IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 339
3236639

BETWEEN	MARC MITCHELL Applicant	
AND	MOORE EXCAVATIONS LTD Respondent	

Member of Authority:	Peter van Keulen
Representatives:	Steven Mitchell, advocate for the Applicant Shannon Hollis and Jacken Middleton, counsel for the Respondent
Investigation Meeting:	7 March 2024 in Nelson and by AVL
Submissions Received:	7 March 2024 from the Applicant 7 March 2024 from the Respondent
Date of Determination:	10 June 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Marc Mitchell worked for Moore Excavations Ltd from 5 May 2021 until 10 May 2022.

[2] Mr Mitchell was engaged as a contractor with Moore Excavations. However, after his work with Moore Excavations came to an end Mr Mitchell claimed he was, in fact, an employee of Moore Excavations.

[3] Mr Mitchell has lodged a statement of problem in the Authority; he seeks a declaration that he was an employee of Moore Excavations and he seeks to have debts he incurred as a contractor (tax to IRD and ACC levies) either extinguished or assigned to Moore Excavations.

[4] Moore Excavations opposes Mr Mitchell's application on the basis that he was a contractor and therefore the Authority does not have jurisdiction to hear his claims regarding the debts he incurred as a contractor.

[5] The issue to be resolved by me is, therefore, that of Mr Mitchell's status when he worked for Moore Excavations; was Mr Mitchell an employee or a contractor?

The Authority's investigation

[6] I investigated Mr Mitchell's claim by receiving written evidence and documents, holding an investigation meeting on 7 March 2024 and assessing the oral submissions of the parties' representatives.

[7] In my investigation meeting, under oath or affirmation, each witness confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Assessment of Mr Mitchell's status

The issues

[9] The legal test for ascertaining whether a person is an employee is set out in s 6 of the Act. The leading case on how to apply s 6 of the Act, is *Bryson v Three Foot Six Ltd*.[1]

[10] The approach to assessing the status of a worker, based on *Bryson* and subsequent decisions of the Employment Court, includes: [2]

(a) Considering the terms of engagement between the parties to establish if there is a common intention, which may indicate the nature of the relationship but will not be determinative.

(b) Considering how the work was then carried out in practice, looking for divergences from the agreed terms of engagement.

(c) Then, based on how the work was carried out in practice applying 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 their own account.

(d) Considering industry practice, noting this is relevant but not determinative.

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

[2] *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 and *Narinder Singh v Eric James & Associates Ltd* [2010] NZEmpC 1.

[11] In recent cases the Employment Court has considered how to apply these factors given the changing nature of New Zealand's work force and working conditions.[3] With this context in mind, I will assess the relationship by applying the steps in *Bryson.*

Parties' intentions

[12] Moore Excavations is an excavation business operated by Logan Moore. The business operated for many years with just Mr Moore undertaking excavation work on a casual basis; Mr Moore also did other unrelated work.

[13] From 2021 a shift in focus for Mr Moore led to him operating the excavation business full time. As business increased, he considered hiring some additional labour to help with the work.

[14] Mr Moore knew Mr Mitchell through previous work-related dealings and Mr Mitchell had followed up with him asking about working for Moore Excavations.

[15] In the end Mr Moore decided to provide some basic excavation and labour work for the business operated by Moore Excavation to Mr Mitchell. Mr Moore was clear that this was not full-time permanent work as he was unsure of how much additional work there would be for Mr Mitchell and that he did not want to have employees employed by Moore Excavations given the additional work and obligations this would bring.

[16] It was on this basis that Mr Moore approached Mr Mitchell about work with Moore Excavations and both of them discussed this.

[17] Mr Mitchell had not operated as a contractor before and was unsure about what was required and whether that was appropriate. He was however very keen to work with Moore Excavations as he wanted to get more skill and experience in excavation work. So, Mr Mitchell spoke to a business accountant to get advice on operating as a contractor.

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[3] *Leota v Parcel Express Ltd* [2020] NZEmpC 61; *Barry v C I Builders Ltd* [2021] NZEmpC 61; *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230; and *E Tu Inc v Rasier Operations BV* [2022] NZEmpC 192.

[18] Mr Mitchell then tried to negotiate an increase to the contractor rate offered by Moore Excavations but Moore Excavations would not increase the contractual rate of payment.

[19] Mr Mitchell then started working for Moore Excavations on 5 May 2021.

[20] It is clear from the negotiations and how the work commenced that Moore Excavations and Mr Mitchell intended to operate their relationship on a contractor basis.

Ongoing performance

[21] Around the time that the contracting relationship began, Moore Excavations provided Mr Mitchell with a draft contractor agreement but this was never finalised and signed by the parties.

[22] Mr Mitchell worked for Moore Excavations from May 2021. The work was allocated to Mr Mitchell directly by Mr Moore. The work was allocated on a daily basis for smaller pieces of work i.e., Mr Moore would undertake different tasks within a day or day to day depending on the work; and the work was also allocated on a job basis for larger pieces of work, where Mr Mitchell would work consecutive days on a project completing specified work.

[23] Mr Mitchell filled in a time sheet, recording the hours worked on a daily and weekly basis. Mr Mitchell then invoiced Moore Excavations for the hours worked each fortnight – noting here that this practice varied depending on the work and Mr Mitchell's timeliness in preparing and sending the invoices for payment. Mr Mitchell charged the agreed hourly rate plus GST for the hours worked in each invoice period.

[24] When Moore Excavations did not have any work for Mr Mitchell, Mr Moore put Mr Mitchell in touch with other companies that he knew might need some additional labouring type work on an ad hoc basis. One example of this was a landscaping business that Mr Moore had had an interest in, Landscape and Construction Nelson Tasman Limited. Mr Moore initially put Mr Mitchell in touch with Oliver Robson, a director of Landscape and

Construction and arranged some work for Mr Mitchell. After this introduction when Mr Robson had additional work that Mr Mitchell could do, he would contact Mr Mitchell directly. Mr Mitchell would balance his commitments between the companies seeking his labour.

[25] During the time Mr Mitchell worked with Moore Excavations he asked Mr Moore if he could switch to being an employee. Mr Moore told him he needed to stay as a contractor so he could continue to work with other companies. Mr Mitchell accepted this and continued to operate with Moore Excavations on the same basis as when he commenced.

[26] So, it is clear that Mr Mitchell continued to operate as a contractor with Moore Excavations and other companies. He accepted work/jobs as he needed or wanted work, he recorded his hours and invoiced accordingly.

Considering the day-to-day operation of Mr Mitchell's work

[27] Despite this initial intention and the ongoing intention to operate as a contractor it is important to look at how Mr Mitchell carried out the work he did to establish if in addition to the intention he did in fact operate as a contractor. This involves considering questions of control, integration and business.

Control test

[28] The control test involves looking at the work Mr Mitchell did and assessing:

(a) Who had control over the work Mr Mitchell did and when he did it i.e., could he refuse or accept whatever work he liked and could he decide when he did the work he accepted?

(b) Who controlled what Mr Mitchell did on any piece of work he accepted i.e., who decided/controlled how the work Mr Mitchell accepted was done?

[29] Mr Moore accepted most of the work offered to him by Moore Excavations. He also accepted work from other companies such as Landscape and Construction. Mr Moore could choose between companies in terms of the work he accepted and he could and did on occasion, refuse work offered to him.

[30] When Mr Mitchell was competing the work on any job, he did accept, there were varying levels of control or instruction. On some jobs he worked closely with Mr Moore or Mr Robson but on other jobs he would be the only person on site and he could manage his own work.

[31] I accept that overall, there was a significant level of control exerted by both Moore Excavations and Landscape and Construction over the work Mr Mitchell did but this was not inconsistent with a contractor relationship. The nature of the work either company was engaged to do dictated what Mr Mitchell could do on any job or work he accepted from them.

[32] Overall, I am not satisfied that the level of control exerted over Mr Mitchell displaced the contractor relationship; the control that came from Moore Excavations related to the jobs Mr Mitchell accepted not from a need to instruct him daily on what was expected from him (as with an employee). And, significantly Mr Mitchell did not need to accept any work or jobs offered to him and could choose to do other work for other companies if he wished.

Integration test

[33] Mr Mitchell says he was integrated into Moore Excavations such that he was an employee of it. In support of this he points to things such as PPE branded gear he was given, that he primarily used Moore Excavations tools and equipment and that he was seen on sites as being a Moore Excavations representative.

[34] Mr Moore says this is overstated. Moore Excavations gave Mr Mitchell two high viz shirts as Mr Mitchell did not have his own but there was no expectation that he would wear them, and in fact, it appears that he did not wear them very much at all. And Mr Mitchell had

other PPE gear of his own such as boots. Mr Mitchell used Moore Excavations diggers and heavy machinery as expecting Mr Mitchell to provide this equipment was not realistic; but Mr Mitchell did have his own smaller tools. Whether Mr Mitchell was seen as being from Moore Excavations was of no consequence; Mr Mitchell was doing Moore Excavation work as a contractor and if others assumed he was from Moore Excavations, then that was their assessment not one that the company put forward.

[35] Overall, I am not satisfied that the integration test indicates one way or the other whether Mr Mitchell was a contractor or not. There are elements of both but some are just a product of the nature and circumstances of the work being done, not because of some intention to integrate Mr Mitchell into the business.

Fundamental test

[36] The fundamental test is an assessment of whether Mr Mitchell was operating a business for his own reward.

[37] In addition to taking accounting advice at the outset of the relationship with Moore Excavations, Mr Mitchell continued to get accounting assistance through the time he worked with Moore Excavations and other companies. As a result, he operated the work he undertook as a business. This included:

(a) Invoicing at a contractual rate that was higher than the rate he would have received as an employee.

(b) Charging this hourly rate on a regular basis and charging GST which he accounted for with GST returns.

(c) Claiming business expenses in his annual tax return for things such as tools and equipment and accounting fees.

(d) Not requesting any employee benefits such as sick leave, annual leave or public holidays.

[38] Whilst Mr Mitchell could not alter his income significantly the business model he used did make this possible. Mr Mitchell was able to increase the work he did, by doing more with any of the companies that engaged him or with other businesses. Mr Mitchell could have increased his revenue by doing more hours or seeking work with other businesses at a higher rate. In short, the way Mr Mitchell operated with Moore Excavations gave him the opportunity to maximise his return; that he did not do that was a matter for him and not Moore Excavations.

[39] The fundamental test indicates that Mr Mitchell was a contractor.

Other factors

[40] Having completed the analysis of how Mr Mitchell and Moore Excavations conducted their work on a day-to-day basis in light of the relevant tests I will finish by considering two other factors.

[41] The first factor is to consider if there is any industry practice that might inform the relationship. In this case neither party referred to anything specific. I note that in general terms the relationship had aspects that reflected a contractor and subcontractor relationship in construction or building particularly as that related to the work to be completed and the control of that work. In this regard, industry practice supports a finding of a contractor relationship between Mr Mitchell and Moore Excavations.

[42] The second factor to consider is Mr Mitchell's primary argument, one that from my perspective was reasonably credible. Mr Mitchell says he was a contractor by default. He wanted to work with Moore Excavations but the terms were dictated by it; he was effectively a contractor by default and without the skills to operate effectively as a contractor. He had no experience or skill as a contractor and Moore Excavations should not have engaged him in

this way. In support of this argument Mr Mitchell points to the due diligence requirements under the Health and Safety at Work Act 2015.

[43] I have considered this carefully. I understand the point being made but do not consider that it changes the nature of the relationship. There are two reasons for this – because Moore Excavations should not have engaged Mr Mitchell as a contractor given the circumstances does not mean that it did not in fact engage him as a contractor and because Mr Mitchell says he did not have the experience to operate as a contractor does not mean he did not in fact operate as one.

[44] Just because Mr Mitchell says he should not have been a contractor does not mean he was not a contractor.

Conclusion

[45] Mr Mitchell commenced work with Moore Excavations as a contractor. He operated in this way accepting work, completing it and invoicing in a manner consistent with a contractor relationship. Mr Mitchell was not compelled to accept any work from Moore Excavations and had some control over the work he did including by accepting work form other businesses. Mr Mitchell was not sufficiently integrated into the Moore Excavations business to indicate he was an employee. Mr Mitchell conducted the work he did for Moore Excavations and others as a business which included his accounts and tax obligations. There are no other compelling features of the relationship that indicate Mr Mitchell was not a contractor.

[46] Overall, I conclude that Mr Mitchell was a contractor and not an employee of the Moore Excavations.

Orders

[47] Mr Mitchell was a contractor to Moore Excavations. I do not have jurisdiction to make any orders in respect of the debts Mr Mitchell has incurred as a contractor.

Costs

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[49] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Moore Excavations may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Mr Mitchell will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[50] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[4]

Peter van Keulen
Member of the Employment Relations Authority

[4] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1