IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 124/09
5159151

	BETWEEN	WILLEM SHEARER Applicant
	AND	JARDIN NOUS LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Willem Shearer in person Tony Tabak, for Respondent
Investigation Meeting:	Interview with applicant 27 May 2009 Interview with respondent 3 June 2009
Determination:	5 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Shearer) alleges that he is owed wages totalling $2,400 for the period from 16 February 2009 down to 16 March 2009 and that during the period in question, he was employed by the respondent (Jardin) which owes him those unpaid wages.

[2] Jardin resists that claim on the footing that Mr Shearer is not an employee but a contractor and that, in consequence, the Authority has no jurisdiction to deal with the claim.

[3] Jardin is a gardening contractor providing gardening services to domestic clients. In October 2008, Mr Tabak determined that he needed additional assistance in his business and entered a business relationship with Mr Shearer. It is the legal nature of that relationship that is the subject of this determination.

[4] In brief, Mr Tabak says that the relationship was that of principal and contractor and Mr Shearer claims he was in an employment relationship with Jardin.

[5] Up until February 2009, there seems to have been no difficulty in the relationship, but in February Mr Tabak took some holiday leave effectively leaving Mr Shearer in charge. There is a dispute about what happened while Mr Tabak was on holiday with Mr Tabak claiming that Mr Shearer did not service the clients that he was supposed to and Mr Shearer saying Mr Tabak left without providing him with the resources to do so. It is not necessary for me to resolve that conflict, simply to record that it happened.

[6] Whether because of that difference or simply for cashflow reasons, the factual position is that after Mr Tabak returned from holiday, his payments to Mr Shearer became less frequent. Whereas previously, Mr Shearer had been paid promptly by Mr Tabak, from this point on, the payments became less regular and were driven by the cashflow imperatives of the Jardin business.

[7] Mr Shearer complained about that situation, both directly and through the agency of his parents, and the matter having failed to achieve resolution, Mr Shearer brought his application to the Authority seeking redress here.

[8] The factual position is that Mr Shearer alleges that he is owed a total of $2,400 by Jardin, but I am satisfied on the evidence before me from Jardin that of that total sum, an amount of $550 has already been paid.

[9] Jardin decided that, once Mr Shearer determined to proceed against it in the Authority, regular repayments of the amount owing would cease until the Authority had considered the matter and issued its determination.

Issues

[10] The first matter for consideration is whether this was an employment relationship or not. If it was, then it is appropriate for the Authority to consider what further steps need to be taken.

Was this an employment relationship?

[11] I am satisfied this was not an employment relationship and accordingly that the Authority has no jurisdiction to take matters further in relation to the dispute between these parties.

[12] The statutory position is set out in s.6 of the Employment Relations Act 2000. That section confers on the Authority the power to determine whether a relationship is one of employment or not. In doing that, the Authority must determine *the real nature* of the relationship between the parties.

[13] Furthermore, pursuant to subsection (3), the Authority must consider all relevant matters, including those that go to intention, but critically … *it is not to treat as a determining matter any statement by* [the parties] *that describes the nature of their relationship.*

[14] It seems to me that the Authority ought to approach this task in a commonsense sort of way looking at all the factors available and that, in particular, the Authority ought to be very cautious about placing too much weight on evidence before it of the parties' intentions.

[15] The leading case on the determination of whether a relationship is one of employment or not is the decision of the Supreme Court of New Zealand in *Bryson v. Three Foot Six Ltd* [2005] 3 NZLR 721. In that decision, the Court considered all of the traditional common law tests for identifying whether a relationship was one of employment or not, but concluded:

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

[16] The integration test tries to measure the extent to which the person providing the services is integrated into the organisational structure of the other party. In the present case, Jardin provided the work opportunities for Mr Shearer but Mr Shearer was expected to work independently. The best example of this is the period when Mr Tabak was away on leave and simply left Mr Shearer with a whole lot of clients to look after. Mr Tabak complains that Mr Shearer did not look after those clients properly, but the fact remains that he entrusted the work to Mr Shearer in the first place.

[17] In the control test, the issue is whether the person doing the work is controlled by the person providing it. Again, I conclude that Mr Shearer was not controlled by Jardin. Although there were issues about transport which blighted the relationship, I am satisfied that the original proposal was that Mr Shearer was to travel to work sites independently of Mr Tabak in order, amongst other things, to facilitate the pair of them working in different places. Mr Tabak told me, and I accept, that Mr Shearer was a good worker and did not require supervision so I conclude that he effectively worked independently and was not controlled by Mr Tabak. Mr Shearer worked the hours that suited him and not hours that he was directed to work by Mr Tabak.

[18] Finally, considering the fundamental test, I conclude on the evidence before me that Mr Shearer was in business on his own account. He filed invoices with Jardin which paid on those invoices. The invoices are clearly not time sheets as would be presented by an employee, but are invoices which simply detail the nature of the claim. Jardin took no tax out and made no arrangements in respect of ACC levies. Mr Tabak told me (and I accept) that he made it clear to Mr Shearer when the relationship first commenced that he was proposing a contractual relationship and not one of employment and that he was in no position to offer employment because the nature of the work available was purely seasonal. There was no payment of holiday pay, sick pay or any of the other usual incidents of employment and there was no prohibition on Mr Shearer working for somebody else as well as Jardin, if Mr Shearer chose to.

[19] While the law requires me to be cautious about evidence of the parties' intention, it is clear in the present case that Jardin's intention was to create a contractual relationship. In Mr Shearer's case, my sense of it is that Mr Shearer did not actually turn his mind to the nature of the relationship until he was deprived of money which he was owed by Jardin. At that point, I am satisfied that he then reflected on the matter and decided that he believed he was in employment. My conviction is that, had his invoices been met in full, the issue would never have arisen.

Determination

[20] It follows that I am satisfied Mr Shearer was not employed by Jardin and that being the position, I have no authority to take the matter any further. However, it is clear to me that Jardin owes Mr Shearer money and while I understand Mr Shearer's

frustration at not being paid out in full, I am satisfied that Jardin is simply not able to do that for reasons of cashflow.

[21] I commend to Jardin the notion that it deals as quickly as it can with the residual debt and, in particular, if the Australian property previously referred to in my Minute of 27 July 2009 does become a source of funds, that the matter be disposed of on a lump sum basis.

[22] If it is of assistance to the parties, I am satisfied that the original amount owed and unpaid was $2,400, that Jardin has paid the sum of $550 on account of that amount and that an allowance may need to be made by the parties for the cost of items supplied to Mr Shearer to use but not returned, such as a pair of leggings and a handsaw. I understand from Jardin that there may be some question about Mr Shearer's invoices which the parties will need to address themselves.

Costs

[23] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority