

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 206
5312830

BETWEEN MARC McELREA
 Applicant

AND SIM AG CONTRACTING
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Kerry Dowling, Counsel for Applicant
 Ashley Sim, Advocate for Respondent

Investigation Meeting: 5 September 2011 at Invercargill

Determination: 20 December 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Marc McElrea worked for Sim Ag Contracting Limited from about February 2010 until the relationship ended in May 2010. Mr McElrea says that he was unjustifiably dismissed and that he has a personal grievance as a result. His claim is for compensation for lost remuneration and compensation for distress.

[2] Ashley Sim is the company principal. He says that Mr McElrea was engaged as an independent contractor so cannot have a personal grievance claim.

[3] To resolve this problem I will explain the arrangements entered into by the parties at the beginning of the relationship and what happened in practice. I will then determine the real nature of their relationship in accordance with s.6 of the Employment Relations Act 2000. If Mr McElrea is found to have been an employee, I will then consider the merits of his personal grievance claim.

The establishment of the relationship

[4] Mr Sim placed an ad in the situations vacant column of the local newspaper.

It read:

Seasonal Worker Required

- * *For Gorse Spraying*
 - * *Casual or Full Time*
 - * *Pay negotiable*
 - * *Immediate Start*
 - * *Fit*
 - * *Committed*
 - * *Reliable*
 - * *Full Drivers licence with 4WD experience*
- Ph Ashley*

[5] Mr McElrea lives near Mr Sim. He applied for the advertised position by going to Mr Sim's house. The two men had a discussion by the end of which it was agreed that Mr McElrea would starting work for Sim Ag on 1 February 2010. No-one else witnessed this discussion and there are differences between Mr McElrea and Ms Sim about what was discussed and agreed.

[6] Mr Sim's evidence is that they discussed and agreed on a payment of \$30.00 per hour plus GST, that he asked and was told by Mr McElrea that he was GST registered, that he told Mr McElrea that he could easily work 150 hours per month during the warmer months but it would be difficult to achieve that in the winter, that it was up to Mr McElrea to chose what hours he wanted to work and that Mr McElrea would be able to take time off in the spring to do some other work. Following this they shook hands and Mr McElrea left. When questioned Mr Sim also told me that they did discuss the options of Mr McElrea working as an employee at the rate of \$22 - \$23 per hour for time worked or at the minimum wage for year round fulltime employment before Mr McElrea opted for the \$30 per hour plus GST option.

[7] Mr McElrea's evidence in his written statement is that they discussed the following terms: an income of \$900 gross per week, 30 hour working week Monday – Friday, that Mr McElrea would receive holiday pay at 6%, would not be required to work statutory holidays but would receive a lieu day if he did work and that he would be trained and sent on a safety course on full pay. However, when questioned, Mr McElrea told me that Mr Sim may have asked him if he was GST registered and

that they did have a discussion about whether Mr McElrea wanted to be an employee or a contractor. Mr McElrea told me that he definitely opted to be an employee and that Mr Sim told him they would sort out an employment contract later.

[8] Both men agree that they discussed the seasonal and weather dependant nature of the work. It is also common ground that there was some discussion between the two men about Mr McElrea's long standing work doing artificial insemination (AI) and they agreed Mr McElrea could continue with that work despite his engagement with Sim Ag.

[9] I will return to the remaining evidential dispute shortly.

What happened in practice

[10] There is somewhat less disagreement about what happened in practice. All of the equipment required for the work was provided by Sim Ag Limited. That included spray equipment and a vehicle worth about \$60,000.00. Mr Sim gave Mr McElrea instructions about all the different aspects of the job. All of the work was done for Sim Ag's clients. Mr McElrea filled in Sim Ag spray sheets recording the client, the chemicals used and the time required for the work. The sheets were given to Mr Sim who then used that information to invoice the company's clients. Mr Sim told me that it is a requirement to retain that information. Mr Sim would usually ring Mr McElrea in the evening to check on the day's work and to advise him about forthcoming work. Mr Sim regarded Mr McElrea as a good worker.

[11] It is clear from the spray records that Mr McElrea worked on 1 – 5 February, 12 February, 16 – 18 February, 7, 8 & 10 March, and 29 – 30 March. There is another sheet but the date is incomplete. These sheets total 106.25 hours. Mr McElrea must have worked on other occasions as well because other records show he was paid for 142.5 hours work.

[12] On or about 9 February 2010 Mr McElrea presented Mr Sim with a handwritten note reading:

*9 - 2 - 10
Marc McElrea
Estimated Hours a week – 30 hrs*

Hourly Rate - \$30 before tax
[Signed] Marc McElrea

[13] Mr Sim's evidence is that he was told that the letter related to day care arrangements for Mr McElrea's children. Mr McElrea's evidence is that he required proof of his employment for Work and Income and his bank. Whichever is correct, Mr Sim signed this note and Mr McElrea provided it to Work and Income the next day.

[14] On or shortly after 17 March Mr McElrea went to Mr Sim's house with the spray sheets and an invoice written out by him using a commercially available pre-printed book of forms. The invoice included neither a GST number nor GST. Mr Sim's evidence is that he pointed out to Mr McElrea that it did not include a GST number, that Mr McElrea then said he was not GST registered and Mr Sim put it to him that he had claimed when interviewed to be GST registered which Mr McElrea admitted. Catherine Whitefield is Mr Sim's partner and has an administrative role with the company. Her evidence is that she was present during this discussion and heard Mr McElrea make this admission. Ms Whitefield also says that Mr McElrea said that he had been to his accountant and talked about GST registration and that things were left with Mr McElrea to raise the matter again with his accountant.

[15] After the investigation meeting I received from Mr McElrea extracts from the relevant invoice books and later again the books themselves. One book is an A5 DL Collins Tax Invoice booklet. It includes duplicates of AI client invoices dated between 20 January 2009 and 13 December 2010. Mr McElrea apparently provided these AI services for various clients on an independent contractor basis. None of these invoices show any GST content. The duplicate invoice numbered 808218 is dated 17 March 2010 and reads:

Sim Ag
Marc McElrea
[Address]
1st Feb – 17th Feb
72½ hours @ \$30 – 2175.00
2175.00

[16] The other book is a 45 DL Collins Tax Invoice booklet. The original and duplicate numbered 885701 are not present. The next three duplicates (885702, 885703 and 885704) refer to Mr McElrea's work for SimAg. There is another partly

completed invoice and duplicate (885705) that relate to Mr McElrea's AI work. Otherwise this book is unused. The SimAg duplicate invoices read:

885702
 23.4.10
 Sim Ag
 Marc McElrea Agriculture
 [Address]
 1st March – 31st March
 46½ hours @ \$30 – 1387.50
 1387.50
 173.44
 1560.94

885703
 17.3.10
 Sim Ag
 Marc McElrea Agriculture
 [Address]
 1st Feb – 17th Feb
 72½ hours @ \$30 - 2175.00
 2175.00
 271.80
 2446.87

885704
 28.4.10
 Sim Ag
 Marc McElrea Agriculture
 [Address]
 1st March – 31st March
 46½ hours @ \$30 – 1387.50
 1st April – 28th April
 23½ hours @ \$30 - 705.00
 64-566-601 2092.50
 261.56
 2354.06

[17] Mr McElrea received a cheque drawn on the company bank account dated 26 March 2010 for \$2,446.90 which he deposited into his bank account that day. That reflects invoice 885703 rather than invoice 808218. SimAg did not deduct any tax from this payment. This was the first payment received by Mr McElrea.

[18] Mr McElrea's evidence is that in order to receive his second pay cheque Mr Sim required him to provide a GST invoice, that he was not happy about it and talked to his father's accountant who advised him not to register for GST. However Mr McElrea did as he was asked because he needed to get paid. That is not inconsistent with Mr Sim's and Ms Whitefield's evidence about the discussion except

as to its timing. The documents (invoices 808218 and 885703 both dated 17 March 2010) support the respondent's evidence as to timing and I find that their evidence about the discussion is more reliable generally as well. It also follows that there must have been a discussion between Mr McElrea and Mr Sim about GST including registration before Mr McElrea was initially engaged by Sim Ag. I therefore reject Mr McElrea's written evidence to the contrary. I also accept the evidence to the effect that Mr McElrea was given a choice about which arrangement he preferred before agreement was reached on the independent contractor arrangement.

[19] Mr McElrea told me that he registered for GST on 19 April 2010. There is a *Transmission Verification Report* showing that he sent the GST registration form by fax on that date. Accordingly I accept Mr McElrea's evidence on this point.

[20] I have not been given any explanation for the existence of invoice 885702. However, there is a company cheque dated 1 May 2010 payable to Mr McElrea for \$2354.06 banked by him shortly after that date. The payment reflects invoice 885704 which includes the work covered by invoice 885702. I note that invoice 885704 includes Mr McElrea's GST number as well as the GST content on the amount due. Again, SimAg did not deduct any tax from this payment.

[21] From all this I find that Mr McElrea was paid monthly or less frequently on his invoice. Mr McElrea was familiar with such an arrangement because (except for the GST aspect) it was identical to his existing AI work. In addition, having told Mr Sim at the outset that he was GST registered, Mr McElrea claimed GST and then registered for GST after Mr Sim took issue with the original invoice.

[22] As to the frequency of the work I find that it was agreed that Mr McElrea would work on a casual basis depending on weather conditions, the availability of work and his own availability.

Real nature of the relationship

[23] I am referred to *Bryson v Three Foot Six Limited* [2005] NZSC 34 to the effect that taxation arrangements are a consequence of legal status rather than determinative of it. *Bryson* more generally is the leading case in this area of the law. In particular,

the Supreme Court approved the formulation of the legal test set out by the Employment Court in *Bryson v Three Foot Six Limited* [2003] 1 ERNZ 581. There, the Court summarised the principles as:

The Court must determine the real nature of the relationship.

The intention of the parties is still relevant but no longer decisive.

Statements by 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.

[24] In the present case there is no direct evidence of industry practice. Ms Sim’s evidence is that he had previously engaged others doing the same work as Mr McElrea as employees. He also says that Mr McElrea would have been on a lower hourly rate of pay if engaged as an employee. This evidence indicates that at least sometimes people in such positions are engaged as employees. Industry practice is no more helpful than that to resolution of this problem.

[25] The advertisement indicates that Sim Ag Limited sought applicants for employment under a contract of service. However, the finding in favour of Mr Sim’s evidence about the pre-engagement discussions means that there was a mutual intention to establish a relationship of principal – independent contractor.

[26] Mr McElrea enjoyed a measure of independence in terms of when he worked but otherwise Mr Sim through his company was entitled to and did control the performance of the work. Mr McElrea performed the work as part of Sim Ag Limited’s business and at Sim Ag Limited’s direction. Mr McElrea merely provided the labour having been instructed in the requirements of the job by Mr Sim. The work was performed for and invoiced to Sim Ag Limited’s clients. There was no opportunity for Mr McElrea to profit or lose from his management of the business. The elements that indicate something other than ordinary employment were the invoicing and payment arrangements.

[27] Mr McElrea was faced with a choice between inconsistent options – engagement as a contractor at a higher hourly rate or employment as an employee at lower hourly rates on a casual or fulltime basis. He chose the former option.

[28] In *Telecom South v Post Office Union* [1992] 1 ERNZ 711, the Court of Appeal was faced with a written agreement that required payment to be made to a senior manager of a monthly fee plus GST on production of an invoice with the manager to be responsible for all taxes as if self employed. The particular clause in the contract was described as *transparently a tax device* and the Court of Appeal barely paused to reject an argument that the manager was not an employee. However, Sir Gordon Bisson thought it necessary to sound a word of caution that those who seek to introduce taxation advantages into terms of employment might have to abide by the consequence that they are classified as self employed for personal grievance purposes in line with *Massey v Crown Life Insurance Co* [1978] 2 All ER 576.

[29] The substantial merits of this matter are that Mr McElrea is caught by the note of caution sounded by Sir Gordon Bisson in *Telecom South* and the point about justice made in *Massey v Crown Life Insurance Co*. He elected self-employment and cannot now pursue a personal grievance.

Summary

[30] Mr McElrea was not an employee. The Authority has no jurisdiction to investigate his complaint about the ending of the relationship.

[31] Mr Sim represented the company so there may not be any recoverable legal costs. However, I will reserve costs in case there is a claim. Any claim should be made by lodging and serving a memorandum no later than 31 January 2012. The other party may have a further 14 days to lodge and serve any reply. This timeframe is set to accommodate the Christmas break.

Philip Cheyne
Member of the Employment Relations Authority