

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 474
5517799

BETWEEN	COLIN BENDER CHARTERED ACCOUNTANTS LIMITED Applicant
A N D	NEIL BLAKE Respondent

Member of Authority: Anna Fitzgibbon

Representatives: James Turner, Counsel for the Applicant
Respondent in person

Investigation Meeting: 12 November 2014 at Auckland

Submissions Received: At the investigation meeting

Date of Determination: 19 November 2014

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Colin Bender Chartered Accountants Limited (“the company”) claims that the respondent, Mr Neil Blake, was employed by it from 1 April 2013 to perform general accountancy, financial and tax duties for it. The company contends that Mr Blake breached the terms of the employment relationship by separately invoicing the company’s clients through Mr Blake’s company, Ability Accounting Services Limited (“Ability”).

[2] The company seeks relief in respect of these alleged breaches by Mr Blake.

[3] Mr Blake says he was never an employee of the company, he was a contractor. Further, Mr Blake says even if he is found to be an employee, then he has not breached the employment agreement with the company.

Issue

[4] The issue for determination by the Authority is whether an independent contractual relationship or an employment relationship existed between the company and Mr Blake.

[5] If an employment relationship existed, then the Authority has jurisdiction to investigate whether or not Mr Blake has breached his obligations as an employee to the company. If no employment relationship existed, then the Authority has no jurisdiction to investigate the company's claims against Mr Blake.

Was Mr Blake an employee or an independent contractor?

[6] The statutory test for determining the preliminary jurisdictional issue is set out in s.6 of the Employment Relations Act 2000 (the Act). Section 6 of the Act states:

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;*
- ...
- (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 the relationship.*

[7] The leading case on s.6 of the Act is the Supreme Court decision of *Bryson v. Three Foot Six Ltd*¹ to which counsel for the company referred me. Chief Judge Colgan in *Singh v. Eric James & Associates Ltd*² states at para.[16] that the inquiry in each case involving s.6 of the Act is “*intensely factual*” and at para.[17] sets out a number of principles derived from the *Bryson* decision.

¹ [2005] ERNZ 372

² [2010] NZEmpC 1

[8] The Employment Court in *Poulter v. Antipodean Growers Ltd*³ at para.[20] summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:

1. *The Court must determine the real nature of the relationship.*
2. *The intention of the parties is still relevant but no longer decisive.*
3. *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
4. *The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the “fundamental” test.*
5. *The fundamental test examines whether a person performing the service is doing so on their own account.*
6. *Another matter which may assist in a determination of the issue is industry practice although this is far from being determinative of the primary question.*

[9] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s.6 is for the Authority, or the Court, to gain an overall impression of the underlying and true nature of the relationship between the parties.

Relevant facts

[10] Mr Blake is an accountant and has been for some 50 years. Mr Blake is the sole director and shareholder of Ability, an accounting company he has owned and operated for 10 years. Mr Colin Bender is the director of the company and is also one of three shareholders in the company. Mr Bender has been a chartered accountant since 1996 and has been running the company since 2008.

[11] In approximately 2010/2011, Mr Bender was looking for business opportunities for the company, including the possibility of purchasing another accountancy practice. During this same period of time, Mr Blake was considering slowly moving into retirement.

[12] In late 2012, Mr Blake approached Mr Bender about the possibility of entering into an arrangement whereby Ability and the company would merge their respective businesses. Under the proposed arrangement, Mr Blake would continue to service Ability’s clients and the company’s clients and would be remunerated by the company for doing so.

³ [2010] NZEmpC 77

Intention of the parties

[13] Mr Bender says that he prepared a sale and purchase agreement (the initial agreement) between the company and Ability which documented the merger and Mr Blake's ongoing role with the company. Mr Bender says that the initial draft of the agreement documented Mr Blake's role as being that of a contractor, to be remunerated at the rate of \$50 per hour. Mr Bender says that Mr Blake was not comfortable with being a contractor. Mr Blake requested that he be an employee of the company at the rate of \$48 per hour and that his tax obligations would be the responsibility of the company.

[14] Mr Blake's version of events differs. Mr Blake says that at no stage was he willing to be an employee. Mr Blake says he sent an email to Mr Bender prior to the agreement being signed stating that he wished to remain as an independent contractor. Mr Bender denies receiving such an email and it was not provided to the Authority. Mr Blake says even though the initial agreement stated he was employed by the company, he was in fact a contractor. The use of the term "employee" was simply to ensure he was not required to be GST registered and that his taxes would be the company's responsibility. Mr Blake says that he had fallen behind with some of his tax obligations previously and was wary of any tax issues with the Inland Revenue Department (IRD).

[15] The initial agreement is as described by Mr Bender. In relation to the relationship between the company and Mr Blake the initial agreement stated:

Neil Blake will still be the primary contact person for his clients transferring to the merged entity and will be responsible for servicing his client in a timely and efficient manner. We will employ him on a sub-contractor basis at the rate of \$50.00 per hour, start date February 2013...

[16] Mr Blake stated after receiving the initial agreement he made some changes and provided Mr Bender with the final wording of the clause regarding his status which was included in the final version of the agreement (final agreement). On 20 December 2012, prior to the agreement being signed by Mr Blake and Mr Bender, Mr Blake emailed Mr Bender as follows:

Further to our chat this morning, here is your S&P agreement amended to cater for what we chatted about this afternoon. I have adjusted the hourly rate to \$48 to allow for KiwiSaver and ACC contributions that you would have to pay as an employer. I also

would not expect to get paid for holiday or sick leave. The intention being that I get paid only for working hours. ...

[17] The changes were made and the final agreement was signed on 4 February 2013, by both Mr Blake as director of Ability and Mr Bender as director of the company. The final agreement sets out the assets being sold by Ability to the company and the purchase price. Settlement date was 1 April 2013. The pertinent part of the final agreement for the purposes of this determination is as follows:

Merger of two businesses:

The vendor will write to his clients advising them of the planned merger of his practice with Colin Bender Chartered Accountants Limited. Letter timing prior to settlement date.

The vendor and the purchaser to work together to ensure a smooth merger of the two business.

Neil Blake will still be the primary contact person for his clients transferring to the merged entity and will be responsible for servicing his clients in a timely and efficient manner. We will employ him on a wages basis at the rate of \$48 per hour, start date 1 April 2013. There will be minimum employable hours of 32 hours per week. There will be no holiday or sick leave pay. Completed jobs will be invoiced by Colin Bender Chartered Accountants Limited from April 2013. The purchaser will provide additional administrative support to reduce the vendor's administration duties. Neil Blake's planned intention is that there will be a gradual phase-out after two years, with reducing work hours and then retirement.

Vendor will transfer all client files/records (hard copy and electronic) to the purchaser. The clients will transfer to the purchaser's Inland Revenue tax agency list.

Restraint of trade:

The vendor is selling to the purchaser the clients as detailed in Schedule 1. Neil Blake will only act for the transferred clients in his capacity as an employee of Colin Bender Chartered Accountants Limited. Neil Blake personally guarantees he will honour this restraint of trade.

...

Warning: This is a binding contract, if any party has doubts they should seek professional advice before signing.

[18] Mr Bender did not provide Mr Blake with the usual form of individual employment agreement because he said the arrangement with Mr Blake was not the "stock standard" employment relationship.

[19] The clear wording of the final agreement as it relates to Mr Blake's status with the company is clear in my view; the final agreement states:

- (a) Mr Blake will be employed by the company at an hourly rate;
- (b) Mr Blake will be employed for a minimum of 32 hours per week;
- (c) Completed jobs will be invoiced by the company; and
- (d) Mr Blake is subject to a restraint of trade clause and specifically only to act for clients transferred from Ability “*in his capacity as an employee of the company*”.

[20] In my view, Mr Blake himself clarified the wording of the agreement by amending it to state that he was going to be “employed” on “wages” and specifying minimum hours of work. Further, the final version of the agreement made it clear that Mr Blake would be subject to a restraint of trade - this was not mentioned in the initial agreement. These are important facts in my view and confirm that Mr Blake was concerned to ensure he was to be employed by the company.

[21] While there is reference in the final agreement to no holiday or sick leave being paid, the provisions of the final agreement as referred to above appear to me to strongly suggest that it was the intention of the parties that their relationship was an employment relationship and not that of an independent contractual relationship.

[22] Even if I am incorrect, there are other factors which strongly suggest that the relationship between the parties was an employment relationship and not an independent contractor relationship.

An employment relationship in practice

[23] While Mr Blake worked reasonably autonomously in terms of the hours he kept, it was agreed that he would work a minimum of 32 hours per week and that he would be paid wages of \$48 per hour. Mr Blake reported to work usually between 9.30 and 10.30am each day. Sometimes Mr Blake worked a couple of hours and some days he worked longer hours. However, the practice was that he worked a minimum of 32 hours and in the event he did not, this time was made up at a later date.

[24] Mr Blake did not render GST invoices, he was paid a wage from which PAYE was deducted. Mr Blake recorded his time on timesheets as is usual in a professional services firm. On 4 April 2013, Mr Blake filled in and signed a tax code declaration.

The tax code declaration is between an employer and an employee. Mr Blake filled his tax code in as “M” and declared his statement to be true and correct.

[25] The company filed an employer monthly schedule (EMS) with the IRD for the period of time that Mr Blake was employed by it and Mr Blake is listed as one of the company’s employees. Mr Blake’s individual tax return for the period 1 April 2013 to 31 March 2014 shows that his entire income with the exception of a very small amount from interest, was derived from his employment by the company.

Integration

[26] Mr Blake performed his duties in the company’s office. He used the company’s computer and received a reimbursement of \$50 per month for using his personal mobile phone. Any mileage in his own car was reimbursed by the company by paying mileage expenses. Mr Blake did not lease or sublet the office from which he worked at the company. This too is an indication to me that the underlying and true nature of the relationship between Mr Blake and the company was that of an employment relationship.

Control

[27] Mr Bender exerted control over Mr Blake’s work, in my view. Mr Blake attended staff meetings where files were discussed and Mr Blake responded to emails from Mr Bender requiring updates on work being carried out. In an email on 21 May 2013 from Mr Bender to Mr Blake and another employee, Mr Bender states:

Neil can we please have an Excel list of all your GST clients, GST frequency, time involved in doing their GST returns, estimated number of bank statement pages per month. This will assist us to target high volume clients. When can we have this?

[28] Mr Bender followed Mr Blake up on 7 June in an email stating:

Hi, please give me a progress report when this will be done?

[29] There were a number of other emails sent by Mr Bender to Mr Blake requesting tasks to be finalised. These matters all point to strong control by Mr Bender over Mr Blake’s work.

True nature of the relationship

[30] In my view, Mr Blake was an employee of the company. At the time of the merger of his business with that of the company, Mr Blake surrendered his GST status.

[31] Despite the fact that he did not receive holiday or sick pay, Mr Blake was paid wages for a minimum number of hours per week. At Mr Blake's request the amount of wages included amounts for Kiwisaver and ACC which the company, as Mr Blake's employer would have to pay him. PAYE was deducted from Mr Blake's wages.

[32] Mr Blake signed a statutory declaration with the IRD that he was an employee and the company filed EMS reports with the IRD on a monthly basis which included information about Mr Blake and his status as an employee of the company. Mr Blake received and followed instructions from Mr Bender and did not receive a profit in respect of any of the company's invoices to clients transferred from Ability to the company. Most tellingly in my view was the amendment by Mr Blake himself to the wording of the initial agreement with the company to make it clear he was to be employed by it on wages.

[33] My overall view is that the underlying and true nature of the relationship between Mr Blake and the company was that of an employment relationship.

[34] The company is therefore able to pursue its claims against Mr Blake. The Authority has jurisdiction to deal with the company's employment relationship problems.

[35] The substantive matter has been proposed for an investigation meeting in the Authority on 4 and 5 February 2015. A telephone conference will shortly be scheduled in order to timetable any further documentation required for that investigation meeting.

Costs

[36] Costs are reserved. Counsel for the company has 14 days in which to file an application as to costs and Mr Blake has 14 days in which to reply.

Anna Fitzgibbon
Member of the Employment Relations Authority