied on the judgments of Chief Judge Colgan in *Atkinson* and *Narinder Singh v Eric James & Associates Ltd*³.

[11] In *Atkinson*, Chief Judge Colgan referred to a decision of the Supreme Court in the United Kingdom of *Autoclenz v Belcher*⁴. The Supreme Court's analysis in *Autoclenz* draws on largely common legal history in both New Zealand jurisdiction and the UK jurisdiction. The Court reaches the same broad conclusions as to the requirements for determining whether an individual is an employee or an independent contractor and as Chief Judge Colgan indicates, this follows broadly what s 6 of the Act requires of the Courts and the Authority in New Zealand. That is, the Authority must make a realistic assessment of the reality and all the circumstances of work performed in a working relationship⁵.

[12] In summary, s 6 of the Act and relevant case law requires me to consider the real nature of the commercial relationship between the parties broadly and realistically, rather than narrowly and artificially or legalistically. In doing so, I must

¹ [2015] NZEmpC 19

² *Bryson v Three Foot Six Ltd* [2003] ERNZ 581 (EmpC) and *Bryson v. Three Foot Six Ltd (No 2)* [2005] NZSC 34

³ [2010] NZEmpC 1

⁴ [2011] UK SC 41

⁵ *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] ERNZ 10 at [13]

make a realistic assessment of the reality and all the circumstances of work performed in the working relationship.

[13] The second aspect of s 6 of the Act requires me to consider all relevant matters when making my assessment.

[14] Again, the relevant case law, starting with *Bryson* and then following with the Employment Court decisions such as *Atkinson* and *Singh*, sets out clearly what those relevant circumstances are that I should consider.

[15] From the relevant case law I determine that the steps I should take and the relevant circumstances I should consider in my assessment are:

- (a) First, I must consider if there is a contract between the parties or at the very least what the terms are for the work to be performed. From this contract or terms I can establish if there is a common intention which may indicate the nature of the relationship but will not be determinative.
- (b) Then I must consider any divergences in the agreed terms by assessing how the work was carried out in practice.
- (c) Once I have assessed how the work was carried out in practice I can then apply the three common law tests which remain relevant:
 - (i) Control being an analysis of who decides what work is done and how it is done;
 - (ii) Integration being an analysis of how integrated the individual is into the business of the alleged employer; and
 - (iii) The fundamental test assessing whether the individual is in fact in business on his or her own account.
- (d) I should also consider industry practice as this remains relevant but it is not determinative.
- (e) Similarly, I should consider the tax treatment on any payments noting however, that the tax treatment may be misapplied based on the

intention of one of the parties such that the tax treatment is merely a mistake and not indicative of what the relationship is.

[16] I will turn to consider each of these steps in relation to Mr Hutching's role with Fourth Estate.

Contract and terms of engagement

[17] Fourth Estate owns and publishes the *National Business Review* (NBR). Fourth Estate purchased NBR in 2012. Prior to 2012 the NBR was owned by Fourth Estate Holdings Limited.

[18] Over the years Fourth Estate Holdings Limited and Fourth Estate have published various forms of the NBR and other publications. At the time when Mr Hutching ceased working with Fourth Estate it was producing five regular publications in different mediums:

- (a) The NBR magazine, a weekly print publication.
- (b) NBR online, an online website with articles updated daily.
- (c) NBR radio, a podcast service commenced by Fourth Estate in 2015.
- (d) NZ Property Investor (NZPI), a monthly magazine available in print and online.
- (e) The Capital Letter, a weekly newsletter summarising decisions from New Zealand Courts and legislation.

[19] Mr Hutching began work with Fourth Estate Holdings Limited in 1993. He describes this engagement as being on a part-time casual basis.

[20] There was no contract between Mr Hutching and Fourth Estate Holdings Limited. The only terms that I can glean from the evidence is that Mr Hutching wrote articles for Fourth Estate Holdings Limited and invoiced for this work on a regular basis. There is no detail of what he charged or how this was calculated.

[21] Without any clear terms and conditions set out in a contract or orally agreed terms presented in evidence to me, I am unable to determine with any certainty what the terms of Mr Hutching's engagement were at the time he commenced work.

Equally, I am unable to say whether there was any common intention between the parties as to his status. I do note, however, it looks most likely, based on the limited evidence that I have, that the common intention at that time was that he would be an independent contractor (evidenced by the invoicing arrangement).

The work in practice

[22] From 1993 through to 2016 the work that Mr Hutching undertook for Fourth Estate Holdings Limited and then Fourth Estate evolved in response to the changing nature of the publications. However, aspects of the way the work was undertaken with Fourth Estate were similar to the way work was undertaken with Fourth Estate Holdings Limited.

[23] The way the work was undertaken by Mr Hutching and the terms governing his work included:

- (a) Mr Hutching worked from home and did not need to attend the office of Fourth Estate on a regular basis.
- (b) Fourth Estate did not pay for or supply any of the resources Mr Hutching used in his home office (from computer equipment through to stationary).
- (c) Mr Hutching wrote a number of articles for NBR for both the weekly edition and the online service. Mr Hutching also wrote regular articles for the weekly NZPI newsletter until it changed to become a monthly publication.
- (d) Mr Hutching was not enrolled in KiwiSaver and did not receive KiwiSaver contributions from Fourth Estate.
- (e) Mr Hutching was not paid holiday pay nor did he receive sick leave entitlements or bereavement leave entitlements.
- (f) Mr Hutching did not have any set hours. He was required to meet deadlines for publishing and be available for contact by Fourth Estate.
- (g) Mr Hutching was allowed to contribute to other publications without restriction from Fourth Estate.

- (h) The number of articles Mr Hutching had to produce changed over time as the nature of the NBR and NZPI publications changed.
- (i) The way in which Mr Hutching was paid by Fourth Estate for his contributions to NBR changed in 1996. Up until 1996 he was paid by way of invoice for the amount of work he produced. Subsequent to this, it was agreed that he would be paid in regular monthly amounts with tax deducted. In respect of the NZPI work, Mr Hutching continued to provide invoices and was paid in accordance with those invoices.
- (j) After Fourth Estate acquired NZPI and NBR, payments made to Mr Hutching for his contributions were regularised. That is Mr Hutching was paid monthly calculated on a 48 week basis. This was a set amount for each week for his contributions to NBR, NBR online and NZPI. For the respective payments for NBR and NBR online Mr Hutching did not provide any invoices, but he received a payment from which PAYE was deducted. In respect of NZPI, he provided an invoice for payment, which itemised the withholding tax to be deducted by Fourth Estate.

Control test

[24] The control test is consideration of the nature and extent of control of the work performed and who exercises that control.⁶

[25] The application of the control test favours a conclusion that Mr Hutching's relationship with Fourth Estate was that of an independent contractor.

[26] Mr Hutching was retained by Fourth Estate to write property stories, which was his specialist area. Mr Hutching was expected to contribute content for the 48 weeks of publication of NBR (similarly for NZPI). The amount of content was not specifically defined, but Mr Hutching and an employee (Sally Lindsay) were expected to fill the allocation of the property section in the weekly NBR edition. Mr Hutching would normally write three or four articles or stories a week. Mr Hutching also

⁶ See *Atkinson v. Phoenix Commercial Cleaners* at [59]

contributed to NBR online. As the website was updated daily, it was normal for Mr Hutching to contribute five to ten articles or stories per week.

[27] Any constraints on Mr Hutching's contributions to both NBR and NBR online were dictated by the nature of the publication (say, for example, if it had a particular theme or there was a particular angle that Fourth Estate wanted covered, it might request Mr Hutching to cover a certain story) and Mr Hutching was bound by deadlines for publication. For example, Mr Hutching was required to get completed articles to Fourth Estate by a particular time in order for it to be part of the weekly NBR publication.

[28] Fourth Estate's evidence is that Mr Hutching was largely free to decide what he wrote about and did not have to write a fixed number of articles/stories or words so long as between himself and Ms Lindsay the property allocation of the NBR were met. Mr Hutching had to meet the deadlines for publishing but he could write his articles when he chose. He was not required to work set office hours, although there was an expectation he would be available if Fourth Estate needed to contact him, but given mobile technology, this did not require him to be working at home.

[29] Mr Bridgeman, the NBR News Editor with overall responsibility for NBR's publications, had regular contact with Mr Hutching by email and phone. Mr Bridgeman would contact Mr Hutching to find out what he was working on, to suggest ideas and occasionally to ask Mr Hutching to do something specific that NBR might need for a particular publication. His evidence and the evidence I have seen in email exchanges attached to the affidavit of Mr Hutching, indicates that Mr Bridgeman did not demand Mr Hutching write any particular article or cover any particular topic, he would merely request or give ideas about content in the course of the ongoing contact and discussions that he had with Mr Hutching.

[30] Mr Hutching received regular emails from Fourth Estate. In particular, he was on the circulation list for three daily emails. These emails were sent to the entire editorial team, which was made up of employees and independent contractors. The purpose of the emails was to keep reporters informed about what was happening, what others were working on and the timeframes involved to avoid any duplications or any deadlines being missed.

[31] As already indicated, Mr Hutching was also able to write for other publications whilst he was engaged with Fourth Estate.

[32] In conclusion then, it is my view that there was very little control exercised by Fourth Estate over the content of Mr Hutching's work and how he went about completing that work other than that he was to write on property matters (as this was his expertise) and he was to meet required deadlines. He was also required to produce a certain number of articles, but had freedom in determining that amount based on the space allocated to property. Mr Hutching was not required to keep normal office hours, attend at an office or attend anywhere else directed by Fourth Estate.

Integration test

[33] This test determines the extent to which a person is integrated into the business. As noted by Chief Judge Colgan in *Atkinson*⁷:

This third common law guideline determines the extent to which the plaintiff was integrated into the defendant's business. Its application in any case is dependent in substantial part, on the nature of the business and the work performed.

[34] I conclude Mr Hutching was not properly integrated into the Fourth Estate business and my analysis of this test supports the conclusion that he was an independent contractor.

[35] The matters that support my conclusion include:

- (a) Mr Hutching worked from home and was not required to attend at an office.
- (b) Mr Hutching was not required to wear corporate attire as employees were.
- (c) Mr Hutching was not required to keep regular hours or even keep in regular contact other than the daily emails and responding to Mr Bridgeman when contacted.
- (d) Mr Hutching had an NBR email address, but he was unable to use that directly. The email address was used as a point of contact for him in

⁷ At para.[66]

response to articles. If someone sent an email in to Mr Hutching's NBR email address it was automatically forwarded to his own private email address, which he used for his own work purposes. He could not respond to anyone on the NBR email address.

- (e) Mr Hutching did not sign off on emails using NBR contact details.
- (f) Mr Hutching did not have access to internal Fourth Estate systems such as an intranet. He only had access through Fourth Estate to some external systems such as Companies Office.
- (g) Mr Hutching was not subject to the same day-to-day control or supervision as an employee. Mr Hutching did not have regular, or indeed any, performance reviews.

[36] The factors indicating possible integration of Mr Hutching into Fourth Estate include that he had an NBR email address, albeit limited in function. He was copied into regular team emails, in particular the three daily reporting emails, he would attend functions or meetings as a representative of NBR and he had an NBR business card.

[37] I do not find that these points of integration as Mr Hutching describes them are persuasive. An independent contractor could be treated in this way without being deemed to be integrated, and Fourth Estate's evidence is that it treats its contractors in this way (so, for example, other contractors have business cards).

[38] The overall balance indicates to me that Mr Hutching was not integrated into Fourth Estate.

Fundamental test

[39] This test is an analysis of whether the person is engaged to perform services on their own account. In my assessment, the fundamental test indicates that Mr Hutching was in business on his own account.

[40] It is clear that Mr Hutching did act independently as a reporter. He accepts that he was an independent contractor for the purposes of the work he did in relation to NZPI. He also accepts that he was an independent contractor in relation to work that he did for other publications.

[41] In contrast, Mr Hutching says he was an employee for the NBR work that he did for Fourth Estate. On the evidence, there is no real distinction in how he did that work, the control over that work, and the lack of integration.

[42] The only difference appears to be the way he was paid – on invoice to NZPI with withholding tax deducted.

[43] To suggest on one set of facts that apply to articles written for Fourth Estate publications he was not in business on his own account but on largely the same set of facts that apply to other articles written for different Fourth Estate publications he is, is nonsensical.

[44] There is one difference in how Mr Hutching treated the two sets of work. Mr Hutching structured his tax and financial matters in respect of the work he did for NZPI and other entities as an independent contractor. So, for example, he worked from home and claimed 50% of the expenses in operating a home office and various other aspects of his business as an independent contractor.

[45] In contrast, Mr Hutching treated 50% of the expenses he incurred in the work he produced as incurring as an employee in respect of his work for Fourth Estate for NBR and NBR online. Yet Fourth estate did not contribute to the cost of running Mr Hutching's home office or provide any of the equipment⁸.

[46] This treatment of expenses is also inaccurate as it is obvious based on the amount of work produced for NBR and NBR online that Mr Hutching would have incurred more than 50% of his expenses through this work.

[47] These two factors suggest that the treatment of expenses was a tax deduction based on an accountant's advice rather than being a result of Mr Hutching's belief that he was an employee and not in business on his own account. So this aspect of the tax treatment of Mr Hutching's payments does not persuade me that Mr Hutching was an employee and not in business.

[48] In support of this conclusion, I note that Mr Hutching says he was an employee for NBR and NBR online work but he did not do anything to have his employment rights enforced. An example of this is the failure to ask for holiday pay when it would have been abundantly clear to Mr Hutching that he was not receiving

⁸ Noting however, that Fourth estate did reimburse some mobile telephone costs.

this. If he was an employee, or even believed himself to be an employee, then surely he would have sought to have a significant amount of money paid to him by way of holiday pay on a regular basis. He also says he did not seek to have an employment agreement put in place although he knew he was entitled to one.

[49] Mr Hutching's reason for not seeking to have these employment rights enforced was that he feared the consequences of that if he stood up for himself. He suggests that some employees who have sought to have their rights met by Fourth Estate have been dismissed. There is no evidence to support this and it is not a conclusion that I am prepared to accept.

[50] I think it is more likely Mr Hutching simply treated himself as an independent contractor being in business on his own account which is why he did not seek to have any employee rights met by Fourth Estate.

[51] On balance the fundamental tests indicates to me that Mr Hutching was in business on his own account as a journalist.

Industry practice

[52] I do not find an analysis of industry practice in relation to the retention of reporters or journalists to be decisive. It is clear from the evidence that a reporter or journalist may be an employee or an independent contract and that this is common practice in the industry. Some reporters are independent contractors because of the way they operate and because they contribute to many publications, whilst others are employees who attend at an office on a regular basis and write as directed by their employer. Fourth Estate uses a combination of contract reporters/journalists and employed reporters/journalists.

[53] It is clear from industry practice that retaining reporters and journalists either as contractors or as employees is possible, either occurs and both are quite regular and not uncommon. Analysing industry practice is therefore not instructive either way.

Taxation

[54] I do not find the analysis of the taxation position to be overly instructive either. The simple point is it appears that tax was deducted in a manner to suit the convenience of Fourth Estate and Mr Hutching. That is, it was done to simplify the

process of invoicing and deducting tax. It does not appear to have been put in place because it was a recognition that Mr Hutching was an employee.

[55] In short, I conclude that the tax treatment was based simply on it being a convenient arrangement rather than reflecting what the parties believed to be the actual nature of the relationship between them.

Broad and realistic assessment

[56] Overall, when I stand back, and make a broad and realistic assessment of the work that was undertaken and the evidence I have heard about how each party treated the other and how Mr Hutching saw himself, I am satisfied that Mr Hutching was an independent contractor.

[57] In summary:

- (a) I believe Mr Hutching started with Fourth Estate Holdings Limited as a contractor. There were some changes in the amount of work he took and the form of which it was published, but there were no significant changes in how he conducted that work over the period of time he was retained by Fourth Estate Holdings Limited and then Fourth Estate. The only change was an agreed change to how he was paid for the work he did on NBR and then NBR online – in my view this did not reflect a change in status.
- (b) Mr Hutching accepts that he was an independent contractor for the work he did in respect of NZPI and I cannot see any real difference in the way in which he operated in producing the work for NZPI as opposed to the work for NBR and NBR online.
- (c) Mr Hutching appears to have had a reasonable amount of autonomy and independence in his work. He worked from home, he could work the hours that suited him, he could produce work as and when it met his other obligations (so long as he met deadlines for publishing) and he was not required to be at an office or any particular location on behalf of NBR at a given time.

- (d) Mr Hutching was not integrated into the Fourth Estate business in the same way that employees were.
- (e) Mr Hutching operated on his own account including the work he did for Fourth Estate and other entities.

Determination

[58] I have considered all of the relevant matters and have applied a broad and realistic assessment of the relationship between Mr Hutching and Fourth Estate. That assessment includes consideration of how the work was performed, particularly the reality of that work and the way it was conducted. I am satisfied that the real nature of the relationship between Mr Hutching and Fourth Estate is that of an independent contractor and not an employee.

[59] Accordingly, I do not have jurisdiction to determine the claims set out in Mr Hutching's statement of problem.

Costs

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

[61] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum of costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority