

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 40
5498163

BETWEEN BRIDGET BUCKNELL
 Applicant

AND WOOLSTON STORE
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Bridget Bucknell, the Applicant in person
 Tim McGinn, Counsel for Respondent

Investigation Meeting: 12 February 2015

Submissions: From the Respondent at the investigation meeting, from
 the Applicant on 20 and 22 February 2015 and from the
 Respondent on 22 February 2015.

Determination: 31 March 2015

DETERMINATION OF THE AUTHORITY

- A. Bridget Bucknell’s claims are dismissed because she was not an
 employee of Woolston Store Limited.**
- B. Costs are reserved.**

Employment relationship problem

[1] Bridget Bucknell applied for an advertised role as the Market Supervisor of the Woolston Store in The Tannery, Christchurch working for Cassels (HR) Limited. She was offered the job and was presented with an individual employment agreement (IEA).

[2] The Woolston Store Limited¹ (the Store) says that although Ms Bucknell was offered the role as an employee of Cassels (HR) Limited she asked if instead her company, The Game Keeper Limited (The Game Keeper), could be engaged. Ms Bucknell proposed she would work through The Game Keeper as the Woolston Market supervisor so she could take advantage of tax losses The Game Keeper had previously sustained.

[3] The Store says that Cassels (HR) Limited agreed that Ms Bucknell could undertake the role via The Game Keeper so long as The Game Keeper did not invoice an annual total of more than the \$45,000 gross per annum, which was the gross salary offered to Ms Bucknell as a potential employee. Ms Bucknell agreed that no more than \$45,000 per annum would be invoiced and neither party signed the IEA.

[4] No other written contract was entered into and Ms Bucknell began working on 9 September 2013. The Game Keeper invoiced the Store monthly as she had been advised to do.

[5] On 29 January 2014 Ms Bucknell's engagement was terminated by Rick Stevens, the then general manager of Cassels (HR) Limited who was authorised by the Cassels Group to terminate Ms Bucknell's engagement.

[6] Ms Bucknell claims that she was unjustifiably dismissed from her employment. By way of remedy, she claims unpaid holiday pay and four weeks' pay for the notice period set out in the IEA.

[7] The Store says that Ms Bucknell was never an employee and was always an independent contractor.

Issues

[8] The first issue I need to determine is whether or not Ms Bucknell falls within the definition in s.6(1)(a) of the Employment Relations Act 2000 (the Act) which defines an *employee* as:

¹ Also a company that is part of the Cassels Group. The two companies have the same directors, Alasdair and Zacharias Cassels and Joseph Shanks, and the same shareholder, Cassels & Sons Brewery (2012) Limited.

any person of any age employed by an employer to do work for hire or reward under a contract of service.

[9] If Ms Bucknell was not an employee the Authority has no jurisdiction to determine her claims.

Relevant law

[10] The law requires the Authority to determine the *real nature of the relationship* between the parties². This requires me to consider all relevant matters including any that indicate the parties' intentions.³ However, I cannot treat any statement by the parties describing their relationship as determinative.⁴

[11] Ms Bucknell bears the onus of establishing on the balance of probabilities that she was an employee.

[12] The leading case is *Bryson v Three Foot Six Limited (No.2)*⁵ in which the Supreme Court endorsed an earlier decision of Judge Shaw's in the Employment Court's decision. All relevant matters that need to be considered in assessing the real nature of the relationship include:

- The written and oral terms of the contract between the parties.
- Any divergence from or supplementation of those terms and conditions.
- How the relationship operated in practice.
- Features of control and integration.
- Whether the contracted person has been effectively working on his or her own account; the fundamental test.
- Industry practice.

[13] I received written witness statements and heard affirmed evidence from Ms Bucknell and her husband, Ryan Bucknell; Richard Till, a former culinary and product consultant/advisor to the Woolston Market; Frederick (Rick Stevens) and Sharon Lysaght, Cassels Group's accountant.

² Section 6(2) of the Act.

³ Section 6(3)(a)

⁴ Section 6(3)(b)

⁵ [2005] ERNZ 372 (SC)

What did the parties intend?

[14] In the absence of a written agreement evidencing a common intention I need to examine the actions of the parties to see if they disclose any evidence of what kind of relationship the parties were in. It is important to examine what the parties intended at the beginning of the relationship and whether their practice changed over time to amount to a variation from what they originally intended.

[15] Ms Bucknell submits that Cassels⁶ acted as if the IEA was the relevant contract when it suited them but not when it dismissed her. She says it was the Store's responsibility to provide her with a contract if it was not going to engage her through the IEA.

[16] Mr McGinn submits that it was Ms Bucknell herself that suggested that she be engaged by way of The Game Keeper and therefore the proffered IEA could never have applied.

[17] Mr Stevens' evidence was that in all other contracting arrangements Cassels and the Store relied on the contractors to provide a contract of engagement if they wished to do so and that the business did not provide such contracts itself. Mr Stevens says the Store was happy to engage Ms Bucknell through The Game Keeper on the basic understanding that she invoiced monthly and the total amount invoiced over 12 months would not be more than \$45,000.

[18] Obviously it is preferable for the parties' expectations to be formalised and rendered into writing at the beginning of an arrangement for work to be performed. However, the fact that there was no written agreement does not mean that some of the terms of an unsigned IEA apply.

[19] The fact that Ms Bucknell initiated the arrangement that The Game Keeper was the vehicle by which she was engaged and remunerated is strong evidence that from the beginning of the relationship she intended it to be a contract for services rather than an employment relationship.

[20] Mr Stevens' and Ms Lysaght's evidence that all employment agreements were entered into by Cassels (HR) Limited suggests that although initially Cassels expected

⁶ Which I take to be Ms Bucknell's reference to the Cassels Group of companies that established and now operate The Tannery mall in which the Market is located.

to recruit an employee its use of the Store company indicates it intended The Game Keeper to be an independent contractor rather than an employee. Cassels Group's agreement with Ms Bucknell's suggestion and its requirement that The Game Keeper invoice the Store also show that the Store intended the arrangement to be for the provision of services rather than to be an employment relationship.

[21] In *Kiwikiwi v Maori Television Service*⁷ Judge Shaw found that Mr Kiwikiwi was an employee and stated:

While MTS may have come to see him as a freelancer and would have preferred for him to be treated as such, it did not make this clear at the outset. The absence of a written agreement is critical to this conclusion. If an organisation is entering into an agreement with an independent entity it is to be reasonably expected that such an agreement would be formalised in writing to acknowledge and name the contractor and to set the parameters of the contractual arrangements being entered into.

[22] I consider that Ms Bucknell's initiation of an independent contracting arrangement makes this case sufficiently factually different from *Kiwikiwi* that Judge Shaw's conclusion does not apply in this case. In *Kiwikiwi* there was no written agreement. After the beginning of his engagement the Maori Television Service tried to rely on its view that Mr Kiwikiwi was a contractor when, in fact, he was not in business for himself. Mr Kiwikiwi did not initiate any discussion about him being a contractor at the beginning of the engagement but Ms Bucknell did.

[23] Throughout the period of her engagement Ms Bucknell made out monthly invoices to the Store from The Game Keeper. She used The Game Keeper's existing invoice template for the invoices. For the first few months the invoices bear the same number but when The Game Keeper's computer was shifted to Christchurch Ms Bucknell set it up in an office at The Tannery and used that computer to produce the invoices.

[24] Ms Bucknell says that on 10 January 2014 she spoke to Mr Stevens and asked to be paid for a week she planned to take off and:

During this meeting I also stated to Rick I wanted to change my status from contractor to employee and that I felt that due to the new level of responsibility my job entailed, I would like to renegotiate my

⁷ (2007) 5 NZELR 6

salary and get my contract signed as well as change the payment style from my invoicing to receiving 'wages'.⁸ [emphasis added]

[25] On 11 January 2014 Ms Bucknell followed up with an email to Mr Stevens:

... as discussed on Thursday, in regards to my wages/consultant tax credit queries.

... I am happy to get paid my normal wage for the week for my time away, in lieu of billing for the unpaid hours.

*If you feel this is the best option under the circumstances then that would be acceptable for me. **I would also then like to go onto a contract.***

...Within 2.5 months I had been promoted officially to Market Manager. This job carries a lot more responsibility than that of Market Supervisor. Therefore I believe a salary of \$70 000 would be appropriate.

Have a think on all this and let me know your position and we can go from there. [emphasis added]

[26] Ms Bucknell's written evidence prepared for the investigation meeting and the email she sent to Mr Stevens (both above), while referring to *wages* and her *normal wage*, demonstrate that on 10 and 11 January 2014 she understood that the relationship between her and the Store was not one of employer/employee. Instead that was the change she was seeking. She wanted to be employed as Market Manager on a salary of \$70,000 per annum.

[27] The Store did not agree to Ms Bucknell's proposal to change her status or the way she was paid. No contract or agreement of the type Ms Bucknell was seeking was entered into and there was no change in the way she was engaged or paid until 29 January 2014 when Mr Stevens told her the Store no longer required her services.

[28] I note however that the parties' description of the kind of relationship they are in is not determinative and so this does not completely answer the question.

Control test

[29] The control test involves an assessment of whether the Store had the right to control Ms Bucknell's work and, if so, to what extent it did so in practice.

[30] There is no doubt that Cassels Group was interested in engaging Ms Bucknell to take advantage of her skills and experience in the food and beverage industry,

⁸ From Ms Bucknell's statement of evidence.

including her prior operation of The Game Keeper. During the period she was engaged the Store and the Market were being established. Ms Bucknell had been involved in establishing other food businesses, including *two on my own account*.⁹

[31] The Cassels Group was content to engage Ms Bucknell through The Game Keeper because it did not consider a contracting relationship detrimental to the Store and it could use her services whether she was an employee or not.

[32] Ms Bucknell was engaged largely because of her extensive prior experience and her consequent ability to work quite independently.

[33] Ms Bucknell had to work set minimum hours but was empowered to make a number of decisions on behalf of the Store. She routinely worked more hours than the set minimum.

[34] Ms Bucknell says that there *was no direction*.¹⁰ She says that from the beginning the job was a lot bigger than a market supervisor role and she had to make a lot of decisions herself.

[35] These aspects of the relationship tend to suggest an independent contracting relationship.

[36] Ms Bucknell supervised staff and prepared rosters for their work hours as well as for her own minimum work hours. However, since Ms Bucknell prepared her own roster of hours the roster does not support her view of herself as an employee and is a neutral factor.

[37] Ms Bucknell says on 3 December 2013 she *received a promotion to that of Market Manager*¹¹ at an *owners/management meeting*¹² she was called into. She says that is evidence that she was really an employee as contractors do not get promotions.

[38] Mr Stevens' evidence was that Ms Bucknell was not promoted as an employee may have been but was called into the meeting to be told the news that the previous

⁹ Ms Bucknell's oral evidence at the investigation meeting.

¹⁰ Oral evidence at the investigation meeting.

¹¹ Witness Statement, page 2.

¹² Also in the Witness Statement, page 2.

market manager had been shifted to the restaurant area and that management wished her to now act in the role of market manager. He described that as *news for her*.

[39] The proffered change in Ms Bucknell's duties from market supervisor to market manager does not tend to suggest that the Store and the wider Cassel's management considered her more like an employee than an independent contractor. An employer cannot unilaterally change an employee's terms and conditions and whether she was engaged as an employee or as an independent contractor it was up to Ms Bucknell either personally or as the principal of The Game Keeper to decide whether to accept the role of market manager.

[40] Overall the evidence is equivocal on whether Store exerted the kind of control over Ms Bucknell that points more to her being in an employment relationship.

Integration test

[41] The integration test involves an assessment of the extent to which Ms Bucknell was integrated into the Store's business.

[42] As already noted Ms Bucknell was on the roster. However, she put herself there mainly to allow others involved in the business to know what minimum hours she expected to be at work every week. Ms Bucknell's name and hours on the roster support the view that Ms Bucknell was integrated into the Store's business as others needed to know when she would be there to be consulted about aspects of the establishment and running of the Store and Market.

[43] Ms Bucknell and other people who worked for the Store/the Market wore clothing which identified them as working for the Store or the Market. However, this is a neutral factor as any employee or contracted adviser or consultant was expected to wear such identifying clothing because of their dealings with suppliers and members of the public.

[44] Ms Bucknell completed time sheets. However, I am satisfied that was on her own initiative and that she was not required to complete and keep them by the Store since it paid her solely in reliance on The Game Keeper's monthly invoices. Therefore, timesheets are a neutral factor.

[45] Ms Bucknell used her own computer at The Tannery premises and used it to generate invoices and to do work for the Store.

[46] Overall, I consider the work performed by Ms Bucknell was an integral part of the Store's business because it could not have established the Store and the Market without her work. However, any employee or contractor could also have performed that work so that it does not mean the relationship was more in the nature of an employment relationship than that of an independent business arrangement.

Industry practice

[47] A consideration of industry practice is of no assistance to me in this case. Even within the Store and the Market business there were employees and at least one other independent contractor, Richard Till, who I am satisfied was operating under an unwritten contract for services.

Fundamental test

[48] The fundamental test requires me to consider whether Ms Bucknell was fundamentally operating as if she was in business on her own account.

[49] Ms Bucknell says on her first day Mr Stevens told her that she could be engaged through The Game Keeper but that otherwise the provisions of the IEA applied. Mr Stevens says that he never said that but would have said that the monetary limit for The Game Keeper's invoices over a year would have to be the same as the \$45,000 salary set out in the IEA. Therefore, he meant to convey, and believed that Ms Bucknell understood, that was the only provision in the IEA which applied.

[50] Ms Bucknell says she did not understand that by asking to be paid via The Game Keeper she would not be an employee. She says she always believed she was an employee and always acted as if she was one.

[51] However, I consider that the following factors point to Ms Bucknell being in business on her own account and outweigh other factors that point to her being in an employment relationship:

- Ms Bucknell suggested that she be engaged by way of her company The Game Keeper. The arrangement was at her initiative.
- Ms Bucknell issued invoices in the name of The Game Keeper.
- No PAYE or ACC levies were deducted on payments made to The Game Keeper by the Store. Ms Bucknell was aware that they would not be. Her intention was that The Game Keeper would account to the IRD for its business income and pay tax, or receive tax credits, and pay any required ACC levies.
- Initially The Game Keeper invoices included a GST component.
- The Game Keeper had an accountant who prepared the company's annual tax return. It had used an accountant in the years prior to Ms Bucknell's services being used by the Store. Therefore, The Game Keeper and Ms Bucknell had the benefit of independent tax advice and The Game Keeper was able to gain tax benefits that would not have been available to Ms Bucknell as an employee.
- Ms Bucknell is The Game Keeper's sole director and sole shareholder.
- In its accounts to the end of 31 March 2014 The Game Keeper claimed expenses such as a motor vehicle allowance of \$3,311 which included Ms Bucknell's travel from her home to The Tannery and back, \$2,145 in rent, \$275 for light, power and heating, \$300 for telephone, tolls and internet and \$358 for national travel while Ms Bucknell was engaged by the Store. The travel was not for any Store business.
- The Game Keeper supplied goods to the Store and The Game Keeper received reimbursement for the goods from the Cassels Group, not Ms Bucknell personally.
- Ms Bucknell's evidence was that The Game Keeper was not actively trading over the period Ms Bucknell was engaged through it by the Store other than through that arrangement. However, the accounts show that not all The Game Keeper's income in the year ending 31 March 2014 was from the Store.
- Ms Bucknell was an experienced businesswoman, and not an inexperienced or naïve one.
- Apart from some drawings from The Game Keeper account to Ms Bucknell and to her husband Mr Ryan Bucknell (who was not engaged in any work for the Store or The Game Keeper) the majority of the income from the Cassels Group was used for other expenses, such as paying The Game Keeper's credit card debt.

[52] Overall when I stand back and ask whether fundamentally Ms Bucknell acted as if she was in business on her own account the answer is that she did. Ms Bucknell worked very hard and put in long hours to benefit the Store. However, she did not do so as an employee.

Conclusion on employment status

[53] The real nature of the relationship between Ms Bucknell and the Store was a contract for services. Ms Bucknell was working for The Game Keeper which was engaged as an independent contractor therefore she was not an employee of the Store.

[54] The Authority has no jurisdiction to consider Mr Bucknell's claims for holiday pay and pay for a notice period contained in an unsigned IEA that she was not engaged under.

[55] Therefore, Ms Bucknell's claims are dismissed.

Costs

[56] The Store, as the successful party, asks me to consider awarding a contribution towards its actual legal costs.

[57] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act. Costs are at the discretion of the Authority.

[58] The principles the Authority follows in considering costs applications are as set out in *PBO Limited v Da Cruz*¹³ a judgment of the Full Court of the Employment Court. The principles include:

- a. A discretion on whether to award costs and if so what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.
- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.

¹³ [2005] ERNZ 808, at p. 819.

- d. Equity and good conscience must be considered on a case by case basis.
- e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. Without prejudice offers can be taken into account.
- h. Awards of costs will be modest.
- i. Frequently costs are judged against a notional daily rate, which is currently \$3,500.00.
- j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k. The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[59] The meeting took half a day so, if costs are to be awarded, the starting point would usually be \$1,750.

[60] In her written submissions Ms Bucknell says it will not be just if she is asked to pay any of the Store's legal costs. She gives a number of reasons for that view.

[61] Following legal advice Ms Bucknell originally filed her claim in the Disputes Tribunal. She submits:

At the Disputes Tribunal hearing [Cassels] welcomed me to bring my claim to the ERA as I believed I was acting as an employee and not as a 'contractor'. Sharon Lysaght herself said at that hearing that "we think it should be in the ERA also". Cassels were active in seeking that my claim be referred to the ERA. Yet they now assert that the very jurisdiction they have asked me to go (sic), in fact has no jurisdiction to hear my claim. All of these arguments they had raised as to my status SHOULD have been raised at the Disputes Tribunal. Cassels should have asserted them then and there that the ERA was not the right forum, and the matter could have been determined by the Disputes Tribunal. Instead, they have in effect lured me to another

jurisdiction only to claim that jurisdiction has no ability to determine the matter. If they were acting in good faith, they would have raised their claim of self-employed contractor then and then let the Disputes Tribunal (sic) whether or not their conduct was appropriate or lawful.¹⁴

[62] Mr McGinn correctly pointed out that Ms Bucknell's above submission contained new evidence. Before I exercise my discretion on whether to not order costs payable to the respondent I consider it important to hear evidence on the issue of how the matter came to move from the Disputes Tribunal to the Authority.

[63] The Authority officer will contact the parties to arrange a brief investigation meeting which Ms Bucknell and Ms Lysaght will be expected to attend to give evidence on what happened in the Disputes Tribunal. A determination on costs is reserved until after that investigation meeting.

Christine Hickey
Member of the Employment Relations Authority

¹⁴ Ms Bucknell's submission received 20 February 2015.