Determination Number: AA 391/05
File Number: AEA 452/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Richard Athol Ogle (Applicant)
AND	The Swim Centre Limited (Respondent)
REPRESENTATIVES	Richard Ogle In person Amy Wright, Counsel for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	26 August 2005
DATE OF DETERMINATION	3 October 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Richard Ogle claims he was underpaid for work done for the respondent and seeks payment for wages on certain days, additional payment for public holidays worked, holiday pay, and compensation for the termination of his relationship with the respondent.

[2] The respondent denies there was an employment relationship and says Mr Ogle received all payments due to him as an independent contractor.

[3] The matter was not resolved in mediation. An investigation meeting was held to consider the preliminary issue – that is, was Mr Ogle an employee or an independent contractor? The applicant, his wife Cathy Young Ogle, his previous employer Andrew Craigie, the respondent's directors Paul and Anne Scanlon, and a contractor carpenter Keith Keymer gave evidence.

Background

[4] Mr and Mrs Scanlon have run a swim school in Greenhithe since 1978. Mrs Scanlon leads the teaching programme which employs between four and six swimming instructors. Mr Scanlon attends to the administration and maintenance of the business.

[5] During October and November 2004 Mr Ogle did some property maintenance work for the Scanlons. There is no question that work was done on a "labour only" contractor basis. He did not submit invoices but Mr Scanlon kept a record of Mr Ogle's hours and paid him $25 an hour.

[6] The Scanlons were planning a renovation of their swim school during its annual shutdown over the Christmas-New Year period, between 22 December 2004 and 17 January 2005. Mr Scanlon asked Mr Ogle if he would do the work and he agreed. The two men talked at least twice

about the work that needed to be done. They disagree now over whether Mr Scanlon gave Mr Ogle copies of the plan and schedule of works for the renovation project.

[7] Mr Scanlon wanted preparation work to begin in late November and early December. They met at the swim centre on 1 December to talk about the paint required for the pool but Mr Ogle was not yet available to start work. As the scheduled date for the work to begin approached, Mr Scanlon became anxious about when Mr Ogle could start work.

[8] On 16 December Mr Scanlon sent Mr Ogle a letter setting out the basis on which he intended engaging him for the project. It stated Mr Ogle would be "*engaged … as an independent contractor*". The hourly rate was to be $25 with no GST applying as Mr Ogle had advised he was not registered for GST. The letter also stated:

> *You will be paid weekly upon presentation of an invoice, withholding tax will be deducted from the invoiced amount and paid by us to the Inland Revenue Department.*
>
> *This engagement is strictly on an on demand basis and does not imply any ongoing offer of work.*

[9] Mr Ogle advised that he was not happy with this arrangement because his wife did not want him doing a job where the tax was not deducted because of "*the paperwork*" required later to attend to tax obligations.

[10] Mr Scanlon decided to talk directly to Mrs Ogle about her concerns. Their accounts now of their conversations at that time differ. He says Mrs Ogle was concerned only about having tax deducted so that Mr Ogle received only nett pay and he emphasised that Mr Ogle would be a contractor, not an employee and not entitled to holiday or sick pay. She says Mr Scanlon was told that Mr Ogle wanted to be "*on wages*" with PAYE deducted, and not be "*a contractor*".

[10] The outcome of their conversation was that Mr Scanlon provided a draft agreement by email on 20 December. Two drafts were exchanged with a final version being signed and dated by Mr Scanlon and Mr Ogle on 21 December 2004.

[11] Mr Ogle started work at the swim centre that day. He worked there most days through to early February and further days through February and March 2005.

[12] For the period through to early February Mr Ogle filled in a time sheet to record his hours. The sheets were kept in the swim centre office. From early February the hours were recorded by Mr Scanlon.

[13] Mr Ogle was provided with weekly pay slips recording his wages and PAYE deductions.

[14] Through February and March the Scanlons were concerned about delays in completing the project. Mr Ogle also became concerned that he was not paid for a day in February he said he worked and he argued with Mr Scanlon about this. In late March Mr Scanlon asked Mr Ogle not to return to the job. In April Mr Ogle lodged a personal grievance application.

Determination

[15] In determining the real nature of the relationship, the Authority is required to consider all relevant matters, including indications of the parties' intentions. No statement of the parties – written or oral – is to be treated as determinative, that is, while the "label" may be a significant pointer, it does not decide the issue.

[16] The analysis requires two steps. Firstly, any written or oral agreement and its operation in practice is examined to identify any common intention. Secondly, the relationship is considered in light of the historical relationship tests regarding control, integration and "economic reality".

[17] After hearing from the witnesses, reviewing all the documents provided, and considering written submissions from both parties, I find that the real nature of the relationship between Mr Ogle and The Swim Centre was an employment relationship. From the evidence I consider the true intention of the parties was to enter a fixed-term employment relationship for the term of the renovation project, which was expected to be 21 December 2004 to 17 January. I make this finding for reasons set out in the remainder of this determination.

The agreement

[18] The 21 December agreement is headed "Individual Employment Agreement for Casual Employee". Features include:

- identifying the respondent as "employer" and the applicant as "employee";
- setting an "initial period of employment" from 21 December 2004 to 21 January 2005;
- setting an expected minimum of 40 hours work each week;
- Overtime at ordinary rates for hours worked over 40;
- Wages of $25 gross per hour. The wages clause states: "Paye *(sic)* will be deducted";
- An annual holidays clause stating: "The Employee has indicated that they *(sic)* have no holiday pay expectations.
- A one week notice period for the employee.

[19] Mr Scanlon's evidence was that he got the form of agreement either off the internet or from a friend. In an email to Mrs Ogle on 20 December he says the form "*was so close to what we needed that I have use (sic) it and added the points that were missing. Ironically the key point missing was that tax would be deducted so I have that we will do that and forward the deduction to the IRD."*

[20] Following telephone conversations between Mrs Ogle and Mr Scanlon, the draft was amended to include a statement of the duties as being "*work associated with painting, tiling and building*", a direct reference to PAYE, stating the place of work and one week's notice. I find that Mrs Ogle acted as Mr Ogle's representative in the discussions with Mr Scanlon.

[21] The wording or 'labels' used in the agreement, while not decisive, are significant pointers to the intention of Mr Ogle that the relationship be one of employment.

[22] I find that it was more likely than not that this was also the common intention with Mr Scanlon for the following reason. Mr Scanlon felt under pressure to get the job started. He was worried by the prospect of any further delay in Mr Ogle starting the work. He was surprised by Mr Ogle's rejection of the 16 December letter offering engagement on an independent contractor basis. Mr Ogle told him he was under pressure from his wife not to do the job at all unless it was "*on wages*" and Mrs Ogle confirmed this when he rang her. With the clock ticking, the bargaining upper hand was with the Ogles. Mr Scanlon had to give them what they wanted, and meant to do so simply in order to get the job started. It would be too late to get someone else to do the job over the summer break. I consider this is more likely than Mr Scanlon's suggestion in evidence that he simply forgot to delete references to 'employee' in the agreement.

[23] This view is confirmed by a statement made by Mrs Scanlon in her brief oral evidence. She told me that when Mr Ogle raised the issue, she talked with her husband and said their "*backs were*

to the wall" and they would "*have to do what they [the Ogles] want, … get the contract together and sign it*".

[24] The Scanlons had previously engaged Mr Ogle on a "labour only" basis and he expressly rejected being engaged as an independent contractor as offered in the 16 December letter. What was agreed to on, and operative from, 21 December was clearly different from those sorts of relationships – that is, it was employment. Put another way, the arrangement with Mr Ogle must have been much more similar to the swimming instructors employed by the respondents than the labour-only arrangement he had worked under until then – and from their experience in the business, the Scanlons must have, and I find did, know the difference.

[25] That Mr Scanlon also included a clause purporting to exclude any entitlement to holiday pay also indicates that Mr Scanlon understood the agreement brought their arrangement into the scope of employment rather than engaging a contractor.

Operation in practice

[26] Considering the operation of the arrangement in practice overlaps with the analysis provided by the historical relationship tests.

- **Control**

[27] Mr Scanlon attended the renovation project on most days. He arranged the supply of materials and discussed the order that work would be undertaken. I accept that he considered himself only in a 'project manager' role rather than directing the work of employees. However he did control hours to the extent of wanting as much work as possible to be done in the closedown period and wanted Mr Ogle to work as long as he reasonably could each day in that period.

[28] The evidence of Mr Keymer, a labour-only contractor engaged in January, was that Mr Scanlon also directed the taking of breaks, insisting that Mr Ogle stop at certain times. Mr Scanlon cannot be criticised for this – it was the proper and responsible thing to do. But his actions in this respect are, again, more consistent with that of an employment relationship.

- **Integration**

[29] Mr Ogle was working on a renovation project which was not part of the respondent's ongoing business. However carpenters, plumbers, electricians and painters working short-term projects generally can be employees or contractors. In that respect this test adds or reveals nothing in assessing the particular circumstances of this case.

- **Economic reality**

[30] Mr Ogle does not appear to have been in business on his own account. Rather he was at pains not to be because his previous experience of doing caused tax problems which he and his wife wished to avoid in future. He took no financial risk by taking on the renovation project for a set total price where he might benefit from working faster or smarter or by more efficient use of materials. Rather he worked for an hourly rate and Mr Scanlon organised and purchased the necessary materials.

[31] He did not provide invoices for his hours worked, unlike Mr Keymer, the labour-only contract carpenter who had no written agreement. Rather he had a written employment agreement, filled out a daily time sheet (through December-January) and received a weekly pay slip. His tax was

deducted at PAYE rates appropriate to an employee, and not the withholding tax rates appropriate for a contractor.

[31] Mr Ogle did not hire his own helpers. Rather it was Mr Scanlon who advertised for and recruited additional casual labourers who were needed to sand and paint the pool. And Mr Ogle failed to provide any assistance in getting additional skilled workers that Mr Scanlon asked him to help find and repeatedly requested.

[32] Mr Ogle did provide his own tools. However I do not find this points either way in this case as many skilled workers – whether employees or contractors – will prefer to bring and use their own tools.

- **Contrary factors**

[33] There are some factors that suggest that Mr Ogle was not always as clear about whether he was in an employment relationship with the respondent. I accept the evidence of Mr Keymer and Mrs Scanlon that Mr Ogle referred in conversations with them to being his "*own man*" and "*doing my own thing*" which they took to mean he saw himself as a contractor not an employee.

[34] Mr Ogle, on his own whim, did not attend work on at least two occasions and appears not to have considered he need seek Mr Scanlon's leave. One occasion was to do his own home renovations for a week, and another was to help repair a friend's tramping hut.

Conclusion

[35] After balancing all these factors I have found that the real nature of the relationship was one of employment. The parties are now in a position where they can consider Mr Ogle's claims in that light. I encourage them to do so.

[36] For the benefit of the parties, I emphasise that this determination establishes only the employment status of the applicant. It does not address the merits or otherwise of his claim. Some aspects – such as an entitlement to holiday pay – may follow automatically. Other aspects – such as his dismissal and compensation claims – would need to be determined by further investigation by the Authority.

[37] If the parties are not able to resolve the outstanding issues between themselves, Mr Ogle should advise the Authority. Consideration can then be given to whether a direction to mediation is required or whether a further investigation meeting should be scheduled to determine those issues.

Robin Arthur
Member of Employment Relations Authority