

be split on the basis of 45% to Mr Wilson and 55% to Mr Nuku. It appears that Mr Wilson was free to accept or decline when he could be rostered to drive.

[3] The arrangement worked amicably and suited Mr Wilson as he has some other business interests, hence he could fit those around the part-time nature of the taxi driving. The arrangement continued until about mid-September 2009. In July 2010, Mr Wilson made a claim for holiday pay in the sum of \$4,056 calculated as 8% of his total earnings of \$50,570 that he says that he earned for the total time that he was engaged by Mr Nuku. But Mr Nuku says that Mr Wilson was not an employee, rather he was an independent contractor and paid GST on the income earned from the taxi fares.

[4] The first issue for the Authority to determine is whether or not Mr Wilson was an employee and hence entitled to be paid holiday pay pursuant to the Holidays Act 2003, a matter over which the Authority has jurisdiction. On the other hand, if Mr Wilson was not an employee, then the Authority does not have jurisdiction hence Mr Wilson cannot be assisted.

[5] Section 6 of the Employment Relations Act 2000 defines the meaning of “employee” and at subsection 2 it is provided that:

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.

And at subsection (3);

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

- (a) must consider all relevant matters, including any matters that indicate the intentions of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.

[6] The evidence of Mr Wilson is that on the advice of Inland Revenue, he paid GST on the monies he earned while engaged by Mr Nuku and he has provided the GST returns. These reveal that on all occasions, Mr Wilson received a GST refund but there are no details available as to what portion of the income and expenses was attributed to his taxi driving activity. There are also some tax return records for the 2007/2008 financial year. The format of this return is an IR10 form. The Inland Revenue website informs that:

Generally, you will need to complete an IR10 if you:

- are self employed
- receive other income
- are claiming expenses against income

I note that in his income summary, Mr Wilson includes the sum of \$17,550 earned for “*Taxi Driving.*” Mr Wilson then provides details of his business expenses but there is little detail of how these expenses were incurred.

[7] While there is limited evidence available, on the basis of the tax records it appears that Mr Wilson was a self-employed contractor and not an employee whilst driving a taxi for Mr Nuku. However, in support of his view that he was an employee, Mr Wilson refers the Authority to what appears to be a letter of reference from Mr Nuku, dated 28th September 2009, within which Mr Nuku informs that:

Peter Wilson has been employed by me as a taxi driver for the past two and a half years.

And:

Peter has always been a tidy and pleasant employee.

Mr Nuku says that he provided this letter to assist Mr Wilson in a matter before the District Court but he is adamant that Mr Wilson was not an employee.

[8] Evidence was also given to the Authority by Ms Raewyn Bayley who has been the accountant for Mr Nuku for about four years. Ms Bayley says that while Mr Wilson was expected to provide invoices for his services none were ever forthcoming. Ms Bayley also told the Authority that Mr Nuku had some drivers as employees who paid PAYE and she can recall one other person on the same arrangement as Mr Wilson, that is, being paid a share of the fares taken. Mr Nuku says that “over the years” he has had fare sharing arrangements with various drivers with the percentage of the fares being split in varying percentages.

Determination

[9] While the evidence is rather scant, in the round I conclude that there was not an employment relationship existing between Mr Wilson and Mr Nuku. The tax records in particular appear to show that Mr Wilson was in business on his own account and that the income he received for the taxi driving was treated as business

income for GST and general tax related purposes. Therefore, as I find that there was not an employment relationship in existence between the parties, the Authority does not have jurisdiction over the matter that Mr Wilson has brought to the Authority and hence it must lapse accordingly.

Costs: As both parties appeared in person, the consideration of any costs incurred by Mr Nuku is not required.

K J Anderson
Member of the Employment Relations Authority