

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 142  
5307747

BETWEEN                      AMY HALL  
   Applicant  
  
AND                                REMUERA BARBER SHOP  
   Respondent

Member of Authority:        James Wilson  
  
Representatives:              Mark Nutsford for the applicant  
   Alan Rowe for the respondent  
  
Investigation Meeting:        25 January 2011 at Auckland  
  
Submissions received:        27 January 2011 from the Applicant  
   3 February 2011 from the respondent  
  
Determination:                7 April 2011

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**The preliminary issue for determination**

[1]     Ms Amy Hall says that she was unjustifiably dismissed from her position as an hairdresser by the Remuera Barber Shop. (“RBS”). However the owner of RBS, Mr Trevor Guise, says that Ms Hall was not an employee of RBS but rather was engaged on a contract for services and that her contract was not terminated that there was no work available for her on the days she wished to work.

[2]     The sole issue for determination at this point is whether or not Ms Hall was an employee of the Remuera Barber Shop. If she was not she is unable to pursue her claim, that she was unjustifiably dismissed, in the Authority.

## Legal considerations

[3] The Employment Relations Act (the Act) at section 6(2) says that:

*(2) In deciding ... whether a person is employed by another person under a contract of service, the Court or the Authority... 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.*

[4] Judge Shaw in the Employment Court in *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581, said:

*[19] Since s 6 of the Employment Relations Act 2000 changed the tests for determining what constitutes a contract of service there have been two cases which have interpreted the changes to the law. The principles established by those cases can be summarised as follows.*

- a. The Court must determine the real nature of the relationship.*
- b. The intention of the parties is still relevant but no longer decisive*
- c. Statements by the parties, including contractual statements, are not decisive of the nature of that relationship.*
- d. The real nature of the relationship can be ascertained by analyzing the tests that have been historically applied such as control, integration, and the "fundamental" test.*
- e. The fundamental test examines whether a person performing the services is doing so on their own account.*
- f. Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.*

And in a subsequent judgment in the same case (*Bryson v Three Fort Six Ltd.(No 2)* [2005] 1 ERNZ 372 at paragraph [32] the Supreme Court, upholding the earlier decision of the Employment Court, said:

*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 the relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly requires the Court or the Authority to have regard to 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 were 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 would usually be possible to examine the relationship in the light of the control, integration and fundamental tests....*

## **Background**

[5] Ms Hall says that prior to commencing at RBS on 8 March 2010 she was told that she would be working from 8.30 am to 5.30 pm Monday, Tuesday and Wednesday and would be paid \$180 per day, less tax. She says that as it happened she worked only on Mondays and Tuesdays. She says that after she commenced, she queried the reduction in days (she had made child care arrangement for 3 days a week) and asked for a contract which was never forthcoming. While there are some differences between the parties about how well Ms Hall performed her duties these are not relevant at this preliminary point. In any event, Ms Hall says, on 14 April 2010 Mr Guise rang her and advised her that he had no further work for her.

[6] Mr Guise says that there was no employment relationship between RBS and Ms Hall and that he had made it clear to her, prior to her commencement, that her engagement would be as an independent contractor on an "as required basis". Ms Hall was to provide her own tools, be responsible for her own tax and GST, and be paid, at the completion of each day worked, \$18 for each hour that she worked. Mr Guise points to discussions he says Ms Hall had with other staff at the salon which he says confirm that Ms Hall was both aware of and happy with this arrangement.

He says that while Ms Hall indicated that she would be available Mondays Tuesdays and Wednesdays, work had only been available Mondays and Tuesdays. He says that on 14 April 2010 rather than terminating this arrangement he told Ms Hall that there was insufficient work on Monday and Tuesday but offered her work on Thursdays, Fridays and Saturdays.

## **Discussion**

[7] It is clear from both the written evidence and the answers to the questions I posed to the parties at the investigation meeting, that there is a fundamental difference between them regarding what they each understood the arrangement between them to be. Mr Guise is adamant that he has never employed staff in his barbershop, that he had explained clearly to Ms Hall what he intended the arrangement to be and that she, in her discussions with others, clearly understood and accepted this arrangement. Ms Hall on the other hand says that she had always believed that she was an employee. In the words of the Employment Relations Act *the intentions of the persons* is clear. Unfortunately the intentions of the respective persons in this case are fundamentally at odds.

[8] In his statement of evidence Mr Guise indicated that Ms Hall was engaged on a “casual” basis and was to be paid for the actual hours she worked. However in answer to a question from the Authority he said that he paid Ms Hall “eight hours wages” irrespective of the actual hours she worked on a particular day. He later clarified that he did this to ensure that the individual barber remained in the salon and available for work even when there were no clients. He said this was necessary to provide an incentive for barbers to remain at the salon through the quiet periods. If they chose to attend for a full day they would be paid for the full day but that they were entitled to leave whenever they wanted (and presumably not then receive payment).

[9] I turn now to the various tests suggested by the Courts in the *Bryson* case.

***Industry practice***

[10] I have no reason to doubt Mr Guise' evidence that all of his experience (including in his own business's over number of years) suggests that barbers are usually engaged as independent contractors. He suggests that Ms Hall's experience, prior to working at RBC, was in hairdressing salons where the practice is often to employ staff. My own inquiries suggest that there is a range of industry practice and that it is by no means uncommon for "staff" in both barber's shops and hairdressers to be engaged either as employees or as independent contractors. There is therefore no predominant industry practice against which I can consider my determination in this matter.

***Integration and control tests***

[11] Mr Guise told me that Ms Hall was free to accept engagement on a particular day (assuming a barber's chair was available). However he, and other staff, also commented negatively on Ms Hall's performance and timekeeping. These comments suggest that there was an expectation, on the days on which she was engaged, that Ms Hall adhere to the standard which would normally be expected of an employee. I accept, however, that these comments were made to demonstrate that Ms Hall was an independent contractor in that *she came and went as she pleased during the day and she cancelled at short notice agreed to days*. Also relevant to this test is Mr Guise's acceptance that Ms Hall was paid for eight hours a day even if no work was available – for this payment she was expected to be available to work at the salon during working hours. There are *control* aspects of Ms Hall's engagement which suggest that she was an employee.

***The fundamental test***

[12] This test asks whether a person was *working on their own account*. In Ms Hall's case I find that answer to this question is yes. Despite her evidence that she had asked for a written contract and had not understood the requirements relating to taxation, I am confident that Ms Hall entered into this arrangement in the expectation that the taxation arrangements at least would be to her benefit. There is (untested) evidence that Ms Hall was referred to an accountant who could arrange her affairs to best effect. I accept that Ms Hall was free to accept work at RBS or not as suited her. There was no suggestion that Ms Hall was restrained in any way from seeking

engagement or employment on those days on which she did not work at RBS. She was for all intents and purposes a free agent, able to work whatever hours and days she was able to negotiate with either RBS or any other barber or hair dresser. The only constraint on Ms Hall was that on the days she was working at RBS she stayed for the full day – for this commitment she was guaranteed payment for 8 hours.

### **Determination**

[13] Having considered all of the information provided by the parties, in terms of the Act and the various tests endorsed by the Courts, **I have reached the conclusion that Ms Hall was not an employee of RBS.** Rather she was an independent contractor who was in business on her own account who entered into an unwritten contract for services.

[14] **As Ms Hall was not an employee she is unable to pursue a personal grievance against RBS in the Authority.**

### **Costs**

[15] Costs are reserved and the parties are encouraged to settle this issue between themselves in the first instance. If they're unable to do so RBS may file and serve a submission in respect to costs within 28 days of the date of this determination. Ms Hall will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority