

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2014] NZERA Christchurch 102
5447905

BETWEEN BENGT TORE LUNDH
 Applicant

AND ALPHA CONSTRUCTION
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
 No appearance for Respondent

Investigation Meeting: 9 July 2014 at Christchurch

Submissions received: 9 July 2014 from Applicant
 None received from Respondent

Determination: 10 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Lundh claims that he was employed by the respondent company, Alpha Construction Limited, between July and October 2013 but that he received no payslips or holiday pay. He says that when he queried this at the end of his employment, he was told that he had been a contractor and not an employee. Mr Lundh argues that he was engaged as an employee and not a contractor.

[2] The respondent has not taken any part in these proceedings, neither lodging a statement in reply nor taking part in a pre-arranged case management directions conference. The respondent was also not represented at the investigation meeting.

[3] Having checked the Authority's file, I am satisfied that all documents have been correctly served on the respondent, at its registered address in Christchurch. In addition, the Authority has corresponded with the company by email, using an email

address which Mr Lundh says he had used to successfully correspond with the respondent. Whilst one of the Authority's documents was returned because a signature from the respondent could not be obtained, no other documents have been returned to the Authority, including the notice of the investigation meeting.

[4] The respondent company's registered office is a physical address in Christchurch and I am satisfied that the respondent company has been given sufficient notice of the investigation meeting to either send a representative or to advise the Authority that the date was inconvenient.

[5] On this basis, I decided that the investigation meeting should continue in the absence of any representation from the respondent.

Brief account of the facts

[6] Mr Lundh is a carpenter who decided, in around June 2013, to seek carpentry work for the forthcoming four months, until October 2013, when his relatives from Sweden were due to visit New Zealand. He registered with a recruitment agency, but also looked at advertisements in the press and on Trade Me. He saw an advertisement placed by Alpha Construction Limited seeking a carpenter and telephoned the number given in the advertisement. He spoke to a Ms Windvogel who told him to speak to Mr Allan Windvogel who was working at a building site. Mr Lundh located Mr Windvogel and had an interview with him.

[7] Mr Windvogel engaged Mr Lundh for a trial period of one week and was satisfied with his work, so continued to engage him for the next four months.

[8] Mr Lundh says that in his conversation with Ms Windvogel and with Mr Windvogel no mention was made of the status of the relationship (ie whether he would be taken on as a contractor or as an employee). Mr Lundh's evidence is that, if Mr Windvogel had been seeking a contractor, he would not have taken the work as he had worked as a contractor in the past and did not want the bother of having to keep his own records and deal with taxation and ACC issues. It was his assumption that he was being engaged as an employee by Mr Windvogel.

[9] Mr Lundh said in evidence that, as far as he could tell, all the other workers engaged by the respondent company were employees. He says that, after the end of the engagement, when Mr Windvogel told him that he would not be getting holiday

pay because he had been working as a contractor, Mr Lundh telephoned one of his colleagues who also worked as a carpenter who told Mr Lundh that he had been engaged by Mr Windvogel as an employee, not a contractor.

[10] Mr Lundh says that Mr Windvogel told Mr Lundh that he treated him as a contractor because Mr Lundh did not wish to work on a Saturday and because it was a short term engagement only.

[11] When Mr Lundh contacted the Inland Revenue Department at the end of his engagement with the respondent company, Mr Lundh found out that the respondent company seems to have treated him as a labour only contractor, deducting schedular payments from Mr Lundh. This is despite the fact that Mr Lundh had given the respondent company his IRD number and his tax code M.

The issue

[12] Mr Lundh would only be entitled to holiday pay under the Holidays Act 2003 if he were an employee, and not a contractor. It is therefore necessary to determine the status of the relationship between Mr Lundh and the respondent company.

[13] Section 6(2) of the Employment Relations Act 2000 (the Act) 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) of the Act states as follows:

...
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.

[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 case of *Bryson v. Three Foot Six Ltd* [2005] ERNZ 372. This held that the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice and then to apply the three tests,

known as the control test, the integration test and the fundamental or economic reality test.

[16] Mr Lundh said in evidence that he was given no documentation setting out the relationship between them, and so it is necessary to consider the three tests stated above.

The control test

[17] This examines the extent to which the activities of Mr Lundh were controlled by the respondent company.

[18] Mr Lundh says that, for the first week or so of his engagement by the respondent company, he believes he was working for Mr Windvogel on a house that Mr Windvogel's company was going to sell itself. He said that Mr Windvogel told him what to do, although he was not there very often and, as Mr Lundh is experienced, he did not need much direction.

[19] After a week or so the respondent company hired out Mr Lundh to other companies (such as Fletchers and Leigh Construction). Mr Lundh says that he had to report to the building sites when he was told to by the client and he would finish when everybody else finished. He says that he was not free to decide when he started and finished and that he was not free to decline work as far as he was concerned. He says that his hours varied from week to week because the respondent company was not always able to give Mr Lundh work.

[20] Because of Mr Lundh's experience as a carpenter, he did not need a great deal of direction and so the control test does not assist greatly in deciding whether or not Mr Lundh was an employee or a contractor. However, given that Mr Lundh says that he was not free to decline work, it is my view that, on balance, the control test favours an interpretation of Mr Lundh being an employee rather than a contractor.

The integration test

[21] This test examines the extent to which Mr Lundh was integrated into the respondent's business.

[22] According to Mr Lundh, there was no difference between the way he was treated compared to the other workers, who he believes were all employees of the company. He took his breaks at the same time as they did, for example.

[23] He says that he was not given any company shirts with the company's logo on it, but that when he worked on building sites with a number of workers from other companies, it was plain to everybody which crew he was in.

[24] Mr Lundh says that like all carpenters, he used his own tools although, occasionally, he did borrow tools from the respondent company. He also says that the respondent company supplied consumables such as nails and screws, although he sometimes used his own screws.

[25] Again, the integration test does not appear to be strongly determinative of Mr Lundh'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. However, on balance, given his evidence that he was treated the same as all the other workers who he believes were employees, and in the absence of any contradictory evidence from the respondent, I accept Mr Lundh's evidence which persuades me that the integration test suggests that Mr Lundh was an employee.

The fundamental or economic reality test

[26] This test examines the extent to which Mr Lundh took on financial risk himself in providing his services to the respondent company.

[27] It is clear from Mr Lundh's evidence that he took on no financial risk in working for the respondent company. Although payments from the respondent company appeared on Mr Lundh's bank statement as *bill payments*, Mr Lundh says that he did not submit any invoices. He submitted timesheets, just like the other workers.

[28] Mr Lundh says that he did not believe that Mr Windvogel would have agreed to him asking someone else to work in his place on any occasion, although this situation did not arise.

[29] I believe that the fundamental test suggests that Mr Lundh was an employee rather than a contractor.

The overall picture

[30] When I step back and look at the arrangement as a whole, it appears to me that it is more likely than not that Mr Lundh was an employee of the respondent company not a contractor. I am aware that building companies engage workers as labour only contractors and that Mr Lundh may satisfy the picture of a labour only contractor as well. However, labour only arrangements can be either employment arrangements or contractor arrangements (the tax treatment of the arrangement deriving from the legal status of the worker, not the other way round).

[31] What is clear is that Mr Lundh and the respondent company entered into a contractual arrangement (albeit without any documentation to record the terms of the agreement formally) but that it was never the intention of Mr Lundh to be an independent contractor. The parties were never of the same mind with respect to the status of Mr Lundh, and so the reality of the relationship must be the determining factor.

[32] On balance, in the absence of any evidence from the respondent company, I favour an interpretation of the status of Mr Lundh as that of an employee rather than a contractor. For the avoidance of doubt, the fact that Mr Lundh did not want to work on Saturdays does not mean that he had to be a contractor. If Mr Windvogel had wanted him to work on Saturdays before taking him on as an employee, he should have made it clear that that was an essential condition of employment.

Holiday pay

[33] Having determined that Mr Lundh was an employee rather than an independent contractor, I must now determine whether he was entitled to holiday pay upon the termination of the employment.

[34] Section 23 of the Holidays Act states as follows:

Calculation of annual holiday pay if employment ends within 12 months

(1) Subsection (2) applies if—

(a) the employment of an employee comes to an end; and

(b) the employee is not entitled to annual holidays because he or she has worked for less than 12 months for the purposes of section 16.

(2) An employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount—

(a) paid to the employee for annual holidays taken in advance; or

(b) paid in accordance with [section 28](#).

[35] There is no evidence that Mr Lundh was paid any holiday pay and, indeed, given what Mr Lundh was told by Mr Windvogel, it appears that the company had no intention of paying holiday pay because it treated Mr Lundh as an independent contractor.

[36] Having determined that he was indeed an employee, he is therefore entitled to 8% of his gross earnings by way of holiday pay.

[37] The copy of his income tax statement dated 12 April 2014 shows that Mr Lundh earned a total of \$14,370 whilst working at the respondent company. 8% of that gross sum equals \$1,149.60.

Order

[38] I order that the respondent company, Alpha Construction Limited, pay to Mr Lundh holiday pay in the gross sum of \$1,149.60.

Costs

[39] Mr Lundh was not represented by counsel or an advocate and so has not incurred any legal costs. However, he has incurred the Authority's lodgement fee of \$71.56 and I therefore further **order** the respondent company to reimburse Mr Lundh for this sum of \$71.56.

David Appleton

Member of the Employment Relations Authority