

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 113
5390741

BETWEEN

DALE COKER
Applicant

A N D

KERURU FISHING
COMPANY LIMITED
First Respondent

A N D

KRAYFORD HOLDINGS
LIMITED
Second Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Greg Skene, Advocate for Respondent

Investigation Meeting: 26 February 2013 at Auckland
11 March 2013 at Christchurch

Date of Determination: 4 April 2013

INTERIM DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Coker) alleges that he was employed by one or other of the respondents and that he is owed wages and other entitlements from that employment.

[2] Having heard the evidence, the Authority is satisfied that the first respondent is not in any way involved and that the relationship (whatever its nature) was with the second respondent.

[3] Krayford says simply that there was never an employment relationship and that the parties undertook to engage in a joint venture arrangement, the effect of which was that both parties were independent contractors and there was never an intention to create an employment relationship.

[4] Mr Skene is the director of Krayford which owns a vessel called *Conquest Sky*. Mr Skene's particular fishing expertise was in catching crayfish but he saw an opportunity to diversify into catching tuna on a long line basis.

[5] Because he lacked the expertise to undertake that kind of fishing, Krayford entered into an arrangement with Mr Coker who was experienced in the tuna fishery.

[6] It is the terms of that arrangement that is the subject of this determination. It is plain to the Authority that there is a dispute between Mr Coker and Mr Skene about the arrangements they made with each other with Mr Coker maintaining that he is owed a significant amount of money by Krayford as a consequence of successful voyages in April 2012 which resulted in the landing of tuna, for which Krayford was paid. The essence of Mr Coker's complaint is that he is entitled to moneys which he says were agreed previously, as a consequence of those fishing expeditions.

[7] But because the parties disagree fundamentally about the nature of the relationship between them, the Authority has indicated to both parties that it will, of necessity, have to deal first with the question of whether there was an employment relationship or not. This is for the entirely practical reason that if there is no employment relationship then the Authority's jurisdiction ceases and the Authority is unable to assist the parties to resolve their differences further. It follows from the foregoing observations that the sole purpose of this determination is to assess whether or not there was an employment relationship between Mr Coker and Krayford, or not.

[8] Although there is dispute about many of the facts concerning the establishment of this relationship, the Authority is satisfied that the parties met first to discuss this possible venture early in 2012. Mr Coker refers to a meeting on the wharf at Westport as an important occasion; Mr Skene agrees there was such a meeting but denies that that meeting was pivotal.

[9] Whether or not the Westport meeting was central or not, the Authority is satisfied that there were discussions between Mr Skene and Mr Coker, the thrust of which was that Mr Coker would use his expertise to prepare the vessel *Conquest Sky* for sea, would take command of the vessel while at sea and, in anticipation of fishing for tuna, would set up the vessel *Conquest Sky* in order for it to catch tuna by long line.

[10] In that regard, Mr Coker represented that he had hooks and lines for that purpose and he undertook to make those available as part of the set up process. There is dispute between the parties as to whether the hooks and lines supplied by Mr Coker were of merchantable quality or not, but nothing turns on that question for present purposes.

[11] Mr Coker told the Authority that at the point at which he first engaged with Mr Skene, he (Mr Coker) was an undischarged bankrupt and Mr Coker is adamant that he told Mr Skene that that was the position. Of course, if the Authority is satisfied that that information was known to Mr Skene, it is a material aspect to the question whether the parties were contemplating a joint venture or not. This is because if Mr Coker was an undischarged bankrupt (and Mr Skene knew that), then the parties would have been legally unable to undertake a joint venture arrangement without the consent of the Official Assignee in bankruptcy. It is plain on the evidence that no such consent of the Official Assignee was ever obtained.

[12] But while Mr Coker is adamant that Mr Skene knew that he was an undischarged bankrupt, Mr Skene was equally adamant that he had no such knowledge. Notwithstanding the fact that Mr Coker had received correspondence from the Official Assignee at Mr Skene's Christchurch home, Mr Skene told the Authority on oath that he had no knowledge of Mr Coker's bankruptcy.

[13] His evidence is that Mr Coker told him that it was his wife who was an undischarged bankrupt and that there was no suggestion that Mr Coker himself was a bankrupt. Further, Mr Skene maintained that while Mr Coker did receive mail at his home address, that mail was of course addressed to Mr Coker and was not opened by Mr Skene. Mr Skene says he simply did not know that Mr Coker was a bankrupt and he had no way of knowing that in the absence of being told it by Mr Coker.

[14] Mr Skene also told the Authority that all of the people who worked in his business were contractors and that the habitual basis on which those workers were remunerated was on a share of the catch returns. The easiest way of achieving that payment structure, according to Mr Skene, was on the basis that the labour used in the business was all contracted rather than employed. Mr Skene invited the Authority to conclude that because all of the other persons working in the business were contractors rather than employees, it would be unlikely for Krayford to employ Mr Coker rather than contract with him.

[15] The Authority sought from the parties any written documentation which would assist it to reach a conclusion about the nature of the relationship. In simple terms, it appears there is none or at least none that bears on that question. In particular, there is no employment agreement nor indeed any other document which would suggest that the relationship was one of employment.

[16] What is more, other agencies have been forced to consider the nature of this relationship and have reached a conclusion about it. One such is the ACC which Mr Coker had occasion to engage with as a consequence of an injury that he sustained while in the relationship with Krayford.

