

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 244
3021333

BETWEEN SHANE HAYWARD
Applicant
AND HORIZON CONCEPTS
LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Jenifer Silva for the Applicant
Penny Swarbrick for the Respondent
Investigation Meeting: 3 May 2018
Submissions Received: At the investigation meeting
Date of Determination: 6 August 2018

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. Shane Hayward was an employee of Horizon Concepts Ltd.**
- B. Costs are reserved.**

What is the Employment Relationship Problem?

[1] From 2000 Shane Hayward worked for Mike Wood in several businesses owned by Mr Wood. Mostly recently Mr Wood was running Horizon Concepts Limited (Horizon or the company). Mr Wood's businesses were mainly in the printing industry.

[2] Mr Hayward's work had started in production but began including personal administrative work for Mr Wood, as well as administrative work for the businesses. Mr Wood did not use computers and Mr Hayward managed Mr Wood's various work and personal email addresses. For some years Mr Hayward was also the office manager of Mr Hayward's printing business.

[3] From late October 2014 Mr Hayward and his wife rented and lived in an apartment at the property where Mr Wood and his wife lived. Mr Wood's business office was in his home at that property.

[4] The parties agree that Mr Hayward was an employee for many years, latterly of Mr Wood's company Riverland Enterprises Ltd (Riverland), used as a trading company. However, the trading business had been sold in late 2013. Mr Wood retained the Riverland company. Horizon was set up in mid-2013 as a new company for Mr Wood to undertake business activities, although Mr Hayward's employment nominally remained with Riverland, as that company was paying him.

[5] In early 2016 a new arrangement was set up where Mr Hayward invoiced Horizon, which was undertaking some printing and printing broking work. He was paid by Horizon.

[6] From early July 2018 Mr Hayward did not work for Mr Wood or his companies.

[7] Mr Hayward maintains that he continued as an employee, albeit with Horizon, and was unjustifiably dismissed by it in mid-2018. He also claims Horizon breached its duty of good faith to him and owes him holiday pay. Horizon says that Mr Hayward was an independent contractor and that he therefore cannot bring personal grievance, good faith or holiday pay claims.

[8] A preliminary issue was identified regarding whether Mr Hayward was an employee or a contractor with Horizon, from about May 2016 to July 2017. At a case management conference the parties agreed that this issue should be dealt with as a preliminary matter.

[9] An investigation meeting on the preliminary issue of Mr Hayward's status was held on 3 May 2018. I heard from Mr Hayward, Mr Wood and accountant Richard Somerville.

[10] As s 174E of the Employment Relations Act 2000 (the Act) permits, this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

What was Mr Hayward's work?

[11] Mr Hayward had previously undertaken a variety of jobs, primarily office and production management, for Mr Wood's companies. Mr Woods had little interest undertaking practical administrative requirements himself.

[12] From 2013 Mr Wood was also involved in Excitor Fiji Ltd, a tourist transfer business and Mr Hayward checked bank balances, shipping manifests, and set up and maintained register systems and GPS tracking systems for Excitor. Horizon was undertaking print work and Mr Hayward was involved in artwork, quotes, production, invoicing and accounts.

[13] Mr Hayward also had responsibility for Mr Woods' personal administrative requirements. He also undertook email and iPhone back ups for Mr Woods' wife, and did such things as arranged the couple's tickets for trips, and liaised with their insurance companies.

[14] Mr Hayward's work day would usually involve getting into the office, at Mr Wood's home, half to an hour before Mr Woods, and getting his emails sorted out. Mr Wood would give him a brief description of what he was doing and give Mr Hayward instructions for what he needed done. Mr Hayward worked autonomously, often without Mr Wood being present for periods, particularly during the middle of the day. Often the men would have a catch up session towards the end of the working day.

How did the arrangement with Horizon start?

[15] The parties do not agree about who first raised the prospect of Mr Hayward becoming a contractor.

[16] Mr Hayward's recall of events has Mr Wood raising the prospect of rearranging the situation as he did not want to keep paying PAYE, ACC or payroll service costs when Mr Hayward was by this point his only New Zealand based

employee and he thought the charges were too steep. Mr Wood asked Mr Hayward to talk to Mr Wood's accountant Mr Sommerville.

[17] Mr Wood says that he did not care whether Mr Hayward was an employee or a contractor as long as Mr Hayward did the work and got paid. Mr Wood's recollection was of Mr Hayward raising the issue, inspired by his wife's establishment of a business a year or so before. Mr Woods recalls a discussion about Mr Hayward wanting his wife to earn some money. Mr Hayward accepts that such a conversation occurred but that it was a year or so previously.

[18] In any event Mr Wood did encourage Mr Hayward, having been self-employed himself for many years. He thought the opportunity was something for Mr Hayward.

What was the accountant's initial involvement?

[19] As Mr Wood's manager and assistant, Mr Hayward had been dealing with Mr Sommerville for some years. Mr Sommerville had also assisted with the establishment of Mr Hayward's wife's business.

[20] The first Mr Sommerville heard about the possibility of Mr Hayward becoming a contractor was during a call from Mr Wood. Mr Hayward later spoke to Mr Sommerville and reported back to Mr Wood.

[21] Mr Sommerville advised that some of the parameters would need to change if Mr Hayward was going to become a contractor. There was discussion about the benefits of claiming expenses.

[22] Mr Sommerville's focus, in terms of the impetus for the change in status, was on the fact that Mr Wood's previous most significant trading business, run by Riverland, had been sold a couple of years before. Mr Wood had been pursuing other interests but none had come to fruition yet. He was keen to try to reduce his compliance costs because there was not a lot of business activity happening. The staff at Riverland had been paid through an external payroll provider but Mr Hayward became the sole employee that provider was paying.

[23] Mr Sommerville provided some calculations which will be discussed below. His next involvement was when Mr Hayward asked him to attend to his GST registration a few months later.

What agreement was reached?

[24] In late May 2016 Mr Hayward and Mr Wood agreed Mr Hayward would become a contractor to Horizon.

[25] Mr Hayward says that he was not enthusiastic about becoming a contractor but that he always said yes to Mr Wood. He also says that he felt pressured to agree, based on comments Mr Wood had made about his financial position.

[26] While there was some inequality of bargaining power, I do not consider that an objective observer would see that Mr Wood forced Mr Hayward to become a contractor. Mr Sommerville had worked with Mr Hayward and had a good relationship with him. They would shoot the breeze occasionally. Mr Sommerville believes that that he would have known if Mr Hayward was being bullied or pushed into the new arrangement but he did not get that impression. I accept that he did not gain a sense of any anxiety or negativity on Mr Hayward's part about it. They talked about the benefits of claiming expenses and tax reduction.

[27] I find it more likely that Mr Wood raised the prospect of Mr Hayward becoming a contractor. However, the discussions were amiable and Mr Hayward was not forced into the arrangement. At the time it was entered into the two men worked closely together and the arrangement was seen as having advantages to them both. Mr Hayward could claim expenses and Mr Woods no longer had to pay for the payroll service or ACC accounts.

What rate was agreed?

[28] Mr Hayward's holiday pay was paid out in mid-2016 when the previous arrangement involving Riverland finished.

[29] The new arrangements took effect from about 10 June 2016 when Mr Hayward came back from some time off. The parties agreed to Mr Hayward receiving \$1451.30 per week, based on \$31.55 per hour plus GST.

[30] Neither party seemed entirely certain on how the pay rate under the new arrangement was worked out or what it equated to.

[31] Mr Sommerville had provided a sheet showing Mr Hayward's Riverland income, adding components for annual holiday pay, sick and bereavement leave, then adding a GST figure. However, that was not the outcome agreed.

[32] Mr Hayward thought that he was paid 8% less as holiday pay was deducted. His hourly rate did not reflect a deduction but as the agreement was that he was a contractor, he was no longer seen as having an entitlement to paid leave.

[33] Mr Wood thought Horizon agreed to pay Mr Hayward approximately his gross salary from before, plus GST. He said, genuinely I consider, that he did not want to see Mr Hayward out of pocket under the new set-up as they were friends.

[34] The new rate was based on what Mr Hayward had previously received, namely a gross salary of \$1251 per week, and GST was added to that. So the agreement was that the rate was \$31.55 plus GST per hour.

[35] The payment was a standard weekly amount, both before and after Horizon began paying Mr Hayward. Mr Hayward's hours varied somewhat, but he was paid on the basis of 40 hours a week.

What is the test?

[36] Mr Hayward's ability to bring claims for unjustified dismissal, breach of the duty of good faith and holiday pay is dependent on him being an employee.

[37] Under s 6(1) of the Act an employee is defined to mean any person employed by an employer to do any work for hire or reward under a contract of service. In accordance with s 6(2) of the Act, for the purposes of determining whether a person is employed under a contract of service, I must determine the "*real nature of the relationship*" between Mr Hayward and Horizon.

[38] As part of considering the real nature of the relationship I must consider all relevant matters, including any matters that indicate the intention of the persons

involved, and is not to treat as a determining matter any statement by the persons describing the nature of their relationship.¹

[39] In *Bryson v Three Foot Six Ltd* the Supreme Court held that all relevant matters included any written and oral terms of the contract between the parties and any divergences from, or supplementation of those terms and conditions which were apparent from the way in which the relationship operated in practice.²

[40] The intention of the parties is a relevant consideration, but is not decisive³ and other tests are to be considered, including the control test, the integration test and the economic reality test.⁴

What were the parties' intentions?

[41] In examining the real nature of the relationship between Mr Hayward and Horizon, I start by considering what any written or oral terms of the contract between the parties were.

[42] Mr Hayward had been an employee of Riverland. There was no written employment agreement between Mr Hayward and any of Mr Wood's companies even when both parties agree that Mr Hayward was an employee. There was no written contractor agreement entered into with Horizon.

[43] The parties however, did clearly agree that Mr Hayward was going to change his status from that of employee to that of contractor. Common intention may be inferred from evidence of expressions of intention by the parties, as demonstrated by their words or conduct at the time of formation.⁵

Who was in control?

[44] From June 2016, to what extent was Mr Hayward working under the control of Mr Wood for Horizon?

[45] Mr Hayward maintains that Mr Woods still wanted to keep control over him.

¹ S 6(3) of the Act

² *Bryson v Three Foot Six Ltd* [2005] ERNZ 372 at [32]

³ *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585, Full Bench Employment Court

⁴ *Bryson v Three Foot Six Ltd* see n 2 at [32]

⁵ *Muollo v Rotaru* [1995] 2 ERNZ 414

[46] There were no changes in the job structure, the place of work, the hours of work or the other conditions of work. Mr Woods says that he saw the new arrangement as a little flexible and easy for Mr Hayward, than when he had been employed. However, he accepted that there was a similar pattern; a “common look and feel” to the work situation before and after mid-2016. I find that Mr Hayward still did the same work in the same manner.

[47] Mr Hayward had to arrange his work time around Mr Woods’ needs. So, he got to the office at Mr Woods’ house early to check emails and have things ready for Mr Woods to look at when Mr Woods arrived later. Mr Woods accepted that while he may have needed someone working for home all day he did need Mr Hayward every day to keep up with administrative tasks.

[48] Mr Wood was not always, to supervise Mr Hayward’s work. Sometimes for quite a large proportion of his day, Mr Woods was not there. However, this had been the case before the Horizon arrangement was agreed.

[49] Mr Wood did authorise the payment of accounts and made the decisions, with Mr Hayward continuing to action them.

[50] Overall Mr Wood maintained control over Mr Hayward’s work.

Was Mr Hayward’s work integrated into the Horizon business?

[51] Was Mr Hayward’s work an integral part of the Horizon business?

[52] Mr Woods described Mr Hayward as his right-hand man, his “everything”. Mr Hayward was very much integrated into the Horizon business. He was also very much integrated into the administrative management of Mr Woods and his wife’s personal lives.

[53] Mr Hayward undertook his work in the office at Mr Wood’s house and continued to use Mr Wood’s equipment, particularly a computer and Mr Wood’s office phone. His invoices for his work were done on Mr Wood’s computer.

[54] Mr Hayward had occasionally used his own car before 2016 for his work for Mr Woods and this continue under the new arrangement.

[55] In conclusion, Mr Hayward was closely integrated in Horizon’s business

Was Mr Hayward in business on his own account?

[56] This is known as the economic reality or the fundamental test.

[57] As set out above, Mr Hayward did not operate his own office or use his own equipment. He continued to be paid at a weekly fixed weekly amount, not on the results of his work.

Holiday money

[58] Mr Hayward agreed to monitor Mr Wood's emails during the break over Christmas. There appeared to be no prospect of Mr Hayward arranging someone else to take his place when he was away. Contractors can sometimes make arrangements for someone else to undertake the work, as personal service is not seen as required. However, here Mr Hayward had access to Horizon and Mr Wood's email accounts and Horizon's bank and financial accounts. There was no suggestion that he could get someone else could fill in for him.

[59] The two men discussed whether Mr Hayward would have money over the Christmas period. He said that it would be pretty bleak because he did not have money or holiday pay. Mr Wood told Mr Hayward to pay himself for it, from Horizon's account. That was done. Mr Wood characterises this as being a kindness to someone who was struggling, rather than indicating Mr Hayward was an employee.

Invoicing and tax

[60] Mr Wood accepts that he raised the prospect of the arrangement with Horizon appearing more of a contractor one if Mr Hayward invoiced Excitor as well as Horizon Concepts. Mr Hayward had undertaken work for Excitor for a few years and continued to do so from mid-2016 onwards. Mr Hayward submitted invoices for office management services each week, one for a block of hours worked for Horizon Concepts and one for Excitor. However, I accept that these did not accurately reflect the actual hours worked for each as there was no time recording and the hours always totalled 40 per week.

[61] The invoices were in a form used by Mr Hayward's wife, headed with her business's name. Mr Hayward accidentally retained his wife's GST number on the form for some time, before realising that he needed to use his own. Payment for the

invoices came only from Horizon and was arranged by Mr Hayward himself, once Mr Wood signed them off. No direct payments were received from Excitor. Mr Wood planned to get reimbursement from Excitor, but this appears not to have happened.

[62] Mr Sommerville arranged for Mr Hayward to be GST registered once the new arrangement was agreed. His firm prepared Mr Hayward's tax information. Mr Hayward did not seem very aware of expenses claimed but accepted that vehicle depreciation may have been claimed.

Other business

[63] Did Mr Hayward undertake other business as well as that of Horizon? As set out above Mr Hayward did work for Excitor, as well as Mr Wood personally. However, all this work had been done when Mr Hayward was an employee of Riverland. After mid-2016 Mr Hayward was not paid directly by Excitor or Mr Wood.

[64] Mr Hayward did have a concept for another business of his own but says that he never actually undertook work in that regard. He put some information on Facebook, indicating that he was establishing a business, but did not earn from it.

Summary on the economic reality test

[65] Mr Hayward's use of invoices and taxation arrangements are suggestive of a contractor arrangement. However, he was using his wife's invoice form, although he was not operating as part of her business which was of a different nature to the work he did.

[66] Mr Hayward charged a set weekly rate and did not have the opportunity to make more money if the business made money.

Was Mr Hayward an employee or a contractor?

[67] Mr Hayward had had a long-standing employment relationship with various companies owned by Mr Wood.

[68] I accept that the parties could change the real nature of their arrangement. Their objective intention was to change the nature of the relationship. However, the

work itself, where and how it was carried out continue in the same manner as previously.

[69] Mr Wood maintained a high degree of control over when Mr Hayward had to be available to assist him. Mr Hayward was closely integrated into the business of Horizon and Mr Wood personally.

[70] The evidence that Mr Hayward invoiced Horizon and of his taxation arrangements suggest that he was a contractor but my impression from the witnesses was that once it was decided to call Mr Hayward a contractor those things flowed, somewhat similarly to *Bryson v Three Foot Six Ltd.*⁶ The splitting of invoices between Horizon and Excitor was done to support the contractor label.

[71] Mr Hayward worked for a fixed hourly and weekly rate, precluding any opportunity to profit from the relationship with Horizon, and was supplied with equipment by the company, meaning he was taking no financial risk.

[72] These factors indicate that Mr Hayward was an employee. I am satisfied that the real nature of the relationship was that of a contract of service, with Mr Hayward being an employee of Horizon.

Costs

[73] Costs are reserved.

Nicola Craig
Member of the Employment Relations Authority

⁶ See n 2 at [37] and [39] SC