Determination Number: CA 162/06
File Number: 5039318

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	James Cockburn
AND	Aylesford Automotive (2001) Ltd
REPRESENTATIVES	Martin Bell, counsel for the applicant William Martyn, on behalf of the respondent
MEMBER OF AUTHORITY	Helen Doyle
INVESTIGATION MEETING	Christchurch 18 October 2006
DATE OF DETERMINATION	23 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, James Cockburn, says that he was employed by Aylesford Automotive (2001) Limited as a warrant of fitness inspector from September 2001 until August 2005.

[2] The respondent, Aylesford Automotive (2001) Limited (Aylesford) says that Mr Cockburn was engaged by it as an independent contractor.

[3] The sole issue for determination in this case is whether Mr Cockburn was an employee or a contractor. If the finding with respect to that issue is that Mr Cockburn was not an employee, then the Authority does not have jurisdiction to investigate his claim. If I find that Mr Cockburn was an employee then, probably with the assistance of a Labour Inspector, the parties will need to consider the minimum entitlement owed to Mr Cockburn with respect to holiday pay, sick leave and statutory holiday pay. Aylesford says that Mr Cockburn owes it money for claiming warrants which he has not processed.

The commencement of the relationship

[4] Aylesford is a duly incorporated company. It carries on the business of providing mechanical and warrant of fitness services in St Albans, Christchurch. Aylesford bought its business as a going concern and took possession of the business on 1 September 2001. The directors of Aylesford are father and son John and William Martyn.

[5] William Martyn attended at the investigation meeting to give evidence, together with his mother Dorothy Martyn who did the paperwork and wages for the business until late 2004.

[6] Mr Cockburn had undertaken some work for the previous owner of Aylesford including work as a warrant of fitness inspector. Mr Cockburn usually received $10 for each warrant of fitness check undertaken for the previous owner, Stephen Chalmers, but says he was not employed by Mr Chalmers.

[7] Mr Cockburn said that it was agreed that he would do the warrants at Aylesford full-time. He said that he continued to be paid $10 per warrant but presumed that tax had been deducted by Aylesford. Mr Cockburn said that he worked 5½ days a week and he considered himself an employee.

[8] Mr Martyn said that there was a meeting at the Shirley St Albans Club with the existing staff about two weeks before Aylesford took over the business on 1 September 2001. He said that the purpose of the meeting was for the Martyns to assure all those present that things would continue as before after possession date on 1 September 2001 arrived. Mr Martyn said that Mr Cockburn was present at that meeting and was told his situation would remain the same as it had been under the previous owner. He said Mr Cockburn was quite happy with this. Mr Cockburn denied he was at the meeting. No written agreement or contract was ever entered into.

[9] Mr Cockburn viewed his relationship with Aylesford as different from the one he had had with the previous owner of the business, Stephen Chalmers. Mr Cockburn presumed that he was in an employment relationship. Mr Martyn said that he understood from Mr Chalmers that Mr Cockburn was an independent contractor who was paid $10 for each warrant processed and took care of his own tax.

Inland Revenue Department audit

[10] An Inland Revenue Department (IRD) audit was undertaken of Aylesford's wage and tax deduction records in early September 2002. The investigator, Mr Thirring, established as a result of the audit process that Aylesford engaged Mr Cockburn as a contractor on a labour-only basis. Mr Thirring also became aware that Mr Cockburn had not paid any tax for at least the year he had been with Aylesford and probably earlier than that. Mr Cockburn was made aware of the concerns that IRD had about his tax situation and engaged an accountant. His accountant wrote to IRD in September 2002 advising that he considered Mr Cockburn to be an employee. Mr Cockburn's accountant also knew in or about September 2002 that IRD was to issue a determination to Aylesford advising that Mr Cockburn was an employee. Mr Cockburn was required to pay PAYE tax owing to September 2002 to IRD.

[11] Mr Thirring sent a letter to Aylesford for the attention of Mrs Martyn dated 23 October 2002. Mrs Martyn said that she did not receive the letter and did not see a copy until Mr Cockburn asked for assistance from a Labour Inspector in early 2005. The letter advised Aylesford that PAYE must be deducted from payments made to Mr Cockburn as IRD had decided that he was an employee. Mr Martyn said that had the letter been received then he would have disputed with IRD its finding that Mr Cockburn was an employee.

[12] I agree with Mr Bell's submission that it would be surprising if the Martyns were completely unaware of the 23 October 2002 letter or the IRD determination that Mr Cockburn was an employee. From October 2002 PAYE was deducted by Aylesford from Mr Cockburn's weekly earnings. Mrs Martyn said that that was because Mr Cockburn wanted the tax deducted by the company. Mr Cockburn did not accept that and said that PAYE was deducted because IRD wanted it to be deducted.

