

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 120  
5635537

BETWEEN            PETER JONES  
                                 Applicant

A N D                PENROSE ENTERPRISES  
                                 LIMITED  
                                 Respondent

Member of Authority:     Peter van Keulen

Representatives:         Philippa Tucker, Counsel for Applicant  
                                 Ray Parmenter, Counsel for Respondent

Investigation Meeting:    21 March 2017 at Christchurch

Submissions and Further    21 March 2017, 31 March 2017 and 27 April 2017 for  
Information Received:     Applicant  
                                 21 March 2017, 3 April 2017 and 28 April 2017 for  
                                 Respondent

Date of Determination:    7 July 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.     Peter Jones was not an employee of Penrose Enterprises Limited, he was an independent contractor and I do not have jurisdiction to determine his claim.**
- B.     I reserve costs with a timetable set for submissions if required.**

**Employment relationship problem**

[1]     The applicant, Mr Jones, claims he was unjustifiably dismissed from his employment with the respondent, Penrose Enterprises Limited (Penrose).

[2] Mr Jones resigned after representatives from Penrose attended at his work place and advised him that a new worker would be hired to assist him. Mr Jones saw this action as a demotion, given what he understood the new worker would be doing, and in response, he sought confirmation of his role with Penrose and a meeting to discuss the role of the new worker. Mr Jones says Penrose did not respond to his requests and this was either an action of dismissing him, which was unjustified or it was a breach of duty, which amounted to constructive dismissal.

[3] Penrose says:

- a. Mr Jones was a self-employed contractor and he cannot bring an unjustified dismissal grievance.
- b. If I determine that Mr Jones was in fact an employee then Penrose did not dismiss Mr Jones nor did its actions amount to repudiatory conduct that would support the allegation of constructive dismissal.

### **Preliminary Matter**

[4] On 3 July 2017 I issued a determination in this matter that declined Mr Jones' application for a non-publication order under clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act). I did however, grant an interim non-publication order to allow Mr Jones to lodge a challenge to my determination if he wished, on the following terms:

- a. The interim order is to stay in place for 28 days commencing from the day after the date of the determination.
- b. If Mr Jones files a challenge, the interim non-publication order will be extended to remain in place until the Employment Court makes any order that renders it unnecessary.
- c. If Mr Jones does not file a challenge to the determination then the interim order will lapse.

[5] As that interim order was still in place when this substantive determination was first issued, it was anonymised and did not include any information that may identify Mr Jones. The Authority did not publish that determination on its website.

Now that the interim order has lapsed the determination has been revised for publication in this form which is no longer anonymised.

### The issues

[6] There are two matters that I must consider:

- a. Was Mr Jones an employee of, or a contractor to, Penrose?
- b. If Mr Jones was an employee, was he unjustifiably dismissed?

### Independent Contractor

[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 homemaker; 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 their relationship.

....

[8] The leading case on how the Authority or the Court should determine the real nature of the relationship and what are relevant matters for the purpose of that

consideration is *Bryson v Three Foot Six Ltd*<sup>1</sup>. Subsequent decisions of the Employment Court have provided guidance on applying the *Bryson* principles<sup>2</sup>.

[9] What the relevant case law says about s 6 of the Act is that I am required 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 assess the reality and all the circumstances of work performed in the working relationship.

[10] From the relevant case law<sup>3</sup>, the steps I should take and the relevant circumstances I should consider in this assessment are:

- a. First, I must consider the terms of engagement in any contract between the parties. From this contract, I can establish if there is a common intention, which may indicate the nature of the relationship but will not be determinative.
- b. I must then 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 relevant common law tests:
  - (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, being an analysis of whether the individual is in business on his own account.
- d. I should consider industry practice as this remains relevant but it is not determinative.

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<sup>1</sup> *Bryson v Three Foot Six Ltd* [2003] ERNZ 581 (EmpC) and *Bryson v. Three Foot Six Ltd (No 2)* [2005] NZSC 34

<sup>2</sup> See *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 and *Narinder Singh v Eric James & Associates Ltd* [2010] NZEmpC 1

<sup>3</sup> Applying *Bryson* and following the Employment Court decisions in *Atkinson* and *Singh*.

- e. Similarly, I should consider the tax treatment on any payments noting however that it is not determinative and 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.

[11] I will turn to consider each of these steps in relation to Mr Jones' role with Penrose.

### **Contract and terms of engagement**

[12] Penrose is a limited liability company that imports and sells cars. It operates two car yards.

[13] Mr Jones commenced work with Penrose on 22 September 2014.

[14] Penrose retained Mr Jones as a car salesperson on a self-employed contractor basis. The parties signed a very brief contractor agreement on 15 October 2014. The terms of the contract included:

- a. Mr Jones responsible for vehicle sales and assisting with day to day running of the yard.
- b. Mr Jones was to be paid \$500.00 plus GST for every car sold, payable weekly on invoice from Mr Jones;
- c. Penrose would deduct schedular payments at 20%.

[15] Mr Jones also completed a tax code declaration form, declaring his tax code as WT, the code applicable to self-employed contractor. Mr Jones registered for GST, rendered invoices for cars sold and conducted his finances and completed tax returns on a self-employed contractor basis.

[16] Mr Jones says that when he first discussed working at Penrose he did not want to be a contractor nor did he expect to be retained as one. However, Penrose wanted the relationship to be structured this way and he accepted that - Mr Jones does accept that he was a self-employed contractor when engaged to sell cars.

[17] It is clear to me that the common intention of Mr Jones and Penrose was that Mr Jones was a self-employed contractor and both parties treated the relationship as such.

### **The work in practice**

[18] Penrose had a site manager based at the car yard that Mr Jones worked at (the Yard) and a general manager based in at another location, who jointly managed the Yard. Penrose had additional staff at the other location including administrative staff.

[19] Mr Jones would attend at the Yard six days per week. He would often open the Yard and then during the day did some additional work to assist with the running of the Yard, including ensuring the cars were vacuumed and kept tidy. When a car was sold Mr Jones would complete the necessary contracts but change of ownership was processed through the administrative staff at the other location with the site manager sending the details to them.

[20] For the administrative tasks that Mr Jones did, such as contracts, he used a Penrose computer and the Penrose system. Mr Jones' administrative function was limited as the Yard did not have access to sales and invoicing systems nor did it have access to the accounts or other financial aspects of Penrose. Mr Jones did have a Penrose email for administrative tasks.

[21] Mr Jones used his own mobile phone, he was not required to wear a uniform, he never had any performance reviews nor did he ever receive any training.

[22] Mr Jones did not buy any cars and had little involvement in setting prices.

[23] In late May or early June 2015 Penrose dismissed the site manager and he was not replaced. Penrose asked Mr Jones to step in, in a caretaker role, taking over some of the tasks that the site manager did. The general manager would assist in taking over some of the other management tasks of the site manager.

[24] The additional responsibilities that Mr Jones took on in this caretaker role included providing the necessary information to the administrative staff for the transfer of ownership of cars sold, arranging reconditioning and/or servicing of cars and assisting with advertising cars for sale. Mr Jones received an additional \$250.00 plus GST per week for this work and the payment was invoiced as "consultancy services".

[25] I am satisfied that the additional work undertaken by Mr Jones was administrative in nature and reflected the fact that these tasks or parts of tasks needed to be done by someone on site at the Yard and could not be done remotely by the administrative staff. I do not accept that this converted Mr Jones from a sales person to a manager as he did not undertake any management tasks.

[26] And, the common intention remained that Mr Jones was a self-employed contractor, best evidenced by the way in which the additional payment for these tasks was invoiced and accounted for and by the fact that Mr Jones continued to treat himself as a contractor.

### **Control test**

[27] The control test is consideration of the nature and extent of control of the work performed and who exercises that control.<sup>4</sup> The nature and extent of control is about looking at the totality of the relationship and establishing the ultimate control over:

- a. what the person must do;
- b. how he/she must do it - how the person's skills and abilities are to be applied; and
- c. when he/she must do it.

[28] Control needs to be considered in the context of a business owner's need to protect and maintain the business, such that strict controls are not always inconsistent with a contractor relationship.<sup>5</sup> So, for example in *Stone v Orams Marine (Auckland) Ltd*<sup>6</sup> the Employment Court decided that Mr Stone was a contractor despite quite specific control being imposed on him. At page 11, the Court stated:

Taking a global view of the whole of the evidence, I am satisfied the respondent had a business to maintain and protect, so it exercised control over Mr Stone to ensure that in conducting that business he operated and was clearly identifiable as the respondent's agent, who maintained the respondent's standards of appearance and behaviour, who accepted and operated within the respondent's accounting system and who attended on specified days at the employer's premises where the respondent's stock was displayed for sale and phone enquiries were received. ....

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<sup>4</sup> *Atkinson v. Phoenix Commercial Cleaners* at [59]

<sup>5</sup> *Cunningham v TNT Express Worldwide (New Zealand) Limited* [1993] ERNZ 695 (CA).

<sup>6</sup> AEC 88/97

[29] In this case, there are elements of control exerted by Penrose over Mr Jones. He could only sell the cars Penrose provided to him, he could not sell other cars nor did he have any input into the cars supplied for sale at the Yard and limited influence on the sale prices for cars. Mr Jones also had to process all of the financial requirements through Penrose's systems using Penrose staff.

[30] But, outside of these high level controls placed upon the sales role at the Yard, Mr Jones was free to sell the cars as he chose. Penrose did not impose a sales quota. Mr Jones did not have to present cars in any particular way or seek to promote one car ahead of another. He did not need to be at the Yard all the time. Mr Jones' evidence is that after the site manager was dismissed, he had no day to day support on site at the Yard so was left working seven days per week for the hours the Yard was open. Penrose said in response that Mr Jones did not need to keep the yard open all of the time that he did. He could have chosen to close and as it was not a busy car sales he did not need to be open all of the time.

[31] The elements of control over Mr Jones are mixed:

- a. Penrose exercised control over the supply of cars, pricing of cars and how the administrative function worked. Mr Jones was required to sell only Penrose cars, from Penrose premises, at Penrose prices, using Penrose resources and systems. Whilst this type of control can be consistent with an employment relationship, some self-employed contractors are subject to quite specific control for the reasons expressed in *Stone* and this control is not, alone, indicative of an employment relationship.
- b. In contrast, on a day-to-day basis Mr Jones could control how he sold the Penrose cars, how he presented the cars for sale, when he sold cars and how many cars he sold. And, by deciding how he would do each of these things Mr Jones had control over how much money he would make.

[32] I find that the control test indicates that Mr Jones was a self-employed contractor, in relation to selling cars. Mr Jones controlled how he exercised and applied the skills he possessed for selling cars. Also, within some limits dictated by Penrose opening hours, he controlled when he exercised and applied his skills. The control exercised by Penrose over what Mr Jones did and the limits on when he did it

was part of Penrose maintaining and protecting its business not controlling Mr Jones as an employee.

[33] The control that Penrose exercised over Mr Jones in the additional administrative functions that Mr Jones undertook was limited to ensuring that the administrative staff at the other location could complete required processes. This additional control did not impact to such an extent that it changed the control Mr Jones had over how he sold cars and ultimately, as I have described it, how much money he would make. These requirements placed some additional restrictions on what Mr Jones did on a day-to-day basis but this was not enough to persuade me that Mr Jones changed from being a self-employed contractor, when he was solely selling cars, to being an employee when he undertook the additional caretaker tasks.

[34] Overall, the control test suggests a contractor relationship.

### **Integration test**

[35] This test determines the extent to which a person is integrated into the business<sup>7</sup>.

[36] In this case Mr Jones was not integrated into Penrose sufficiently to suggest the relationship was an employment one. Mr Jones did use Penrose resources and systems but this was a product of the location of the Yard and how Penrose's administrative function worked.

[37] Mr Jones was not integrated into the Penrose business; he was not subject to appraisals, training or any day-to-day management or supervision, he did not wear a uniform, he did not have any policies or processes he had to follow, nor was he provided benefits consistent with an employment relationship, such as a mobile telephone.

[38] Overall, the integration test suggests a contractor relationship.

### **Fundamental test**

[39] This test is an analysis of whether the person is engaged to perform services on their own account.

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<sup>7</sup> *Atkinson v. Phoenix Commercial Cleaners* at [66]

[40] Penrose paid Mr Jones a commission on every car he sold, so on the face of it, he performed the services of selling cars for his own account.

[41] On one analysis, Mr Jones bore his financial risk in terms of making sufficient money from the work he did. What Penrose did in terms of supplying cars and setting prices may have had some influence on that but regardless of this Mr Jones could make \$500.00 on every car he sold and whether he did or not or even how often he did, was solely down to him and his skill as a salesperson.

[42] However, Mr Jones did not have any major financial outlay for the purchase of cars, but he did have some expenses such as travel costs and mobile telephone costs. This limited the financial risk that Mr Jones faced. Further, Mr Jones had no control over what cars Penrose provided for him to sell or how much profit he could make out of a car sale – it was just a straight commission for selling Penrose’s product. So there was a limit on how much he could influence the profit that he made.

[43] And every sale made by Mr Jones realised profit or at least revenue for Penrose, so his work was not solely about making money for him.

[44] Ultimately, though, I am persuaded by the fact that Mr Jones decided, within some limits, when and how he used his skills to sell cars and the result of those daily decisions directly translated to how much money he made. Everything that Mr Jones did, including the additional administrative tasks, related to cars he could sell or had sold. He did not do anything that assisted the sales of cars for other salespersons. His primary motivation in applying his skill was to make money for him, not to promote Penrose’s business or make money for it; the fact that Penrose profited from the sales Mr Jones made was simply a consequence of his work, not the reason he worked.

[45] On balance, I find the application of the fundamental test indicates Mr Jones was in business on his own account, primarily for his own benefit.

### **Industry practice**

[46] Industry practice is not particularly instructive on this issue. It is clear that the car sales industry has employed sales persons and the self-employed.

[47] I do note however that Penrose retains all of its car sales people as self-employed contractors, so a contractor relationship is consistent with Penrose’s normal practice and the way in which it structured and ran its business.

**Taxation**

[48] Mr Jones treated himself as a self-employed contractor and seemed content to do so. Mr Jones obtained the tax benefits of being a contractor, including claiming expenses against the tax he paid and he acted consistently with being a self-employed contractor by doing things such as charging and accounting for GST.

[49] The tax treatment was not just a consequence of the label put on the relationship but a desire to obtain the financial and commercial benefits for both parties and it is indicative of a contractor relationship.

**Broad and realistic assessment**

[50] The common intention was that Mr Jones was a self-employed contractor and the day-to-day function was then consistent with this intention.

[51] Mr Jones did not receive any sick leave or holiday pay and he did not request this.

[52] Mr Jones did not complain to Penrose about being treated as a contractor or claim to Penrose that he was in fact an employee. Given Mr Jones' position, that the change to his role after the site manager was dismissed meant he became an employee, I would expect him to have complained about this at some point. He did not assert he was an employee nor did he complain about not receiving a more consistent pay such as a wage or salary, perhaps even minimum wage, and other employment benefits such as breaks and leave.

[53] The parties treated the relationship as a contractor one, with Mr Jones structuring his finances and tax on this basis, to his benefit.

[54] Whilst Penrose exercised some control over Mr Jones, he retained control over how he sold cars, this being his fundamental task and the task that dictated how much money he was paid. Mr Jones bore the financial risk of how much money he made, this directly relating to the work he did – the number of sales equated to more profit.

[55] Penrose did not integrate Mr Jones into its business.

[56] The additional tasks that Mr Jones undertook did not change his status to an employee. The tasks were administrative in nature and necessary for his primary role of selling cars.

[57] When I stand back and assess how the relationship operated on a day-to-day basis I am satisfied that Mr Jones was a self-employed contractor and not an employee. I am particularly persuaded by the facts that Mr Jones controlled how he applied his skills and he then applied those skills for his benefit. And Mr Jones accepted he was a self-employed contractor and obtained the benefits of this whilst allowing Penrose to carry on its business on that basis.

### **Unjustified dismissal**

[58] As I have decided that Mr Jones was a contractor and not an employee, I cannot consider his claim of unjustified dismissal.

### **Determination**

[59] Mr Jones was not an employee of Penrose he was an independent contractor and I do not have jurisdiction to determine his claim.

### **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 on 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