

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 86
3020152

BETWEEN ZHIBIN LI
 Applicant

AND BOFENG KANG
 Respondent

Member of Authority: Vicki Campbell

Representatives: Eloise Callister-Baker for Applicant
 Ezra Tie for Respondent

Submissions Received: 22 February 2018 from Applicant
 1 March 2018 from Respondent

Determination on the 14 March 2018
Papers:

DETERMINATION OF THE AUTHORITY

- A. Mr Li was an independent contractor. His application for payment of arrears of wages is declined.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Li came to New Zealand in April 2009. In August 2016 he says he worked as an employee for Mr Kang as a painter. Mr Li says he worked for nine months before leaving New Zealand due to issues with his visa. Mr Li says when he left New Zealand Mr Kang still owed him wages and holiday pay.

[2] Mr Kang denies Mr Li was employed to work for him and says Mr Li worked as an independent contractor.

[3] In his statement of problem Mr Li also claims remedies for personal grievances however these claims were withdrawn on 22 February.

[4] By consent of the parties the issues about whether Mr Li was an employee or contractor and the arrears of wages claim are to be determined on the papers before the Authority.

Issue

[5] In order to resolve Mr Li's employment relationship problems I must determine the following questions:

- a) Was Mr Li an employee or contractor?
- b) If Mr Li was an employee is he owed wages and holiday pay?

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Li and Mr Kang but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Was Mr Li an employee or contractor?

[7] The onus of establishing whether Mr Li was an employee rests with him on the balance of probabilities. The starting point for the Authority is Section 6(1) of the Employment Relations Act ("the Act") which states:

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.

[8] Section 6(3) states:

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.

[9] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd*.¹

[10] The Employment Court in *Poulter v Antipodean Growers Limited* summarised the following applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:²

- 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 analyzing the tests that have been 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.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[11] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice, then to apply the three tests known as the control, integration and fundamental or economic reality test.

[12] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.³

[13] The Court in *Atkinson v Phonenix Commercial Cleaners Ltd* noted:⁴

Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties’ common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix’s employee.

¹ [2005] ERNZ 372.

² [2010] NZEmpC 77 at [20].

³ Ibid at [21].

⁴ [2015] NZEmpC 19 at [58].

Terms and conditions of the agreement

[14] Mr Li says he was employed as a full time painter. Mr Kang says Mr Li undertook odd jobs as and when they arose and was under no obligation to accept work when it was offered. Mr Kang also says Mr Li was not legally entitled to work in New Zealand.

[15] Based on the documents before me I have concluded the arrangement between Mr Li and Mr Kang was that if Mr Kang required a painter to assist him he would ask Mr Li to work. Mr Li was under no obligation to work.

[16] I find it is more likely than not that the relationship between Mr Li and Mr Kang was casual in nature. When Mr Kang needed some assistance with a painting job he would ask Mr Li if he was available and provided work for him for a limited number of days, usually between one and seven days.

[17] Mr Kang has provided text messages which have established to my satisfaction the ad hoc nature of the invitations made to Mr Li for work.

[18] There is no dispute that the rate to be paid to Mr Li was \$20 per hour and that this rate increased to \$22 per hour. Mr Li was paid for all hours worked except his final week. Mr Li was paid in cash.

Intention of the parties

[19] There was no written documentation between parties to demonstrate their intention about whether Mr Li was to be an employee or contractor at the time arrangements were entered into.

[20] Based on the documents currently before the Authority it is difficult to discern what the intention of the parties was from the outset other than the fact that work was provided on an ad hoc basis.

The control test

[21] This test examines the extent to which the activities of Mr Li were controlled by Mr Kang. Mr Li was left to undertake the various jobs with little or no supervision. When other painters were working at the same site Mr Li was expected to cooperate with them but there was no supervision of his work.

[22] The control test is more indicative of independent contractor status than that of an employee.

Integration test

[23] This test examines the extent to which Mr Li was integrated into Mr Kang's business. That is whether the work undertaken by Mr Li was integral to the business and whether Mr Li had become part and parcel of the business.

[24] The work undertaken by Mr Li was as a painter and could have been undertaken by employees or by contractors.

Fundamental test

[25] This test examines the extent to which Mr Li took on financial risk himself in providing his services to Mr Kang including whether he was in business for himself.

[26] Mr Li did not invoice Mr Kang for the work he undertook. Mr Kang says Mr Li was paid in full for his work at the end of each assignment without deduction of PAYE. Mr Kang says it was up to Mr Li to pay his own tax.

[27] From the documents I have available to me it seems Mr Li did not pay any tax on the income he received from Mr Kang. Because the payments were made by cash and not bank deposit there are no records of the amounts paid to Mr Li and therefore it is not possible for me to determine whether Mr Li received payment without deduction.

[28] Mr Li says Mr Kang provided him with the necessary tools to complete his work. Mr Kang says Mr Li provided his own tools.

[29] In his affidavit Mr Kang says Mr Li was free to pursue other work opportunities and he did so. Mr Li says he did not work for anyone else during the time he undertook his work for Mr Kang.

[30] The fundamental test has elements of a contracting relationship in that Mr Kang left it to Mr Li to account for his tax, provide his own tools and was free to pursue other job opportunities. There are also elements of an employment

relationship in that Mr Li was paid an hourly rate for his work and was paid in cash. There is no evidence Mr Li was in business on his own account.

Industry practice

[31] There was no evidence as to the industry practice although I am aware the building industry uses a range of relationships including employees and contractors.

Overall impression

[32] The overall impression from all of the information available on the documents before me is that the underlying and true nature of the relationship between Mr Li and Mr Kang is not that of employer and employee but rather a contracting relationship.

[33] There is no evidence to support a finding that there was any mutual intention to enter into a wage/work bargain.

[34] The Authority has no jurisdiction to investigate Mr Li's claim that he is owed arrears of wages.

Costs

[35] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Kang will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Li will have a further 14 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.

[36] This matter has been dealt with on the papers without the need for attendance at an investigation meeting. It is likely any costs award would be less than half a day on the usual "daily tariff" basis.

Vicki Campbell
Member of the Employment Relations Authority