

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE**

**BETWEEN** Ralph and Marie Carson  
**AND** Murray and Judith Lancaster  
**REPRESENTATIVES** Phil Butler for Applicant  
Tim Mackenzie for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** Christchurch Wednesday 2 August 2006  
**DATE OF DETERMINATION** 24 August 2006

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] The applicants (Mr and Mrs Carson) say that they have an employment relationship problem with the respondents (Mr and Mrs Lancaster) and they seek to rely upon the existence of that employment relationship to resolve their employment relationship problem within the employment institutions.

[2] Mr and Mrs Lancaster, on the other hand, deny that there was an employment relationship with Mr and Mrs Carson and say that the relationship was always one of contractor and principal.

[3] While it is common ground that there is a dispute between the two couples, the forum in which that dispute is to be dealt with depends on whether there exists an employment relationship or not.

[4] Accordingly, I directed that there would be a preliminary hearing exclusively to deal with the question of the legal status of the relationship between the parties. This determination deals only with that question and the investigation meeting was concerned only with evidence as to that issue.

[5] The relationship between the parties commenced in 2002. Mr and Mrs Carson were working on another property and Mr and Mrs Lancaster invited them to consider whether they would be interested in working on the Lancasters' Harewood property. There were various meetings between the parties during the period in which the arrangement was formulated, but the formative meeting seems to have been on 5 March 2002 which involved not just the two couples but also Peter Gaul who was then a farm adviser to the Lancasters.

[6] The documents which were eventually signed by the parties were produced as templates by Peter Gaul and his evidence (which I accept) was that each of the templates came from his firm.

[7] The documents which Mr Gaul presented at the meeting were a job description for a farm manager and an employment agreement for a farm manager. In addition, there was another document styled *Appendix 3* which produced an indicative calculation of a bonus. Mr Gaul's evidence was that this document also was discussed at the 5 March 2002 meeting.

[8] With the passage of time, it is difficult for all the parties to be absolutely explicit as to what happened, but there is some suggestion that this meeting also considered other templates, specifically templates of contractor-type agreements as well as the employment agreement which was eventually executed.

[9] Mr Gaul's evidence is that he could not recall if he had taken contractor templates to the meeting but his words were that *he may not have*. However, he was equally clear that there was discussion at this 5 March meeting of the differences between an employment relationship and a contract relationship.

[10] That view is confirmed by the other professional adviser involved in this matter, Mr Ross Miller, who, at the relevant time, was the accountant for both the Lancasters and the Carsons.

[11] As the Carsons' advocate was very quick to point out, that fact put Mr Miller in a *conflict of interest* situation. No doubt that is true, but nonetheless, Mr Miller's evidence is valuable from his recollection of what actually took place.

[12] Because Mr Miller was the Carsons' accountant as well as the Lancasters' accountant, it was to Mr Miller that Mrs Carson went to seek advice on the proposal that she and her husband should enter into a relationship with Mr and Mrs Lancaster.

[13] Mr Miller's file discloses that there was a meeting between him and Mrs Carson on 14 March 2002, not much more than a week after the meeting that Mr Gaul had presided over at the farm. Mr Miller recalls that Mrs Carson produced some documents to him at the meeting which he perused and then returned when he wrote to her setting out his professional advice.

[14] At the meeting between Mrs Carson and Mr Miller on 14 March 2002, Mr Miller's file discloses that they talked about whether the relationship between the Carsons and the Lancasters should be an employment relationship or a contract relationship.

[15] When Mr Miller wrote his letter dated 20 March 2002 to Mr and Mrs Carson, he clearly sets out his view that Mr and Mrs Carson would be most advantaged if the relationship were a relationship of a principal and a contractor rather than the relationship of an employer and an employee. He took that view primarily because the tax advantages to Mr and Mrs Carson of being self-employed were, in his view, more beneficial to them than the advantages of them being employees to the Lancasters.

[16] It follows that Mr and Mrs Carson could be expected to know that the relationship in contemplation (at least on their own accountant's advice) was a contractual rather than an employment relationship. Certainly, Mr Miller's evidence

is quite unequivocal that both Mr and Mrs Lancaster and Mr and Mrs Carson knew very well that the relationship proposed was to be a contractual relationship rather than an employment relationship.

[17] Despite Mr Miller's certainty, the evidence suggests that the parties themselves may well have been clear about what they wanted to achieve but were not necessarily clear about the implications of the different kinds of legal status.

[18] For instance, Mr Carson's evidence is that at the meeting on 5 March 2002 with Peter Gaul, both of the two couples read the employment agreement and the job description (the documents that were subsequently used) and that those documents *looked pretty straightforward*. He said that there was nothing about GST in the contract and that all he understood he was to do was to manage the farm at Harewood. He said he could not remember when he found out that he had to be registered for GST and had to employ staff, but he does remember having a conversation with his wife after she had consulted with Mr Miller and another accountant that Mr Miller encouraged the Carsons to consult, given his conflict of interest.

[19] In this conversation between Mr and Mrs Carson, Mr Carson remembers his wife being *puzzled* by what she had found out from the two accountants.

[20] Notwithstanding Mr Carson's conviction that he was engaged as an employee, he clearly remembers Mr Gaul telling him that he would be paid \$45,000, that a further \$25,000 would be paid to him to enable him to employ a full-time permanent worker, and a further \$5,000 would be paid to him to enable him to employ a part-time or casual worker.

[21] Mr Carson also remembers Mr Gaul explaining the bonus calculation which I described earlier as *Appendix 3* and Mr Carson's evidence was that he understood that that particular bonus calculation applied *from day one*. He said there was no discussion about a \$5,000 flat bonus which is referred to in some of the evidence.

[22] Mrs Carson certainly recalls the discussion with Peter Gaul on 5 March 2002 and refers in her evidence to the breakdown of the \$75,000 that was to be paid by the Lancasters to the Carsons in a similar way to the way that her husband referred to it.

[23] However, Mrs Carson had a better understanding, it seems, about the GST component. She thought that the position was that the Carsons were already registered for GST by virtue of the fact that they owned a rental property and had previously worked on farm properties in a contracting role.

[24] However, she said in her evidence that the second accountant who she had seen (the one that she had been referred to by Mr Miller), wondered why Mr and Mrs Carson had to be registered for GST and render invoices when the documentation that had been presented to the Carsons by the Lancasters's adviser (Mr Gaul), was plainly an employment agreement.

[25] Mrs Carson said that she was *a bit confused about all this* and talked to her husband but his view was that it was a good deal and he *wanted to get on with it*.

[26] Mrs Carson had been working as a cleaner to supplement the couple's income, prior to their meeting Mr and Mrs Lancaster, and she gave evidence that she earned about \$10,000 a year in that capacity. Because that work would cease by reason of their moving to the Harewood farm, the new arrangement with the Lancasters would

need to effectively replace the income that Mrs Carson had earned from her cleaning duties in order for the deal to be attractive to them.

[27] It seems from an analysis of the evidence that the only way in which the arrangement with the Lancasters could have been attractive was on the basis of the bonus calculation which both Mr and Mrs Carson thought applied from day one. The effect of the calculation was that in return for their effort in increasing milk production on the farm, subject to that being reflected in a profit improvement for the farm, they would get a financial benefit which it appeared could be significant.

[28] Mr Lancaster gave evidence that he had instructed Peter Gaul that he wanted to pay a fixed sum of \$75,000 and that the incoming person was *doing everything from that*. Mr Lancaster described wanting to *be very much in the background*.

[29] Mr Lancaster thought that the templates produced by Mr Gaul were filled in by his wife and then the two couples *got around a round table and signed it up*.

[30] Mr Lancaster said that his understanding was that the bonus was going to be 5% of the profit – that is, roughly the calculation that would emerge from the so-called *Appendix 3* calculation of the bonus based on the documentation supplied by Mr Gaul. In the result, Mr Lancaster actually paid Mr Carson bonuses of cash sums. He agreed with me that there was no documentation anywhere of those lump sum bonuses and he said that he paid them simply to keep Mr Carson on the job because he valued Mr Carson's efforts and thought he was working out well.

[31] Mr Lancaster also was very clear that although Mr Carson was *getting good production*, the farm never produced a profit. Amongst other things, it seems that in certain months of the year it was difficult to grow grass on the farm and that of course added to the cost of running the business.

[32] Importantly, Mr Lancaster told me during the investigation meeting that he was completely illiterate and so when it was time for the agreement between the Lancasters and the Carsons to be signed up, his wife had read to him *99% of it*.

[33] Mrs Lancaster told me that she had physically filled in the template that became the agreement between the parties and that she had in fact read it to her husband.

[34] She acknowledges now that the agreement is expressed to be an employment agreement but she said that the cover page which says that *didn't interest her*. She was very clear that she thought Mr and Mrs Carson were contractors and that she did not know the difference between an employee and a contractor in 2002, although she wryly said that she does now.

### **Issues**

[35] The only issue really is whether this relationship is an employment relationship or a relationship between a principal and a contractor. If the relationship is an employment one, then Mr and Mrs Carson can pursue their dispute in the Employment Relations Authority. Conversely, if the relationship is a contractual relationship, then the parties will need to deal with their dispute in the ordinary Courts.

### **The nature of the relationship**

[36] It is absolutely plain that the document executed between the parties looks like an employment agreement. Not only does the cover page refer to it being an employment agreement but there are numerous provisions within the document which emphasise its status. These include normal employment conditions which one would expect to see in an employment agreement and numerous references within the document to the fact that it documents an employment relationship.

[37] Both parties signed the document and three of the four parties were at least able to read it and make sense of it. However, it is by no means clear to me that any of the parties actually understood the significance of the document and I have indicated already in this determination a number of examples from each of the salient witnesses which disclose that the parties simply did not turn their minds to the way in which the relationship was actually documented. Indeed, I think the evidence shows that the documentation of the relationship is in no way determinative of the actual nature of the relationship.

[38] It is equally clear that, notwithstanding the apparent nature of the documentation of the relationship, Mr and Mrs Carson were registered for GST, rendered invoices to Mr and Mrs Lancaster on which they were paid and that Mr and Mrs Carson in addition were responsible for the payment of staff for most of the period that the relationship continued. It was only at the very end of the relationship that both parties acknowledge there was indeed a clear employment relationship.

[39] For the balance of the period in dispute (the period where there was plainly no agreement there was an employment relationship) the treatment of Mr and Mrs Carson's status in a tax sense discloses principally that they were treated as if they were contractors. There was one gloss to that, and that is a payment by Mrs Lancaster to Mr and Mrs Carson which purports to be payment of holiday pay. The evidence suggests that Mrs Lancaster was somewhat flustered by constant claims from Mrs Carson for payment of holiday pay and that, without seeking any advice or discussing the matter even with her husband, Mrs Lancaster paid Mr and Mrs Carson a cheque, purportedly as holiday pay. Again, I do not think that action in itself is determinative of the relationship. However, the fact that Mr and Mrs Carson were registered for GST and rendered invoices on which they were paid and that they employed other people, all tend to encourage one to the view that this was indeed a contractual relationship.

[40] Further, and significantly in my view, Mr and Mrs Carson were given clear advice by their then accountant that it advantaged them to be contractors rather than employees and Mr Miller was unshakable in his evidence that both parties knew that the relationship was a contractual one rather than an employment one.

[41] However, the documents which were eventually executed by the parties as being representative of their bargain, were provided by Mr and Mrs Lancaster's adviser rather than by Mr and Mrs Carson's and so if there is to be any dispute as to where the balance might lie, it is difficult to escape a conclusion that the balance should favour the party whose documents these were not.

[42] Mr and Mrs Carson drew my attention to the fact that, not only was the document the parties executed provided by the Lancasters, but it was also *rolled over* by the parties re signing the document, thus allegedly recommitting themselves to its status. I do not find this argument attractive. If the parties were confused at first blush (as I believe they were) they might be just as confused at *roll over*.

[43] Next, I must consider whether it is possible for Mr and Mrs Carson to be employees as a matter of law but still be registered for GST and issue invoices as if they were contractors. I think the answer to that conundrum must be in the affirmative because it is conceivable that the tax status of the parties was simply activated by a mistake as to the actual legal position.

[44] What is less easy to explain though is the fact that Mr and Mrs Carson employed staff. There is no sensible basis on which they could do that if they were employees themselves. Indeed, their advice from Mr Miller was plainly that they should not be employees but should in fact be contractors.

### **Determination**

[45] I think the matter is very finely balanced but in the result, I have reached the conclusion that the relationship between these parties is not an employment relationship. I am particularly drawn to that conclusion by the letter from Mr Miller which I see as absolutely significant and by the fact that Mr and Mrs Carson were employing staff. That last fact in particular seems completely irreconcilable with Mr and Mrs Carson being employees themselves and, coupled with the advice from their then accountant, and his conviction that everybody knew that there was no employment relationship contemplated, it seems to me to weigh the balance in favour of a contractual rather than an employment relationship.

[46] In the end, I have not found it particularly helpful to try to discern what the intentions of the parties themselves were because, as I have identified in the analysis in this determination, it is by no means clear that any of the parties were absolutely sure themselves of the nature of the relationship or even whether they understood the differences between the two kinds of legal status that are relevant to this particular proceeding.

[47] In reaching the conclusion I have, I draw a distinction between the instant case and cases such as *Drake Personnel Ltd v Taylor* [1995] 2 ERNZ 67 when the salient feature was that one party believed there was an employment relationship and the other was, or purported to be, unsure of the status of the relationship. Here I have found as a fact that both parties were uncertain about the status of the relationship.

[48] Had the parties taken more explicit professional advice at the time the documentation was executed, some subsequent heartburn may perhaps have been avoided.

[49] I think the various tests derived from the common law all tend to support the conclusion that this was a contractual rather than an employment relationship. In essence the Lancasters relied on the Carsons to manage the farm business with little or no input from the owners and, on the evidence, there seems little or no direction of the Carsons by the Lancasters. The Carsons twice purchased significant items of plant to assist them with the business.

[50] I am acutely conscious that this determination makes it more rather than less difficult for the parties to resolve their dispute. Notwithstanding my finding as to status, the dispute remains and the effect of my decision (if it is not challenged) is simply to change the venue in which the dispute will continue to be ventilated.

[51] I express the hope, without making any binding finding, that the parties will now engage with each other and seek to resolve the areas of difference between them so as to save both of them time, cost and anguish.

***Summary***

[52] I find that the relationship between Mr and Mrs Lancaster and Mr and Mrs Carson is a relationship of principal and contractor and not an employment relationship.

***Costs***

[53] Costs are reserved.

James Crichton  
Member of Employment Relations Authority