

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 41  
5360415

BETWEEN

BRIAN MCGEOWN  
Applicant

AND

ANDY ANDERSONS  
INDUSTRIAL SERVICES  
(2007) LIMITED  
Respondent

Member of Authority: R A Monaghan

Representatives: B McGeown in person  
J Black, advocate for respondent

Investigation meeting: 25 January 2012

Determination: 31 January 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Brian McGeown says he was dismissed unjustifiably by one of the partners in his former employer, Andy Anderson's Industrial Services (2007) Limited (AAISL).

[2] AAISL says the parties were not in an employment relationship, rather the relationship was one of principal and independent contractor.

[3] An investigation meeting was convened in order to address whether there was an employment relationship between the parties, and this determination sets out my findings on the point.

[4] Additional matters discussed during the investigation meeting, and having a bearing on the employment relationship problem overall, will be referred to at the end of the determination.

## Background

[5] AAISL provides cleaning and other services to industrial premises. The cleaning services are provided as a backup to the regular or day to day services available on the premises – often by staff employed by the business operating at the premises. Backup services are required when, for some reason, a special clean or related service is sought in addition to the cleaning service usually operating. By their nature AAISL's services are often sought on an ad hoc, short notice basis, and at the relevant time AAISL had no schedule of clients to service on a regular basis.

[6] AAISL maintained a core workforce which numbered three at the relevant time. It engaged cleaners on an as and when required basis, under a document headed 'contract for service, casual worker'. John Black and his wife purchased the company on 3 September 2007 and continued to use this method of operating until they became more familiar with the business.

[7] Mr McGeown had been engaged to carry out a Christmas clean in the holiday period 2006-2007. The work lasted for some four weeks. He approached AAISL for further work in or about October or November 2007, and spoke to Mr Black.

[8] Mr Black explained to Mr McGeown that he was managing the business in the same way as the previous owner, and that the same 'contract for service, casual worker' document was being used. He told Mr McGeown there was no guarantee of regular work, and he made no promise about the amount of work that would be available or length of time during which it would be available.

[9] The document was provided to Mr McGeown when he reported for his first period of work on 2 December 2007. He signed it and returned it. The document was one page long, with relevant provisions including:

(i) *Background*

*This is an agreement for contract work, not for salary or wages. ... The company has agreed to remunerate the contractor for the provision of these services as required from time to time. The contractor is aware that he/she is self-employed and responsible for their own ACC payments, holidays, student loans and other payments.*

(ii) ...

(iii) *Hours and Place of Work*

*... The Contractor has no fixed hours of work or minimum hours of work. The company currently operates at the hours necessary to complete the work. ...*

(iv) *Remuneration*

*The contractor shall be paid \$125 per 8 hour working day for undertaking work onsite as directed or in proportion thereof at an hourly rate. ...*

[10] Withholding tax was to be paid on Mr McGeown's remuneration.

[11] Mr McGeown said he accepted work each time it was offered to him. That occurred on three occasions, namely in respect of work done on 2, 14 and 23 December 2007. The incidents of concern to Mr McGeown occurred while at work on 23 December.

### **Whether the parties were in an employment relationship**

[12] In determining whether the parties' relationship was one of employment I apply s 6 of the Employment Relations Act 2000, which provides in part:

*"6. Meaning of employee*

*(1)...*

*(2) In deciding ... whether a person is employed by another person under a contract of service, the ... Authority ... 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."*

[13] I also apply the following passage from the judgment of the Supreme Court in *Bryson v Three Foot Six Limited (No 2)*<sup>1</sup>:

*'All relevant matters' certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way*

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

*in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. 'All relevant matters' equally clearly requires the Court or 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 Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental tests."*

[14] Although the clauses in the contract which I have set out above are relevant to the nature of the parties' relationship, they are not determinative of it. Thus the provisions stating the relationship is one of self-employment support a conclusion that such is the case, but other factors of the kind discussed in the above passage from *Bryson* must also be taken into account.

[15] Such factors include the extent to which hours of work are prescribed, the extent of the ability to accept or decline work without penalty, and whether any time off is paid for. Here the hours of work were defined to the extent necessary to ensure the necessary work was done, Mr McGeown was free to decline work, and he was not entitled to paid leave. In many cases provisions of this kind support a conclusion that the relationship is one of principal and independent contractor, although they may also support a conclusion that the relationship is one of casual employment. Indeed the label 'casual' was also used in the document Mr McGeown signed.

[16] The extent to which one party is under the 'control' of the other regarding the performance of the work is also relevant. Here Mr McGeown was obliged to observe the safety procedures in effect at the sites where he worked, and was obliged to comply with lawful and reasonable instructions of AAISL regarding the conduct of his duties. In some cases provisions of this kind support a conclusion that the relationship is one of employer and employee, rather than one of principal and contractor.

[17] A further consideration is the extent to which Mr McGeown could be said to be working or in business on his own account. I do not believe that could be said of him, which supports a conclusion that he was an employee.

[18] In the light of that conclusion, I regard the form of control exercised over his work also supported the existence of an employment agreement.

[19] On balance I conclude that the real nature of the relationship was one of casual employment. Since that means an employment relationship existed, the Employment Relations Authority can proceed to address Mr McGeown's employment relationship problem.

### **Additional matters**

[20] During the discussion at the investigation meeting the existence of further issues relevant to whether or how this matter can proceed became apparent. I considered them sufficiently significant to raise them with the parties and embark on some discussion of them. They were:

- (a) whether the actions to which Mr McGeown took exception, and which formed the basis of his personal grievance, were the actions of his employer for the purposes of the personal grievance;
- (b) whether the termination of his employment was effected by his employer; and
- (c) whether Mr McGeown's personal grievance was commenced in the Authority within the 3 year timeframe set out in s 114(6) of the Employment Relations Act.

#### 1. Whether actions of concern were the actions of the employer

[21] Mr McGeown's underlying concern was with comments made by 'Frank', who Mr McGeown asserted was Mr Black's business partner. Frank was working on the same site as Mr McGeown on 23 December 2007. He was said to have passed adverse comment to Mr McGeown about the number of Mr McGeown's observed absences from the site, to have said that Mr McGeown was not paid to f- around, and to have asked Mr McGeown why he should be kept on when he would not work on heights. Mr McGeown has taken particular exception to the last of these comments, and says the accusation regarding working on heights is not true. He also said among other things, in an account written in March 2008, that Frank told him he was on his

'last legs', and said at the investigation meeting that Frank told him this would be the last day Mr McGeown would 'work for us'. Mr McGeown took this as a dismissal.

[22] Frank was no more than another contractor on the site. He was not part of AAISL or its cleaning team. He was not a supervisor, foreman, member of the AAISL management structure, or a business partner and was not introduced to Mr McGeown in any of those capacities. Mr McGeown said he assumed that Frank was Mr Black's business partner, but was not able to say why he made that assumption. Nothing in his interactions with AAISL gave Mr McGeown any grounds for the assumption. Frank had neither actual nor ostensible authority in respect of Mr McGeown's employment, so that he did not and could not dismiss Mr McGeown.

[23] Some days later Mr McGeown telephoned Mr Black to raise his concerns about the exchange with Frank and his view that Frank had fired him. Mr Black said he explained to Mr McGeown that he was the person with whom Mr McGeown should be dealing and he would call Mr McGeown if there was work. Since Mr Black was outside Auckland and was conducting the conversation by telephone while driving a car, he asked Mr McGeown to call him when he returned if he wished to discuss Frank's comments any further.

## 2. Whether actions of the employer amounted to a dismissal which was unjustified

[24] It is open to a casual employee who ceases receiving offers of work to challenge the cessation by raising a personal grievance on the ground of unjustified dismissal.

[25] Mr Black's account at the investigation meeting was that he offered work to Mr McGeown because Christmas was the busy period, but it was likely that work would tail off afterwards. Contrary to Mr McGeown's understanding there was never an offer of work for the entire four week Christmas period, rather work was being offered on a day to day basis. Early in 2008 Mr Black attempted without success to contact Mr McGeown to offer him more work, then ceased to do so when less work was available.

[26] Mr McGeown denied being contacted again. However my preliminary view is that a claim of unjustified dismissal based on the events described is weak and has little chance of success.

### 3. Whether time limits were exceeded

[27] During the investigation meeting I pointed out to Mr McGeown that he began raising his concerns with AAISL in late December 2007 and January 2008, but did not commence proceedings in the Authority until 17 October 2011. That is outside the three year time limit contained in s 114(6) of the Act.

[28] Accordingly it appears this matter cannot proceed because it was commenced out of time. Again, however, this is not my final determination on the point.

[29] On a review of the material since the investigation meeting, I have come to the further view that it is arguable whether a personal grievance was raised in early 2008 in terms of s 114(1) of the Act. If Mr McGeown's method of expressing his concerns did not amount to the raising of a personal grievance, then the grievance he now seeks to address was raised well outside the 90-day period in s 114(1). An adverse final finding on that point would also mean his grievance cannot proceed.

### 4. The next steps

[30] The parties may respond to the views set out in this section of this determination. To that end I make the following directions:

(a) Mr McGeown is to lodge in the Authority a statement setting out any additional evidence relevant to the issues identified above (including the raising of a grievance within the 90-day time limit in s 114(1)), and making such further application as he considers necessary, within 14 days of the date of this determination;

(b) Mr Black or AAISL is to lodge any written statement of evidence in reply within 14 days of the receipt of any statement received from Mr McGeown; and

(c) If Mr McGeown wishes to reply to Mr Black's statement he is to lodge the reply in writing within a further 7 days after receipt of that statement.

[31] On receipt of that material I will address with the parties a further procedure for resolving those issues.

**Costs**

[32] Costs are reserved. If either party seeks an order for costs the matter will be addressed in association with the resolution of the above matters.

R A Monaghan

Member of the Employment Relations Authority