

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 93
5366699

BETWEEN MARK WILLIAM KENDALL
 Applicant

AND THE FLAMEKEEPER
 COMPANY LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
 Brian Gauld, for Respondent

Investigation Meeting: 9 February 2012 at Auckland

Submissions Received 9 February 2012 from Applicant
 24 February 2012 from Respondent

Determination: 13 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, (Mr Kendall) alleges he is due wage arrears from the respondent company (Flamekeeper). Flamekeeper say in contrast that Mr Kendall was always paid the wages that were agreed and that no additional monies are owing.

[2] The issues for determination in the present case are first whether the relationship between the parties was one of employment or not and secondly whether, if it is one of employment, there are wages due and owing.

[3] Mr Kendall is an inventor who has been working on developments of the technology involved in fire boxes in space heaters. Flamekeeper was a company established to promote the development of Mr Kendall's ideas.

[4] A contractual agreement was entered into between Mr Kendall and Flamekeeper in October 2009 and it is that document which Mr Kendall alleges is an employment agreement for the purposes of the law.

[5] Both parties have supplied the Authority with a copy of the agreement just referred to although the version supplied by Mr Kendall has the addition of a heading "employment contract" which Flamekeeper say is both inappropriate and not agreed to by them. Whether that heading was agreed to or not, is not in the Authority's view pertinent. The fact of the heading does not determine the nature of the document and the document must be assessed in accordance with the law.

[6] Looked at commercially, Mr Kendall's invention was owned by Flamekeeper and was to be marketed as part of the technology associated with wood burning space heaters. Flamekeeper is owned as to 49% by Mr Kendall and as to 51% by other interests. Those other interests have in effect funded the development of Mr Kendall's project. The relationship between Mr Kendall and the other shareholders has become strained as a consequence of disagreements between the parties as to the marketability of Mr Kendall's invention. A principal funder of Flamekeeper has made demand on Flamekeeper and, having not had that demand satisfied by Flamekeeper, the creditor will progress liquidation proceedings shortly.

[7] To assist Mr Kendall in concentrating on the development of the invention and the bringing of the invention and the surrounding technology to market, Flamekeeper resolved to provide Mr Kendall with regular payments and it is the nature and extent of those payments that are now in dispute.

[8] The agreement the Authority has referred is dated October 2009.

Was this an employment relationship or not?

[9] There are two provisions in the Employment Relations Act 2000 (the Act) which are relevant to this question. The first is s.6 which defines what an employee is and prescribes the test which the Authority must adopt in determining the nature of the relationship between the parties and the second is s.65 which identifies the terms and conditions of employment which are required by law to be included in an individual employment agreement. In the Authority's opinion, if the present document under scrutiny were found to contain the relevant statutory minima set out

in s.65 of the Act and the Authority were to conclude that the real nature of the relationship was one of employment then that would conclude the matter.

[10] It is convenient to deal with the effect of s.65 first. That section simply provides *inter alia* the minimum provisions required by law in an individual employment agreement. The Authority is satisfied that the present document contains all of the statutory minima save for the requirement in s.65(2)(a)(vi) referring to the 90 day period in which to raise a personal grievance. In all other respects, the document under scrutiny complies with the law, as if it were an employment agreement.

[11] In addition, it is fair to say that the parties appear to have taken a number of steps to make the document look as if it were an employment agreement by, for instance, the use of the word *salary*, clear provisions in respect to the entitlement to statutory holidays and annual holiday and sick leave, a reference to a notice period, a requirement for diligent and faithful service and a requirement for Mr Kendall not to engage in other activities that would conflict with his obligations to Flamekeeper.

[12] So what then is the real nature of the relationship between these parties? At s.6 of the Act, sub-section (2) requires the Authority to determine the real nature of the relationship between the parties. That expression *real nature* is a term of art and has been the subject of judicial interpretation.

[13] The leading case is the decision of the Supreme Court of New Zealand in *Bryson v. Three Foot Six Ltd* [2005] 3 NZLR 721. In that decision, the Court considered all of the traditional common law tests for identifying whether a relationship was one of employment or not, but concluded:

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

[14] The integration test tries to measure the extent to which the person providing the services is integrated into the organisational structure of the other party. In the

present case, it is difficult to see Mr Kendall as anything other than integral to the operation of Flamekeeper. Without Mr Kendall, arguably Flamekeeper has no *raison d'être*.

[15] In the control test the issue is whether the person doing the work is controlled by the person providing it. Here, the Authority thinks the boot is probably on the other foot because the evidence rather suggests that Mr Kendall controlled Flamekeeper rather than Flamekeeper controlling him. Certainly, Mr Kendall was the driving force behind the constitution of Flamekeeper and the very reason for its existence.

[16] Finally, the fundamental test requires the Authority to look at whether Mr Kendall could be said to be operating in business on his own account. In a very real sense, in the present case, Mr Kendall is “the business” of Flamekeeper. It is not so much that Mr Kendall has the ability to go off and work elsewhere (in any event that is specifically precluded by the agreement) but rather that the question is almost the wrong one because this Flamekeeper entity is in truth Mr Kendall’s business generated by his intellectual property, his energies and his ideas. The involvement of others, while no doubt important, is really only for the purposes of providing goods and services which Mr Kendall does not have, principally funding. The Authority fancies that the commercial structure adopted for Flamekeeper was a function of the parties desire to be taken seriously in the business world; but in a real sense, this was Mr Kendall’s business and were it not necessary for outsiders to be involved, he would simply have been a sole trader.

[17] While the Supreme Court in *Bryson* and s6(3) of the Act both emphasise caution in placing too much reliance on the intention of the parties, it is none the less relevant that Mr Gauld, himself a shareholder in Flamekeeper told the Authority that the agreement between Mr Kendall and the company was not intended to create an employment relationship. His contention was that the label employment contract was put on it after it was executed and indeed he told the Authority on oath that he had the original signed document which did not have those words on it.

[18] Mr Gauld says that the payments made to Mr Kendall pursuant to that agreement were not payments of salary at all. He describes the payments alternatively as either payments of capital or drawings. The practical reality was that Flamekeeper

had no income and its sole source of funds was loan finance put in by investors associated with the 51% shareholding not held by Mr Kendall.

[19] Mr Gauld makes the point in his concluding submissions that, in all probability, Mr Kendall would not be liable for income tax in the normal way for the payments that he had received from Flamekeeper (and amongst other things would not be eligible for ACC cover for the same reason) and it is suggested that that is persuasive evidence of the real nature of the relationship. According to Mr Gauld, the way in which these payments to Mr Kendall would be treated, was as a charge against Mr Kendall's current account with the company. That said, the Authority must observe that there many situations where the tax position is not necessarily determinative of the nature of the relationship pursuant to employment law.

[20] The Authority concludes that despite the difficulties with this matter, on the balance of probabilities it seems more likely than not that, as a matter of employment law, Mr Kendall was not an employee of Flamekeeper. This is so notwithstanding the appearance of an employment agreement between the parties. The submission advanced by Flamekeeper that the payments made to Mr Kendall were in the nature of capital payments which in effect would constitute a charge on Mr Kendall's current account is relevant, as is the presumption that income tax is not due and owing on the sums paid confirmed to some extent by the absence of ACC cover for the position. But, the most important factors in the Authority's decision are the conclusions reached by applying the various common law tests to establish the real nature of the relationship. The Authority concludes from this analysis that the real nature of the relationship is not one of employment because, in a real sense, this business was Mr Kendall's such that it could not be said that he was employed by Flamekeeper.

Are any additional monies owed?

[21] Because of the conclusion that this was not an employment relationship, the Authority has no jurisdiction to consider matters beyond that fundamental conclusion. Certainly, in the absence of an employment relationship there can be no entitlement to unpaid "salary".

Determination

[22] The Authority considers that the real nature of this relationship is not one of employment. Given that conclusion, the Authority has no jurisdiction to consider whether any monies are owed by one party to the other.

Costs

[23] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority