

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 74  
3085317

BETWEEN                      SANGHOON KIM  
   Applicant  
  
AND                                MEGA PAINTING LIMITED  
   Respondent

Member of Authority:        Vicki Campbell  
  
Representatives:              Applicant in person  
   Michael Kim, counsel for Respondent  
  
Investigation Meeting:        19 January 2021  
  
Submissions Received:        19 January 2021  
  
Determination:                25 February 2021

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Kim was not in an employment relationship with Mega Painting Limited.**
- B.     Costs are reserved.**

**Employment relationship problem**

[1]     Mr Kim alleges he was dismissed by Mega Painting Limited (MPL) where he had worked as a painter in November and December 2019. He also alleges he was subject to sexual harassment during his employment, is owed arrears of wages and that MPL breached various sections of the Employment Relations Act 2000 (the Act).

[2]     MPL denies the allegations and says the Authority does not have jurisdiction to investigate and determine Mr Kim's claims because he was not an employee but was engaged as an independent contractor.

## **Issue**

[3] By agreement of the parties this determination deals only with the question of whether there was an employment relationship between Ms Kim and MPL.

[4] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

## **Background**

[5] Mr Kim and Mr Dong Woo Shin, a director and shareholder of MPL, are both from Korea. During the relationship the parties communicated largely in Korean. Mr Kim speaks both English and Korean fluently, but Mr Shin does not have good English skills. For that reason the Authority was assisted by a Korean interpreter during the investigation meeting.

[6] MPL operates a painting business which depends on securing projects in and around Auckland city. MPL's main source of project work is in refurbishing rooms in retirement villages preparing rooms for new residents. From time to time MPL picks up contracts as a sub-contractor for other companies.

[7] On Wednesday, 30 October 2019 MPL posted an advertisement in the Korea Post seeking a contractor painter. The advertisement was written in the Korean language and stated that MPL was seeking someone who was able to file their own tax returns.

[8] Mr Kim applied for the role and attended an interview with Mr Shin. During the interview Mr Shin explained he was looking for a contractor and that due to the nature of the work, the hours and workload varied and so MPL was not in a position to provide guaranteed hours.

[9] Mr Kim told Mr Shin he was already working as a contractor and had his own GST number. He told Mr Shin he contracts his services and issues invoices through a company called Future Group Limited (FGL) of which he is the sole director and shareholder.

[10] Mr Kim undertook work as an independent contractor for AA through FGL. It was common ground that during his engagement with MBL he continued to undertake work under his AA contract.

[11] Mr Shin and Mr Kim agreed to contract FGL to provide painting services, the rate of pay would be a rate equivalent to the current minimum wage plus GST and Mr Kim would provide his own tools and equipment.

[12] On 10 November 2019 Mr Kim provided MPL with FGL's bank account details and its registered GST number.

### **The law**

[13] To determine this issue I must first decide whether or not Mr Kim falls within the definition of employee under s 6(1) of the Act. This involves a consideration of the real nature of the relationship between the parties. This assessment includes considering all relevant matters, including any matters that indicate the intention of the parties.

[14] The Supreme Court in *Bryson v Three Foot Six Limited (No. 2)* addressed what "all relevant matters" in s 6(3) (a) of the Act includes:<sup>1</sup>

- a) The written and oral terms of the contract, which usually contain indications of the parties' common intention concerning the status of the relationship;
- b) Any divergences from, or supplementation of, those terms and conditions, which were apparent in the way in which the relationship had operated in practice;
- c) The behaviour of the parties in implementing the agreement between them – how the relationship operated in practice is crucial to a determination of its real nature;
- d) Features of control and integration, and whether the person had been effectively working on his or her own account; and
- e) Industry practice.

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<sup>1</sup> *Bryson v Three Foot Six Limited (No. 2)* [2005] ERNZ 372 at

### **Intention of the parties**

[15] There was no written contract entered into by the parties. At the investigation meeting Mr Kim agreed that during the time of his engagement with MBL he continued to undertake paid work under his contract with AA and was not available to work for MBL on those days.

[16] On the request of MBL Mr Kim provided his GST number rather than his Inland Revenue number for PAYE purposes. He also provided the bank account details for FGL rather than a personal bank account. Mr Kim has experience in operating companies. He owned and operated KSH Limited from 2013 until it was put into liquidation in 2018.

[17] Mr Kim's actions at the outset are consistent with his understanding of the advertisement placed by MBL and which led to his engagement. The advertisement required someone who could file their own tax returns.

[18] Having observed Mr Kim during the investigation meeting I am satisfied he had the comprehension to understand what he had agreed to. While the relationship was on foot he seemed satisfied with it and did not raise any concerns about it.

[19] At the investigation meeting Mr Kim acknowledged that he was looking to set himself up in business as a painter. For that reason he asked Mr Shin a number of questions about how to quote on jobs. In his words, he wanted to know as much as possible.

[20] Overall, I find the intention of the parties is consistent with MBL's assertion that Mr Kim was engaged as an independent contractor through FGL.

### **How did the relationship operate in practice?**

[21] Mr Kim worked with other painters including Mr Shin on various projects. Each painter had their own tasks to complete and reported to the site supervisor who was the person assigned to supervise the entire site. The site supervisor was not associated with MBL. Each painter would be allocated a specific task, for example, one painter would complete the sanding while another would then paint the smoothed surface.

