

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Karl Maley (Applicant)  
**AND** Matthew and Deanne Thomson (Respondent)  
**REPRESENTATIVES** Karl Maley In person  
Deanne Thomson, Advocate for Respondent  
**MEMBER OF AUTHORITY** Helen Doyle  
**INVESTIGATION MEETING** 11 May 2006  
**DATE OF DETERMINATION** 20 June 2006

**DETERMINATION OF THE AUTHORITY**

***The Employment Relationship Problem***

[1] The applicant, Karl Maley says that he is owed wages and has a personal grievance against the respondents Matthew and Deanne Thomson in terms of work he performed for them in the silviculture area, tree thinning and pruning.

[2] The respondents say that Mr Maley was not an employee but was a sub-contractor.

[3] I sent a directions notice to both parties, advising them that there was a preliminary issue for the Authority to determine whether Mr Maley performed work for the Thomsons as an independent contractor or an employee. I set out the sort of issues that are relevant in determining that matter.

[4] I indicated in the directions notice that I would want to hear evidence about the substantive claim at the investigation meeting. Ms Thomson did not have her documentary evidence available to enable further investigation beyond the preliminary issue. With the agreement of both Ms Thomson who appeared for the respondents and Mr Maley, I will only determine the preliminary issue as to whether or not Mr Maley was an employee of the Thomsons.

[5] Mr Maley understood that if he was not an employee the Employment Relations Authority does not have jurisdiction to deal with his claim and it would need to be lodged with the Disputes Tribunal.

[6] I asked Mr Maley to explain the nature of his personal grievance as it was unclear to me. Mr Maley confirmed that essentially his claim was for money that he says he was not paid and not really about a personal grievance.

### ***The Issues***

[7] Section 6 (2) of the Employment Relations Act 2000 provides that to determine whether a person is employed by another person under a contract of service, the Authority *must determine the real nature of the relationship between them*. For the purpose of subsection (2), subsection 3 provides that the Authority must consider all relevant matters, *including any matters that indicate the intention of the persons; and is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*.

[8] The Supreme Court in *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 held as accurate the summary of applicable principles to establishing the nature of the relationship set out by Judge Shaw in the Employment Court judgment of *Bryson v Three Foot Six Limited* [2003] 1 ERNZ 581.

[9] The Supreme Court set these principles out in paragraph 5 of its judgment as below:

*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 analysing the tests that have 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.*

[10] I have also considered a recent Employment Court judgment of Shaw J, *William Gordon Alexander Ferguson v Sounds of Forest Limited* WC 7/06 12 May 2006 where Mr Ferguson applied to the Court for a declaration under section 6 (5) of the Employment Relations Act 2000 that he was an employee.

### ***The Background***

[11] Mr Maley had two separate engagements with the Thomsons during which he pruned and thinned trees.

[12] The first engagement was in May 2003 at which time he signed a contract that provided amongst other matters:

- *Workers are sub-contracted by MDT Contracting.* The contract clarified that MDT Contracting is owned and operated by the Thomsons.
- *Sub-contractors are paid per metre of pruning at 55c per metre.*
- *Payment for pruning will be made to the subcontractor on a fortnightly basis.* How MDT was paid was also set out.
- *Withholding tax of 15% will be taken from each fortnights earnings and held by MDT Contracting to be paid on behalf of the sub-contractor to Inland Revenue.*

- *Subcontractors are responsible for paying their own ACC levys.*
- *MDT Contracting or the sub-contractor may terminate this contract at any time with two weeks notice to the other party.*
- *MDT Contracting can terminate this contract with no notice on the following grounds:*
  - *Dishonesty is discovered with individuals tree tally's.*
  - *Any drug use within work hours.*
  - *Unexplained absence from work for more than three days.*
  - *Misuse of tools supplied by MDT Contracting.*

[13] Mr Maley came to be engaged by the Thomsons after responding to an advertisement in the Otago Daily Times for forestry workers. During this initial period of engagement Mr Maley worked for the Thomsons on a part time basis for the months of May, June and September 2003. He had some knowledge in the silviculture area because he had undertaken a course in silviculture and had his own block of trees.

[14] Mr Maley said that he was essentially left to his own devices in 2003 to prune and trim an allocated block of trees and used his spare time to undertake some fishing as well.

[15] In February 2005 Mr Maley telephoned Mr Thomson to see if any work was available. Mr Maley was told there was work available. He then worked most days full-time from late February 2005 until the end of May 2005. Mr Maley questioned with the Thomsons the timing of his payment which had changed from 2003 to payment one month following each months work.

[16] For the balance of February 2005 onward Mr Maley and the others engaged by the Thomsons would meet each morning at a pick up point. They would then be transported to a block of trees and the pruning and thinning work would be undertaken. Mr Maley was supplied with a counter and he said often, but not always, a tree marker so that he could keep a record of trees he had pruned. He would tell Mr Thomson the number at the end of each day. Mr Thomson would note the number down and payment was to reflect the tally accordingly.

[17] Mr Maley said from April 2005 he started writing his tally down as well as advising Mr Thomson of them. The tallies in Mr Maley's notebook are not reflected in the payments that he received from the Thomsons which is the reason for Mr Maley's claim. Mr Maley says that he is owed \$1889.53 net.

[18] Mr Maley said Mr Thomson would check the work performed on the trees and sometimes he would have to do the work again. If it was a wet day Mr Maley said that Mr Thomson may *pull the plug* and they would all go home. If the workers did not want to do any more work on a particular day then they would wait in the truck until everyone else had finished although Mr Maley said that there were occasions when he was pressured to leave by Mr Thomson. Ms Thomson denied that occurred.

[19] Ms Thomson said that it was up to Mr Maley where he started on a particular block of trees and how fast he wanted to go. Ms Thomson did not accept that there was any particular degree of control.

[20] Mr Maley supplied his own chainsaw and safety gear. The Thomsons provided ladders, fuel for the chainsaw and, when Mr Maley was required to stay away from home on one occasion, accommodation and food. Ms Thomson said that the equipment supplied by the employer was taken into account in setting the tree rate. Mr Maley accepted that he knew that fuel was factored into the rate.

[21] Ms Thomson said that in terms of industry practice no head contractor in the silviculture area in Otago has employees. There is some independent evidence to support this. I note that Mr Maley worked as a subcontractor for another company in the silviculture area after he finished with the Thomsons.

### ***Determination***

#### ***Intention of the parties***

[22] There was no written contract for the second engagement of Mr Maley in 2005 and no discussion about matters that one would normally expect to be discussed in an employment relationship such as annual leave and sick leave.

[23] I am satisfied that there was a mutual intention, in the absence of any discussion otherwise, that the relationship be on the same basis as it had been in 2003 which was that of head contractor and sub contractor rather than employee and employer.

[24] Intention of the parties, whilst relevant, is not a factor decisive of itself and it is necessary to examine the ways in which the engagement was performed and whether it was consistent with a relationship of head contractor and sub contractor or an employment relationship.

#### ***Control***

[25] When Mr Maley was engaged in 2005 the transport arrangements made it difficult for him when he was performing trimming and pruning to perform other work. I do conclude however that Mr Maley had the option of simply not turning up at the pick up point on any particular morning and doing something else. Mr Thomson may have wanted as many workers to turn up as possible but there was no evidence that he did anything about absences from work, notwithstanding the 2003 contract that provided the contract could be cancelled by unexplained absence of more than three days.

[26] There was some control by the Thomsons as to when work was carried out. Mr Thomson would sometimes make the decision if the weather wasn't good or for another reason that the workers should not work.

[27] Mr Maley's work was checked and his work had to be to a reasonable standard or it had to be done again. This could be seen as indicative of an employment relationship but a contractor can also be liable for redoing a job if it is not done properly and bearing any resulting loss in terms of time and money.

[28] There was no evidence of any formal training prior to or during the employment. Mr Maley satisfied the Thomsons that he knew what was required to do the job. Mr Maley performed the work at his own speed and the only reporting back that was required of Mr Maley was the number of tree tallies. This is indicative of an independent contractor.

[29] Although the start time would invariably be fairly early in the morning the finish time was more flexible. Mr Maley could finish earlier if he wanted and wait in the truck although I find that it is probable that there was some pressure on those still working to finish up for the day. There was some limited ability to profit by undertaking more trimming or pruning.

[30] The different factors in terms of control are fairly evenly balanced.

***Integration***

[31] The work Mr Maley performed trimming and pruning was done for the Thomsons business.

[32] Mr Maley was paid on the basis of his results. Withholding tax was deducted. Mr Maley did not invoice the Thomsons but was paid according to the tallies which he would provide to Mr Thomson at the end of each day's work. Mr Maley indicated to me that he had never considered invoicing for his work. Mr Maley was not GST registered although could have made the necessary arrangements. He was responsible for paying his own ACC levies.

[33] Mr Maley supplied his own chainsaw and safety gear. The Thomsons provided some other equipment by way of ladders, and fuel for the chainsaws although the fuel was factored into the rate paid to Mr Maley for work performed on the trees.

[34] Considering all the factors I conclude that Mr Maley's work was accessory to the business but not integrated into it. This is indicative of a contractor arrangement.

***Fundamental test***

[35] Mr Maley did not take any financial risk in terms of his work with the Thomsons. There was only very limited ability for him to profit from good performance in terms of his work. If Mr Maley wanted to work on a particular day the Thomsons could dictate whether he worked if they thought conditions were unsafe. Withholding tax was deducted from his payments. The factors in terms of the fundamental test are more consistent with an employment relationship than a person in business on his own account.

***Industry Practice***

[36] I did not hear extensive evidence about whether it was industry practice for those in the silviculture industry to be engaged as contractors but there was certainly some evidence to indicate that it was. That is a factor to be considered along with the other matters.

***Conclusion***

[37] The real nature of this relationship is finely balanced. It was a relationship of short duration during 2005. I have weighed and balanced the various factors which are indicative of either an employment relationship or an independent contractor. I am satisfied that the factors indicative of an independent contractor including industry practice slightly outweigh the factors indicative of an employment relationship.

[38] In conclusion therefore I find there was no employment relationship between Mr Maley and the Thomsons. The Employment Relations Authority has no jurisdiction to determine Mr Maley's claim for payment.

*Costs*

[39] Both parties were unrepresented and accordingly I make no order as to costs.

Helen Doyle  
Member of Employment Relations Authority