

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 202
5403967**

BETWEEN NEVILLE BRADFORD
 Applicant

AND EARTH CREST LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Jill Ward, Advocate for Respondent

Investigation Meeting: 18 April 2012 at Whangarei

Submissions received: 26 April 2012 from Applicant
 from Respondent

Determination: 20 May 2013

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] This determination addresses the preliminary issue of whether the Applicant, Mr Neville Bradford, was an employee of the Respondent, Earth Crest Limited (Earth Crest), or an independent contractor during the period he carried out work for Earth Crest.

[2] Mr Bradford claims he was unjustifiably dismissed by Earth Crest. Only employees can bring an unjustifiable dismissal personal grievance claim in accordance with s 103 of the Employment Relations Act 2000 (the Act). Mr Bradford claims that he was an employee of Earth Crest during the period January to June 2012 when he carried out work for Earth Crest.

[3] Earth Crest denies that Mr Bradford was an employee and claims that he was an independent contractor during the period January to June 2012 when he carried out work for Earth Crest.

Issues

[4] The preliminary issue for determination before the Authority is whether Mr Bradford was an employee or an independent contractor during the period he was working for Earth Crest.

Background Facts

[5] The Kingdom of Zion (the Park) is a privately owned zoo housing big cats of varying species, which had been acquired out of receivership by Zion Wildlife Kingdom Limited. Earth Crest manages the Kingdom of Zion on behalf of Zion Wildlife Kingdom Limited.

[6] Mr Bradford said he had been approached by Mr Ian Stephenson who was one of the directors of Zion Wildlife Kingdom Limited, the accountant for Earth Crest, and also Mr Bradford's own personal accountant, to assist with the initial takeover of the Park with the possibility of being retained after that if required.

[7] Mr Stephenson said he had known Mr Bradford was available to assist with the Park takeover, and he had discussed this with Ms Suzanne Eisenhut, sole Director of Earth Crest.

[8] Mr Bradford confirmed that he had been subject to a 'No Asset Procedure' (NAP) which prohibits an un-discharged person from being self-employed, therefore in accordance with the NAP he could work only as an employee.

[9] Mr Stephenson said he had known about Mr Bradford's NAP and had also discussed this with Ms Eisenhut, advising her that Mr Neville had no option but to work as an employee.

[10] Mr Stephenson said it had been agreed with Ms Eisenhut that Mr Bradford would work as a full-time Grounds man at an hourly rate of \$18.00, and that he would

live onsite with the costs of rental, power and telephone costs being paid by Earth Crest.

[11] Mr Bradford said he had commenced working at the Park on 30 January 2012, and had completed a tax code declaration form and signed it on 18 February 2012. Mr Bradford said he had understood that PAYE was being deducted from the payments made to him, and that the wages deposited into his bank account reflected the hourly rate and net figure after PAYE was deducted. Mr Bradford said he had not been aware that Earth Crest had not forwarded the PAYE amounts to the IRD.

[12] Mr Stephenson explained that he had arranged for the employees at the Park, including Mr Bradford, to complete the relevant IRD forms which had then sent to Ms Eisenhut who had been managing the payroll at that time. Mr Stephenson said that he had believed Ms Eisenhut had filed the IRD forms; however she had not done so, and that he had worked to correct this situation on or at some time after the end of July 2012.

[13] Mr Bradford said that as cash flow had been poor prior to the Park's planned re-opening date at Easter 2012, he had offered to defer his wage payments until the end of February 2012, in recognition of which he was to receive 20% uplift in the hourly rate of his pay.

[14] Earth Crest submitted that Mr Bradford had been engaged as a contractor, and that the initial payments made to Mr Bradford on 9 March 2012 had been paid to 'Getting Hire' which was a trading arm of Omega Trust, a company owned by Mr Stephenson.

[15] Wage records provided to the Authority appear to indicate a part payment to Mr Bradford of wages and a contract rate, and show a calculation in respect of PAYE. There are also calculations in respect of holiday pay. The wage records are accompanied by an email from Mr Bradford to Ms Eisenhut dated 23 May 2012 which states:

Hi Suzanne,

I have scanned and copied the ical to jpeg format so you can open them. Ian's take on it is as below, if works for you. This would mean once we have the phone/internet, power and

accommodation factored it will be one deposit as wages and the balance as per invoice from Getting Hire to earth Crest ...

[16] Mr Bradford said his wage payments had been made direct into his bank account and he had received no other payments. In relation to the 23 May 2012 email Mr Bradford said that due to fluctuations in Earth Crest's cash flow, the payments to him had been sporadic, and a proposal had been made as outlined in the email dated 23 May 2013 to Ms Eisenhut to address the taxation issues which had arisen as a result.

[17] Mr Bradford further explained that during the period January to June 2012 he had only been in receipt of wages from Earth Crest, however he had been able to make use of a trading account for Farmlands, a farming equipment company, and of Getting Hire, an equipment hiring company, both controlled by Mr Stephenson.

[18] Mr Bradford said he had used these facilities to purchase items and hire equipment for use in his work at Earth Crest, and that this expenditure had been paid on receipt of invoices to Omega Trust, a company owned by Mr Stephenson.

[19] Mr Bradford said he had been provided with a job description which listed his duties as:

- *Grounds man work as required including mowing, edges, spraying as required*
- *Enclosure duties including cleaning, mowing, feeding and water etc*
- *Participate in regular OSH and Training*
- *Taking tours/guide*
- *Maintaining equipment, maintenance, repairs, cleaning etc*
- *Such other duties that you are requested to carry out from time to time within your ability*

[20] Mr Bradford said that initially there had been a shortage of staff, and he had worked 7 days a week, and long daily hours.

[21] Mr Bradford said he had been required to submit, and had been paid in accordance with, the weekly time sheets which he had completed and submitted via his computer diary, these had been emailed initially to Ms Eisenhut and then to Ms Potter.

[22] Initially Mr Bradford said he had reported to Mr Craig Busch, but subsequently to Ms Eisenhut, and then latterly to Ms Michelle Potter, who had been appointed as the Park Manager on or about March 2012, and they had directed him as to the work they required to be carried out on a daily basis.

[23] Mr Bradford who said he had received training, primarily from Ms Potter, provided as evidence induction and training records which had been signed by him, and initialled by the trainer, whom Mr Bradford identified as Ms Potter.

[24] Mr Bradford said that the tools and equipment which he had used in carrying out his duties had been leased by Earth Crest from the Park's landlord, Zion Wildlife Kingdom Limited. Mr Bradford said that whilst carrying out his duties he had been issued with a shirt to wear which displayed Earth Crest's logo.

[25] With effect from late March 2012 Mr Bradford said that Ms Potter began to exercise control over the hours he worked, requiring him to reduce these to 40 hours per week, and to take tea and meal breaks, however his responsibilities and workload expectations had started to increase.

[26] Mr Bradford said he had been presented with a Contract for Services on or about May 2012 and had been told by Ms Potter that it was the contract he was expected to sign. Mr Bradford said he had read the Contract for Services and made some notes on it, but he would not agree to it, or sign it, as he was bound by the NAP arrangement until November 2012.

[27] Mr Bradford said that some three weeks prior to the Queen's Birthday weekend at the beginning of June 2012, he had been told to take the Queen's Birthday weekend as leave. However as he had realised that if he took the leave the Park would not have staff available with the requisite heavy traffic and gun licenses, he had offered to work over the weekend, and his offer had been accepted by Ms Potter.

[28] On 6 June 2012 Ms Potter sent Mr Bradford an email in which she had noted that Mr Bradford had been: ‘*advised formally on several occasions that all staff are to work a maximum of 80 hours per fortnight*’, and stated:

It has become clear over the past few weeks that you are attempting to choose your own work days and hours is suiting no-one, and we will notify you next week of a meeting to address this, and any other issues.

[29] In the same email, Ms Potter also referred to Mr Bradford having worked on the Queen’s Birthday weekend, and instructed him to take substitute time off during that week:

... It would be remiss of me as Manager, to not heed these signs of an over tired employee, in a physically demanding, potentially dangerous workplace. You will be taking Thursday to Sunday (7th – 10th June) off work. If you wish to have extra days after this, (Monday, Tuesday) please let me know and it will be accommodated..... If you still insist you want to work on Thursday, then I will have to enforce that stress leave be taken.

[30] Mr Bradford said he had taken leave and had subsequently been informed that if he attempted to return to the Park following the leave period he would be ordered to take stress leave.

[31] Mr Bradford confirmed that he had not been allowed to return to the Park following the June leave period.

Determination

[32] Mr Bradford gave evidence that he agreed to enter into an employment relationship with Earth Crest rather than to accept work on an independent contractor basis because he was subject to a NAP arrangement which precluded his working in any other capacity except that of an employee.

[33] There was no offer letter, or employment agreement provided to Mr Bradford, and he did not receive any pay slips.

[34] In deciding whether Mr Bradford was employed by Earth Crest as an employee, I apply s.6 of the Act which provides:

“s.6 Meaning of employee:

1. In deciding ... whether a person is employed by another person under a contract of service, the Authority-... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2)... or the Authority-

(a) must consider any relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[35] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

“‘All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and

¹ [2005] 1 ERNZ 372

integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.

Contractual basis

[36] In this case there are no written terms and conditions of employment on which to establish the contractual nature of the relationship. In *Cunningham v TNT Express Worldwide (NZ) Ltd*² the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship. This broad approach in *Cunningham* was held by Chief Judge Goddard in *Muollo v Rotaru*³ to apply to orally agreed terms, in that the relevant intention could be inferred from words or conduct at the time the contract was formed or subsequently varied.

[37] Mr Bradford said that an employment relationship was intended at the time he commenced working at Earth Crest, and that he was precluded from working as an independent contractor by virtue of the NAP arrangement.

[38] Mr Stephenson’s evidence was that because he had been aware of the NAP arrangement and its implications for Mr Bradford, he had advised Ms Eisenhut that Mr Bradford was only able to accept a position working for Earth Crest on the basis of direct employment.

[39] The proposed Contract for Services provided to Mr Bradford on or about May 2012 had not been signed by Mr Bradford, and he had said he knew he could not sign it until after the expiry of the NAP arrangement in November 2012.

[40] I find that although there are clear indications that an employment relationship was intended from the outset, there is no documentation which establishes the real nature of the employment relationship and therefore I must turn to the way in which the relationship operated in practice by having regard to the features of control and

² [1993] 1 ERNZ 695

³ [1995] 2 ERNZ 414 (WEC64/95)

integration, and to the fundamental test of whether Mr Bradford was working on his own account.

Control and Integration

[41] I find that the following factors indicate that Mr Bradford was subject to the control of Earth Crest and integral to the business:

- Mr Bradford had been provided with a job description detailing comprehensive duties, covering not merely maintenance, but additional duties associated with animal welfare, and the requirement to carry out guided tours for Park visitors;
- Mr Bradford had initially worked long hours 7 days a week and he lived on the site in Earth Crest property;
- Earth Crest provided the tools and equipment for Mr Bradford to carry out his duties;
- Mr Bradford been required to provide weekly time sheets to Earth Crest in accordance with which he had been paid, rather than submitting invoices for his services;
- Mr Bradford said he had been directed in his work by those Earth Crest personnel to whom he had reported, namely successively Mr Busch, Ms Eisenhut and latterly Ms Potter;
- Mr Bradford had received induction and other training in his duties by Ms Potter;
- The email from Ms Potter dated 6 May 2012 is a clear indication that she was in control of the number of hours Mr Bradford worked, and also directs Mr Bradford to take time off on stress related grounds, which are both indicative of a manager/employee relationship rather than that of an independent contractor.

The Fundamental Test

[42] Earth Crest did not calculate, deduct or pay PAYE on behalf of Mr Bradford. Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*⁴ that: “Taxation arrangements, both generally and in particular are a relevant consideration.”

[43] A tax code declaration form completed and signed by Mr Bradford, dated 18 February 2012, was provided in evidence. The evidence of Mr Stephenson was that he had supplied both this and the tax code forms supplied by the other staff to Ms Eisenhut, who had failed to file them.

[44] Mr Bradford had believed that PAYE had been deducted from the wage amounts deposited in his bank account, and said he had been unaware during the period January to June 2012 that the PAYE deductions had not been forwarded to the IRD.

[45] I do not find the non-payment of the PAYE in respect of Mr Bradford to the IRD to be determinative of the issue.

[46] In considering the fundamental question of whether Mr Bradford was in business on his own account I find the following facts significant:

- a. The evidence of Mr Bradford as confirmed by Mr Stephenson that he was bound by a NAP arrangement which precluded him from working as an independent contractor until November 2012 when the NAP would conclude;
- b. Mr Bradford had been subject to the control of Earth Crest as to the manner in which he carried out his work, and Earth Crest represented itself as having the right to control the hours he worked.
- c. The email of 6 June 2012 from Ms Potter in which she makes reference to the fact that Mr Bradford had been exceeding the expectation that staff would work 40 hours a week, refers to having a

⁴ [2010] NZEMPC 1

meeting with Mr Bradford to address this issue which is an action associated with the concept of employment;

- d. The purchases made by Mr Bradford using the Farmers account and Get Hire were paid by Earth Crest on receipt of invoices from Omega Trust.

[47] I determine that Mr Bradford was an employee rather than an independent contractor during the period when he carried out work for Earth Crest.

[48] The Authority will shortly consult Mr Bradford and Ms Ward about the parties' availability and the time table for an investigation meeting to be held at a time and date to be established at the case conference.

Costs

[49] Costs are reserved pending the final determination of the matter.

Eleanor Robinson
Member of the Employment Relations Authority