IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 308/10
5164535

	BETWEEN	EMILY BELL-BOOTH Applicant
	AND	WINGATE + FARQUHAR LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Hugh Fulton, counsel for Applicant Sarah-Jane Neville, counsel for Respondent
Investigation Meeting:	20 October 2009
Submissions Received	30 October, 17 and 30 November 2009
Determination:	30 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The substantive claims of the applicant Ms Emily Bell-Booth are personal grievances and an action to recover arrears of wages. She seeks reimbursement of lost wages and compensation arising from the contended dismissal and disadvantage grievances, and she claims the amount of arrears alleged.

[2] For Ms Bell-Booth to have her claims investigated and determined by the Authority they must be underpinned by a relationship that is or was one of employment between her and the respondent Wingate + Farquhar (W + F).

[3] W + F has denied the existence of any employment relationship at any time with Ms Bell-Booth. It says she was an independent contractor, or was self-employed by the company at all material times.

This issue going to the jurisdiction of the Authority has been addressed at a preliminary investigation meeting followed by submissions in writing provided by the parties through counsel Mr Fulton and Ms Neville.

Commencement with W + F – the 2005 agreement

[4] Ms Bell-Booth is a professional architect specialising in interior design. She obtained an honours degree in Architecture and after qualifying in 2001 worked, apparently as an employee, for a number of architectural firms including some offering interior design services.

[5] While working for one such firm Ms Bell-Booth was approached in 2005 by Mr David Wingate. He is a director of W + F which is an architectural firm offering interior design services. A few weeks later after discussions Ms Bell-Booth commenced working for the firm and on 7 September 2005 signed an agreement.

[6] In that agreement W + F is referred to as "the company" and Ms Bell-Booth as "the contractor." The agreement is expressed to have commenced on 29 August 2005, the day Ms Bell-Booth started work for W + F, and to terminate 12 months later on 28 August 2006. It provides for architecture and interior design work, including documentation and project and contract management, to be carried out by Ms Bell-Booth under programmes to be agreed by the parties.

[7] Remuneration is provided to be by way of a "fee" paid at $30 per hour, exclusive of GST. Handwritten and initialled changes show the fee was increased by agreement from $27.50.

[8] Hours of work are expressed as follows:

> *Estimated hours to be worked are 46 weeks at 40 hours per week. Additional hours may be worked as required and agreed by both parties. The same rate will apply to additional hours.*

[9] The payment of remuneration is expressly to be made weekly by direct transfer to Ms Bell-Booth's bank account "following receipt of invoice."

[10] The agreement provides that W + F shall provide computer hardware and software appropriate for executing the interior design work. As to income tax and ACC levies, the agreement provides:

> *The contractor is responsible for the payment of all Income Tax, GST and ACC premiums.*

[11] A further clause provides that W + F is to carry professional indemnity insurance to indemnify the company against any legal action taken against Ms Bell-Booth, and that she is to be insured by the company for any claims of public liability during the term of the agreement.

[12] The final clause provides for termination of the agreement as follows:

> *In the event that the contract work is not required then the company may terminate this agreement on four weeks notice and pay to the contractor for all work carried out to (or anticipated by) that date.*
>
> *In the event that the contractor is unable to carry out the contract work then the contractor may terminate this agreement on four weeks notice.*

[13] The agreement makes no provision for annual holidays, statutory public holidays or sick leave whether paid or unpaid. Neither does it expressly or impliedly refer to the Employment Relations Act 2000 or contain personal grievance or other dispute resolution procedures that are to be made available to all employees under that legislation.

[14] The 2005 agreement, the express terms of which on their face are relatively simple and straightforward, after execution was performed by the parties without significant variation, except for an increase in fees under it from $30 to $33 per hour, until about April 2009. Ms Bell-Booth then raised a personal grievance claiming that she had been unjustifiably dismissed by W + F following a reduction in the amount of work being provided to her. The company however claimed that it had less and less work to offer her, as by then the deepening recession had begun to affect demand for its architecture and interior design services.

[15] It is significant in this case that W + F had not been opposed to Ms Bell-Booth becoming an employee (if she was not one already) and to facilitate change in that regard had provided her with documentation outlining proposed terms of employment. Ms Bell-Booth says that she became confused by her discussions with Mr Wingate about becoming an employee and became concerned that she might be manipulated or exploited. Her evidence was that as a result she chose to leave things as they were under the terms of the September 2005 agreement, which described her as a contractor.

[16] Ms Bell-Booth acknowledged in her evidence that consistently with the representation made of her in the 2005 contract as being a "contractor," that is how she regarded herself, at least until 2009 when work from W + F began dropping off and she took legal advice that led to the raising of a grievance. She said she had known from commencement that her position had been constructed around her being in an independent contractor relationship with W + F. In evidence Ms Bell-Booth also referred to an occasion in late 2008 when she told Mr Wingate that she wished she was an employee.

[17] In early 2007 an offer of employment was made to Ms Bell-Booth by W + F. For her consideration she was provided with a draft individual employment agreement and a draft independent contractor's agreement. She advised W + F that she wished to continue providing her services as a contractor. Changes to the terms of her independent contractor relationship were discussed and an amended contract was provided to her near the end of 2007. Although she did not sign the amended draft contract the only issue she raised was about the hourly rate of pay. Subsequently by agreement this was increased in April 2008 from $30 to $33 per hour. At this new rate Ms Bell-Booth continued invoicing W + F for her architecture/interior design services.

[18] The preliminary issue going to the Authority's jurisdiction to investigate Ms Bell-Booth's claims must be determined under s 6 of the Employment Relations Act 2000. The statute provides that for the purposes of deciding whether a person is employed by another under a contract of service, the Authority must determine the real nature of the relationship between the persons, and in doing so:

> *(a)* *Must consider all relevant matters including any matters that indicate the intention of the persons; and*
>
> *(b)* *Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[19] The leading case on s 6 of the Act is *Bryson v. Three Foot Six Ltd* (2005) 3 NZLR 721. From the judgment of the Supreme Court in that case and earlier judicial decisions approved of by the Court, the principles to be applied are as follows:

(1) The Authority 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 services 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.

[20] The summary above of applicable principles was recently given by the Employment Court in *Poulter v. Antipodean Growers Ltd* [2010] NZEMPC 77, 17 June 2010, at para.[20] by Judge Perkins.

[21] The Employment Court in its judgment also concluded that ultimately the approach necessarily to be taken under s 6(2) of the Act is for the Authority (or the Court) to gain an overall impression of the underlying and true nature of the relationship between the parties.

[22] I find that the actual intention of Ms Bell-Booth and W + F, as expressed by them in the agreement of 7 September 2005, while not determinative should in the particular circumstances of this case be given greater weight as an indicator of the real nature of the relationship than in other cases. This is not a case where a party contending for an employment relationship, such as Ms Bell-Booth is, was naïve and uninformed about the legal and commercial differences between a contract for services and a contract of service. Neither is it a case where there was a significant imbalance of power between the contracting parties, such that an applicant party contending for the latter contract was at a disadvantage when choosing the form of work relationship that suited him or her best.

[23] I consider it likely that Ms Bell-Booth during her professional training at university over several years received some instruction in the law of contract and in the way that architects may practice their profession both as employees and on their own account, whether in partnership or as a director of a company. In any event I

accept from the evidence that Ms Bell-Booth used an opportunity given to her to take advice about the contract she was offered before entering into it on 7 September 2005. She discussed the proposed contract with a family member, who was a solicitor, and with her father who was in business providing services as a project manager, and she discussed the arrangements, particularly GST issues, with her own accountant and the accountant for W + F.

[24] Ms Bell-Booth was I am satisfied aware from the beginning of her relationship with W + F of the benefits of being a contractor. They included the ability to claim for GST, if registered and, significantly in her case, to be "her own person" when practicing her profession rather than being too much under the control and direction of an employer. She claimed the expenses of running a home office and for text books she bought.

[25] After executing the 2005 agreement Ms Bell-Booth under its terms regularly invoiced W + F, either weekly or later fortnightly, for her fee for time worked. She made arrangements for her remuneration to be paid into two separate accounts, one opened for the purposes of keeping aside sufficient money for remission to the IRD as withholding payments against her tax liability. In that regard she was treated by W + F as a contractor rather than an employee subject to PAYE. No tax was withheld by W + F or remitted to the IRD by the firm. Ms Bell-Booth regularly paid to the IRD tax due on that basis.

[26] I find that from the advice she sought and took, including professional legal and accounting advice, Ms Bell-Booth more than adequately understood the nature of the relationship offered to her by W + F and the differences between being a contractor and an employee. I find that she made a clear and free choice to accept the offer for her to become an independent contractor, or self-employed, according to the description given in the document of the parties' arrangement.

[27] I do not accept that Ms Bell-Booth's decision in 2007/08 not to enter into an employment relationship was based on confusion created by Mr Wingate or anyone else from W + F. I consider that her decision was based on her own assessment of the advantages and disadvantages of self employment versus a contract of service. Had the terms proposed by W + F in respect of the latter been more favourable then it is likely Ms Bell-Booth would have been more inclined to accept that relationship. Her acceptance or rejection of any particular terms offered was a bargaining or negotiation

matter. The adequacy or quality of terms offered is not of much relevance in this case, assuming they met legal minima.

[28] I find that not surprisingly the major interest of Ms Bell-Booth was in the hourly rate she was to be paid rather than in the form of contractual arrangement that rate was to be a term of.

[29] The status of Ms Bell-Booth, whether as a contractor or an employee, is not to be presumed. The Authority is required to objectively assess the real nature of the relationship. It may attach such relevance to the parties actual or presumed intentions as the circumstances require and it may have regard to the traditional tests such as control and integration.

Intention of parties

[30] I find that the clear intention of the parties was that Ms Bell-Booth throughout her engagement was to be a contractor to W + F. Although later to Mr Wingate she expressed regret that she was not an employee, Ms Bell-Booth did not seek to change to her status even when there was an opportunity offered to do so.

[31] I do not consider this is a case where a contract of service somehow evolved or developed out of a contract for services through changes in the conduct of the parties. While Ms Bell-Booth may have wanted to become an employee she did nothing to make that her wish come true or implement any change of mind or intention she may have had.

Control

[32] As to the control test, it must be considered against the circumstance that Ms Bell-Booth was a qualified, trained and experienced professional person. The cases have indicated there is a distinction to be drawn between a party such as W + F directing the work to be done by a party such as Ms Bell-Booth, and directing how and when that work is to be done. I am satisfied that W + F left it to the professional skill and judgment of Ms Bell-Booth as to how she discharged work the firm assigned to her. In this regard she had a considerable degree of autonomy although, as could be expected, W + F reviewed her work, or made itself aware of what she had done, and if necessary could have critiqued that work against the requirements of the firm's client for which it was done.

[33] Although there were undoubtedly elements of control by W + F over Ms Bell-Booth's work they point to the relationship being more of a dependent contractor than independent contractor relationship, but still outside of an employment relationship.

Integration

[34] The integration test must be considered against the circumstances that W + F was a firm providing professional services delivered by qualified, trained and skilled professionals. There was in fact a mixture of work relationships among the staff but the type of contract each member had was not disguised or hidden in any way. The agreement entered into by Ms Bell-Booth with W + F in September 2005 was an arrangement which, at the beginning at least, was one of mutual satisfaction to those contracting parties. Beyond providing her professional services for the jobs or briefs given to her, Ms Bell-Booth had no obligation to train or supervise staff or to market the firm's services in an effort to bring in new clients. She was I find several times reminded that she had the opportunity of working for other clients of her own if she wished and there were occasions when she did that. Ms Bell-Booth was free to expand her practise with other clients of her own if there was a market for her services. It was her decision as to how much of her time she devoted to work provided by W + F.

[35] I do not consider that much importance can be attached to the so-called face of the firm as W + F may have deliberately presented. In my view this amounts to nothing more than the wish of any firm of professionals to present itself to its clients as a cohesive unit or organisation able when required to call upon the skills of specialists to assist in the performance of client's work. The important thing for the firm was to portray itself as having on hand the human resources to be able to efficiently, economically and in a timely way deliver work it was engaged to perform. It is unlikely to have been a matter of real significance to any client as to whether the work was performed by someone who was an employee of W + F or a contractor to it.

[36] What is significant is that the minds of Ms Bell-Booth and W + F were at one over the contractual arrangement they intended to apply to themselves. On any consideration it must be found that there were degrees of control and integration but in my view they were not so great as to displace the clear and strong expression of intention by the parties as to the nature of their relationship.

[37] The same applies to the fundamental test and its application. Ms Bell-Booth was not an investor in W + F and did not stand to gain by increasing her effort. Her remuneration was directly proportionate to the time she spent on her work rather than the result she achieved by it.

[38] As with control, there were features or indications present suggesting that the relationship was one of employment but in my view and my finding, the description the parties gave to Ms Bell-Booth as a "contractor," was much closer to the reality of their arrangement than "employee."

[39] From the evidence, the overall impression gained by the Authority of the underlying and true nature of the relationship between Ms Bell-Booth and W + F was one of a contract for services.

Determination

[40] For the above reasons the Authority determines the real nature of the relationship between W + F and Ms Bell-Booth was that of a contract for services.

[41] It must follow that any claims Ms Bell-Booth has in relation to the performance of that contract or the termination of it must be determined in a jurisdiction other than the Authority.

Costs

[42] Costs are reserved. If counsel for the parties are unable to resolve the issue, application may be made in writing by W + F within 21 days of the date of this determination for an order from the Authority. Ms Bell-Booth shall have a further 21 days in which to respond, if an application is made.

A Dumbleton
Member of the Employment Relations Authority