

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 240  
5548745

BETWEEN                      DAMON PARTINGTON  
Applicant

A N D                              MSANZ LIMITED  
First Respondent

THE GLASS HOUSE  
COMPANY LIMITED  
Second Respondent

Member of Authority:      Vicki Campbell

Representatives:              Applicant in person  
Karl Rusher for the First and Second Respondents

Investigation Meeting:      10 August 2015

Oral Determination:        10 August 2015

Record of Determination:    11 August 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.      Mr Partington was an employee of The Glass House Company Limited from 1 November 2012 until 14 February 2014.**
- B.      Mr Partington was never an employee of MSANZ Limited.**
- C.      The Glass House Company Limited is ordered to pay Mr Partington wage arrears pursuant to section 131 of the Employment Relations Act 2000 totalling \$3,201.78 net within 28 days of the date of this determination.**
- D.      The Glass House Company Limited is ordered to pay Mr Partington the sum of \$71.56 within 28 days of the date of this**

**determination.****Employment relationship problem**

[1] Mr Damon Partington claims he is owed arrears of wages amounting to \$3,201.78 net. Both respondents deny Mr Partington is owed money and say that he has received all sums due to him.

[2] MSANZ Limited (“MSANZ”) denies Mr Partington was ever employed by it and says Mr Partington was at all times employed by The Glass House Company Limited (“The Glass House Company”).

[3] There is also a dispute about when the employment relationship commenced and ended.

**Background**

[4] Mr Partington attended a job interview in or about September 2012 with Mr Karl Rusher and Mr Curtis Dobbie. On 23 September 2012 Mr Partington emailed Mr Dobbie and set out his expectations regarding a salary of \$820 gross per week plus reimbursement of petrol expenses.

[5] A copy of a written employment agreement was provided to the Authority. This document has not been signed by the parties. The agreement has a commencement date of 1 November 2012 and provides for the payment of a salary of \$48,100 per annum. Mr Partington has provided the Authority with a spreadsheet which he says sets out the payments due to him for salary and payments made to him. The balance of \$3,200 is showing as outstanding.

[6] On 22 December 2012 Mr Rusher emailed Mr Partington requesting his bank details so that he could transfer his wages and seeking confirmation that Mr Partington still preferred PAYE. In response Mr Partington provided his bank account details and had calculated that he was owed a net amount of \$5,550.00 for his work from 1 November 2012 and confirmed that he would send details of his holidays either that day or the following day.

[7] Mr Partington’s calculations were based on his understanding that he would be paid fortnightly on an annual salary of \$48,100.

[8] On 24 December 2012 Mr Partington was paid the sum of \$5,000. Mr Partington continued to receive regular payments from The Glass House Company.

[9] On 20 January 2014 Mr Rusher signed a letter confirming previous discussions with Mr Partington that his job had become redundant and provided notice of four weeks.

[10] Between 18 February 2014 and 22 January 2015 Mr Partington continued to receive regular payments from The Glass House Company in varying amounts.

### **The issues**

[11] The issues for determination are:

- (i) What was the nature of the relationship?
- (ii) When did the employment relationship commence?
- (iii) What were the applicable terms and conditions of employment agreed between the parties?
- (iv) When did the employment relationship end?
- (v) Is Mr Partington owed unpaid wages?

### ***What was the nature of the relationship?***

[12] Mr Rusher says Mr Partington worked as a contractor for the period between 1 November 2012 and 8 February 2013, then became engaged as an employee from 8 February until 6 July 2013 at which time he then became a contractor again.

[13] The Authority must determine for the relevant period for which Mr Partington claims he was owed arrears of wages whether he was an employee or an independent contractor.

[14] Mr Partington does not fall within any of the statutory exceptions to employees set out in section 6 of the Employment Relations Act 2000 (“the Act”). Accordingly consideration must be given to the real nature of the relationship.<sup>1</sup>

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<sup>1</sup> Employment Relations Act 2000 s 6(2).

[15] In determining the real nature of the relationship regard must be had to all relevant matters that indicate the intention of the parties. It is important also to have regard to the way in which the relationship operated in practice. This in turn requires an assessment of the whole of the factual matrix. As the Supreme Court observed in *Bryson v Three Foot Six Limited*:<sup>2</sup>

*It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial and a determination of its real nature. All relevant matters equally clearly requires the Court or Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test) which were important determinants of the relationship by common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests.*

[16] The inquiry is not always easy, particularly in borderline cases. In the present case there are indicia which are strongly indicative of an employment relationship.

[17] There was no signed agreement but a written employment agreement drafted by Mr Partington indicates that the parties' intention about the nature of their relationship was from the outset, to be an employment relationship.

[18] My conclusion is supported by an email dated 22 December 2012 where Mr Rusher seeks to clarify that Mr Partington prefers the PAYE arrangement together with the letter signed by Mr Rusher on 20 January 2014 confirming the disestablishment and redundancy of Mr Partington's job. That is consistent with there being an employment relationship.

[19] When Mr Partington notified Mr Rusher on 22 December 2012 of the outstanding payments owed to him, Mr Partington advised Mr Rusher that he had calculated the amount using the IRD calculator. In his email Mr Partington used words such as "pay cycle" and provided his tax code as "M". These factors are indicative of an intention to form an employment relationship and not a contracting relationship.

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<sup>2</sup> *Bryson v Three Foot Six Ltd (No2)* [2005] ERNZ 372 at [32].

[20] There is no evidence that Mr Partington was working on his own account during the period 1 November 2012 to 14 February 2014. Indeed the evidence from Mr Partington is that in March 2015 a new company was registered and that company has entered into a contractual relationship with MSANZ for the provision of services.

[21] Mr Rusher says he paid Mr Partington on the basis of bits of paper he would give him setting out the amounts he was owed. Mr Rusher was unable to provide examples of the papers and Mr Partington denies that he did that. There is no evidence to indicate Mr Partington provided invoices for payment or was GST registered.

[22] Mr Partington says he raised with Mr Rusher amounts he was owed and kept a spreadsheet so he could keep track of outstanding wages. Mr Partington kept a spreadsheet of all hours worked by him, which was maintained on the computer system at The Glass House Company. The spreadsheet shows Mr Partington worked regularly, five days each week and would also work on some weekends.

[23] Mr Rusher says Mr Partington wanted to revert to being a contractor in July 2013 because he had work for other companies he wished to undertake and he wanted the flexibility of being a contractor. Mr Partington worked exclusively for The Glass House Company business. Mr Partington denies he had other work to do.

[24] The timesheets maintained by Mr Partington indicate he was fully engaged in working for The Glass House Company business. The work undertaken by Mr Partington could be undertaken by both a contractor or an employee. Mr Rusher's evidence is that for part of the time Mr Partington was a contractor and at other times an employee.

[25] An overall impression from all of the facts in this case of the underlying and true nature of the relationship between Mr Partington and The Glass House Company is of an employment relationship.

***When did the employment relationship commence?***

[26] I find the employment relationship commenced on 1 November 2012. This is consistent with Mr Partington claiming monies owed to him as salary payments in his email dated 22 December 2012 for which he received a payment on 24 December 2012.

***What were the applicable terms and conditions of employment agreed between the parties?***

[27] Mr Rusher says he agreed to a salary of \$41,200. This is less than Mr Partington had advised him on 23 September 2012 he required. Mr Partington's salary at that time was \$42,600. In addition to that is the agreement to reimburse Mr Partington for petrol expenses.

[28] Mr Rusher told the Authority he did not sign the employment agreement because he did not agree with the salary set out in the agreement. When Mr Partington set out the amounts he believed were due to him on 22 December 2012 Mr Rusher paid the amount without raising any questions or concerns. The sums were based on the salary of \$48,100.

[29] I find it is more likely than not that the agreed terms and conditions of employment included that Mr Partington would be paid a salary of \$48,100 per annum.

***When did the employment relationship end?***

[30] Mr Rusher says the employment relationship ended on 6 July 2013. Mr Partington says it ended on 14 February 2014 after he was given notice of redundancy on 20 January 2014. Both parties agree that The Glass House Company could no longer afford to pay Mr Partington and the position was no longer required.

[31] Mr Partington drafted the letter which Mr Rusher signed. Mr Rusher says he made a mistake in signing the letter.

[32] I am satisfied Mr Partington's employment ended with the disestablishment of his job on 14 February 2014.

***Is Mr Partington owed unpaid wages?***

[33] Mr Partington has set out all of the salary payments he says were owed to him during his employment and has accounted for all amounts paid to him. Some payments were made by direct credit, others were paid in cash.

[34] For the period 18 February 2014 to 22 January 2015 Mr Partington continued to receive various payments on a regular basis from The Glass House Company. Mr Rusher told the Authority that these payments were for contracting work Mr Partington undertook following the end of the relationship.

[35] I have preferred Mr Partington's evidence that he did not undertake any further work for The Glass House Company but in about March 2015, after he had incorporated his own company, the company entered into a contractual relationship with MSANZ to provide contracted services. Mr Partington says his new company has received payments from MSANZ for all work undertaken for it and the payments received from February 2014 to January 2015 were personal payments to him for arrears of salary outstanding at the time his employment with The Glass House Company ended.

[36] I find The Glass House Company Limited owes Mr Partington arrears of wages in the amount of \$3,201.78 net.

[37] I find Mr Partington was only ever an employee of The Glass House Company Limited and was never employed by MSANZ Limited.

### **Orders**

[38] The Glass House Company Limited is ordered to pay Mr Partington wage arrears pursuant to section 131 of the Employment Relations Act 2000 totalling \$3,201.78 net within 28 days of the date of this determination.

[39] Mr Partington is entitled to be reimbursed for the filing fee on this application.

[40] The Glass House Company Limited is ordered to pay Mr Partington the sum of \$71.56 within 28 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority