

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 135  
5376360

BETWEEN                      LESLIE ASPLET  
   Applicant  
  
A N D                              BIRCHFIELD              MINERALS  
   LIMITED  
   Respondent

Member of Authority:        David Appleton  
  
Representatives:              Applicant in Person  
   Allan Birchfield for Respondent  
  
Investigation meeting:        2 July 2012 at Greymouth  
  
Submissions Received        At the investigation meeting  
  
Date of Determination:       4 July 2012

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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- A.     The Applicant was an employee of the respondent and not an independent contractor.**
- B.     A telephone conference shall take place with a view to the matter being set down for a substantive investigation.**
- C.     The Authority shall write to the Disputes Tribunal to suggest that the respondent's counterclaim be investigated by the Authority.**
- D.     Costs are reserved.**

**Employment relationship problem**

[1] Pursuant to an order of the Disputes Tribunal dated 3 February 2012, Mr Asplet lodged a claim in the Employment Relations Authority for unpaid wages

and a compliance order in respect of the payment of contractual notice following the Disputes Tribunal expressing the view that his claim was an employment claim which should be dealt with under the Employment Relations Act 2000. Accordingly, this determination will simply consider whether or not the relationship between Mr Asplet and the respondent was an employment relationship or whether it was governed by a contract for services.

[2] There was also a counterclaim in the Disputes Tribunal which was adjourned to allow the parties to produce appropriate documentation and witnesses.

### **A brief account of the facts**

[3] Mr Asplet started working for the respondent on 2 March 2009. Mr Asplet is an engineer and was engaged by the respondent in order to maintain equipment used in the respondent's gold dredging operation.

[4] Mr Birchfield terminated the arrangement with Mr Asplet on 24 August 2009 after Mr Birchfield had suspicions that Mr Asplet had unlawfully retained several items of equipment belonging to the respondent. That is essentially the subject matter of the respondent's counterclaim in the Disputes Tribunal.

### **The law**

[5] Section 6(2) of the Employment Relations Act 2000 (the Act) states:

*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.*

[6] Section 6(3) of the Act states as follows:

*For the purpose of subsection (2) the court or the Authority –*

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

[7] The leading case in determining whether an individual is an employee or an independent contractor is the Supreme Court case of *Bryson v. Three Foot Six Ltd* [2005] ERNZ 372 which held that the starting point is to examine the terms and

conditions of the contract and the way it operated in practice and then to apply the three tests (the control test, the integration test and the fundamental or economic reality test).

### **The contractual documentation**

[8] The first step in determining this preliminary issue is to consider the documentation that governed the relationship. First, there was a *Letter of Offer* dated 18 February 2008 from Mr Birchfield to Mr Asplet which stated as follows:

*Birchfield Minerals wishes to offer you employment as a full time contractor. To follow is a contract setting terms and conditions.*

*The services to be supplied are to cover supervising the maintenance on the gold dredge and associated equipment.*

*The remuneration is to be \$36.00 per hour plus GST for time on site. Hours will be time onsite less lunch break.*

*A work vehicle will be supplied to travel to and from work. No private use to be allowed.*

*There is a 2 month trial period starting from 2 March. At approx 8 weeks from this date we will review the contract.*

*The contract can be terminated by either party at any time with a fortnights notice given or by mutual agreement.*

*Regards  
Alan Birchfield  
Birchfield Minerals Limited*

[9] There was also a document which had been signed by Mr Asplet and Mr Birchfield for the respondent on 25 February 2009 which was headed up *Contractor Agreement*. This stated, inter alia, the following:

#### 3. OFFER OF EMPLOYMENT AS A CONTRACTOR

3.1 *BIRCHFIELD MINERALS LTD offer of Contractor Employment to: Leslie Asplet for the position of Maintenance Supervisor.*

3.2 *When you have signed that you accept the terms of our offer this will become the Contractor Agreement between us. It will come into force on 2/3/09 and will remain our Agreement until it is replaced or either of us terminates the employment.*

#### 4. TERM AND VALIDATION

4.1 *This agreement may be varied during its term where we agree to this. When any variation is agreed we*

*will record the variation and it will form part of the agreement between us.*

5. **POSITION AND DUTIES**

5.1 *The position offered and your current duties and responsibilities are that of a: Maintenance Supervisor.*

*We may need to amend or alter these duties from time to time to reflect changing requirements but we will consult you before doing so.*

6. **OBLIGATIONS**

6.1 *We will act as a good Employer, providing fair and proper treatment in all aspects of your employment. You agree to carry out your responsibilities honestly and diligently and to the best of your ability during your normal working hours.*

6.2 *You also agree not to make any statement or take any actions at any time which are intended to or likely to adversely affect our business or reputation.*

6.3 *You will be required to comply with our rules, policies and procedures which may be amended from time to time. We will consult with staff before any changes are made. All these matters are part of this agreement.*

7. **HOURS OF WORK**

7.1 *Are as required by the demands of the business. Additional hours shall be worked from time to time as we require in order to meet the demands of the position. Such hours to include availability to work where required on weekend.*

8. **REMUNERATION**

8.1 *You will be remunerated in accordance with the provisions in PART II of this agreement.*

17. **HEALTH, SAFETY AND WELFARE**

17.1 *We undertake to comply with the provisions of the Health & Safety in Employment Act 1992 concerning safety, health and welfare matters in respect of safety for all people working for Birchfield Minerals Limited.*

...

17.3 *It is your responsibility to work safely and to report any hazards, accidents or injuries to us as soon as possible.*

17.4 *If we require any safety equipment or clothing to be worn or used you must make sure you do so.*

*Health and Safety Plan To be Provided for you to read and sign acknowledgment.*

18. *TERMINATION OF EMPLOYMENT*

18.1 *In the event of termination of your employment the following conditions will apply:*

(a) *Where notice is given by either of us it shall be for 2 weeks, or less by mutual agreement.*

18.3 *Property. On termination of employment you agree to immediately deliver to Birchfield Minerals all property belonging to them including but not limited to documents, diaries, keys equipment, clothing, tools or other property within your possession or control.*

21. *MISREPRESENTATION*

21.1 *In entering into this Agreement we have relied upon your statements and representations in relation to your skills, knowledge and history. Should you have provided us with incorrect information or failed to provide us with information when required, this will be regarded as serious misconduct which could lead to your dismissal.*

...

23.4 *I, also acknowledge I will undertake to become fully familiar with the rules, policies and procedures referred to in this agreement and accept that I will observe them fully during my employment.*

*PART II SCHEDULE OF CONTRACTOR EMPLOYMENT*

1.1 *General confirmation*

- (a) *Candidate name: Leslie Asplet*
- (b) *Job title: Contractor – Maintenance Supervisor*
- (c) *Point of contact: Alan Birchfield*
- (d) *Remuneration: \$36.00 plus Gst for time on site less lunch break  
Work Vehicle supplied to travel to and from work.  
NO Personal Use.*
- (e) *Location: Dredge Road Ngahere*
- (f) *Commencement Date: 2/3/2009*

[10] The terms of the offer letter and the agreement between the parties are somewhat confused, in that they refer to both employment and a contractor relationship. It would appear that the agreement is a hybrid of an employment and independent contractor agreement, probably having started life as an employment

agreement. Putting terminological confusion apart, the agreement does include elements that could be construed as relating to an employment relationship, such as the right to dismiss for serious misconduct (section 21.1). However, these documents are not, in and of themselves, determinative of the real relationship between the parties and it is necessary to consider the reality of the relationship.

### **The factual realities of the relationship between the parties**

[11] Mr Asplet explained to the Authority that he had been working in engineering for around 30 years and had worked both as an employee and as a contractor during that period. He had worked through a corporate entity called *Classic Contracting* which he had used as a vehicle for his independent contractor work but had decided to register a limited liability company in the name of *Les A Engineering & Contracting Limited* when he found that the company name *Classic Contracting Limited* had already been taken. The Companies Office records show that Les A Engineering & Contracting Limited was incorporated on 18 May 2009. Mr Asplet said that he had been using the *Classic Contracting* name as a vehicle for around six years prior to that.

[12] Mr Asplet said that he started off working full time for Birchfield Minerals but at some point during the six month arrangement Mr Birchfield had reduced the hours of all workers to 40 hours a week. Mr Asplet said that this did not give him enough income so he decided to work four days a week for Birchfield Minerals and did work at the Pike River mine on Fridays. Although he said that this decision by him was the start of the relationship souring with Mr Birchfield, Mr Birchfield said that he had had no problem with this. Two relevant conclusions emerge from this fact; first, that Mr Asplet was allowed to carry out other work during the latter part of the relationship. Secondly, that Mr Asplet had initially been reliant on the work he was being given to do by the respondent, having no other work arranged when he entered into the arrangement.

[13] Mr Asplet invoiced Birchfield Minerals and included GST in those invoices. Mr Asplet confirmed that his contracting company was registered for GST.

[14] Mr Asplet said that he had his own ute but Mr Birchfield gave him the use of a company ute during the relationship as well as a telephone. Mr Birchfield explained that this was for convenience because he wanted Mr Asplet to be able to travel

directly to the dredge from home and because of the distance between the dredge and the workshop.

[15] Both parties agreed that Mr Birchfield would tell Mr Asplet what he must do every day. Mr Asplet took a regular lunch hour with the other staff member who worked in the workshop with him.

[16] Mr Asplet had his own tool box and supplied all his own hand tools. Consumables and large pieces of equipment, such as a lathe, were supplied by the respondent. However, Mr Birchfield agreed that a mechanic who was an employee of the company also provided his own hand tools, and that this was the norm with such trades. It was agreed between the parties that consumables were provided by the company because, otherwise, Mr Asplet would have to invoice for them which would have complicated matters. This was why fuel was also provided by the respondent.

[17] The men never discussed what would happen if Mr Asplet had been ill or whether he would be paid if he took leave, although Mr Birchfield gave evidence that he would not have paid Mr Asplet because he regarded Mr Asplet as a contractor, not an employee.

[18] Mr Birchfield explained that the reason he had decided to engage Mr Asplet as a contractor rather than as an employee was because someone had warned him not to employ Mr Asplet. Mr Birchfield said that the intention was to trial Mr Asplet and to have confirmed the arrangement after two months if Mr Asplet worked out. As it was, the relationship lasted six months, although Mr Birchfield said that he had always intended that Mr Asplet should remain as a contractor rather than become an employee at the end of the two month trial.

### **The three tests**

[19] Applying the control test, (which examines the extent to which the activities of Mr Asplet were controlled by the respondent) all the evidence suggests that Mr Birchfield decided what Mr Asplet should do on a day-to-day basis, although he did not closely supervise Mr Asplet. This, however, is often the way when someone with special skills is employed. Mr Birchfield also controlled what hours Mr Asplet would work, and reduced those hours partway through the arrangement. Taking into account the control test, then, I am satisfied that it points to Mr Asplet being an employee.

[20] Turning to the integration test, (which examines the extent to which Mr Asplet was integrated into the respondent's business) there does not seem to have been any significant difference in terms of how integrated Mr Asplet was into the workforce when compared with its employees. He took his lunch break at the same time as an employee, used the company's vehicle, telephone and large items of equipment. Mr Asplet was also allowed to order supplies on behalf of the company, using the company's order book. (Although Mr Birchfield alleges that Mr Asplet over-ordered supplies and kept some of them, this does not detract from the fact that Mr Asplet was originally trusted with the order book.)

[21] Taking into account the facts set out above, it would appear to me that the integration test also favours an interpretation of the relationship as one of an employee.

[22] Applying the fundamental or economic reality test, (which examines the extent to which Mr Asplet took on financial risk himself in providing his services) the fact that Mr Asplet routed the payment through his company suggests an independent contractor relationship. However, he did this only because he was told by Mr Birchfield that he was a contractor, not because he had any great desire himself to be an independent contractor. Also, his contracting company employed only Mr Asplet and no one else.

[23] The fact that Mr Asplet charged GST is also the mark of an independent contractor, but again, this appears to have been a function of the fact that Mr Birchfield wanted Mr Asplet to be a contractor. In addition, having registered his company for GST, he would have had no option but to have charged GST.

[24] Applying the fundamental test, whilst superficially it would appear that Mr Asplet was an independent contractor because he invoiced Birchfield Minerals through his own contracting company, this was merely to accommodate Mr Birchfield's preference for Mr Asplet to be a contractor and not an employee. Mr Birchfield agreed, for example, that if Mr Asplet had wanted to take time off and get someone else to carry out the work as his substitute, Mr Birchfield probably would not have agreed.

**The overall picture**

[25] When one steps back and looks at the arrangement as a whole, it would appear to be more strongly arguable that Mr Asplet was an employee of Birchfield Minerals rather than an independent contractor. I am particularly convinced of this in light of Mr Birchfield's agreement during the investigation meeting that he would have kept on Mr Asplet if the relationship had not gone wrong. The fact that Mr Birchfield allowed Mr Asplet to carry out other work for a different company on Fridays is no different from an employer allowing a part time employee to work for a different employer during their days off to top up their income.

**Next steps**

[26] Having concluded that Mr Asplet was an employee of the respondent, it will be necessary to set down the matter for a substantive investigation, the terms of which will be set out more fully at a telephone directions conference which will be held at a time and date to be agreed.

[27] It seems sensible to the Authority that, having established that Mr Asplet's relationship with the respondent was one of an employee, thereby accepting into the Authority's jurisdiction his complaint in relation to unpaid wages and failure to give notice, the respondent's counterclaim should also come within the jurisdiction of the Authority as the alleged unlawful retention of equipment arises out of an employment relationship. For the moment, the counterclaim resides with the Disputes Tribunal and the Authority shall communicate with the Disputes Tribunal with a view to the counterclaim being struck-out of that jurisdiction and being investigated in the Authority.

**Costs**

[28] It does not appear that either party has been legally represented at any time but the issue of costs are, in any event, reserved pending the determination of the substantive matter.

David Appleton  
Member of the Employment Relations Authority