

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 436  
5462962

BETWEEN

DAVID LESTER  
Applicant

AND

KIWIPANEL LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Ben Wilson for Applicant  
John Meroiti for Respondent

Investigation Meeting: 7 October 2014

Determination: 23 October 2014

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

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- A. The applicant, Mr David Lester was an independent contractor, not an employee of the respondent, Kiwipanel Limited.**
- B. Costs are reserved.**

**Employment relationship problem and Issue for Determination**

[1] This determination deals with the preliminary matter of whether Mr Lester was an employee or an independent contractor for the period 12 March 2012 to 5 February 2013.

[2] Mr Lester claims he was an employee of Kiwipanel Limited ("KPL") and that he was not paid all holiday pay and wages owed to him. Mr Lester has applied to the Authority for an order that KPL pay the arrears of wages and holiday pay.

[3] KPL disputes the claims and says Mr Lester was not an employee and is therefore not owed any holiday pay. KPL says at all times during his engagement with KPL Mr Lester was engaged as an independent contractor on a labour only contract.

[4] During a case management conference the parties agreed that the preliminary matter of whether Mr Lester was an employee or a contractor would be determined prior to the substantive arrears of wages and holiday pay claim.

### **Background**

[5] KPL engages a number of workers on a labour only basis. KPL does not pay tax, but pays a gross hourly rate for each hour the worker is engaged on work undertaken on behalf of KPL and the workers are responsible for accounting to the Inland Revenue Department (“IRD”).

[6] At the time of his engagement on 12 March 2012 Mr Lester was not provided with any written form of contract or agreement. He provided his own tools but KPL provided the larger tools required to undertake some of the work. It was common ground that the hours were flexible and Mr Lester took responsibility for his own taxes.

[7] The evidence from the witnesses at the investigation meeting was to the effect that if a person was on a labour only contract the hourly rate would be significantly higher than that of a person on wages. Mr Lester told me, and his evidence was not disputed by KPL, that a contract only rate was between \$27 and \$32 per hour. Mr Lester started at KPL on \$21 per hour although that increased to \$23 per hour.

[8] Mr Lester’s evidence was that his daughter helped him with his tax and that he had worked on labour only contracts in the past. The evidence suggests there is no industry norm with respect to the engagement of workers and that there is a mix of labour only contractors and waged employees.

[9] At the commencement of his engagement Mr Lester and Mr Hoani Bason, the Managing Director of KPL had a discussion from which they both left with differing perceptions. Mr Lester says Mr Bason told him he would be an employee and paid wages and that timesheets would be brought in and PAYE would be deducted when

more men were employed. Mr Bason left the meeting believing he had told Mr Lester he would be engaged as a labour only contractor.

[10] The Authority heard evidence from two other workers engaged by KPL. One was clear that he was a labour only contractor, while the other was an employee and was paid wages for the initial period of his engagement and then accepted a labour only contract.

### **Issues for determination**

[11] This preliminary determination deals with the issue of whether an independent contractual relationship or an employment relationship existed between Mr Lester and KPL.

[12] If an employment relationship existed then the question will become whether KPL is liable for any outstanding wages and holiday pay proven by Mr Lester. If no employment relationship existed then the Authority has no jurisdiction to investigate Mr Lester's claim that he is owed monies by KPL for work he performed for it.

### **The law**

[13] Whether Mr Lester was an employee or a contractor is determined under Section 6(1) of the Employment Relations Act ("the Act") which states:

In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

[14] Section 6(3) states:

For the purposes of subsection (2), the court of 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.

[15] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd.*<sup>1</sup>

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<sup>1</sup> [2005] ERNZ 372.



[16] The Employment Court in *Poulter v Antipodean Growers Limited*<sup>2</sup> summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:

- 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 analyzing the tests that have been 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 which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[17] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice then to apply the three tests known as the control, integration and fundamental or economic reality test.

[18] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.<sup>3</sup>

### **Intention of the parties**

[19] There was no written documentation demonstrating the intention of the parties at the time the arrangement for work was entered into. Mr Lester says he was offered and accepted the rate of \$21 per hour. Based on the uncontested evidence at the investigation meeting that the going rate for a labour only contractor is \$27 - \$32 per hour, Mr Lester’s rate was significantly less than the going rate for a contractor. Mr Lester’s rate increased to \$23 per hour after he commenced working for KPL and before he entered into a formal written agreement to provide labour only services.

[20] Mr Lester’s evidence was that when he was offered the work on 10 March 2012 Mr Bason told him he could start work the following Monday but that he should not claim GST. Mr Bason acknowledged that he advised Mr Lester not to claim GST.

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<sup>2</sup> [2010] NZEmpC 77 at [20].

<sup>3</sup> *Ibid* at [21].

He says he did this because unless Mr Lester was earning in excess of \$80,000, in Mr Bason's opinion, it was not worth it.

[21] Mr John Meroiti provided Quantity Surveying services. Mr Meroiti says that he was in the meeting with Mr Bason and Mr Lester at the Te Papatapu Marae on 10 March 2012. He told me that during that meeting he advised Mr Lester he would need to take responsibility for his own tax. Mr Lester responded by telling Mr Meroiti that his daughter would look after his tax. At the investigation meeting Mr Lester confirmed his daughter took care of his tax and that she had done this for him on previous occasions when he worked on labour only contracts.

[22] I have concluded that when Mr Lester and Mr Bason left the meeting on 10 March 2012 they both left with very different perceptions of what had been discussed and agreed. Mr Lester had formed the view that he was to be employed on a wage of \$21.00 per hour. He expected to pay his own tax until more people were engaged and at that time would also begin completing timesheets.

[23] Mr Bason believed he had offered Mr Lester a labour only contract, that Mr Lester would be responsible for his own tax, there would be no set hours, although he would try to offer full weeks, and Mr Lester would provide his own tools and personal protective equipment.

[24] The intention of the parties is not clearly expressed anywhere. The rate of pay, was not in the range of what was considered normal for labour only contractors. While the rate of pay is not a determining factor in the assessment of whether Mr Lester was an employee or a contractor given the level of the rate it is more indicative of an employment relationship than a labour only contractor.

[25] One matter that is consistent between the parties, is that Mr Lester was to be responsible for his own tax from the outset. According to Mr Lester's evidence this is normal for labour only contracts which he has worked under previously. This is more indicative of a contracting relationship than that of an employment relationship.

**The control test**

[26] This test examines the extent to which the activities of Mr Lester were controlled by KPL.

[27] Mr Lester completed work on two different sites for KPL. The first was the Te Papatapu Marae and the second was the Summerset Village. Mr Lester was responsible for maintaining his own records of the hours he worked on each site.

[28] Mr Lester could manage his own hours as there were no limitations or restrictions placed on him as to how many hours he worked each week or on which days he worked.

[29] The hours worked by Mr Lester and the work undertaken by him were recorded on an "invoice" and produced to KPL. While KPL had specific requirements regarding the way in which the hours were to be recorded on the invoices, I am satisfied this was only to assist KPL in accurately recording the actual hours spent on each job by its workers. This was the method used by KPL to accurately assess "extra works" carried out on each site and enabled KPL to pass those costs onto its customer.

[30] There was no evidence that the work undertaken by Mr Lester was closely supervised or monitored by anyone. As an experienced worker it is apparent that he did not require a great deal of direction.

[31] The control test does not assist greatly in deciding whether or not Mr Lester was an employee or a contractor, although its analysis points to Mr Lester being free to work hours which suited him. In addition he undertook his work with little or no supervision, all of which is indicative of a contracting relationship.

#### **Integration test**

[32] This test examines the extent to which Mr Lester was integrated into KPL's business. Mr Meroiti told the Authority that all workers engaged by KPL were labour only contractors. Mr Tyman Tangaroa-Timoko gave uncontested evidence that he was initially engaged by KPL on wages but later became a labour only contractor however his work was not the same as the work Mr Lester was engaged in.

[33] Mr Lester's evidence was that at the time he commenced working for KPL he was the only person on wages, all other workers were engaged on a labour only basis

and that he generally supplied his own tools which were mainly hand tools, but KPL provided other tools such as electric saws.

[34] A colleague of Mr Lester, Mr William Edmonds, gave evidence of his relationship with KPL. Mr Edmonds was engaged on a contract only basis and in answer to questions acknowledged that he was able, and did, take on other work when there was no work at KPL for him.

[35] Again, the integration test does not appear to be strongly determinative of Mr Lester's status one way or the other. The fact that he largely used his own tools is not of great assistance in this matter as it is common practice for employed carpenters and other tradesmen to use their own tools. On balance, given the evidence that Mr Lester was treated the same as all the other workers who were also largely labour only contractors, I am persuaded that the integration test suggests that Mr Lester was an independent contractor.

#### **Fundamental test**

[36] This test examines the extent to which Mr Lester took on financial risk himself in providing his services to KPL.

[37] From the date he commenced with KPL Mr Lester maintained an invoice book in which he recorded the hours worked each day. The invoices were presented to KPL for payment every two weeks. Mr Lester received gross payments from KPL with no tax deducted.

[38] Among the documents produced to the Authority was an IRD form showing the income earned by Mr Lester during the 2012/2013 tax year. Mr Lester told me he sent IRD his bank statements, invoice books and diaries to show what he had earned during the tax year. He says that the form sets out income received partially as an employee and partially as a contractor. He then told me that as his daughter's husband was a labour only contractor, she knew how to work out the tax he would owe and she worked it out monthly for him. He says he did this because he had to pay the tax whether it was taken out of his payments from KPL or not.

[39] I note, Mr Lester has not claimed any business related expenses in his tax return. This indicates that he was not in business on his own account. He has simply



claimed the income he received. He has been taxed accordingly. However, the tax return was completed after 5 February 2013 at which time Mr Lester accepts he was engaged as an independent contractor. It is therefore of no particular assistance in resolving the question of whether he was a contractor or an employee for the period 12 March 2012 to 5 February 2013.

[40] Mr Lester raised concerns with KPL in late 2012 that he had not been paid holiday pay. In order to settle matters between them, KPL paid Mr Lester a sum of money calculated as 8% of the invoices Mr Lester had been paid up to January 2013. The sum was paid as a gross amount on the basis that it would resolve the matters raised by Mr Lester and Mr Lester took on the responsibility for the tax component of the payment. Mr Bason told me he paid the money to settle all the issues between him and Mr Lester. He said he needed to ensure there were no cost overruns on the project as the contract with KPL's customer was a fixed price contract.

[41] It is clear Mr Lester took no financial risk in working for KPL however he took responsibility for accounting for his own tax and income to IRD.

[42] The payment received by Mr Lester in January 2013 was KPL's calculation of an amount equivalent to the holiday pay Mr Lester would have received if the employment from 12 March 2012 to January 2013 had been an employment relationship which had ended. The payment was made as a gross payment and Mr Lester took responsibility to pay the tax component.

[43] The fundamental test has identified elements of both a contracting and employment relationship and is not determinative of the true nature of the relationship.

#### **Industry practice**

[44] The evidence available to the Authority indicates that the industry operates on a mixture of labour only contracts and waged employment agreements. Labour only arrangements can be either employment arrangements or contractor arrangements

[45] Mr Lester has previously worked under labour only contracts and acknowledges that from 5 February 2013 there is no dispute that he was working as an independent contractor.



**Overall impression**

[46] The decision as to whether Mr Lester was an employee or an independent contractor is finely balanced. The difficulties have arisen due to a complete failure by the respondent to document its proposals prior to entering into the relationship.

[47] The overall impression, from all the facts in this matter, of the underlying and true nature of the relationship between Mr Lester and KPL is that of an independent contractor. Mr Lester supplied his labour to KPL when work was available and when work was not available he did not work and did not get paid but was free to work elsewhere if he wished. He accepted responsibility at all times for the payment of his own tax and the supply of his own tools. Mr Lester undertook his work without any close supervision and worked his own hours which he accounted for in his invoice book.

[48] As a result of my findings the Authority does not have jurisdiction to investigate Mr Lester's claim that he is owed wages and holiday pay by KPL.

**Costs**

[49] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the respondent shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.



Vicki Campbell  
Member of the Employment Relations Authority

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