

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI Ā TARA ROHE**

[2024] NZERA 668  
3216319

BETWEEN	TIMOTHY RYDER Applicant
AND	LEOPARD LIME LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Hayley Johnson, advocate for the applicant James Eade, for the respondent
Investigation Meeting:	25 June 2024 in Palmerston North
Submissions:	Up to 15 August 2024
Determination:	12 November 2024

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Timothy (Tim) Ryder raises a claim he was unjustifiably dismissed by Leopard Lime Limited (LLL). Mr Ryder was employed at a quarry by the former operators of the quarry from November 2021 until the quarry's operations were taken over by LLL in September 2022. Mr Ryder's employment ended in November 2022.

[2] LLL says it never employed Mr Ryder, with his employment at the quarry continuing past the sale of the quarry operations while operations were being handed over.

**The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged for Mr Ryder himself and by his brother-in-law Shaun Driscoll, and for LLL by (Gordon)

James Eade, sole shareholder and director of LLL, and his sister Cassandra Eade. All witnesses answered questions, under oath or affirmation, from me, Mr Ryder's advocate and Mr Eade. The representatives also provided written submissions, which were presented following the investigation meeting.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The preliminary issue**

[5] At the commencement of the investigation meeting I advised the parties I considered this matter should be investigated on the basis of the following preliminary issue:

- Did Mr Ryder become an employee of LLL?

[6] I also advised the parties that if I found Mr Ryder did not become an employee of LLL, then he would have no claims to proceed against LLL, which would be the end of the matter. If I found however Mr Ryder did become an employee of LLL, as it had followed no process then the ending of Mr Ryder's employment would likely be an unjustified dismissal and consideration of remedies would follow.

[7] The parties agreed to this approach to investigating the preliminary issue.

### **Chronology of events**

[8] I set out below the chronology of events from witness statements and evidence given during the investigation meeting which is relevant to the preliminary issue. The chronology is largely agreed or non-contentious, although there are points where I have made findings of fact based on the evidence before me.

[9] Mr Ryder was employed by the former operators of quarry, with his evidence being he commenced employment on 15 November 2021.

[10] Mr Ryder met the Eades at a meeting at the lawyers' premises about the sale of the quarry to LLL on 29 July 2022. The former owners of the quarry were also present, as this meeting was part of the negotiation process for the sale and purchase of the quarry. Mr Ryder was not present for all of this meeting.

[11] The quarry sale was concluded in September 2022 through a number of commercial contracts for sale and purchase of a business, with separate purchases of the assets and land associated with the quarry, rather than LLL taking over the business of the quarry as a going concern through the purchase of shares.

[12] While Mr Ryder was aware the quarry was being sold, he was understandably not aware of the details of the commercial contracts between LLL and the former operators of the quarry. In particular he was not aware of arrangements for vendor assistance or arrangements related to employees including about transfer or termination of employment, which provided:

*[Clause 6.4(5)]*

The vendor, or a suitably experienced person nominated by the vendor and acceptable to the purchaser, will, during the vendor's period of assistance stated on the second page of this agreement [30 working days after settlement], give the purchaser to such extent as reasonably required by the purchaser the benefit of the vendor's knowledge and experience in the conduct of the business....

**34. Employees**

34.1 Upon signing this agreement, the Vendor will immediately provide to the Purchaser details of any employees that are "vulnerable employees" for the purposes of the Schedule 1A of the Employment Relations Act 2000 [sic]; and

34.2 On or before the settlement date the Vendor will terminate the employment of all staff employed in the conduct of the business and will pay all sums to which such staff are entitled, including but not limited to, accident compensation, personal injury insurance, current pay, holiday back pay, redundancy, sick leave and other allowances and entitlements so that no liability whatsoever to staff will be taken over by the Purchaser. Records showing that such sums have been paid will be made available on the settlement date.

34.3 It is acknowledged that, without there being any obligation on the Purchaser, the Purchaser may offer employment to present staff. The Vendor agrees to work with and assist the Purchaser in any associated discussion and negotiations with staff.

[13] Mr Eade attended the quarry on 20 September 2022 when Mr Ryder and a co-worker were informed the sale of the quarry had occurred. What was said on 20 September 2022 and whether LLL entered into an employment arrangement with Mr Ryder from that date on is disputed.

[14] Mr Ryder received his final pay from the former operators of the quarry on 27 September 2022, with payslips showing holidays entitlements were paid out at that time, which strongly supported his employment with the former operators of the quarry

ending prior to that date, consistent with cl 34.2 of the sale and purchase agreement for the quarry, quoted at paragraph [12] above.

[15] Mr Ryder continued to work at the quarry for approximately six weeks, with no written employment agreement ever entered with LLL. Mr Ryder was paid by LLL on 5, 10, 17, 25 and 31 October 2022, and 7 November 2022. All of the bank records for these payments included the annotations “LEOPARD LIME LIMITED Wages BQL”.

[16] Mr Ryder was advised on 3 November 2022 he would not be offered further work, which he claims was a dismissal. While I do not need to determine whether he was dismissed for the purposes of this preliminary determination, LLL appear to have been acting under the impression it could simply cease offering work on the basis it had not employed Mr Ryder. This was evidenced by an email from Mr Eade to Mr Ryder on 3 November 2022 which said:

I did not fire you. Over the past few weeks I have had to evaluate you and your fit for the job and have decided to not offer you employment.

You will get your pay on the normal pay run Sunday night/ Monday morning.

### **Did Mr Ryder become an employee of LLL?**

[17] Mr Ryder and LLL had starkly divergent views on whether Mr Ryder became an employee of LLL.

[18] It was accepted there was no employment agreement between Mr Ryder and LLL, so the factual matter for determination is whether there was an employment relationship notwithstanding this.

#### *Relevant law*

[19] To determine whether Mr Ryder was an employee of LLL I consider I need to apply the test in s 6 of the Act, the relevant provisions for this determination of which are set out below:

#### **6 Meaning of employee**

(1) In this Act, unless the context otherwise requires, **employee** —

a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and ...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

- (3) For the purposes of subsection (2), the Court or the Authority —
- (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.

[20] Submissions also discussed whether Part 6A of the Act was relevant in relation to Mr Ryder’s employment transferring from the former operators of the quarry to LLL. For reasons discussed below, I do not consider Part 6A relevant to my determination of this matter.

[21] Rather, I consider the parties’ conduct in relation to work performed by Mr Ryder is the most significant factor.

[22] The Court stated *Olsen v Carter Holt Harvey IT Ltd* in “Although the [Act] requires every employer to provide every prospective employee with an agreement in writing, the absence of a written agreement does not affect the validity of an agreement reached by other means.”<sup>1</sup> The Court went on to say “whether or not Mrs Olsen was provided with a proposed employment agreement in writing is immaterial to the question of whether an offer of employment was made and accepted. That is to be determined by applying well established legal principles”.<sup>2</sup> The Court then went on to consider “the totality of the conduct of the parties” and found “a clear inference” an employment relationship had been established.<sup>3</sup>

[23] The Court of Appeal has also stated in *LSG Sky Chefs New Zealand Ltd v Prasad*:<sup>4</sup>

it is well established that the existence of a contract may be inferred by conduct. In such cases, the Court will look at the totality of the dealings and determine whether those dealings should be regarded as having resulted in a contract coming into existence.

#### *Submissions of the parties*

[24] Submissions for Mr Ryder said he asserted his employment ended with the former operators of the quarry on 20 September 2022 and from this point on Mr Ryder

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<sup>1</sup> (2008) 6 NZELR 318 at [57].

<sup>2</sup> *Ibid* at [60].

<sup>3</sup> *Ibid* at [73].

<sup>4</sup> [2018] NZCA 256 at [23].

was paid by LLL and instructed by Mr Eade in the performance of his duties, until his employment ended.

[25] Submissions for LLL said there was no transfer of employment from the former operators of the quarry to LLL including under Part 6A of the Act and LLL never offered Mr Ryder employment. LLL said Mr Eade advised Mr Ryder he was under no obligation to employ him, consistent with cl 34.3 of the sale and purchase agreement for the quarry, quoted at paragraph [12] above, and would be evaluating the businesses needs over the handover period before determining who to offer employment to.

[26] LLL said the former owners of the quarry were supposed to pay Mr Ryder during the handover period but refused to do so. No documentary evidence was provided in support of this proposition, with Mr Eade saying arrangements were discussed at the quarry but not reduced to writing. While accepting LLL paid Mr Ryder during the handover period, LLL said “This did not mean that the employees had transferred to LLL, we just did not want the employees to be adversely affected by [the former operators of the quarry’s] actions”.