[22] Deadlines for the completion of projects were set by the site supervisor and not MPL. If one painter did not complete their allotted task within a reasonable timeframe, the others following behind could not complete their tasks on time.

[23] Mr Shin told me Mr Kim did not have routine work days or work hours each week. As long as Mr Kim completed his tasks for a project, he did not care whether he came in early or late. Mr Kim acknowledged at the investigation meeting that he sometimes arrived later than others to the work site.

[24] Mr Kim did not provide details of the hours he worked to MPL. Instead MPL maintained its own record. It calculated and paid to FGL the hours recorded including GST on a weekly basis.

[25] Mr Kim was required to provide his own tools and equipment such as sanding machines, ladders, brushes, painting trays and silicon guns. Mr Kim was new to the industry and had not yet purchased the tools required of him. At times the painters on a project might share their tools as not all workers had a full list of the larger tools. Mr Shin told me Mr Kim often borrowed others tools because he did not yet have his own. He told me he reminded Mr Kim often of the requirement for him to provide his own tools.

[26] Mr Kim undertook other work for other organisations. For example during the relationship with MPL Mr Kim often spoke of the work he did changing batteries for the AA. Mr Shin told me he picked up a project in Whangaparaoa and needed a couple of sub-contractors to work with him on the weekend to finish the job on time. Mr Shin asked Mr Kim if he was available. Mr Kim told Mr Shin he was not available because he had other jobs on the weekend.

### **Control**

[27] This test looks at the degree of control or supervision exercised by the employer over the work performed. The greater the level of control the more likely a contract of service exists.

[28] Mr Kim was not an experienced painter when he started with MPL. He told Mr Shin during the interview that he was looking to get more experience and learn plastering if he could.

[29] Working in retirement villages creates difficulties for tradesman regarding hours and flexibility. Mr Shin told me all workers on site, including painters, electricians, and builders come in ready to work from about 8 am and finish about 4.30pm. This is the only time available without affecting the elderly residents' daily lives.

[30] Mr Kim often arrived on the work site later than others. Mr Shin did not care about Mr Kim's arrival and departure times, so long as he completed the task allocated to him. The only instructions passed on to Mr Kim and other sub-contractors by Mr Shin were the instructions already given to Mr Shin by the site supervisor.

[31] At times Mr Shin had to redo work that had not been completed properly by Mr Kim, but he did not supervise his work on a daily basis and did not require him to redo the work.

[32] Clearly there were some elements of control in the working activities, but as noted by the Court in *Singh v Eric James & Associates Limited* such elements of control are not uncommon in non-employment situations.<sup>2</sup>

### **Integration**

[33] This test examines the extent to which the work performed by Mr Kim was an integral part of the business and whether he had effectively become "part and parcel" of the organisation as opposed to being an adjunct to the business.

[34] I am satisfied the work undertaken by Mr Kim was integral to the business but could have been undertaken equally as an employee or in some other capacity. This test is not determinative of the relationship between Mr Kim and MPL.

### **Fundamental or Economic Reality**

[35] This test examines the extent to which Mr Kim took on financial risk himself in providing his services including whether he was in business for himself. The question is whether Mr Kim was engaged as a person in business on his own account.<sup>3</sup>

[36] Mr Kim confirmed to Mr Shin at the interview that he had his own company and was happy to provide GST invoices to MPL in relation to the services he provided.

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<sup>2</sup> *Singh v Eric James & Associates Limited* [2010] NZEmpC 1 at [23].

<sup>3</sup> *Downey v New Zealand Greyhound Racing Association Inc.* (2006) 3 NZELR 501 at [34].

The company operated by Mr Kim had been established before he took on the work with MPL. During a case management call with the parties on 31 July 2020 Mr Kim was directed to lodge with the Authority copies of the financial and other records associated with FGL. This direction was confirmed in a Notice of Direction issued on 10 August 2020. Mr Kim did not comply with the Authority's directions.

[37] In the absence of the requested records it has been difficult to assess the extent to which Mr Kim was in business on his own account. Given that he was registered for GST I have concluded it is more likely than not that he was required to complete GST returns to the Inland Revenue and could, accordingly exercise the benefits of being able to claim back any GST paid on goods or services from other registered providers.

[38] From the information provided to the Authority I have concluded it is more likely than not that during the period of his engagement with MPL Mr Kim was in business on his own account.

### **Industry practice**

[39] Mr Shin gave evidence that about 80 percent of the building and construction industry in New Zealand is made up of independent contractors.

[40] I have found Mr Shin's unsupported evidence to be of little assistance in determining the relationship between Mr Kim and MPL.

### **Overall impression**

[41] Standing back and considering the evidence as a whole I have concluded Mr Kim was engaged as an independent contractor under a contract for services by MPL. He knew the true position when he took up the role.

[42] While there are aspects of the relationship between Mr Kim and MPL that may point to employment, the intent of the parties throughout their relationship was that Mr Kim would operate his own business and the parties acted in accordance with that intention.

[43] Mr Kim was not an employee and accordingly the Authority has no jurisdiction to investigate and determine his claims.

## **Costs**

[44] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so MPL shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. Mr Kim shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[45] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority