

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 154
3067192

BETWEEN DAMON FORDE
 Applicant

AND RENU KUMAR
 Respondent

Member of Authority: Peter van Keulen

Representatives: No appearance from the Applicant

 Naoimh McAllister, counsel for the Respondent

Investigation Meeting: 17 March 2020

Submissions received: 17 March 2020 from the Respondent

Determination: 16 April 2020

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Damon Forde claims he was unjustifiably dismissed from his employment with Renu Kumar. Mr Forde's claim is based on an assertion that he was employed by Ms Kumar as a property caretaker, with this role evolving into a home help or carer for Ms Kumar before he was subsequently dismissed.

[2] Ms Kumar says she did not employ Mr Forde, rather he was hired as a contractor and therefore the Authority does not have jurisdiction to hear his claim. Ms Kumar requested that this issue, as to the status of Mr Forde, be resolved as a preliminary matter.

[3] This determination, written after my investigation, deals with the issue of status and consequently whether the Authority has jurisdiction over Mr Forde's claim.

Progress of this matter

[4] In a case management conference on 5 November 2019, I directed that I would investigate the preliminary issue of Mr Forde's status in an investigation meeting on 17 March 2020. I also made directions for the exchange of evidence relating to that preliminary issue.

[5] Mr Forde participated in the case management conference but subsequently did not lodge and serve his evidence as directed.

[6] Ms Kumar, through her counsel then requested that she be excused from attending the investigation meeting in person for various reasons around her residing in Singapore. In the absence of her attending in person I advised that I would proceed with my investigation by taking evidence from Mr Forde and then dealing with Ms Kumar's evidence remotely.

[7] Ms Kumar then lodged her evidence in an affidavit on 6 March 2020.

[8] So, by 17 March 2020, when the investigation meeting was scheduled to occur, I had received affidavit evidence from Ms Kumar and no written evidence from Mr Forde.

[9] On 17 March 2020 Mr Forde did not attend at the Queenstown District Court where the investigation meeting was being held. Ms McAllister, counsel for Ms Kumar attended.

[10] As Mr Forde was not present I took a short adjournment and an Authority Officer attempted to contact Mr Forde to find out whether he was intending to attend or not. That officer was unable to get hold of Mr Forde and he did not turn up during the adjournment.

[11] Having taken the adjournment to try and locate Mr Forde and to give him more time to attend at the Queenstown District Court, and as no contact had been made with the Authority or the District Court from Mr Forde, I decided he was not going to attend the investigation meeting.

[12] Further, as the Notice of Investigation Meeting served on Mr Forde had set out clearly the date, time and place of the investigation meeting and as it also set out that the Authority

could proceed in either party's absence, I decided to proceed with my investigation using the affidavit evidence of Ms Kumar and submissions I received from Ms McAllister.

Independent Contractor

[13] The legal test for ascertaining whether a person is an employee is set out in s 6 of the Employment Relations Act 2000 (the Act).

[14] What the relevant case law says about s 6 of the Act is that I am required to consider the real nature of the commercial relationship between the parties broadly and realistically, rather than narrowly and artificially, or legalistically. In doing so, I must assess the reality and all the circumstances of work performed in the working relationship.¹

[15] From this relevant case law², the steps I should take and the circumstances I should consider in this assessment are:

- (a) I must consider the terms of any contract between the parties. From this contract, I can establish if there is a common intention, which may indicate the nature of the relationship but will not be determinative.
- (b) I must then consider any divergences in the agreed terms by assessing how the work was carried out in practice.
- (c) Once I have assessed how the work was carried out in practice I can then apply the three relevant common law tests:
 - (i) Control, being an analysis of who decides what work is done and how it is done;
 - (ii) Integration, being an analysis of how integrated the individual is into the business of the alleged employer; and

¹ *Bryson v Three Foot Six Ltd* [2003] ERNZ 581 (EmpC); *Bryson v. Three Foot Six Ltd (No 2)* [2005] NZSC 34; *Noble v Ballooning Canterbury.com Limited* [2019] NZEmpC 98; *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 and *Narinder Singh v Eric James & Associates Ltd* [2010] NZEmpC 1.

² Applying *Bryson*, above n 1, and following the Employment Court decisions in *Noble*, above n 1, *Atkinson*, above n 1, and *Singh*, above n 1.

- (iii) The fundamental test, being an analysis of whether the individual is in business on his own account.
- (d) I should consider industry practice as this is relevant but it is not determinative.
- (e) Similarly, I should consider the tax treatment on any payments noting however that it is not determinative and that the tax treatment may be misapplied based on the intention of one of the parties such that the tax treatment is merely a mistake and not indicative of what the relationship is.

The terms of engagement agreed between Ms Kumar and Mr Forde

[16] Ms Kumar primarily resides in Singapore but for the last two years she has spent four to five months each year living in Queenstown.

[17] In April 2019 Ms Kumar decided to hire a property caretaker to undertake some maintenance at her Queenstown house. She advertised this position between 23 and 29 April 2019 on a recruitment website. That ad described the role as a full time property caretaker undertaking cleaning, gardening, property maintenance, driving duties and walking two dogs.