[27] Submissions in reply for Mr Ryder said Part 6A was not relevant, Mr Ryder’s employment by the former operators of the quarry had been terminated as required under cl 34.2 of the sale and purchase agreement for the quarry, quoted at paragraph [12] above, and disputed there were conversations about Mr Ryder’s employment status.

*Mr Ryder was employed by LLL*

[28] While there is no written employment agreement in this case, I consider the conduct of Mr Ryder and LLL is sufficient to establish an employment relationship being entered into between them on or about 20 September 2022.

[29] The most significant factors for me are that LLL paid Mr Ryder’s wages without clear evidence this was on behalf of the former operators of the quarry, and after 20 September 2022 Mr Ryder’s work was performed for the benefit of LLL at the direction of Mr Eade, until the ending of Mr Ryder’s employment. In addition, there was no documentary evidence supporting the proposition Mr Ryder was paid by LLL on behalf of the former operator of the quarry, which would be unusual given LLL was the party benefiting from the work.

[30] While Mr Eade said he did not intend this to create an employment relationship and claimed he had a gentleman's agreement with the former operators of the quarry they would make sure their employees were fully advised of what was going on, that was not what occurred.

[31] On the balance of probabilities I am not satisfied LLL's expectations were clearly communicated to Mr Ryder by Mr Eade or agreed with by Mr Ryder.

[32] Given this finding and the fact Mr Ryder's final pay from the former operators of the quarry clearly paid out his holidays entitlements and ended his employment with them consistent with cl 34.2 of the sale and purchase agreement for the quarry, quoted at paragraph [12] above, I consider it reasonable that Mr Ryder understood his employment to be with LLL on the same terms and conditions he had previously been employed by the former operators of the quarry. I consider payment by LLL on that basis for the first five weeks after it took over the operations of the quarry reinforced Mr Ryder's understanding he had been employed by LLL on that basis.

[33] LLL also claimed Mr Ryder was being assessed to establish his suitability for ongoing employment and his employment was being continued under the vendor assistance provision at cl 6.4(5) of the sale and purchase agreement for the quarry, quoted at paragraph [12] above. While not expressly claimed by LLL, as it maintained it had not employed Mr Ryder, the lack of a written employment agreement means LLL would have faced barriers in asserting Mr Ryder was employed under a trial period, as s 67A(2) of the Act requires such a provision must be in writing. Similarly s 67(4) requires fixed term employment arrangements be agreed in writing and s 67(3)(b) prohibits such arrangements being used to assess suitability for permanent employment.

[34] There was also no documentary evidence to support Mr Ryder's employment being continued under the vendor assistance provision, which would have been inconsistent with the continued under with cl 34.2 of the sale and purchase agreement for the quarry, quoted at paragraph [12] above, which expressly required the termination of all employees on or before the settlement date.

[35] Finally I note while LLL raised concerns about the actions and inactions of the former operators of the quarry, the matter before me related to Mr Ryder's claims based on him being employed by LLL and no claims against the former operators of the quarry

are before me. Whether LLL has claims against the former operators of the quarry in relation to their actions or inactions is not for me to determine.

*Concluding comments*

[36] Mr Eade was frank in asserting he did not consider he had dismissed Mr Ryder, rather he had chosen to not offer him further employment, as outlined in the email quoted at paragraph [16] above.

[37] Given my finding LLL had employed Mr Ryder, my preliminary view is LLL unjustifiably dismissed Mr Ryder as it followed no process in deciding to end his employment, based on the assumption it could simply chose to not offer him further employment.

[38] While submissions have been provided about remedies sought by Mr Ryder, I consider it appropriate to arrange a case management call to discuss the next steps in this matter and to allow an opportunity for parties to resolve this matter between themselves, should they wish to do so.

**Summary of outcome on the preliminary issue: Mr Ryder was an employee of LLL**

[39] For the above reasons, I find Timothy Ryder was employed by Leopard Lime Limited from 20 September 2022 until his employment was ended by Leopard Lime Limited on 3 November 2022.

**Next steps**

[40] An Authority officer will be in touch with the parties to arrange a case management call to discuss the next steps in this matter.

Shane Kinley  
Member of the Employment Relations Authority