New Zealand Employment Relations Authority Decisions

May v Armourguard Security Limited [2011] NZERA 300; [2011] NZERA Auckland 208 (17 May 2011)

Last Updated: 26 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 208 5320576

BETWEEN LYALL MAY

Applicant

AND ARMOURGUARD SECURITY

LIMITED Respondent

Member of Authority: Alastair Dumbleton

Representatives: Helen White, counsel for Applicant

Andrew Shirnack, counsel for Respondent

Investigation Meeting: 18 November 2010
Submissions Received 22 and 24 November 2010
Further evidence Received 16 December 2010
Determination: 17 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Lyall May and the respondent Armourguard Security Ltd had two kinds of contractual relationship at times between 1994 and 2010. There is no dispute between Mr May and Armourguard that at one time they were parties to a contract of service in an employment relationship and that at other times, in respect of different work, they were parties to a contract for services in an independent contractor relationship.

[2] The dispute they do have is over the kind of contractual relationship they were in until 19 November 2010. It came to an end then after notice had been given to Mr May by Armourguard on 27 August 2010 that the company was exercising a right of termination under a provision of the contract. The parties had entered into it in

February 2009, in writing signed by Mr May and the Operations Manager of Armourguard, Mr Steve Brown. Under a term of it the contract could be terminated by Armourguard giving written notice of three months.

[3] Mr May's response to Armourguard's advice was to challenge the company's ability to lawfully invoke the notice provision, as he claimed an employment relationship existed under the contract. In taking issue with the termination he noted that Armourguard in purporting to end an independent contractor relationship had failed to acknowledge his rights as an employee, particularly a right to be allowed "due process." He sought an acknowledgment from Armourguard that he was an employee and not a contractor, and he advised he would seek from the Authority a determination of his status as such if that was not confirmed by Armourguard.

[4] As the issues remained unresolved Mr May applied to the Authority. Before it investigated the problem the parties undertook mediation but were unable to resolve their dispute.

[5] The Authority has investigated as a preliminary issue the question of whether Mr May was an employee of Armourguard, or whether he was a contractor, either independent or dependent. If the Authority determines he was an employee Mr May has indicated he will seek to have resolved a personal grievance in relation to Armourguard's contended action of dismissing him on 19 November 2010.

Section 6 of the Employment Relations Act

[6] This preliminary issue is to be determined under s 6 of the Employment Relations Act 2000. The statute provides that for the purposes of deciding whether a person is employed by another under a contract of service, the Authority must determine the real nature of the relationship between the persons and in doing so:

> *(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.*

[7] The leading case on s 6 of the Act is *Bryson v. Three Foot Six Ltd* [2005] NZSC 34; [2005] 3 NZLR 721. From the judgment of the Supreme Court in that case and from earlier judicial decisions approved of by the Court, the principles to be applied are as follows:

> (a) The Authority must determine the real nature of the relationship;
> (b) The intention of the parties is still relevant but no longer decisive;
>
> > (c) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship;
> > (d) The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the fundamental test;
> > (e) The fundamental test examines whether the person performing the service is doing so on their own account;
> > (f) Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[8] The summary above of applicable principles was given recently by the Employment Court in *Poulter v. Antipodean Growers Ltd* [2010] NZEMPC 77, 17 June 2010, at para.[20].

[9] The Employment Court in its judgment also concluded that ultimately the approach necessarily to be taken under s 6 is for the Authority (or the Court) to gain an overall impression of the underlying and true nature of the relationship between the parties.

[10] As a matter of principle, where a contract is in writing the words used are to be taken as the expression of the parties' actual intention which, although for the purposes of s 6 of the Act is not decisive, is a relevant matter when considering the totality of the relationship between the parties. Also, the intention the parties had at the time of entry into the contract may later change as a result of a variation of the agreement consented to by them, or as a result of conduct by them showing a change of intention.

Security Vehicle Service Contract

[11] Over a long working life of 40 years or more, Mr May has accumulated considerable experience of being employed as an employee under a contract of service. A butcher by trade, he has also been a mine worker, a freezing worker and has worked in the Police. In his written evidence Mr May said he had started working for Armourguard in June 1994 as a security guard stationed at the premises of a company client. Later for a short time he was also employed by the company as a dispatcher, a position in which it seems from his evidence he was an employee under a contract of service. He said that in the mid-1990s he applied to become a contractor with Armourguard. This was to carry out line haul work in which he had been part of the crew of a vehicle.

[12] Mr May and Armourguard recorded the terms and conditions of their contractual relationship in a document with the title **Security Vehicle Service Contract.** The first was executed in August 2003 and was followed by two more, in 2005 and 2009. The termination by Armourguard of the last led Mr May to raise his personal grievance.

[13] Under each written agreement Mr May was to undertake armoured vehicle, security and courier services for and on behalf of Armourguard on the terms and conditions set out in the agreement. Those of the 2003 agreement are similar if not identical to those set out in the subsequent agreements dated 20 June 2005 and 30 November 2009, apart from remuneration provisions.

[14] In the agreement the parties relationship was expressly described as follows: ***8. STATUS OF CONTRACTOR***

> *8.1 The relationship between the Company and the Contractor is, and shall be for all purposes, an independent contractor relationship and neither this agreement nor anything contained herein, or implied, shall constitute any*

other relationship.
8.2 For the avoidance of doubt the parties acknowledge and agree that this agreement shall not operate as or constitute, an offer or contract of employment either during its Term or at expiry for whatever reason.

[15] This labelling of Mr May's status is not determinative, as in principle parties cannot deem the relationship between themselves to be something it is not.

[16] By definition contained in the agreement references to "company" are to Armourguard and references to "contractor" are to Mr May. The agreement also provided for a class of worker referred to as an "employee" to become involved directly or indirectly with the parties, although this term is defined as meaning any person employed by Mr May in any capacity in relation to the various services he contracted to provide.

[17] The road transportation and security work to be performed by Mr May for Armourguard required particular licences to be held and it was a term of the agreement that they were to be obtained by Mr May in his own name and kept in force during the agreement at his own expense. This was a requirement expressly under clause 4 in relation to a security guard's licence pursuant to the Private Investigators and Security Guards Act 1974 and a goods and services licence under the Transport Services Licensing Act 1989. As a driver he was required to be the holder of a licence appropriate for the class of vehicle to be used for the work.

[18] Mr May was also expressly required to obtain registration under the Goods and Services Act 1985.

[19] The agreement contemplated that Mr May would engage other persons to undertake the work. For that purpose he agreed that Armourguard could obtain a credit check, a history check and a Police check on him and anyone he employed. Armourguard was also entitled to require a Certificate of Approval to be issued by the Police in respect of Mr May and his employees. Armourguard reserved the right to disapprove the employment by Mr May of any employee.

[20] In relation to the provision of a vehicle and equipment necessary for performing the contracted services, Armourguard agreed to provide Mr May with a vehicle and Mr May was required to enter into a lease agreement for it at his own expense. Later he found it less expensive to provide a vehicle himself to use rather than paying to lease one from Armourguard. He was required to pay for the insurance of the vehicle and to maintain it and pay all running costs including petrol and road user charges. Armourguard however controlled the appearance of the vehicle which had the company's name on it and was decorated in the company's livery. The company also controlled the fittings and equipment the vehicle needed to have, particularly for security needed in cash handling work.

[21] Mr May himself does not dispute that at inception of the relationship from 2003 he was an independent contractor under the written security vehicle service contracts. As he said in his witness statement, "my intention was to be a contractor."

He gave evidence about a company May Security Services Ltd he had set up "for tax purposes." It seems to be no mere coincidence that Mr May had his company incorporated on 25 August 2003, the same day in 2003 he entered into the Security Vehicle Service Contract with Armourguard, under which the parties are expressly described as having an "independent contractor relationship."

[22] May Security Services Ltd had an integral role in the contractual relationship between Mr May and Armourguard, although it was not in any contractual relationship with the company. It held licences that were necessary for Mr May to discharge his obligations under the agreements with Armourguard. It was GST registered and it rendered invoices to Armourguard for work that Mr May performed. It owned the vehicle that Mr May used for providing services to Armourguard under the agreements and, in its bookkeeping and accounting, it treated Mr May as an employee of May Security Services Ltd. Mr May's company also employed other drivers to perform the services for which it paid them after deducting PAYE from the gross amount.

[23] Mr May in effect has claimed that at the same time in respect of the same work and the same remuneration for that work, he had two employers; Armourguard and May Security Services.

[24] Mr May's case is that the relationship of independent contractor he had with Armourguard changed in December 2009 to one of a contract of service when there was a change to the remuneration he was going to be paid for his work. A document, signed by Armourguard and Mr May to confirm discussions about an increase in rates of remuneration, led to a dispute and ultimately to Armourguard giving notice of termination of the relationship. With regard to the alterations this document made to previous terms counsel Ms White submitted:

... the terms of the 30 December 2009 Document include a significant change in the relationship between the applicant and the respondent. It is submitted it became an employment relationship in reality from this date.

[25] I find that the 30 December 2009 document was not entered into in substitution for, or cancellation or renewal, of any previous agreement such as the 2009 agreement but that it recorded a variation of the 2009 agreement as provided for at clause 19.1 which states:

19.1 This agreement constitutes the entire agreement between the parties. It is in substitution for and cancels all or any agreements between the Company and the Contractor prior to the date of this agreement, and constitutes the entire understanding and agreement of the parties relating to the matters dealt within it. Except where expressly agreed in writing by the parties, there are no other obligations, terms, conditions, representations, arrangements or understandings, whether oral or written, that apply to this agreement.

[26] I find that clause 19.1 contemplated that the parties could, after entry into the 2009 agreement, expressly agree in writing to other terms, conditions or arrangements that would apply to the 2009 agreement accordingly without terminating that agreement. That was the effect of the 30 December 2009 agreement which increased the rates of remuneration for the work Mr May performed. The increases were expressed to be effective from 5 January 2010 and it was agreed they would apply until April 2010 when "we will review your Contract status".

[27] I do not accept that there is anything about the variation in rates of remuneration agreed to in December 2009 which had the effect of changing the nature of the relationship the parties had before 30 December 2009. If that relationship from 2003 or 2005 or 2009 had been one of employer-independent contractor under a contract for services, then it remained that relationship after the 30 December 2009 alteration. Alternatively, if that relationship had been one of employer-employee under a contract of service, then it remained that relationship after 30 December 2009.

[28] The written terms of the contract between Mr May and Armourguard contained indications of their common intention concerning the status of their relationship, and these are to be regarded as "relevant matters" under s.6 of the Act.

[29] As a matter of principle, "relevant matters" include features of control and integration and whether the contracted person, Mr May in this case, has been effectively working in business on his own account.

[30] Also as a matter of principle, the Authority must examine the terms and conditions of the contract and the way in which it actually operated in practice before it will be in a position to examine the relationship in the light of the various tests of control, integration and economic reality. As also recognised by previous cases, industry or sector practice, while not determinative of the question, is a "relevant factor". Another is common intention as to the nature of the relationship, if that is ascertainable. Taxation arrangements can be a relevant consideration, although the

Authority must be careful to consider whether these may be more a product of labelling a person an independent contractor or an employee rather than a consequence of their true relationship.

[31] In practice Mr May, under the contractual relationship he had with Armourguard, and as stated in the introduction to the 2003, 2005 and 2009 written agreements, provided armoured vehicle, security and courier services for Armourguard. The vehicles he used were provided at his expense. Initially he leased a vehicle from Armourguard but later found it more economic to buy, through his company, May Security Services Ltd, a vehicle to use. All maintenance and running costs and associated expenses were met by Mr May or his company. He was required to have the vehicle painted in Armourguard colours or to have it display Armourguard signage, and it was required to be fitted to Armourguard's specifications, particularly as they related to its use as an armoured vehicle in public places carrying cash or other high value material.

[32] The 2003, 2005 and 2009 agreements made no provision for Mr May to have holidays or to receive holiday pay. He was required to be available to perform the services under the contract "7 days a week, 52 weeks of each year, during such hours and at such time as the company may require". Mr May "personally" was required to perform the services for a minimum of five days per week. The agreement provided that he was to ensure the services were carried out at all times over this period by himself or by a relief driver or an "employee". Employee is defined as a person employed by Mr May in any capacity in relation to the services. Among those employed by Mr May were his grandson, Mr Todd May. As with Mr May, his grandson was shown as an employee of May Security Services Ltd and he was paid remuneration by that company from which, according to its books, PAYE was deducted.

[33] A relevant matter from one of the terms of the 2003, 2005 and 2009 agreements required that Mr May, as the "contractor", had to obtain and keep in force insurance cover with an insurer acceptable to Armourguard. This cover included insurance against robbery. For this insurance Mr May paid Armourguard a premium, although he was able if he wished to find and pay for other cover suitable to Armourguard.

[34] An interesting clause provided that Mr May was required to perform services under the agreement regardless of any strike, lockout or dispute or other industrial action involving or affecting Armourguard. If Mr May was an employee, then he had purportedly agreed not to strike, even although under the Employment Relations Act 2000, as an employee, he would have had some rights in that regard.

[35] Another term that cannot be reconciled with a contract of service allowed for the possibility of Mr May providing the services under the agreement in partnership with others. While a partnership of persons, whether legal or natural persons, may be an employer and may be a contractor, it is unheard of for a partnership to be an employee. The agreements also contemplated the contractor could be an "entity" as well as a person. Used in that sense entity is clearly a reference to a legal person such as a company. However the law provides only for natural persons to be employed under a contract of service.

Control test

[36] Under the 2003, 2005 and 2009 written agreements between Armourguard and Mr May, a high degree of control was able to be exercised by Armourguard. Much of that is necessary because of the highly regulated nature of the road transport industry and also the security services industry. Control or submission to practicable and necessary rules is inevitable for the safety and security of property and people including the general public. I do not consider the control test can be applied in this case to provide much help as to the nature of the contractual relationship between the parties. To find control was determinative of a contract of employment in this case would be to find that a person could never be an independent contractor in this industry. That goes against legal principle which recognises that unless there is a statutory requirement to the contrary parties are free to enter into either relationship for the performance of work under a contract.

Integration

[37] Mr May was solidly integrated into the business of Armourguard but equally was part and parcel of his own business, May Security Services Ltd. Again though his Armourguard integration would be the same with an independent contractor, because of the nature of the work and the industry in this particular case. I do not consider the integration test in this case provides help in determining the nature of the relationship.

The fundamental or economic reality test

[38] I consider that Mr May was in business on his own account and did have appreciable scope for improving the financial returns to be had from his work. While his remuneration was a flat fee generally for all work performed within certain hours specified by Armourguard, Mr May had the ability to save money by running and maintaining his vehicle as economically as possible. He also had the ability to save on the cost to his own company of employing his grandson and others by negotiating remuneration at a level beneficial to the company. Through making savings of that kind his company profits could increase and May Security Services Ltd could pay him a higher salary.

[39] In practice Mr May drove a vehicle on three or four days a week, not seven as the contract provided. Others were employed by Mr May or his company as relief drivers or "employees" of Mr May as defined. The remuneration for that work was received from Armourguard by May Security Services Ltd. The employees were not necessarily paid the same amount as May Security Services had received. Unlike an employee, Mr May was not required to serve personally his employer all the time but on occasions assigned or sub-contracted the work to others such as his grandson.

[40] Unlike an employee under a contract of service Mr May received a fee for his work which he was able to channel to another entity he effectively controlled, May Security Services Ltd. No deduction for tax of any kind was made by Armourguard from the fee, as the parties had agreed that Mr May would be responsible for paying his own tax. He could if he wished invest the remuneration before paying tax, and he could take advantage of corporate tax rates and GST registration. He could make a claim for using part of his residence for business purposes, and for depreciation on the vehicle used in the work for Armourguard. From the key role played by May Security Services Ltd the reality is I find that Mr May was self-employed, or in business on his own account, and was not an employee of Armourguard under a contract of service.

[41] The arrangements in this case were very similar to those found in *Brunton v. Garden City Helicopters Ltd* [2011] NZEMPC 29, where the Employment Court determined that a pilot had not been the employee under a contract of service of a company providing flying doctor and other similar medical services. In that case the pilot's work for the company had been invoiced by the pilot, with GST included, in the name of the pilot's company set up with him and his wife as co-directors and equal shareholders. The contractual arrangements were recorded in written agreements and described as a "contract for service". The contract was between the pilot and the company and payment was to be on GST invoices.

[42] The pilot accepted in presenting his case that the parties' relationship had started life as a contract for services, or an independent contractor relationship but he claimed the situation changed later so that the written contractual arrangements did not reflect the manner in which the relationship between the parties had actually been operating after a time. The Courts have found occasions where a working relationship has changed during its course, so that a person employed as an independent contractor has reverted to employee status.

[43] I find that there was no change in Mr May's relationship with Armourguard from as far back as 2003 under the agreement entered into that year. The 30 December 2009 agreement was a variation of the 2009 contract in relation to remuneration but made no substantive change to the way the services were performed by Mr May. His objection to such change as occurred was that it reduced the value of his bargain as a contracting party rather than it changed the type of contracting party he was.

[44] It is also relevant that Mr May did not apply for annual leave or seek to be paid for working on public holidays or for taking any holiday at any time that he may have taken while his relief driver was providing the services.

[45] As in the *Brunton* case, Mr May's company, May Security Services Ltd, claimed expenses including vehicle expenses and the running of a home office and depreciation on various items. By these means no doubt Mr May was also able to enhance

his net income earned through Armourguard.

[46] For many of the same reasons why the Court in the *Brunton* case found the pilot was not an employee but a contractor, I find that Mr May provided his services as a person in business on his own account.

[47] In relation to the control test there are similarities with *Brunton's* case which involved a commercial pilot, where statutory and regulatory responsibilities were not to be confused with control by the employer. The Court held this was an example of a case where the same statutory measure of control would have been exercisable over the position whether or not the person holding it was an independent contractor or an employee. I find that is the situation with Mr May and Armourguard in the particular industry they were operating in.

[48] As in *Brunton,* I find this is a case where Armourguard and Mr May appear to have been content with the kind of contractual relationship they had continued over a lengthy period. Those arrangements had been freely and independently entered into at the request of Mr May who was a professional driver with extensive experience of the differences between employment as an employee and contracting independently.

[49] As the Court observed in *Brunton:*

... it is a very serious matter for either the Employment Relations Authority or this Court to find, notwithstanding the clear intention of capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually agreed, after those arrangements have terminated, that the real nature of their relationship was completely different.

[50] Mr May became dissatisfied with Armourguard over the remuneration he was to receive for the level of services he was providing. He believed his rights as a contracting party had not been observed by Armourguard. He considered that the jurisdiction of the Authority under the Employment Relations Act provided him with remedies. In my finding however the Authority has no ability to consider his claim although he may still be able to bring one in the civil jurisdiction.

Determination

[51] For the above reasons, the preliminary issue of the status of Mr May is determined in favour of Armourguard. Mr May, I find, was not employed under a contract of service by Armourguard. The underlying and true nature of the parties' relationship was one of independent contractor.

Costs

[52] Costs are reserved. If the parties are unable to resolve any question of costs Armourguard may apply in writing for an order within 21 days of the date of this determination. Any reply on behalf of Mr May is to be made within a further 14 days after that period.

A Dumbleton
Member of the Employment Relations Authority
