

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 209/09
5146533

BETWEEN TREVOR HUNAPO
 Applicant

AND GARIN FAMILY TRUST
 Respondent

Member of Authority: Vicki Campbell

Representatives: David Hayes for Applicant
 Matt Robson for Respondent

Investigation Meeting: 8 April 2009 at Hamilton

Submissions Received: 24 April 2009

Determination: 26 June 2009

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

[1] Mr Trevor Hunapo says he was employed by the Garin Family Trust (“the Trust”) as a Security Officer from 1 March 2008 until he was dismissed on 18 May 2008. Mr Hunapo says that dismissal was unjustified and seeks remedies.

[2] The Trust denies the claims by Mr Hunapo and says Mr Hunapo was an independent contractor whose services were terminated as he failed to fulfil his contractual obligations.

[3] The preliminary issue to be determined is whether Mr Hunapo was an employee or a contractor.

What was the nature of the employment relationship?

[4] Section 6 of the Employment Relations Act 2000 prescribes that the Authority must determine the real nature of the relationship. The intention of the parties is still relevant but is no longer decisive. 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] In making the assessment, the Authority is required to consider all relevant matters, including any matters that indicate the intention of the parties. The Authority is prohibited from treating as determining a matter, any statement by the parties that describes the nature of the relationship. The assessment calls for an analysis of the actual operation of the relationship in practice. (*Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114; and *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585; *Bryson v Three Foot Six* [2003] 1 ERNZ 581 (EC), and *Bryson v Three Foot Six* [2005] 3 NZLR 729 (SC); *Tse v Cieffe (NZ) Limited*, unreported, 6 April 2009, Shaw, J, WC4/09)

Terms and conditions of engagement

[6] Prior to Mr Hunapo undertaking work at the Commercial Hotel in Hamilton he had worked on a casual basis for Mr John Boyte who was at that time the provider of security services to the Trust.

[7] Mr Boyte terminated his contract with the Respondent and Mr Hunapo was offered the work. Mr Hunapo was to provide security services seven days per week from 11.00pm to 7.00am each day.

[8] The conditions of the engagement were set out in a written agreement which states the nature of the relationship is that of independent contractor. This agreement was provided to Mr Hunapo after he started providing security services and was never signed by him.

Intention of the parties

[9] Mr Hunapo and his partner were keen to enter into the contract to provide security services as this would allow them more time to spend with their children. Mr Hunapo’s partner was also working as a part-time security guard at Waikato Hospital.

[10] I am satisfied that on the balance of probabilities it is more likely than not that the intention of both Mr Hunapo and the Trust was that Mr Hunapo be engaged on a contracting basis. I have reached this conclusion based on the evidence of both Mr Hunapo and the Trust that Mr Hunapo intended for his partner and son to assist him in providing the security services. The evidence shows that this is what eventuated.

Control and Integration

[11] Mr Hunapo was provided with a cell phone for work purposes. The evidence at the investigation meeting was that this cell phone would be handed to the cleaners on their arrival each day.

[12] Mr Hunapo was also required to report to Mr Kapoor each evening and morning. I am satisfied the purpose of the reporting was for Mr Hunapo to be made aware of the number of guests staying in the Hotel each evening and to advise Mr Kapoor of any issues that had arisen over night.

Fundamental tests

[13] From 9 March 2008 Mr Hunapo completed a weekly Tax Invoice/Statement document claiming payment of \$730.77. Mr Hunapo completed this document irrespective of whether it was he or someone else who provided the security services.

[14] Mr Singh met with Mr Hunapo and his partner before Mr Hunapo started working for the Trust. Mr Singh says he discussed with Mr Hunapo that he would be responsible for his own tax obligations and GST and advised him to get advice from an accountant. Mr Hunapo's oral evidence at the investigation meeting on this point was equivocal. After initially confirming Mr Singh's evidence on this point, he then changed his mind and told me he did not recall discussing tax issues or GST.

[15] There was no evidence to suggest that Mr Hunapo could or did make a profit from his work. Neither was there any evidence as to whether Mr Hunapo paid either his son or his partner for the work they performed.

Determination

[16] I am satisfied Mr Hunapo knew he was a contractor and that is why he purchased tee-shirts with his initials on it for wearing at work. Mr Hunapo was free to either undertake the work himself or have others undertake the work for him.

[17] While Mr Hunapo was expected to report on the commencement and ending of each days work, this was not for supervisory purposes, but to ensure Mr Hunapo was aware of any issues which may affect his provision of security services and to alert the Trust to any issues at the end of each shift.

[18] Viewed in the round, I find the real nature of the relationship between Mr Hunapo and the Trust was a contract for services. The Authority therefore, does not have jurisdiction to hear a personal grievance brought by Mr Hunapo.

Costs

[19] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Garin Family Trust may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority