

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 345
5417180

BETWEEN DARRYL STRINGER
Applicant

A N D SANFORD LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Miriam Mallinder, Advocate for Applicant
Charlotte Parkhill and Joey James, Counsel for
Respondent

Investigation Meeting: 4 July and 1 August 2013 at Auckland

Submissions Received: 8 July 2013 from Applicant
17 July 2013 from Respondent

Date of Determination: 07 August 2013

DETERMINATION OF THE AUTHORITY

A. The applicant, Mr Darryl Stringer was an independent contractor to the respondent, Sanford Limited (Sanford), he was not an employee.

B. Costs are reserved

Employment relationship problem

[1] The applicant, Mr Darryl Stringer, claims he was unjustifiably dismissed by the respondent, Sanford Limited (Sanford) on 7 December 2012 after raising a health and safety complaint.

[2] Sanford says Mr Stringer was not its employee and he was an independent contractor. Sanford says it did not dismiss Mr Stringer, it chose not to re-engage him pursuant to the terms of an independent contract it had with him.

Issue for determination

[3] The issue for determination by the Authority is whether an independent contractual relationship or an employment relationship existed between Mr Stringer and Sanford.

[4] If an employment relationship existed then the Authority has jurisdiction to investigate whether or not Mr Stringer was unjustifiably dismissed by Sanford. If no employment relationship existed then the Authority has no jurisdiction to investigate Mr Stringer's claim that he has an employment relationship problem.

The issue

Was Mr Stringer an employee or independent contractor?

[5] This preliminary issue is to be determined under s.6 of the Employment Relations Act 2000 ("the Act"). Section 6 of the Act states:

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;....*
- (2) *In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract for 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-*
 - (b) *Must consider all relevant matters including any matters that indicate the intention of the persons; and*
 - (c) *Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[6] The leading case on s.6 of the Act is *Bryson v. Three Foot Six Ltd*¹. The Employment Court in *Poulter v. Antipodean Growers Ltd*² summarised the applicable

¹ [2005] 3 NZLR 721

² [2010] NZEmpC 77, 17 June 2010 at para.[20]

principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions at paragraph [20] as follows:

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

[7] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessarily to be taken under s.6 is for the Authority, or the Court to gain an overall impression of the underlying and true nature of the relationship between the parties.

[8] Sanford is a large and long established New Zealand fishing company which harvests, farms, processes, stores and markets seafood and aquaculture products. Sanford’s main competitors in New Zealand are Sealord Group and Talleys Fisheries.

[9] Sanford is divided into five business units including a deepwater vessel operation, within which Mr Stringer was engaged. Other units include inshore vessels and land-based factory processing, aquaculture, head office/administration/marketing and international operations.

[10] In Sanford’s deepwater division there are approximately 350 seagoing personnel, all of whom are engaged as independent contractors. The seagoing personnel are sharefishers, which is a generic term for not only fishers but also officers, cooks and general hands- deck and factory. Sharefishers form the majority of the seagoing personnel. Other seagoing personnel are chief engineers, second engineers and fish processing equipment engineers.

[11] The deepwater division has approximately 20 “shoreside” staff who are employed pursuant to employment agreements, and are in management and administrative positions.

[12] As Mr Darren Shaw, divisional manager of the deepwater division says

Share-fishers are responsible for operating the vessels and harvesting fish. Some share-fishers perform other roles on board the vessels, rather than actual fishing, such as the cooks. Engineers provide a support role to the share-fishers, whereby they carry out all repairs and maintenance of the vessel's many systems in order to ensure that the vessel is able to catch, process and store fish, and provide a seaworthy and safe vessel to work and live on.

[13] In general terms, share fishers are paid a share of the catch and engineers are paid a daily rate while out at sea. Independent contract relationships are common in the fishing industry and have been condoned in respect of share fishers by the Employment Court in *Muollo v. Rotaru*³

[14] Mr Stringer was engaged by Sanford as a trainee engineer in May 2003. Prior to this, Mr Stringer had been employed for a number of years including most recently as a fitter/welder for Peninsular Engineering and Helensville Engineering.

[15] In early 2003, Mr Stringer contacted Mr Grant Finlayson, Engineering Manager about a position at Sanford. There were no positions at that time but when a trainee engineer role came up in May 2003, Mr Stringer was interviewed by Mr Finlayson for the role. At the interview, Mr Stringer was told by Mr Finlayson that he would be taken on as a trainee and would be paid \$200 per day when he was at sea and he would be responsible for his own tax, GST and ACC liabilities.

[16] Mr Stringer accepted the role and was assigned to the *San Discovery*, one of Sanford's deepwater vessels.

[17] Mr Stringer says at the time of his engagement by Sanford, he was not given a contract of service, this was provided to him subsequently. Sanford and Mr Stringer recorded the terms and conditions of their contractual relationship in a contract, the latest version of which states:

³ [1995] 2ERNZ 414 EmpC

SANFORD LIMITED**SUSTAINABLE SEAFOOD**

Deep Water Division contract for the provision of engineering services.

1 April 2011

Engineer's terms and conditions**1. General**

a. This appendix covers all sea-going Chief Engineers and Second Engineers aboard the following vessels:

...

San Discovery

...

e. *Engagement of Engineers*

I.. All Chief Engineers will be contracted by the Engineering Manager after consultation with the Vessel Manager, Skipperand the Manager, Deep Water Vessel Operations.

II. The Engineering Manager will also be responsible for, after consultation with the Vessel Manager and Chief Engineer the engagement of the Second Engineer.

[18] The engineer's responsibilities are contained in Annex A as follows:

Second Engineer

- (1) Complete all lawful tasks assigned to the Engineer by the Chief Engineer.
- (2) Stand watches as designed by the Chief Engineer and remain alert and diligent during these watches.
- (3) Report immediately to the Chief Engineer or Skipper any matters relating to the safety of the vessel or the crew.
- (4) Ensure that company machinery is maintained and operated in a safe and efficient manner.
- (5) Ensure that company stores are maintained and utilised in an efficient manner.
- (6) To be available for work – by at all times when the vessel is alongside if so required.
- (7) To assist the Chief Engineer as requested.
- (8) Ensure that machinery and workshop spaces are kept in a clean and tidy condition.

[19] The second engineer sea rates include a sea day daily rate, qualifications allowance and specific vessel allowances together with a shore rate. Meals and training allowances are separate.

[20] Enclosure 1 to the Engineer's contract expressly describes the parties' relationship as follows:

1. **GENERAL**

(a) *"Fishers" means the Skipper and Crew (also referred to as "Crew Members") of al Sanford Deep Water Fleet vessels including, but not restricted to, ... San Discovery ...*

...

(c) *The parties to this contract for service acknowledge and agree that each Fisher is an independent contractor and neither this agreement nor any of its terms (either expressed or implied) shall be deemed to create the relationship of employer and employee between the parties.*

(d) *Each Fisher shall alone be responsible for all taxes payable (the company will deduct withholding tax with a minimum rate of 20%, or higher if specified by the Fisher), and for all levies or charges including without limitation, those under the Accident Rehabilitation and Compensation Act 1992 arising from the monies received by each Fisher.*

(e) *Each Fisher shall be responsible for payment of their own ACC levies, income tax and GST payment, and shall not be entitled to any holiday payments under the Holidays Act 1981.*

...

(g) *Unless specified otherwise all rates in this contract are GST exclusive.*

8. **ENGAGEMENT AND RESPONSIBILITIES OF FISHERS**

(a) *Fishers are engaged on an initial one trip trial basis. Subject to satisfactory performance, Fishers shall be re-engaged on a trip by trip basis and must sign on at the beginning of each trip.*

[21] As a matter of principle, where a contract is in writing, the words used are to be taken as the expression of the parties' actual intention which, although for the purposes of s.6 of the Act is not decisive, is a "*relevant matter*" when considering the totality of the relationship between the parties⁴.

⁴ *May v. Armourguard Security Ltd* [2011] NZERA, Auckland 208

[22] Mr Stringer claims he was unable to negotiate the terms of the contract. I do not accept that was the case. Mr Stringer was involved in the negotiation of the Engineers Contract over the years. During negotiations for the most recent contract, Mr Stringer and other engineers contributed to the cost of an independent negotiator and Mr Stringer provided feedback and input in respect of the contractual terms. Mr Stringer made no attempt to negotiate “employment” terms such as holiday pay, sick leave or indeed his status as an independent contractor.

[23] Each time Mr Stringer and other members of the crew were engaged on a trip they were required to sign a register.

[24] The sign on register specifies the name of the vessel, the trip number and date of departure. The register is headed up:

Crew sign on register and acknowledgement of terms of engagement

[25] The crew to sail on the vessel is listed on the register and each contractor going to sea on the vessel is required to agree, among other things, that they:

- *Have read, understood and accepted the conditions of engagement as detailed in the vessel’s “contract for service”.*
- *Agree to the deduction, as per the amendment to the vessel’s contract for service is “for costs of SKY TV installation”....*

[26] The contract was very clear that the relationship was that of a contract for services and Mr Stringer confirmed his understanding of the arrangement each time he signed on for a trip. Mr Stringer said he did not read the sign on register, believing it was “*something to do with maritime laws*”. I do not accept Mr Stringer was ignorant with regard to that which he was signing. Mr Stringer has filled in boxes on the register about his membership of the New Zealand Fishing Industry Guild and any medical conditions. This further indicates the parties’ intention that their relationship was not an employment relationship but rather an independent contract for services.

[27] Mr Stringer received a letter from Sanford’s Payroll Administrator on 29 September 2003 enclosing forms so that GST could be arranged for him and stating that:

Self employed contractors..... are required by law, to be registered for GST.....Sanford Ltd run a trust account for the benefit of our self employed contractors and we recommend you use this facility. GST is paid into the trust account at the end of each trip or workby...You can

however select a different account or your accountants trust account, if they are completing your returns for you.

[28] In January 2004, Mr Stringer completed his tax code declaration and registered for GST. Approximately one year after commencing as a trainee engineer, Mr Stringer engaged an accountant, Lorraine Thompson, to assist him with filing his tax and GST returns and ACC liabilities. Mr Stringer says he thought he was a sole trader at this time.

[29] On 12 January 2007, Mr Stringer incorporated a company called “Mecar Limited”. Mecar stands for Marine Engineering Consultancy and Repair and it provided engineering services to Sanford.

[30] Mr Stringer says he decided to set up Mecar Limited after reading a book entitled “*Pay Zero Taxes*” by Peter Sibbald. Mr Sibbald’s book provides advice on structuring personal affairs, including setting up a company to minimise tax liabilities, proportioning income to a partner or spouse, being able to claim tax rebates on home office space and vehicle running costs. Mr Sibbald’s book makes numerous references to the differences between employees and contractors and the financial advantages associated with being a contractor or incorporating a company. Ms Thompson confirmed that she assisted Mr Stringer to structure his financial affairs so that he could obtain the tax benefits and advantages he could not obtain as an employee.

[31] Mr Stringer is the sole director of Mecar Limited and he and his partner, Angela McLeod jointly own the shares. Mecar Limited employs both Mr Stringer and Ms McLeod and their incomes are split in order to gain a tax advantage. Mecar Limited owns one of Mr Stringer’s rental properties and his motor vehicle.

[32] Mr Stringer says he did not really think about whether he was an employee or an independent contractor. However, when his contract was terminated by Sanford, he made inquiries and formed the view he was in fact an employee and not a contractor. Up until the termination of his contract, Mr Stringer says he had no reason to question his status.

[33] I find this hard to believe. Mr Stringer had for many years prior to his engagement by Sanford, been employed. Mr Stringer knew as an employee that he received certain benefits he could not get as a contractor, including paid annual leave, and sick leave. Mr Stringer also knew that as an employee PAYE was deducted from

his wages. Mr Stringer says when he was engaged by Sanford he knew he was a sole trader and was told he was responsible for paying his own tax, ACC and GST himself. Mr Stringer also knew he was paid a rate when he was on the ship and that he did not get paid when he was not on the ship. After reading Mr Sibbald's book, Mr Stringer took proactive steps to ensure he could get the most benefit out of his independent contractor status.

[34] The arrangements in this case are similar to those found in *Brunton v. Garden City Helicopters Ltd*⁵, where the Employment Court determined that a pilot had not been the employee under a contract of service of a company providing Flying Doctor and other similar medical services. In that case the pilot's work for the company had been invoiced by the pilot, with GST included, in the name of the pilot's company set up with him as director and he and his wife as equal shareholders. The contractual arrangements were recorded in written agreements and described as a contract for service.

[35] As a matter of principle, "*relevant matters*" in s.6 of the Act include features of control and integration and whether the contracted person, Mr Stringer in this case, has been effectively working in business on his own account. As also recognised by previous cases, industry or sector practice, while not determinative of the question, is a "*relevant factor*".

[36] I find that, in practice, Mr Stringer was in business on his own account.

[37] In relation to the control test, the question is:

*... did the putative employer direct not only what work was to be done but the manner in which it was to be done? Mr Muollo did not exercise any such control [the skipper] did. He decided when the boat would go out, in which direction it would go, what species of fish it would endeavour to harvest from the sea, where it would go to do so, and when it would come back.I would expect the skipper of the fishing vessel to exercise control...It was his task to command and to direct or navigate.*⁶

[38] Mr Darryn Shaw, Divisional Manager of the Deep Water Division of Sanford says:

Sanford have the assets and resources and we engage contractors including the skipper and crew on a vessel, to find and catch the fish.

⁵ [2011] NZEmpC 29

⁶ *Muollo v. Rotaru* supra para.[20]

Engineers maintain the vessel. Sanford does not tell the contractors how to find and catch the fish because we do not have the skills to do so. The contractors provide their skills to catch the fish.

[39] The control test in fishing type cases was examined in *Gisborne Sharefishermen's Assoc (Inc) v J Wattie Canneries Ltd*⁷ a case concerning whether share fishermen were in a contract of “*master and servant or whether it was a contract of services*”. Judge Horn at p.635 of the decision stated:

The real crux of the matter concerns the control test. It is clear that the boat owner does not control the manner, nor the location, nor the method of hunting the fish. This is entirely left to the skipper....He is entrusted with a boat and equipment belonging to the boat owner designed to enable him to hunt for fish successfully. It is for his skill, knowledge and experience that he has been engaged by the boat owner. He is in practical terms given the full discretion as to how, when or where and in what weather he shall fish. That is his skill.

[40] Sanford did not control how Mr Stringer did his job on the vessel. As second engineer, Mr Stringer assisted with the maintenance of the vessel and reported to the Chief Engineer in respect of tasks on the vessel. The skipper is ultimately responsible for the vessel and for finding and catching fish. Sanford provide the resources for the skipper and crew to do their job, Sanford do not direct how the job is to be done.

[41] Further, New Zealand Maritime regulations require certain standards and controls in relation to the sailing of vessels. Maritime rules prescribe minimum crew numbers and roles for example.

[42] Mr Stringer was not obliged to accept an engagement on a trip, but in practical terms, if he did not accept an engagement on a trip, reengagement was less likely because Sanford needed to have a crew including engineers in order for its ships to be able and safe to sail. Such statutory and regulatory responsibilities are not to be confused with control by the employer.

[43] As Judge Travis stated in *Brunton's* case at para [70] with regard to the “control” test:

This was one example of a case where the same statutory measure of control would have been exercisable over the operations manager whether or not that person was an independent contractor or an employee.

⁷ [1982] ACJ629(AC)

[44] Even so, if Mr Stringer gave sufficient notice of his intention to decline a trip, he could do so. The control test in my view indicates the relationship between Mr Stringer and Sanford to be that of an independent contract.

[45] There was no provision for Mr Stringer to have holidays or to receive holiday pay. Mr Stringer worked 4.5 to 5 months a year and when he was not working he was not paid and took what he termed to be a holiday to spend time with his family. Mr Peter Robertson, the Chief Engineer on the San Discovery, contracts his services to Sanford for approximately 7-8 months a year. When he is not working for Sanford between trips he contracts to other businesses such as Hydraulics Hawke's Bay Limited and Pacific Trawling Limited. In *Muollo v Rotaru*, there was no contract expressing the intention of the parties. However, the Employment Court looked at the practical operation of the parties relationship and stated in relation to Mr Rotaru:

He worked, ...making and mending crayfish pots but was not paid, nor does it appear that he was required or even asked to do this work or to make himself available for the rest of the day once the decision was taken not to put to sea....the apparent absence of any protest at the time to the non-payment, is indicative although not conclusively so of an understanding on the part of the respondent that he was not working under a contract of service...

[46] Mr Stringer was engaged by Sanford on a trip by trip basis and when not engaged on a trip, he was not paid, he was on "holiday". Mr Stringer chose to take the time between trips when he was not at sea and spend it with his family. Mr Stringer accepted he could have worked elsewhere in between trips. This is important given Mr Stringer's claim that his primary source of income was derived from Sanford. Mr Stringer's primary source of income was from Mekar Limited who received remuneration from Sanford. This was Mr Stringer's choice. Mr Stringer chose not to contract his services or work elsewhere in between trips. The Chief Engineer, Mr Robertson is engaged on a trip by trip basis and when not working on the vessel chooses to contract his services elsewhere or take a holiday at his own cost. Mr Stringer never "*protested*" to Mr Robertson or to Sanford that he should be paid between trips or when the vessel he sailed on was not at sea. This is a relevant factor in assessing the relationship and reinforces in my view the intention expressed in the contract between the parties that the relationship was one of a contract for service.

[47] As in *Brunton*, I find this is a case where Sanford and Mr Stringer were content with the contractual relationship enjoyed between them for a number of years.

Those arrangements were freely entered into by Mr Stringer who knew as an independent contractor he had the benefit of tax advantages he had never had in his many years as an employee.

[48] For all of the above reasons, the preliminary issue of the status of Mr Stringer is determined in favour of Sanford. Mr Stringer, I find, was not employed under a contract of service by Sanford. The underlying and true nature of the parties' relationship was one of independent contract.

Costs

[49] Costs are reserved. Sanford is to file a memorandum as to costs within 7 days of the date of this determination and Mr Stringer has 7 days following receipt to file his memorandum as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority