

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 133
5390391

BETWEEN MICHAEL BOSKETT
 Applicant

AND CLAUDIA KALTENSTADLER
 First Respondent

 and

 HARAKEKE TRUST
 Second Respondent

Member of Authority: Christine Hickey

Representatives: Janette Walker, advocate for Applicant
 Mark Donovan, Counsel for the Respondents

Investigation Meeting: 21 July 2014

Determination: 1 September 2014

DETERMINATION OF THE AUTHORITY

- A. Michael Boskett's claims are dismissed.**
- B. Michael Boskett was not an employee of Claudia Kaltenstadler or of the Harakeke Trust. The Authority does not have the jurisdiction to investigate and determine Mr Boskett's claims.**

Employment relationship problem

[1] Michael Boskett claims that he was unjustifiably dismissed from employment with Claudia Kaltenstadler which began sometime between May and July 2011. Ms Kaltenstadler terminated Mr Boskett's work in May 2012.

[2] Mr Boskett claims that there were two types of employment. For his dismissal from the first he claims \$3,000 reimbursement for lost wages in lieu of

accommodation and \$5,000 in compensation for humiliation, loss of dignity and injury to his feelings.

[3] For his dismissal from the second Mr Boskett claims \$12,100 in unpaid wages, \$12,000 reimbursement for lost wages after dismissal and \$10,000 in compensation. Mr Boskett also claims unpaid vehicle expenses of \$19,875.23 but as that claim was first raised in his witness evidence and no evidence has been provided in relation to that claim I will not determine it.

[4] Mr Boskett also claimed that he needed access to retrieve tools, equipment and property from a number of premises owned by Ms Kaltenstadler. By the time of the investigation meeting this was no longer claimed and I doubt whether the Authority would have had jurisdiction to order Ms Kaltenstadler to give Mr Boskett access to all of her premises.

[5] Ms Kaltenstadler is a director of Harakeke Administration Limited which is the sole trustee of the Harakeke Trust. She says that she never employed Mr Boskett but engaged him as a contractor in her capacity with the Harakeke Trust and not in a personal capacity.

[6] The Harakeke Trust (the Trust) is joined as the second respondent. Ms Kaltenstadler stated in her Statement in Reply that she had not employed Mr Boskett but had engaged him as an independent contractor doing work for the Trust. Mr Boskett applied to join the Trust belatedly in his witness statement. However, he was not represented until a few weeks before the investigation meeting and he applied to join the Trust once he got advice and representation. I do not consider the Trust or Ms Kaltenstadler is disadvantaged by the addition of the Trust as a respondent.

Issues

[7] There are three preliminary issues that need to be considered before the Authority can consider Mr Boskett's personal grievance claim:

- (i) Was Mr Boskett an *employee* within the meaning of s 6 of the Employment Relations Act 2000 (the Act)? If not the Authority does not have jurisdiction to determine a claim of unjustified dismissal.

- (ii) If Mr Boskett was an employee, who or what entity was his employer?
- (iii) Did Mr Boskett raise a personal grievance within 90 days of his dismissal? If not the Authority does not have jurisdiction to determine a claim of unjustified dismissal.

[8] It is only if I determine that Mr Boskett was an employee of Ms Kaltenstadler or of the Trust that I need to consider whether he raised his personal grievance within 90 days of his dismissal.

Determination

[9] The definition of *employee* is contained in s 6 of the Act which reads in part:

- (2) *In deciding ... whether a person is employed by another person under a contract of service¹, the ... Authority ... must determine the real nature of the relationship between them.*
- (3) *For the purposes of sub-section (2) the ... Authority –*
 - (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.*

[10] In *Bryson v. Three Foot Six Limited*² the Supreme Court said *all relevant matters* include:

- The written and oral terms of the contract, including terms indicating the party's intentions;
- Any divergences from those terms in practice;
- The day-to-day implementation of the contract; and
- The tests of control and integration, and whether the contracted person is effectively working on his or her own account (the fundamental test).

¹ Rather than a contract for services or some other business arrangement.

² [2005] ERNZ 371

[11] The ultimate decision about whether someone is an employee *depends upon the entire factual matrix*.³

What were the arrangements between the parties and what work did Mr Boskett do?

[12] The starting point for determining whether the arrangement between Mr Boskett and Ms Kaltenstadler was an employer/employee relationship is an examination of the contract between the parties. That would be evidence of the intention of the parties at the beginning of the relationship. However, there is no written contract or agreement between them. Therefore, I will examine what oral agreements and practical arrangements were in place.

[13] In mid-2011 Ms Kaltenstadler and Mr Boskett agreed that he would move onto her property in Upper Moutere and that he and his children could live there⁴ with her and her children in exchange for Mr Boskett doing 10 hours a week work on the property, principally gardening and mowing lawns. They agreed that the value of the accommodation was \$250 per week, with the hourly rate for work valued at \$25 per hour. From time to time Mr Boskett also looked after Ms Kaltenstadler's children.

[14] Ms Kaltenstadler asked Mr Boskett if he wished to earn some money by assisting with cleaning up and repairing a rental property she bought in Nelson. He did so for some time. According to Mr Boskett when they first discussed him doing same paid work outside of his work for accommodation:

Claudia said she did not want to be involved in employment matters and that I would invoice her on a contract basis. I was not registered for GST.

[15] Mr Boskett started by supplying invoices to the Trust from an entity called AAAA Foray Enterprises. He supplied at least three invoices in that name. The invoiced amounts included GST and a GST number. Mr Boskett also invoiced for mileage costs for using his own vehicle for work purposes.

[16] Mr Boskett's recall of Ms Kaltenstadler telling him that she did not want to be involved in employment matters and his beginning the relationship by invoicing the Trust are both indicative of an independent contracting arrangement, rather than that of an employer/employee at the beginning of the relationship.

³ Ibid at paragraph [21]

⁴ Mr Boskett's children stayed there for three out of four weekends.

[17] The fact that Mr Boskett invoiced the Trust is indicative that Mr Boskett was aware that Ms Kaltenstadler did not personally engage his services.

[18] Mr Boskett says he did not furnish a tax return and has not paid tax for the 2012 year. No PAYE was paid for Mr Boskett.

[19] Mr Boskett and Ms Kaltenstadler then agreed that Mr Boskett would manage the renovation for resale or renting of seven properties in Blenheim that Harakeke Administration Limited owned. Mr Boskett spent most of his working week in Blenheim. Mr Boskett liaised with the Nelson Council on building consent issues and engaged tradespeople such as builders and painters to do work on the houses. The Harakeke Trust provided a CRT card on its account to allow Mr Boskett to purchase building materials. Mr Boskett used some of his own tools in renovating the houses.

[20] In September 2011 the parties decided Mr Boskett would be paid \$1,000 per week. Ms Kaltenstadler refers to that payment as a weekly retainer. She understood that the \$1,000 included GST and set up an automatic payment to Mr Boskett's account. It was also agreed that Mr Boskett would get 10% of any profits made on the sale of the Blenheim properties.

[21] Ms Kaltenstadler expected Mr Boskett to produce weekly invoices, but he did not do so.

[22] Mr Boskett says that he consulted his accountant and that he was advised not to charge GST as he was not registered for GST. Ms Kaltenstadler says that she assumed that he was registered for GST as he claimed it in the first three invoices. I find that if Mr Boskett did have such a conversation with his accountant he did not convey his accountant's advice to Ms Kaltenstadler.

[23] When the payment arrangement became an automatic weekly one Mr Kaltenstadler believed it included GST and the Trust claimed GST back. However, Mr Boskett was not registered for GST. The GST number he included on the first three invoices was no longer validly registered and had not been even when he issued the first three invoices.

[24] Ms Kaltenstadler, or the Trust or Harakeke Administration Limited, leased a vehicle for Mr Boskett to use as it was more cost effective than paying him mileage costs. However, in about November 2011 Mr Boskett had an accident in the vehicle

which landed in a river and Ms Kaltenstadler did not lease another vehicle for him after that. After that Mr Boskett used his own vehicle again and paid for his own fuel. He claims that Ms Kaltenstadler agreed that he would be reimbursed at the rate of 87 cents per kilometre. Ms Kaltenstadler denies that she agreed to reimburse him for mileage after the leased vehicle was damaged. Mr Boskett did not claim any mileage reimbursement again until after the working relationship was over.

[25] Mr Boskett leased two of the Blenheim properties for \$900 per week on the understanding that he would sub-let the properties to vineyard workers for the season. Mr Boskett was in charge of paying the power and gas bills and ensuring the lawns and gardens were done and the properties were cleaned. Ms Kaltenstadler says Mr Boskett received \$1,980 per week in rent for the two properties and was entitled to retain any profits. He did this for some weeks.

[26] Mr Boskett disagrees with the figures Ms Kaltenstadler gave for the two properties but agrees they did have such an arrangement.

[27] In March 2012 Mr Boskett asked for a letter from Ms Kaltenstadler to give to his bank. On 16 March 2012 she wrote:

I am the owner/director of Harakeke Administration Ltd, I am a private Investor in the business of renovating houses that I buy, sell and rent.

Michael Graham Boskett is permanently contracted to my company as my Project Manager. He is presently managing the renovation of 7 residential properties that I own in Blenheim.

Mr Boskett is paid a weekly retainer of \$1000.00, plus expenses.

In addition to the weekly retainer Mr Boskett is paid a percentage of the profit made on each transaction, this amount is variable but would equate to approximately 10% per transaction.

Mr Boskett also manages and maintains my lifestyle block in Upper Moutere. For this service Mr Boskett is paid \$250.00 for an average of 10 hrs work per week. In contra Mr Boskett receives accommodation, food, telephone, internet and electricity, at my property in Upper Moutere.

[28] Invoices created after Mr Boskett's work was ended are addressed to Ms Kaltenstadler from Mr Boskett and do not include GST.

[29] I consider that even once Mr Boskett began to be paid weekly by Ms Kaltenstadler the fact that he was managing two of the properties for his own

financial benefit, and not for Ms Kaltenstadler's benefit or that of the Trust or Harakeke Administration Ltd, points towards him being an independent contractor rather than an employee.

[30] Ms Kaltenstadler's letter refers to Mr Boskett as being *permanently contracted* to her company, and while that is not determinative I consider the fact that Mr Boskett did not question the use of the word *contracted* and ask for the letter to say he was employed points to his understanding at the time that he was a contractor and not an employee.

[31] The reference to Mr Boskett as a project manager is a neutral factor which does not support a conclusion of an employee/employer or an independent contracting arrangement.

[32] The CRT card and account being in the name of the Trust points to Mr Boskett being aware that his work on the Blenheim properties was not for Ms Kaltenstadler personally but was for the Trust.

[33] The fact that Mr Boskett was entitled to claim some expenses from Ms Kaltenstadler's business is a neutral factor.

[34] However, the receipt of pay of a fixed amount by automatic payment and without invoices being issued is a factor that tends towards the arrangement being one of employer/employee.

The control and integration tests

[35] These traditional tests assist in the analysis of the real nature of the relationship between the parties. I will examine how much control Ms Kaltenstadler or the Trust exerted over Mr Boskett's work and how integrated Mr Boskett was into the general work of Ms Kaltenstadler or of the Trust.

[36] Mr Boskett says that Ms Kaltenstadler had a high level of control over his work. Ms Kaltenstadler says she made decisions about what properties were bought for improvement and what work needed to be done on each property. Ms Kaltenstadler remained in Upper Moutere most of the time. Both parties agree that they would discuss what needed to be done on about a weekly basis. However, Ms Kaltenstadler says Mr Boskett was free to decide how to achieve the aims she had for each of the Blenheim properties.

[37] Ms Kaltenstadler did not control the number of hours Mr Boskett worked while in Blenheim, where he decided to work on a particular day and how he undertook the work including what materials he bought. That tends to suggest that there was less control on a day to day basis than might be expected in an employer/employee relationship.

[38] Ms Kaltenstadler's decision-making powers arose out of control and ownership of the properties but are a neutral factor which does not support either an employee/employer relationship or that of an independent contractor.

[39] Ms Kaltenstadler says she decided to offer Mr Boskett a 10% share of the profit in each of the Blenheim properties to increase his commitment to the projects. That is a factor that does not necessarily lean towards an employee/employer relationship. Employees can have profit sharing arrangements although such arrangements are not exclusively those of an employer/employee relationship.

[40] The control and integration tests do not assist in conclusively determining whether or not Mr Boskett was an employee.

Fundamental test/economic reality test

[41] I consider that the first arrangement – that of accommodation in exchange for work done on the property - was not in the nature of a business arrangement but an arrangement made between friends. I do not consider that Ms Kaltenstadler or Mr Boskett intended to enter into legal relations when they agreed to the arrangement. There was never an intention to become employer and employee at that stage. It was an arrangement that assisted both of them having both recently come out of long term relationships. That is evidenced by the fact that from time to time Mr Boskett cared for Ms Kaltenstadler's children instead of or in addition to gardening and outdoor work. There was no employer/employee relationship that covered the accommodation arrangement.

[42] Mr Boskett provided the Authority with an audio recording of a conversation between him and Ms Kaltenstadler on 21 June 2012, after the work arrangement had been terminated. Ms Kaltenstadler says that during that conversation she reminded Mr Boskett that she had not been his employer and that he was a contractor and Mr Boskett did not say that she was wrong and that he had been an employee. I have listened to the recording and there are two times that Ms Kaltenstadler reminds

Mr Boskett that he had been an independent contractor and not an employee. Mr Boskett did not correct her either time.

[43] When I stand back and take into account the second phase of arrangements - once Mr Boskett began working for money - and how the relationship worked in practice, I find Mr Boskett behaved more as if he was engaged in business on his own account, for the following reasons:

- Ms Kaltenstadler told him she did not want him to be an employee and he agreed to undertake the work on that basis,
- He issued invoices,
- He claimed GST on those invoices,
- He made income personally from two of the Blenheim properties with Ms Kaltenstadler's knowledge and agreement,
- He was aware that Ms Kaltenstadler was not paying tax on his behalf.

[44] Mr Boskett was not an employee of Claudia Kaltenstadler and therefore the Authority has no jurisdiction to consider his claim of unjustified dismissal. Mr Boskett was engaged as an independent contractor by the Harakeke Trust or by Harakeke Administration Limited.

[45] The Authority has no jurisdiction to investigate and determine Mr Boskett's claims against Ms Kaltenstadler or the Harakeke Trust.

Christine Hickey
Member of the Employment Relations Authority