[17] Of course, Mr Coker represented to ACC that he was employed but the evidence before the Authority is that the ACC did not accept Mr Coker's claim on the footing that he was not an employee. Mr Skene told the Authority that the ACC had contacted him in relation to the matter and that he had assisted the ACC with its inquiries. While the ACC's conclusion is by no means definitive, it must be persuasive evidence that the Authority should take into account when reaching a conclusion on the matter.

[18] Mr Coker alleges that the relationship between himself and Mr Skene "*went toxic*" when he (Mr Coker) asked Mr Skene to formally document the "*employment relationship*".

[19] What is clear is that the working relationship was of relatively short duration. There were a short number of trips to sea where Mr Coker commanded *Conquest Sky* and had crew with him who were contractors to Krayford; Mr Skene was not on board the vessel during these voyages. Significant catch was landed under Krayford's permit but relationships on board the vessel were obviously stressful. The other fishermen complained about Mr Coker's attitude to Mr Skene, referred to drunkenness, abuse and significant deafness so as to be a safety hazard for a skipper. Mr Coker retaliated with complaints about the crew being insubordinate, using drugs, and generally being incompetent.

[20] Mr Coker says that on or about 15 May 2012, Mr Skene terminated the relationship with him, gave him \$5,000 in a lump sum on account, indicated that there may be more coming after the costs had been assessed and the income had all come in.

[21] Mr Skene says that the relationship came to an end because of the vociferous complaints from the other workers about Mr Coker and issues to do with his management of the crew and his management of the vessel. There was an argument about damage to *Conquest Sky* when she was tied up in Milford Sound and issues about who was to blame for the damage to the vessel.

[22] Mr Skene says that as part of his commitment to the arrangement with Mr Coker, he took a lease of a caravan for 12 months which Mr Coker was to live in (a lease which the Authority is told is still being paid for notwithstanding Mr Coker has long since left the relationship), provided a truck for Mr Coker to use and even settled Ministry of Fisheries bills for Mr Coker.

[23] Mr Skene says there was a joint venture between Krayford and Mr Coker to take advantage of Mr Coker's expertise. The intention of the parties was that they would catch tuna and that they would do that on a joint venture basis, Krayford using Mr Coker's expertise in the tuna fishery, and Krayford providing the vessel and the rest of the crew. Mr Skene says the arrangement simply did not work because Mr Coker could not settle on a working relationship with the rest of the crew and there were concerns about his operation of the vessel as well.

[24] Mr Skene also provided evidence to the Authority about a previous venture in which Mr Coker had been engaged which was also on a joint venture basis rather than one of employment, and which had also ended in disputation between the parties.

Determination

[25] Despite Mr Coker's adamant view that he was employed by Krayford, there is simply no evidence to support that view. Indeed, all the evidence supports the conclusion that the arrangement was a contractual one, whatever its terms, and that being the position, it falls outside the remit of the Authority.

[26] As the Authority has already made clear, it has no jurisdiction to consider disputes unless they are about an employment relationship and this dispute, which plainly is a very real one for the parties, falls squarely outside of the Authority's ability to act.

[27] The reason the Authority has concluded that this is not an employment relationship is the absence of any evidence to support that view together with the

reasonably compelling evidence of the contrary view. There is no documentary evidence to support Mr Coker's belief that this was an employment relationship and the fact that he says that the relationship effectively came to an end when he sought to document the relationship as one of employment does not assist him because Mr Skene denies that that conversation ever took place and there was no independent evidence to suggest it did. Even if Mr Coker did have the conversation he maintains with Mr Skene, the fact of the matter is that by that stage, the relationship had already been entered into and, on Mr Coker's evidence, came to an end at about that time anyway.

[28] The issue about Mr Coker's bankruptcy is important. The two men have diametrically opposed views on this matter. Mr Coker is adamant that Mr Skene knew of his bankruptcy; Mr Skene is equally adamant that he had no such knowledge. The Authority prefers Mr Skene's recollection of events on this point. Mr Skene was very persuasive that he had no idea that Mr Coker was a bankrupt and that he learned that after the relationship had come to an end.

[29] The fact that Mr Skene referred to the usages in the fishing industry and the common use of contractor workers weighed with the Authority as did the evidence that the other crew on the vessel *Conquest Sky* were themselves contractors. It seems highly unlikely that a principal would contract with a number of crew but then employ the skipper, particularly when the arrangement between the parties has the elements of a contractual relationship. It would be an unusual employment relationship where the hooks and lines to catch the subject fish were provided by an employee, whereas it is much easier to envisage that such provisioning was part of a contractual agreement.

[30] Furthermore, the fact that Mr Coker was expert in the tuna fishery and Mr Skene knew nothing at all about it together with the sheer value of the tuna fishery, seem to militate against an employment relationship and suggest a contractual one where both parties have "*a chance of reward and a risk of a loss*".

[31] Finally, the fact that the Accident Compensation Corporation has itself considered the issue and concluded that there is no employment relationship, while not conclusive, must be persuasive evidence that, whatever the dispute between the parties, the nature of the relationship is not one of employment.

[32] That also is the Authority's considered view; on that footing, the Authority is unable to help the parties further in resolving their dispute and must dismiss Mr Coker's claim in this jurisdiction on the basis that there is insufficient evidence of an employment relationship and thus no basis on which the Authority can engage in considering the dispute between these parties.

Costs

[33] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority