

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 82
5310242

BETWEEN AMANDA AND DION
 HENRY
 Applicants

AND MILLENNIUM 1ST GROUP
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicants in person
 Maxwell (Meisheng) Zhu for Respondent

Investigation Meeting: 28 February 2011, at Paihia

Determination: 03 March 2011

DETERMINATION OF THE AUTHORITY

- A Amanda and Dion Henry and Millennium 1st Group Limited were not in an employment relationship.**
- B The Employment Relations Act 2000 does not apply to this matter, and the Employment Relations Authority does not have jurisdiction to determine the applicants' claim.**

Employment Relationship Problem

[1] Dion and Amanda Henry claimed they were employed by Millennium 1st Group Limited (MGL) and that MGL has not paid them what they are owed.

[2] MGL says the parties were not in an employment relationship.

Issues

- [3] The issues to be determined include;
- a. Whether the parties were in an employment relationship, and if so;
 - b. What, if anything, MGL owes the Henrys.

Relevant Facts

[4] Dion and Amanda Henry are married with two small children. They responded to an advertisement by MGL asking for someone to manage the Millennium Nocturnal park (the park). The park was owned and operated by MGL, and located in Fairburn in the Far North.

[5] After a brief meeting at the park with the Director of MGL, Maxwell Zhu, and a rushed half hour tour of the park in the rain, the Henrys accepted Mr Maxwell's offer to run the park. Mr Zhu required the Henrys to resign from their other employment so they could live at the housing unit provided on site at the park and devote their full attention to running the park.

[6] The parties signed an Agreement on 24 September 2009, the same day they first met. The Agreement identified MGL as Party A and Amanda and Dion Henry as Party B. The Agreement does not expressly refer to the status of the parties' relationship and it does not use employment related terms, such as employer, employee, or employment relationship.

[7] Mr Zhu said MGL entered into a commercial business arrangement with the Henrys, not an employment relationship. Mr Zhu said because he was in Auckland and the park was in the Far North, and because it was a live in role, it would have been too difficult to manage an employment relationship, so MGL decided to enter into a partnership type arrangement where the profits and risks were shared between the parties.

[8] The Henrys believed they were employees. The Henrys said they would not have accepted the offer to run the park if they had thought it meant they would be going into business with MGL.

[9] The parties operated under the terms of the Agreement until the Henrys resigned, predominantly because they were unhappy with Mr Zhu who they said withheld payment from them, whenever a dispute arose. The Henrys said this put them under significant financial pressure given they had young children and no other source of income.

[10] Under the Agreement, Party A (MGL) contributed the “*business premises*” (i.e. the park) and “*current business assets*” (i.e. a number of chattels which were listed, and the list was attached to the Agreement). Once the Henrys got to the park they found some of the listed chattels were missing or were in disrepair, and they provided Mr Zhu with an updated list, which he never responded to.

[11] MOG were to provide what was described in the Agreement as “*the base benefit of \$25,000 of accommodation and cash (\$1,000 paid monthly) to Party B, plus their split of 30% of the business profit and expense share. Party B should be GST registered.*”

[12] Party B (the Henrys) were to contribute “*labour and idea [sic] and responsibility and work in the [...] park.*”

[13] The Agreement stated:

“Party B’s duty is living in the park and supply [sic] all business service, park maintenance, and business development including marketing. Business in the park will include customer service, souvenir shop, Campervan Park, some accommodation and future café.”

[14] The Henrys were required to pay MGL a bond of \$900 upon signing of the Agreement which would be returned 5 working days after the Agreement ended, provided there had been no damage or loss of business assets and property, and the Henrys had no outstanding debts to MGL.

Determination

[15] MGL said this was a bond for its business assets, but the Henrys said they believed it was a bond for the accommodation they were living in.

[16] Although tenancy bonds must be paid to the Department of Building and Housing to hold, the Henrys' bond was held by MGL. I find it was a bond for the business assets provided by MGL, not for the accommodation.

[17] After taking advice from the Inland Revenue Department, the Henrys did not register for GST because they would be earning less than the threshold income which required them to register.

[18] The Henrys thought the monthly \$1,000 payment was net of tax, and that MGL had been making the appropriate deductions before the money was given to them. However, they after they exited the Agreement they found out MGL had not made any deductions on their behalf.

[19] The Henrys then provided a tax return which identified the money they received under the Agreement as salary and which split the \$1,000 per month equally between both of them. They said each paid the tax which was due to avoid a lengthy drawn out battle with MGL over which party was to pay it, but maintain the \$1,000 they were paid should have been the net amount.

[20] Although the Agreement did not identify whether the monthly \$1000 payment was net or gross, I find that the reference that Party B should be GST registered implied the Henrys were responsible for their own tax affairs. If they were employees they would not need to be GST registered.

[21] The Authority only has jurisdiction to investigate employment relationship problems which are founded on an employment relationship.¹ The Employment Relations Act 2000 (the Act) defines employee.²

¹ Section 161 ERA

² Section 6 ERA

[22] In deciding whether a person is employed the Authority must have regard to the real nature of the relationship.³ This requires consideration of all relevant matters, including the parties' intentions, but statements by the parties describing their relationship are not determinative.⁴

[23] I find that the manner in which the parties' relationship operated is indicative of a commercial business relationship, not an employment relationship. The factors which I consider establish the parties were not in an employment relationship include:

- a. The Henrys paid a \$900 bond for the park assets;
- b. The Henrys could choose when and how they carried out their work activities, provided they carried out their responsibilities under the Agreement;
- c. The Henrys were aware that the amount they were paid was less than the minimum wage, but they did not seek a minimum wage;
- d. The Henrys had the ability to profit from their own endeavours, with profits being split 70:30 in MGL's favour;
- e. The Henrys contributed 30% of the parks operating expenses, which included contributions towards rates, property insurance, business phone, etpos costs, website costs, which are all business costs employees would not pay;
- f. The Henrys also contributed 30% towards the costs of maintenance and repairs (such as to the water cylinder), and for the cost of engaging tradesmen such as a plumber and electrician. These costs would not have been paid by employees;
- g. The Henrys worked all of the public holidays which arose during the Agreement. They told me they were aware from their previous jobs of the public holiday entitlements under the Holidays Act 2003, but did not seek to enforce those entitlements for the public holidays they worked. I find that was likely to have been the case because they viewed themselves as being in business rather than as employees;
- h. The Henrys did not see themselves as having annual leave entitlements, rather they viewed it as a flexible arrangement where they

³ Section 6(2) ERA

⁴ Section 6(3) ERA

took leave when that was convenient, i.e. when the park was open or not busy;

- i. The Henrys acted consistently with the role of business owners, for example they left their family Christmas lunch to open the park when they discovered out of town visitors were waiting at the park gates on Christmas day.

[24] After considering all relevant matters, including the terms of the Agreement and the way the parties' relationship operated in practice, I find that the real nature of their relationship was not an employment relationship.

[25] The Authority does not have jurisdiction to hear the applicants' claim and accordingly it is dismissed.

Costs

[26] The parties were not represented, so no issue arises as to costs.

Rachel Larmer
Member of the Employment Relations Authority