[13] A discussion did take place between Mr Cockburn and Mr Martyn after the IRD investigation. Mr Cockburn said that $10 per warrant was not enough if he had to pay tax. Mr Martyn then reached an agreement with Mr Cockburn to increase his payment for each warrant to $12.50.

[14] Mr Cockburn authorised Aylesford to pay what was owing to IRD by deduction of $100 out of his pay each week until the amount of approximately $6,000 was cleared. Mr Cockburn also paid a sum to IRD upfront to reduce the amount of tax owing.

Nature of the work Mr Cockburn performed

[15] Mr Cockburn was paid for each warrant of fitness check he undertook. If there were no warrants to be done, then Mr Cockburn would occasionally fix punctures and do oil changes. Mainly though he just did the warrant of fitness checks. The office at Aylesford would book warrants in for Mr Cockburn although customers would also come in off the street to get a warrant of fitness.

[16] I heard considerable evidence with respect to the hours Mr Cockburn worked and any control that Aylesford had over him during those hours. Mr Martyn said that Mr Cockburn came and went as he pleased and was sometimes away when warrants were booked in. Mr Cockburn said that he worked between 8.30am to 5pm Monday to Friday and between 9am and 1pm on Saturdays. He did not accept that he came and went as he pleased. Mr Cockburn said that in the entire period that he was with Aylesford, he only had about two days off sick and a bereavement day. Mr Cockburn said he would go home for lunch because his home was close to Aylesford.

[17] Glen Gloisten, who was employed by Aylesford for much of the period Mr Cockburn worked there, confirmed that Mr Cockburn worked Monday to Friday and Saturdays between the hours set out in paragraph 16 above. Mr Gloisten said that if Mr Cockburn was away on the odd occasion he was probably attending to breakdowns or picking up parts. It was agreed that Aylesford was a relaxed team environment where everyone helped out when required. Mr Martyn and another employee sometimes did warrant of fitness checks as well.

[18] Mrs Martyn, in my view quite properly and fairly, accepted that Mr Cockburn was on the premises *a reasonable percentage of the time*. There may well have been times when Mr Cockburn did leave the premises during the hours that he normally worked for whatever reason. Mr Cockburn also accepted that sometimes he would leave a little before 5pm if there were no warrants to be undertaken. Mr Cockburn did carry out repairs on vehicles for friends and family but he said, and there is no evidence to satisfy me otherwise, that he did these repairs outside of the hours he worked at Aylesford and was not carrying on a business in terms of these repairs. I find that Mr Cockburn was usually on the premises at Aylesford between 8.30am to 5pm Monday to Friday and on Saturday mornings.

[19] In support of the time that he spent at Aylesford Mr Cockburn provided his gross earnings details. He was unable to provide details for the period between April and September 2002. I set out the earnings below:

- 1 September 2001 to 31 March 2002 - $17,115.45 gross
- 18 September 2002-31 March 2003 - $19,896 gross
- Year ending 31 March 2004 - $41,250 gross
- Year ending 31 March 2005 - $43,250 gross.

I have considered particularly Mr Cockburn's last two years income from Aylesford on the basis that Mr Cockburn received $12.50 per warrant of fitness check. I accept Mr Bell's submission that this would support that Mr Cockburn was working full time hours during the week and Saturday morning.

The Legal Position

[20] Section 6 of the Employment Relations Act 2002 provides a meaning of *employee*. The relevant parts of s.6 are set out below:

> ***6 Meaning of employee***

> *(1) In this Act, unless the context otherwise requires, employee –*
>
> *(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
>
> *(b) includes –*
>
> *(i) a homeworker; or*
>
> *(ii) a person intending to work; but*
>
> *(c) excludes a volunteer who -*
>
> *(i) does not expect to be rewarded for work to be performed as a volunteer; and*
>
> *(ii) receives no reward for work performed as a volunteer.*
>
> *(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
>
> *(3) For the purposes of subsection (2), the Court or 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.*
>
> *(4) …*

[21] In ascertaining what the relevant matters are that the Authority must consider for the purpose of s.6(3)(a) of the Employment Relations Act 2000, I have had regard to *Bryson v. ThreeFootSix Ltd* [2005] 1 ERNZ 372. The Supreme Court said at para.[32] of the judgment:

> *All relevant matters certainly include the written and oral terms of the contract between the parties, which would usually contain indications of their common intention concerning the status of their relationship. They would also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship is operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing the contract. How their relationship operates in practice is crucial to a determination of its real nature.*
>
> *All relevant matters equally require the Court or the Authority to have regard to the features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which are important determinants of the relationship at common law. It is not until the Court or 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 light of the control, integration and fundamental test.*

Determination

[22] Aylesford intended Mr Cockburn be engaged as a contractor in September 2001. Mr Cockburn, on the other hand, considered himself to be an employee. There is an absence

of any common intention. I need to examine the ways in which the parties actually behaved in order to determine how the relationship operated in practice and whether, even if there was an initial intention to engage Mr Cockburn as an independent contractor, the relationship changed after the IRD audit in September 2002.

[23] There was no direct supervision of Mr Cockburn whilst he undertook the warrant of fitness checks. Warrants would be booked in for Mr Cockburn each day without consultation but with an expectation that he would carry them out. Mr Cockburn did not undertake warrant of fitness checks for anyone other than Aylesford. He worked the hours that the business was open and was required to follow instructions that were given to others who worked at Aylesford in terms of not making private calls. The rate of payment for each warrant was that set by Aylesford. There was nothing to suggest that Mr Cockburn felt that he was able to change the rate for which he received payment for the warrant of fitness checks and it remained at $12.50 from October 2002.

[24] Mr Cockburn had no control over the financial operation of the warrant of fitness side of Aylesford business. Aylesford charged a set fee per warrant of fitness about which Mr Cockburn had no control. Mr Cockburn could not hire or fire employees. I find that the different factors in terms of control weigh in favour of an employment relationship.

[25] I have considered whether or not Mr Cockburn was an integral part of Aylesford's business. Mr Cockburn could not have been seen or regarded as having a separate independent operation from that of Aylesford. The provision of warrant of fitness checks was an integral part of Aylesford's business operation. Mr Cockburn would pitch in and carry out other work if there were no warrant of fitness checks to be undertaken. Mr Martyn and another employee would sometimes perform warrants of fitness when Mr Cockburn was busy or not on the premises. I conclude that Mr Cockburn's warrant of fitness inspector role was an integral part of Aylesford's business and not an accessory to it.

[26] I have also had regard to the fundamental test as to whether or not Mr Cockburn was effectively working on his own account. Mr Cockburn took no financial risk in terms of his work with Aylesford. Mr Cockburn did provide his own overalls but the evidence supports that Mr Cockburn was in fact offered overalls by Aylesford but preferred to provide his own. Mr Cockburn was not registered for GST. He was not paid on the basis of GST invoices but rather on a record of the number of warrant of fitness checks that he undertook. Mr Cockburn was engaged essentially solely in work for Aylesford. He did not seek other work outside of that business or have significant periods of time to undertake any other work. He did undertake repair to family and friends vehicles outside of the hours he worked for Aylesford.

[27] Mr Cockburn had no real ability to increase his income by his own efforts. There was a maximum number of warrant of fitness checks that could be undertaken during the hours that Aylesford was open. Mr Cockburn did not advertise his services independently of Aylesford and was not in a position whereby he could employ others to carry out the work.

[28] Except for the first year when he worked for Aylesford Mr Cockburn did not account personally to IRD for his tax. He did not pay his own ACC levies or lodge GST returns. Mr Cockburn was not self-employed for tax purposes from October 2002 and PAYE was deducted from his weekly wages. His pay slips indicated holiday pay but he was told to disregard that as he was a contractor. Significantly in my view there was no tax advantage for Mr Cockburn as there would normally have been with a self-employed person. Mr Cockburn did not claim expenses. For a period Mr Cockburn was paid a set amount for warrants done each week regardless of whether he was under or over that amount. In my view this method of payment is more consistent with employment than a contractor relationship.

[29] I have placed little weight in this case on the fact that Mr Cockburn did not use his own tools apart from a possibly superior brake meter. This is because Mr Martyn said it was a requirement of the Land Transport Safety Authority that the tools are supplied by the business from whose premises warrant of fitness checks are being carried out.

[30] I find in conclusion that the factors in terms of the fundamental test are more consistent with an employment relationship than a person in business on his own account.

[31] There was no significant evidence of industry practice whereby warrant of fitness inspectors are treated as independent contractors rather than employees.

[32] Mr Martyn submits that it was only after there was a discussion with Mr Cockburn about money owing to Aylesford that he claimed he was an employee. The Authority however is required to carefully consider the real nature of the relationship and not treat as a determining matter any statement made by the parties to describe the relationship.

[33] I find having taken all the relevant factors into account the factors indicative of an employment relationship clearly outweigh the factors indicative of an independent contractor. I find this to be so from October 2002. Prior to October 2002 Mr Cockburn did account personally for payment of taxes and it is my view had not considered the true nature of the relationship. It is clear that from October 2002 onward though the relationship was that of employment.

[34] From October 2002 until August 2005 I find that the real nature of the relationship between James Cockburn and Aylesford Automotive (2001) Limited was that of employer and employee.

Costs

[35] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority