

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 110
5525591

BETWEEN NATHAN CHARLES BERG
Applicant

A N D EMERGENCY.CO.NZ
LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: S Harvey, Advocate for the Applicant
G Mackley, Respondent Director
Investigation Meeting: 14 April 2015 at Auckland
Submissions Received: 14 April 2015 from the Applicant
14 April 2015 from the Respondent
Date of Oral Determination: 14 April 2015
Date of Written Determination: 15 April 2015

DETERMINATION OF THE AUTHORITY

- A. Nathan Charles Berg was an employee of Emergency.Co.Nz Limited**
- B. The parties are to confer about the amount of holiday pay owing. If there is no agreement, submissions on remedies regarding holiday pay from both parties are to be filed and served by 12 May 2015 at 3pm. I will issue a determination on the papers thereafter.**
- C. The applicant is directed to advise the Authority by 12 May 2015 3 pm whether he wishes to pursue an application for personal grievance.**
- D. Costs are reserved.**

Employment relationship problem

[1] Nathan Charles Berg seeks payment of holiday pay he alleges is owed by Emergency.Co.Nz Limited (the respondent) following termination of his employment.

[2] There is a sole issue for determination today, namely whether Mr Berg was an employee of the respondent. If he is not an employee I have no jurisdiction to determine his application. If he is an employee the matter can be determined by me including whether any holiday pay is due and owing.

Facts leading to dispute

[3] There was no dispute Mr Berg started work as a personal assistant with the respondent in March or April 2013.

[4] The respondent is a contractor to TV3 providing remote satellite broadcasting services. It provides a truck with a satellite dish which is driven to the broadcasting location.

[5] Mr Berg was trained by the respondent director, Geoffrey Mackley, and the previous personal assistant on the administrative tasks required. He worked Monday to Friday from 10am to 4pm on tasks specified by Mr Mackley.

[6] He was given a template by Mr Mackley for his invoices. Mr Berg changed the template to provide for deduction of PAYE. There were IRD Employer Deduction forms and schedules produced and Mr Berg's personal tax summaries which showed Emergency.Co.Nz Limited as the employer or payee and PAYE being paid on behalf of Mr Berg to the Inland Revenue Department. The respondent accepted it may have signed some of the employer deduction forms and/or schedules.

[7] There was no employment agreement between the parties.

[8] Mr Berg's employment ended on or about October 2014.

The Law

[9] An employee is defined in s.6(1) of the Employment Relations Act 2000 (the Act) as "*any person ... employed by an employer to do any work for hire or reward under a contract of service.*"

[10] In deciding whether Mr Berg is an employee or not, I must determine the real nature of the relationship between the parties. This includes considering all relevant matters including any matters that indicate the intention of the parties. I cannot treat as determinative any statement by the parties describing the nature of their relationship.¹

[11] All relevant matters may be determined by applying the control, integration and fundamental tests.² The control test considers the degree of control or supervision exercised by the employer over the alleged employee's daily work.³ The integration test considers whether the work performed by the alleged employee is an integral part of the business and whether he or she has effectively become “part and parcel of the organization”⁴ The “fundamental” test considers whether the alleged employee engaged themselves to perform the services with the employer as a person in business on their own account.⁵

Determination

[12] The respondent submits there is no employment relationship because Mr Berg determined what he did or did not do and always had a *back-up* worker who could take over in his absence. This is the way things were always done and Mr Berg controlled what he did and did not do. It denied Mr Berg was integral to his work because there was always a back-up employee. It submitted Mr Berg could always arrange for someone else to do his work if he wanted to take time off. The evidence Mr Berg was in business on his own account were the invoices, the lack of timesheets and the fact he could arrange when and where to take time off for holidays, without reference to the respondent. It admitted the invoices and IRD documents showed deduction of payment of PAYE but denied this was inconclusive. The tax situation needed to be reviewed and Mr Berg would be paying an independent contractors tax rate following the review.

[13] I find there was an employment relationship between the parties because:

¹ Refer s.6(1), (2) and (3) of the Act

² [Curlew v Harvey Norman Stores \(NZ\) Pty Ltd](#) [2002] 1 ERNZ 114 (EmpC) at [46]

³ [Bryson v Three Foot Six Ltd](#) [2003] 1 ERNZ 581 (EmpC)

⁴ [Bank voor Handel en Scheepvaart NV v Slatford \(No 2\)](#) [1953] 1 QB 248 (CA) at 295

⁵ [Bryson v Three Foot Six Ltd](#) [2003] 1 ERNZ 581 (EmpC) at [52]

- (a) The respondent director, Geoffrey Mackley, and/or the respondent contractor, TV3, controlled the work Mr Berg would undertake each day;
- (b) Mr Mackley paid a retainer to Mr Berg while overseas to undertake or organise others to do work required by TV3;
- (c) Mr Berg was integral to the respondent's business because Mr Mackley relied upon him to be available for work when he was overseas which was often;
- (d) Mr Berg required training on the administrative tasks he did. The respondent was not purchasing skilled services from him.
- (e) The invoices do not conclusively show one way or the other whether he was employed or an independent contractor. They both refer to independent contracting and payment of PAYE;
- (f) Mr Mackley confirmed he approved the invoices for payment and may have signed the IRD Employer Deduction forms authorising payment of PAYE for Mr Berg;
- (g) I do not accept there was a discussion between Mr Mackley and Mr Berg that he was an independent contractor prior to starting work. The first time such a conversation was raised was at hearing and there were no date, time or details about that conversation given, except Mr Mackley's certainty it must have occurred.
- (h) Mr Berg's job was not short term. It was a long term position which continued over the course of two years. I accept Mr Berg's evidence that he had no other employment whilst working for the respondent.
- (i) Although Mr Mackley made reference to an industry practice of contracting due to the short term nature of work, there was no evidence this pertained to personal assistants of satellite services contractors in the television industry. This may be more common for actors and other workers in the film industry, but it is not necessarily the case here.

Orders

[14] I determine Nathan Charles Berg was an employee of Emergency.Co.Nz Limited.

[15] I direct the parties are to confer about the amount of holiday pay owing. If there is no agreement submissions on remedies regarding holiday pay from both parties are to be filed and served by **12 May 2015 at 3pm**. I will issue a determination on the papers thereafter.

Addendum

[16] I had apprehended this application was only about recovery of holiday pay. At the end of the delivery of my determination, the applicant referred to a personal grievance. His statement of problem refers in its remedies to a personal grievance but does not specifically plead that as a cause of action. The applicant is directed to advise the Authority by **12 May 2015 3 pm** whether he wishes to pursue an application for personal grievance. If so, he shall be required to properly plead this in an amended statement of problem. If not, the application shall be dismissed following determination of the above remedies (if required).

[17] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority