New Zealand Employment Relations Authority Decisions

Loo v Vircom Energy Management Services Limited (Christchurch) [2017] NZERA 1101; [2017] NZERA Christchurch 101 (28 June 2017)

Last Updated: 6 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 101
5639739

BETWEEN PHILIP LOO Applicant

A N D VIRCOM ENERGY MANAGEMENT SERVICES LIMITED

Respondent

Member of Authority: Christine Hickey

Representatives: Derek Gilbert, Advocate for Applicant

Angela Hansen, Counsel for Respondent

Investigation Meeting: 2 May 2017 at Christchurch

Submissions and further evidence received:

17 and 19 May and 12 June 2017, from the Applicant

31 May 2017, from the Respondent

Date of Determination: 28 June 2017

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Philip Loo claims that he was an employee when he worked for Vircom Energy Management Services Limited (Vircom) and that Vircom unjustifiably dismissed him.

[2] Vircom says Mr Loo was never an employee, but was an independent contractor. Vircom says it terminated his contract with notice as provided for under the contract. Therefore, Vircom says that the Authority has no jurisdiction to consider the personal grievance claim.

[3] This determination resolves the threshold issue of whether Mr Loo was an employee.

The relevant law

[4] Mr Loo bears the onus of establishing on the balance of probabilities that he was an employee.

[5] Section 6 of the Employment Relations Act 2000 (the Act) defines

“employee” as:

(1) (a) ... any person of any age employed by an employer to do work for hire or reward under a contract of service, and

(b) includes –

(i) a homeworker;

...

(2) 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.

(3) For the purposes of subsection (2), the court or 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 their

relationship...

[6] The law requires the Authority to determine the *"real nature of the relationship"* between the parties. That requires considering all relevant matters including any that indicate the parties' intentions.

[7] 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*1.

[8] The Employment Court in *Poulter v Antipodean Growers Ltd2* 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;

1 [2005] NZSC 34; [2005] ERNZ 372

2 [2010] NZEmpC 77 at [20]

• 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 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.

[9] 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.

[10] 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 parties3.

[11] Although a simple description of the parties' roles, such as calling Mr Loo a contractor, is not determinative of the matter, the agreement between the parties is an important aspect of determining what their actual relationship was. Beyond that, I need to consider the whole of the relationship and how it operated in practice, particularly, whether it differed from how the contract set out it would operate.

The parties' intentions

[12] The starting point for investigating the parties' intentions is the advertisement

and the contract.

[13] In July 2014, Vircom advertised for New Zealand registered qualified electricians as:

3 Ibid at [21]

Reliable, self-employed contractors, who pride themselves in quality workmanship to join our team in July for up to 12 mths guaranteed work.

[14] Mr Loo sent in an email application on 12 July 2014. The CV that Mr Loo attached showed that he had been employed up until 2009, and self-employed from

2011.

[15] The project was delayed. In November 2014, a staff member from Vircom tried to get in touch with Mr Loo to see if he was still interested. In February 2015, Mr Loo confirmed that he was interested. Vircom sent him a copy of the Services agreement document, which described Mr Loo as a *"contractor"*.

[16] The work to be done was the installation of smart electricity meters. Vircom is an accredited testing house and is engaged under contracts by a meter asset owner, which wished to have such meters installed on power retailers' customers' premises.

[17] The Services agreement set out a schedule whereby contractors were paid a set fee for each job done. The fee depended on the job and its complexity. There was also a fee for when an installer was unable to install a meter for some reason outside their control.

[18] Each month Vircom supplied a schedule of jobs to be done to contractors; sometimes more frequently. Some were jobs for which Vircom had made an appointment that the contractor was expected to keep. The majority of jobs given to contractors did not have appointments made and it was up to the contractor when they did those jobs. When a contractor ran out of jobs to do s/he could ask for more jobs to be allocated.

Events leading up to the signing of the services agreement

[19] Vircom submits that everything about the contractual arrangements, including the factual circumstances leading up to the signing of the Services agreement, show plainly that the intention, understanding and agreement of the parties was that the arrangement was an independent contracting one.

[20] Prior to signing the Services agreement, Mr Loo read it through and made specific inquiries of Bronwyn Miles from Vircom.

[21] Mr Loo inquired of the Inland Revenue Department whether Vircom's requirement for him to be registered for GST, set out in the Services agreement, would apply to him given that he did not expect to be earning more than $60,000 a year. IRD told him that it did not require him to register for GST if he earned under

$60,000 a year. Mr Loo decided not to register for GST and advised Vircom of this.

[22] Mr Loo obtained public liability business insurance of $2,000,000 on

20 March 2015. This was a requirement set out in the Services agreement. Mr Loo had never previously held public liability insurance. This is indicative that he understood he was entering into a contracting relationship.

[23] Mr Loo told Vircom that he did not wish to sign the Services agreement before commencing his training on 2 March 2014. He had some questions about the contract and wanted to resolve those before he signed. He was allowed to undergo training before he signed.

The Services agreement

[24] On behalf of Mr Loo, his advocate, Mr Gilbert, argues that the services agreement contract itself contains a number of clauses that are more indicative of an employer/employee relationship. Vircom asserts the contrary view.

[25] I will now look at the aspects of the Services agreement that the parties both rely on to support their view of the relationship.

Health and Safety

[26] Clause 6 requires the contractor to provide Vircom with copies of its health and safety in employment procedures. If the contractor did not have any health and safety in employment procedures documented, they needed to follow the health and safety in employment procedures supplied to them by Vircom. Mr Loo argues that the imposition of Vircom's health and safety procedures on him were indicative of an employment relationship.

[27] However, Vircom submits that the legislation in force at the time imposed obligations on any party who controlled a place of work to take all practicable steps to ensure that no harm or hazard befell any person on the site. In other words, a reference to that legislation is not evidence of an employment relationship.

[28] I agree. The reference to health and safety in employment compliance procedures do not point towards an employment

relationship. It is a neutral factor.

[29] Mr Loo signed an agreement attached to the Services agreement entitled "Contractor's Acknowledgement of Health and Safety Obligations. It covered his responsibility for health and safety obligations to himself, any of his subcontractors and any of his employees. This points to Mr Loo being aware he could subcontract his services out or employ people, and suggests he understood he was to be an independent contractor.

Code of Conduct

[30] Mr Gilbert submitted that the Code of Conduct referred to in the Services agreement is more akin to something to something that would be included in an employment contract. However, I note that the Code of Conduct refers to the "responsibility of employees and contractors working on behalf of Vircom to comply with the standards set out".

[31] Mr Loo was clearly identified to the public and to Vircom's clients as working on Vircom's behalf. Therefore, Vircom had the right to set out some basic standards of conduct, both towards members of the public and towards Vircom's employees. The Code of Conduct is a neutral factor and one that reasonably could apply to employees or contractors.

[32] Also in the Code of Conduct there is a provision entitled "Copyright", providing that all work produced for Vircom by employees and contractors is "copyright of Vircom". That provision is potentially indicative of an employment relationship rather than an independent contracting relationship. However, it is not strong evidence of that.

[33] There is a provision in the Code of Conduct entitled "Secondary Employment". This refers to making sure that there is no conflict of interest in relation to secondary employment and advising "your Manager of any work/business activities that you are involved in outside of your Vircom EMS duties". This could be indicative of an employment relationship, rather than an arm's length contracting relationship. However, it needs to be read in the context of clauses 27 and 28 of the Services agreement, dealt with at paragraphs [37] to [40] below.

Intellectual property rights

[34] Clause 25 of the services agreement deals with ownership and intellectual property rights. Mr Gilbert submits that this is more like a provision that would be in an employment contract. It provides that material produced by the contractor and provided to Vircom as part of the services the contractor provides becomes Vircom's exclusive property. It also states that any right, title and interest in intellectual property developed by the contractor in the course of providing services vests exclusively in Vircom. However, if the contractor had ISO certification, clause 25 would not apply.

[35] Clause 25 also contains a provision that the contractor would not disclose any processes, ideas, systems or any other intellectual property belonging to Vircom without Vircom's written consent. That clause is intended to survive the expiry or termination of the agreement.

[36] That aspect of the clause is closely related to clause 26 that prevents a contractor from disclosing any confidential information about Vircom or Vircom's customers or clients, unless the customer or client approved disclosure. These provisions are the kinds of things that may be included in an employment agreement. However, there is no reason a commercial entity engaging contractors could not protect its confidential information and intellectual property rights. I consider that clauses 25 and 26 are neutral in these circumstances.

Assignment and sub-contracting

[37] Mr Gilbert submits that a number of the provisions in the services agreement, whilst describing Mr Loo as a contractor, are in fact more akin to him being an employee. In particular, clauses 27 and 28 are said to be more akin to an employment relationship. Clause 27 prevents a contractor from assigning the benefit of the services agreement to anyone except with the *"prior written consent of Vircom"*. Clause 28 provides that the contractor:

... will not subcontract all or part of its rights or obligations under this Agreement except with the prior written consent of Vircom ... The Contractor will not be relieved from any of its obligations under this Agreement by entering into any subcontract for the performance of any part of this Agreement.

[38] I do not agree with Mr Gilbert's analysis. These provisions do not mean that a contractor could not assign the benefit of the contract or subcontract some of the work to be done under the contract; it just means that Vircom would need to give prior written consent to either of those things happening.

[39] That is quite unlike an employment relationship, which is a personal relationship between an employer and an employee. An employee could not assign his or her rights and obligations under the employment relationship to anyone else. The services agreement contemplates such assignment or subcontracting as a possibility. An employment relationship never has that possibility.

[40] I consider that Vircom's need to be consulted and to give its prior written consent is more likely due to the safety-

sensitive nature of the operations the contractor was engaged in, and Vircom's need to comply with electricity industry regulations and whatever performance standards it has with its clients.

Performance standards

[41] Mr Gilbert's submissions invite me to consider that performance standards set out in the services agreement are indicative of a high degree of control over Mr Loo, and so more in line with it being an employment relationship.

[42] However, Mr Loo was acting on behalf of Vircom when undertaking highly regulated and potentially dangerous work. There is nothing to prevent an engaging party from requiring particular performance standards from a contractor. This kind of provision is neutral and does not point either towards or away from an employment relationship.

Training

[43] Mr Gilbert's submissions also suggest that the training that contractors received along with a training manual and practical instruction points towards the relationship being one of employment. The kind of work contemplated to be undertaken by Vircom's contractors was very specific and required close adherence to industry regulation and good practice. The fact that Vircom trained the contractors is not a factor that points towards or away from an employment relationship.

Audits

[44] I consider the same to be the case with the specific audits that were set out in clause 17 of the services agreement4. It was in Vircom's power and was reasonable for it to expect that it could audit the work done by its contractors. This would have also been reasonable inside an employment relationship. I do not find that the inclusion of clause 17 in the services agreement points towards the relationship being one of employment.

Disputes provision

[45] Mr Gilbert suggests that clause 29 "Disputes" is similar to features found in employment agreements. I do not agree. It is specifically a method of dealing with disputes that is outside of the Employment Relations Act provisions. This clause is more indicative of the relationship being one of independent contracting.

Pre-employment testing and Ministry of Justice clearance

[46] Mr Gilbert's submissions suggest that the fact that Mr Loo was required to undertake a pre-employment drug and alcohol test and fill out a Ministry of Justice form allowing Vircom to be notified of any convictions points towards an employment relationship. It is increasingly common for employees and contractors within safety-sensitive industries to be required to undertake drug and alcohol testing before they are engaged. It was simply prudent of Vircom to ensure all its contractors had passed such a test and that Vircom was aware of any prior convictions because contractors often needed to enter customers' premises to install meters. Vircom retained responsibility for its contractors during their presence on customers' premises. These requirements are neutral.

Features of the services agreement suggesting a contracting arrangement

[47] Other features of the services agreement which point to the relationship being intended by both parties to be one of independent contracting, when taken together, are:

• Mr Loo was referred to as a contractor in the services agreement;

4 3% of all installations were to be audited by Vircom.

• Mr Loo describes himself as the sole proprietor under his signature agreeing to the terms of the services agreement;

• Clause 8 allows Vircom to vary or add to the services required on seven days' notice. An employer cannot unilaterally alter the terms and conditions of an employee's employment. An employer must consult with an employee before altering terms and conditions of employment;

• Clause 4.2 does not oblige Vircom to provide work for Mr Loo to do.

However, it requires Mr Loo to be available to complete no less than the number of installations scheduled for each week or whatever lesser number Vircom's principal client issued during the duration of the agreement. Mr Loo understood prior to signing that Vircom was asking him to commit to a minimum of three days a week work, or a maximum of five or six days, but that it could not "guarantee any minimum or maximum amount of work or the times that work would be available". An employer would have an obligation to provide work to its employees. Mr Loo queried clause 4.2 before he signed the agreement. He was aware that he was taking on some risk that workflow would not necessarily be regular or constant when entering into the services agreement.

[48] I consider the Services agreement is strong evidence that the parties both intended the relationship to be one of principal

and independent contractor. In the Employment Court case of *Clark v Northland Hunt Inc.5* Judge Perkins wrote:

In determining the real nature of the relationship between the parties, a clear starting point is the way the parties negotiated the relationship to exist between them. If a written document is executed in advance then it gives a clear indication as to their intentions.6

How did the relationship work in practice?

[49] In *Bryson7*, the Supreme Court held that all "relevant matters" going to the real

nature of the relationship include the written and oral terms of the contract, and:

5 [2006] NZEmpC 119; (2006) 4 NZELR 23.

6 Ibid., at paragraph [28].

7 Ibid, footnote 1.

... requires the ...Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the ... Authority has examined the terms and conditions of the contract and the way in which it has actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests. Hence the importance ... of analysing the contractual rights and obligations8.

The control and integration tests

[50] The control test examines the extent to which Vircom controlled Mr Loo's

work activities.

[51] Mr Loo was not supervised in person, but Mr Gilbert submits that the type and amount of control exercised over Mr Loo's work meant that he was really an employee. One example he relies on is that Vircom had a specific and detailed checklist procedure for the installation of meters that contractors not only had to follow but also had to document their compliance with at every stage. This included taking detailed notes and photographs at each stage and sending them to Vircom at the end of each job for compliance to be checked. Without the notes and photographs, Vircom would be unlikely to pay a contractor invoice for the job.

[52] Mr Gilbert submits such close supervision is more suggestive of an employment relationship, and that the requirements placed on Mr Loo went beyond regulatory requirements of the Electricity Industry Participation Code (EIPC).

[53] Vircom's submission is that it was required to ensure that its contractors complied with not only the electricity sector's regulations but also with safe work practices, and with the requirements of its customers, the meter asset owners.

[54] Only an authorised test house, such as Vircom, can undertake meter installation. Mr Loo was working on behalf of Vircom but Vircom retained the liability and responsibility for work done by Mr Loo. Craig Shepherd is one of Vircom's founders, and a registered electrician himself, although not acting as one currently. His evidence was that the checklist contained a number of items that reflected the regulatory requirements and that the photography, and the provision of a

cell phone to contractors to use for taking and conveying the photographs, was a

8 Ibid, footnote 1, at paragraph [32].

means Vircom decided to use to provide evidence of safe installation. I accept Mr

Shepherd's evidence.

[55] Vircom was entitled to choose the method it considered best to ensure compliance with industry regulations and contractor and customer safety, and to choose how it would require contractor to prove that. Even if the checklist also contained some requirements imposed by Vircom over and above simple strict compliance with EIPC regulations that does not mean that Mr Loo became an employee.

[56] Mr Loo was not required to accept every job offered to him by Vircom and could, apart from appointment jobs, do the work when it suited him.

[57] Mr Loo did not always work full days or every day of the week that was available to him. He elected to work Monday to Friday and told Vircom he did not want Saturday work. He could accept or decline work and did so from time to time; including telling Vircom it was not worth his while to take on two jobs at Greendale. He also took time off, including on his birthday, to give blood, to have his van serviced and to attend a first aid course.

[58] Vircom and Mr Loo agree that Mr Loo did not need to seek permission to take time or days off.

[59] Vircom did not prevent Mr Loo from doing work for any other party provided it could be satisfied that there was no conflict of interest. For example, Mr Loo could have continued doing residential wiring if he had wished to. Mr Loo's evidence was that, considering he only wanted to work 5 days a week, he was kept so busy with Vircom work over that time that he had no opportunity to do other work. That is a practical consideration only, not a result of the contract between him and Vircom. It is the result of a pragmatic decision of Mr Loo's to offer himself for Vircom work 5 days a week and not to work on the weekends. It was not a matter of control exerted over him by Vircom.

[60] The integration test examines the extent to which Mr Loo was integrated into Vircom's business. That is, whether the work undertaken by Mr Loo was integral to the business and whether he had become part of the business.

[61] In the Christchurch area, at the relevant time, the work of Mr Loo and other meter installers was an integral part of Vircom's business. However, that does not automatically mean Mr Loo was so integrated into Vircom's business that he became an employee.

[62] Although he was required to wear an identification tag, it did not say that he was a Vircom *employee*, and he was not required to introduce himself as a Vircom employee.

[63] Mr Loo used his own vehicle and paid for his own petrol and other vehicle expenses for travel to and between meter installation sites.

[64] Vircom did not supply any office or computer for Mr Loo. He supplied most of his own tools of the trade, although Vircom supplied the meters, circuit breakers, Perspex and junction boxes, which were necessary materials. The meters are specialised equipment that only an authorised test house can supply. This makes the supply of equipment a neutral factor.

[65] Vircom also supplied work gloves and a mobile phone, which Mr Loo was required to use to takes photographs and send them to Vircom. It came to him pre- programmed with Vircom contact numbers. This factor could be suggestive of an employment relationship.

[66] Mr Loo bore the costs of his own electrical registration and any professional development he needed to do to keep that current.

[67] Overall, the control and integration tests suggest that the relationship operated as one of independent contracting.

The economic reality or fundamental test, and how did the relationship operate in practice

[68] The relationship operated according to the terms of the contract entered into. That is strong evidence that the parties' mutual intention to be in a principal and contractor relationship lasted throughout the period of engagement. Indeed, Mr Loo's evidence at the investigation meeting was that he did not consider that he might have been an employee until after Vircom terminated his contract with it.

[69] Mr Loo invoiced Vircom for payment and was paid on those invoices. The amount he was paid varied depending on how many jobs and what kind of jobs he had completed.

[70] Vircom did not pay ACC levies or tax on Mr Loo's behalf.

[71] Mr Loo acknowledged at the investigation meeting that he had made an income tax return for the tax year ending 31 March 2016 in which he had claimed various expenses he incurred in his work for Vircom against his tax liability.

[72] Although Mr Loo was not an experienced or sophisticated businessperson I am satisfied that he acted in every way as if he was in business for himself.

Industry practice

[73] There was no specific evidence of industry practice. The reality is that registered electricians are often employees and are often independent contractors. A consideration of industry practice is not of any assistance in this case.

Mr Gilbert's further submissions

Unequal bargaining position

[74] Mr Gilbert submits that Vircom and Mr Loo were in an inherently unequal bargaining position and that Mr Loo was disadvantaged because of that. Mr Gilbert submits that because Mr Loo was desperate for work, he agreed to be engaged by Vircom under the terms it offered him as a contractor. He seeks to rely on a statement of Judge Perkins in the *Clark v Northland Hunt Inc.* case, that in entering into contracts:

Mutuality may not exist where the party paying the consideration is in an overbearing position as a result of unequal

bargaining power.9

[75] I understand that Mr Loo was unemployed at the time and saw the Vircom work as a good opportunity for him to get some further experience as a registered electrician and to earn money. However, I do not accept that meant that the bargaining power was entirely in Vircom's hands and put it in an overbearing position towards Mr Loo. Mr Loo engaged with Vircom before signing the agreement to

establish that he clearly understood the terms and conditions that it offered. He

9 Ibid, footnote 5, at paragraph [6].

challenged some of the contractual provisions. He received training from Vircom and then decided to sign the contract. He had sufficient time to take legal advice but did not do so. However, he sought advice from friends and clarified his tax requirements with the IRD.

[76] Mr Loo was not an entirely powerless party. I accept that he was not an experienced businessperson but he went into the contractual arrangement with his eyes open. He abided by the agreement during the engagement period and after it finished by arranging his tax affairs in line with having been a contractor, not an employee.

The utility of cases cited by Mr Gilbert

[77] Mr Gilbert relied on three specific cases to argue that, in line with these cases, I must find Mr Loo to have been an employee.

[78] One case, *Tsoupakis v Fendalton Construction Limited,10* is an Employment Court case. The other two are Employment Relations Authority cases. Authority Members are not bound to follow determinations of other Authority Members. Members are bound to follow the law as interpreted by the Employment Court and higher courts.

[79] However, each enquiry into the real nature of a working relationship is intensely fact specific. I briefly comment on each case to show why I do not consider that I must decide the same as the Court or Authority Members decided in those cases.

[80] In the *Fendalton Construction* case, a crucial factual difference from Mr Loo's

case is that there was no written agreement recording the parties' intentions.

[81] In the *McGeown v Andy Andersons Industrial Services (2007) Limited11* case, The Member reached the conclusion that Mr McGeown could not be said to have been working or in business on his own account. I have found differently based on the different facts in Mr Loo's case.

[82] In the *Blincoe v Waste Contractors Limited12* case, I decided that the amount

of control over Ms Blincoe's work and integration into Waste Contractor's business

10 Unreported, WC 16/09, 18 June 2009, Chief Judge Colgan

11

12 [2015] NZERA Christchurch 17

was much greater than in Mr Loo's case, and that she was not really in business for herself. Some of the factors different from Mr Loo's situation are:

a. Ms Blincoe worked shifts based on rosters set by Waste Contractors and was directed to provide cover for other drivers when they were on holiday.

b. Ms Blincoe had to obtain agreement from Waste Contractors when she wanted to go on holiday.

c. Waste Contractors paid her a set amount each month whether she was on holiday for part of that time or not.

d. She did not have to, and did not, submit invoices.

e. Waste Contractors contributed money towards her public liability insurance and accounting/book keeping costs.

Conclusion

[83] There is no evidence that the intention of Mr Loo and Vircom as set out in the services agreement changed during the relationship. Therefore, I take the parties mutual intention to be as set out in the services agreement.

[84] The installation of smart meters could equally be undertaken by an employee or a contractor. However, when I look at the relationship overall, I am satisfied that the real nature of the relationship between the parties was not one of

employment. Philip Loo was an independent contractor and not an employee of Vircom EMS Limited. The Authority does not have jurisdiction to investigate his claim of unjustified dismissal.

Costs

[85] Costs are reserved. Usually the successful party can expect a reasonable contribution towards its costs from the unsuccessful party. I encourage the parties to attempt to agree on costs.

[86] The Authority is likely to award costs on the basis of the daily tariff of $4,500 per day. I note that the matter did not take a full day, although it took more than a half day.

[87] If the parties cannot agree on costs the party seeking costs may make written submissions to me within 28 days of the date of this determination and the other party may reply within a further 28 days.

Christine Hickey

Member of the Employment Relations Authority