[18] In early May 2019, Ms Kumar spoke to Mr Forde about the caretaker role. Ms Kumar described the role as being short term and discussed with him the general property maintenance work she required to be done. Mr Forde told her about his experience, including that he carried out maintenance work on other properties in Queenstown, that he had his own equipment and that he could complete the required maintenance work and other work he considered necessary at the rate of \$40.00 per hour plus expenses, invoicing her on a weekly basis.

[19] In her evidence Ms Kumar said this arrangement was different to what she initially had in mind but it dealt with the property maintenance concerns and she believed as Mr Forde was set up and working in property maintenance that she would just become one of his clients.

[20] Ms Kumar and Mr Forde agreed to him being engaged as the property caretaker on that basis, but a written agreement was not completed.

[21] Given this evidence of the negotiations and the oral agreement reached, I infer that the common intention at the outset of this relationship was that it would be a contracting one – Ms Kumar would be a client of Mr Forde’s existing property maintenance business, Mr Forde would undertake the maintenance work required, either from his own assessment or as requested by Ms Kumar, and Mr Forde would invoice Ms Kumar directly for that work undertaken at an hourly rate plus expenses.

How the work was carried out

[22] Mr Forde started property maintenance work at Ms Kumar’s Queenstown house on 17 May 2019 whilst Ms Kumar was still in Singapore. In this first week of work, Mr Forde checked Ms Kumar’s house and car and undertook some general maintenance work such as cleaning gutters. Mr Forde then invoiced Ms Kumar for 10 hours work. The invoice dated 24 May 2019 was issued by a company, Live24 New Zealand Limited, and was for \$400.00 plus GST. Mr Forde is the sole shareholder and director of Live24 NZ Limited.

[23] Mr Forde then did further work for Ms Kumar through the first half of June 2019. Mr Forde rendered two invoices to Ms Kumar for this period of time through Live24 New Zealand Limited. The first of these invoices dated 10 June 2019 was for 7 hours work (totalling \$480.00) and expenses of \$97.00 together with GST on the total of \$577.00. The second invoice was for expenses incurred between 14 June 2019 and 19 June 2019 to a total of \$553.61 plus GST – which, on my analysis, appears in some cases to be charging GST on the GST included in the expenses claimed.

[24] Ms Kumar arrived in Queenstown on 18 June 2019 and Mr Forde continued to provide property maintenance work at an increased level through until 14 July 2019. Ms Kumar says that Mr Forde had no regular pattern of work and was left to work when he wanted on the required maintenance work, fitting this around other maintenance work that Ms Kumar believed he was undertaking.

[25] On 22 June 2019, Mr Forde invoiced Ms Kumar for work he had undertaken between 17 June 2019 and 22 June 2019, being 46 hours work. However, rather than send through an invoice from his company Mr Forde just sent an email to Ms Kumar itemising the 46 hours work and requesting payment of \$1,840.00.

[26] Then on 29 June 2019, Mr Forde sent a second email to Ms Kumar setting out the hours worked for that week, totalling 47 hours and requesting payment \$1,880.00 plus expenses.

[27] On 1 July 2019, having paid for two weeks of increased maintenance work, Ms Kumar decided it might be more cost effective for her to simply pay Mr Forde a flat weekly rate whilst she was living at her Queenstown home. She discussed this with Mr Forde and they agreed on a weekly rate of \$1,400.00.

[28] This new arrangement was in place for just over one week, with Ms Kumar paying one weekly payment of \$1,400.00 when Mr Forde and Ms Kumar appeared to disagree over some issues relating to the work that was part of the contractual arrangement – essentially Mr Forde asserted that his role had become more of a home helper and that Ms Kumar might prefer to engage someone else for that.

[29] As a result of this Ms Kumar reflected on the work being provided by Mr Forde and others who she engaged and she decided that the arrangements with Mr Forde were not the most economical use of her money and his time so she proposed a reduction in the amount of property maintenance work required and a reduction in the flat rate to monthly amount of \$2,500.00.

[30] Mr Forde did not respond to this particularly well, advising Ms Kumar that he was now an employee and she could not simply reduce his hours of work as she proposed. Ms Kumar rejected this and tried to negotiate further with Mr Forde reiterating her wish to continue to use him as a maintenance contractor but on a reduced basis.

[31] Ultimately these discussions came to an end without a resolution and Mr Forde lodged his Statement of Problem in the Authority.

[32] Reflecting on this chronology of events, I conclude that the work undertaken by Mr Forde for Ms Kumar was carried out on a basis consistent with the original agreement. Mr Forde undertook the maintenance work he considered necessary, using his own tools and equipment and working when it suited him. He was also free to undertake other maintenance work. Mr Forde then invoiced for the work he did undertake initially on an hourly basis, sometimes through his company and charging GST as a result and other times directly. This

charging rate then changed by agreement to a flat weekly rate, which Ms Kumar paid. All payments were made into the same bank account and were made in response to invoices or requests for payment from Mr Forde.

[33] Ms Kumar never treated Mr Forde as an employee either in terms of providing equipment or any benefits such as holiday pay or sick leave nor did she deduct any PAYE.

[34] The only time there appeared to be any discussion about Mr Forde being employed was when Ms Kumar attempted to control and limit the amount of maintenance work Mr Forde was doing for her.

[35] There was nothing in the way that the property maintenance work was carried out that indicates that the parties' intentions changed from operating a contractor relationship to an employer and employee.

Application of the relevant common law tests

[36] Based on the agreement between Mr Forde and Ms Kumar and my conclusions as to how that operated, I can apply the three common law tests – the control test, the integration test and the fundamental test.

The control test

[37] The control test is an analysis of the nature and extent of control of the work performed and who exercises that control. At its simplest it is a consideration of who controls or decides what the person must do, how he/she must do it and when he/she must do it.³

[38] The greater the level of control exerted by the person providing the work, that is supervision of and direction over the work performed (the what, how and when of the work) the more likely the person carrying out the work is an employee.⁴

[39] In this case, there were only limited elements of control exerted by Ms Kumar over the work carried out, in that she gave some direction by requesting specific tasks be performed. However, this was limited and overall Mr Forde had the discretion to decide much of what was done under the general requirement to perform property maintenance, how it was done by

³ *Atkinson*, above n 1, at [59]

⁴ *Noble*, above n 1, at [106]; and *Clark v Northland Hunt Incorporated* (2006) 4 NZELR 23 at [30].

applying his own knowledge and expertise and using his own tools and equipment, and when it was done.

[40] Mr Forde's considerable ability to control the what, how and when of the work to be done supports a contractor relationship.

The integration test

[41] This test determines the extent to which a person is integrated into the business⁵.

[42] To the extent that running a house could be deemed a business, Mr Forde was integrated only so far as he did maintenance work on the house. This by its very nature cannot be persuasive as otherwise every contractor would be deemed to be integrated into a business merely by the fact that they undertake some work for that business. The integration test requires an analysis of whether, when the work is performed, the person performing the work is integrated into the business through the way in which the work is performed.

[43] In this regard there is very little evidence to show Mr Forde was otherwise integrated into any business of Ms Kumar's. He was not required to wear a uniform or use any particular equipment; he did not work directly with others, who might be part of any business operated by Ms Kumar; he did not attend meetings with other workers or coordinate his work with them; he did not hold himself out as being part of any workforce for a business operated by Ms Kumar, nor was he required to; and he did not follow any procedures or guidelines for work that might apply for a business operated by Ms Kumar i.e. there was no employee handbook or any policies or processes that workers had to abide by.

[44] I conclude that Mr Forde was not integrated into any business operated by Ms Kumar and this supports a contractor relationship.

The fundamental test

[45] This test, also known as the economic reality test, is an analysis of whether the person engaged to perform work was in business on his/her own account.⁶

⁵ *Atkinson*, above n 1, at [66].

⁶ *Noble*, above n 1, at [119]; *Chief of Defence Force v Taylor* [2010] NZEmpC 22.

[46] I conclude that Mr Forde was in business on his own account - the way he worked shows this: he had other property maintenance work which he had been undertaking prior to working for Ms Kumar and he was free to continue with; he operated through a company, or at least appeared to do so initially; he invoiced for work done on an hourly rate and then the agreed weekly rate, plus expenses; and he used his own tools and equipment.

[47] This conclusion supports a contractor relationship.

Other factors

[48] The other factors I can consider are industry practice, i.e. are people who provide property maintenance normally engaged as contractors, and what tax was paid.

[49] I have no evidence of industry practice, so cannot consider this factor.

[50] Turning to the tax paid, Ms Kumar did not deduct any PAYE or schedular tax payments for Mr Forde, leaving the tax obligations to him. Ms Kumar did pay GST on three invoices.

[51] This tax treatment supports a contractor relationship.

Conclusion

[52] Applying the legal test under s 6 of the Act, I determine that Mr Forde was operating as an independent contractor when he performed property maintenance work for Ms Kumar. As a result, the Authority does not have jurisdiction to hear and determine his claims and they are dismissed.

Costs

[53] As Ms Kumar has been successful she is entitled to a contribution to her costs. My starting point is to apply the daily tariff and then consider whether this should be adjusted based on the principles in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*,⁷ and *Davide Fagotti v. Acme & Co Ltd*.⁸

⁷ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

⁸ *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135.

[54] My investigation of this matter took almost half of a day, so applying the appropriate proportion of the daily tariff of \$4,500.00 for the first day of an investigation meeting, the initial amount for costs is \$2,250.00.

[55] However given the additional work that counsel for Ms Kumar had to undertake because Mr Forde failed to lodge his evidence as directed and because he failed to appear at the investigation meeting, I am prepared apply an uplift to the daily tariff of a further \$2,250.00.

[56] Within 14 days of this determination, Damon Forde must pay Renu Kumar \$4,500.00 as a contribution to the costs she has incurred in this matter.

Peter van Keulen
Member of the Employment Relations Authority