

[5] Quantum further claims that if Mr Michael is determined to have been an employee and to have raised a personal grievance within the statutory time period, he was employed on a casual employment agreement and paid for all the hours worked in accordance with the terms of that agreement.

[6] Quantum denies that it terminated the agreement between the parties, and claims that Mr Michael terminated the agreement by refusing to accept further work.

Issues

[7] The issues for determination are whether or not:

- Mr Michael was an employee or an independent contractor when working for Quantum

If determined to be an employee, whether or not:

- Mr Michael raised a personal grievance within the statutory 90 day time period;

If no personal grievance was raised within the statutory 90 day time period, whether or not:

- Leave should be granted for Mr Michael to raise his personal grievance outside the statutory 90 day time period;

If leave is so granted, whether or not:

- Mr Michael was employed as a casual employee and paid for all the hours he worked;
- Mr Michael was unjustifiably constructively dismissed by Quantum

Background Facts

[8] Quantum provides data connection services to customers, undertaking installation work. During 2014 Quantum entered into a contact with Visionstream Pty Ltd

(Visionstream), a company providing telecommunications and ICT services in New Zealand and Australia, principally installing fast broadband. This was work outside of Quantum's core business.

[9] On or about April 2014 Quantum was approached by a group of applicants, including Mr Michael, enquiring about the possibility of work.

[10] Mr Jim Patterson, Director of Quantum, explained that the work Quantum obtained from Visionstream, which was a new venture for Quantum, was initially in the nature of a 'trial run' with no guarantee of an ongoing work basis. Accordingly he had authorised Mr David Grubb, Contracts Manager for Quantum, to engage independent contractors, rather than employees, to work on the Visionstream work.

[11] As the applicants had previously undertaken work for Visionstream and had experience in that area, Mr Grubb had agreed in May 2014 to engage three of the applicants as independent contractors. Mr Michael was not offered work at that time.

[12] In July 2014 Mr Patterson said that Mr Grubb had informed him that he intended to offer Mr Michael work as an independent contractor. Mr Patterson said that he spoke with Mr Michael and ensured that he understood he was being engaged as a contractor, and advised that he should get advice from an accountant.

[13] Mr Michael was subsequently offered work by Mr Grubb and commenced on 25 July 2014. Both Mr Michael and Mr Grubb confirm that the agreed intention was that Mr Michael would be an independent contractor, he would be paid in accordance with the hours he claimed via time sheets, and the hourly rate was \$26.50 inclusive of GST, an hourly rate offered to the other independent contractors engaged by Quantum.

[14] Mr Grubb said the intention also was that Mr Michael:

- would be offered jobs by Quantum from time to time;
- was free to accept or refuse the work offered; and
- except when he was undertaking work he had agreed to undertake, there was no obligation on him to be available to work for Quantum

[15] Mr Michael said he was taken on in a Team Leader capacity and required to work from 7.00 a.m. to 4.00 p.m. Monday to Friday. He collected a work truck from Quantum's offices at the commencement of each work day, and returned it to the Quantum offices at the

end of the day. The equipment necessary for him to undertake the work supplied by Quantum, however he used his personal mobile telephone for work purposes.

[16] Mr Michael said he was allocated work each morning on arrival at Quantum's offices, which included the job location and job type. He was not given an option whether or not to accept any of the allocated work.

[17] He completed a time sheet in respect of each day he worked for Quantum, and was paid only for the time specified on the time sheets.

[18] Mr Michael said that he attended Quantum's offices at 7.00 a.m. and worked until 4.00 p.m., but these hours were not entered on the time sheets he completed, nor was he remunerated in accordance with those hours.

[19] He was not supervised in relation to the various jobs he carried out, and with effect from August 2014 he supervised employees at the various work sites who were employed by Quantum through a subsidized arrangement with Work and Income New Zealand (WINZ) to work on the Visionstream contract.

[20] Mr Michael said he was unable to accept work other than that from Quantum during the period he was engaged, and he was unable to subcontract the work.

[21] Mr Grubb said that Mr Michael was not engaged as a Team Leader, and the initial intention had been that the independent contractors would be working in pairs at the job locations. After the engagement of the WINZ employees, Mr Michael who worked on an unsupervised basis himself, provided supervision to a WINZ employee working at a job location with him.

[22] At the beginning of each work day, Quantum would agree with the independent contractors which work they would undertake that day. There was no requirement that the independent contractors complete all the jobs allocated, and Mr Michael regularly did not complete all the jobs which he had been allocated.

[23] Mr Michael completed a time sheet in respect of each day he worked for Quantum, and was paid only for the time spent working at a work location. If Mr Michael returned early to the Quantum offices, Mr Grubb said he was not required to, and did not, undertake any work.

[24] Mr Jamie Jones, a WINZ subsidized employee who worked with Mr Michael said that whilst he and the other WINZ subsidized employees would perform work on return to the Quantum offices, Mr Michael and others would be free to have a drink.

[25] Mr Grubb also said that although Mr Michael choosing to finish a work allocation and return to Quantum's offices before the end of a working day impacted adversely upon the hours worked by a WINZ-subsidized employee whom Quantum was contractually required to pay for a full working day, Quantum took no issue with this.

[26] Mr Grubb said that Mr Michael did not work on 28 July 2014, 1 August 2014, 13 August 2014, 15-22 August 2014, 26 August 2014, 1 September 2014, 9 September 2014, 22 September 2014, 6 October 2014 or 9 October 2014. No permission had been sought to take these days off, rather Mr Michael informed Quantum that he was not available to undertake work on those dates.

[27] Mr Grubb said that the independent contractors he had engaged to work on the Visionstream work had been keen to be granted employee status, including Mr Michael. In late August 2014 when the Visionstream work had become more stable, he had offered employment to some of the independent contractors, but not to Mr Michael who was not completing the same amount of jobs as the other contractors.

[28] Mr Michael said he had been upset when he found out that some of the independent contractors who had previously worked with him at the company DTIS had been offered employment, and on 25 September 2014 he wrote to Mr Grubb.

[29] In the email dated 25 September 2014 Mr Michael had set out the amount of wage payments he had received since the commencement of his engagement with Quantum, pointed out that the rate did not include entitlement to sick or holiday leave, and requested a more fair arrangement.

[30] Mr Grubb said that in late September 2014 Mr Michael had told him he was looking for other work and, authorised by Mr Patterson, he made him an offer of employment of a 40 hour working week and an hourly rate of \$20.00 which was the rate paid by Quantum to the employees with the same level of experience as Mr Michael.

[31] Mr Grubb said that Mr Michael did not accept the offer of employment and in October 2014 had advised him that he had obtained other employment and would not be returning to Quantum.

[32] On 10 October 2014 Mr Michael wrote to Mr Grubb explaining that he had been advised that he was an employee of Quantum rather than a contractor.

[33] The last day on which Mr Michael carried out employment for Quantum was 14 October 2014.

Determination

Was Mr Michael was an employee or an independent contractor when working for Quantum?

[34] Mr Michael claims that he was an employee whilst carrying out work for Quantum.

[35] In deciding whether Mr Michael was employed by Quantum as an employee, I apply s.6 of the Act which provides:

“s.6 Meaning of employee:

1. 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)... or the Authority-

(a) must consider any relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[36] In *Poulter v Antipodean Growers Limited*¹ Judge Perkins summarised the principles applicable to the issue of whether a relationship is that of employment or as an independent contractor, as derived from *Bryson v Three Foot Six Limited*² as:³

1. The Court must determine the real nature of the relationship.

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

3. Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.

4. 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.

¹ [2010] NZEmpC 77

² [2005] NZEmpC 1

³ *Poulter* [2010] NZEmpC 77 at [20]

5. The fundamental test examines whether a person performing the services is doing so on their own account.

6. Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

Intention

[37] There was no written agreement entered into by the parties and Mr Michael did not receive any pay slips. He did not receive a salary from which PAYE was deducted, nor were Kiwisaver deductions made. He was not registered for GST.

[38] It is not disputed that the parties intended at the outset that Mr Michael would be engaged as an independent contractor at an hourly rate of \$26.00. The hourly rate was set at a higher level than the applicable hourly rate for an employee in the same position on the basis that it included GST.

[39] Prior to working at Quantum, Mr Michael had been an employee with DTIS, he had provided DTIS with his tax code and I consider would have appreciated the attributes of a normal employment situation, including the deduction of PAYE from the salary or wage payment, and regular payment in return for regular hours.

[40] Immediately prior to working for Quantum, he had had independent contract work, operating machinery and was paid in accordance with a time sheet for hours worked which varied being weather dependent.

[41] Consistent with the agreed intention that Mr Michael would be an independent contractor, I find that he did not complete or provide any form of documentation normally associated with the establishment of an employee relationship at the outset, nor in the letter dated 25 September 2014 did he query his employment status but instead queried the hourly rate payable to him, stating: *“I need to know how charging for my time can be done differently ...”*

Control and Integration

[42] Consistent with the agreed intention that Mr Michael would be an independent contractor, I find that there was no expectation that he would be available to work for Quantum other than when he chose to accept work, and he was free to accept or decline work as he chose.

[43] Consistent with this expectation I note that the time sheets completed by Mr Michael state the hours worked on a job allocation, but do not reflect a regular working day of 7.00 a.m. to 4.00 p.m., and payment to Mr Michael was based on the time sheet hours and not the hours he stated he was expected to work..

[44] Mr Michael did not work on a number of dates during his employment. He did not seek permission to be absent on these days, nor was he required to complete any form of documentation in relation to these absences as would be expected of an employee. Further there was no issue raised by Quantum with his not being available to undertake work on those days despite this impacting upon the work performed by the WINZ-subsidized employees.

[45] I note that the WINZ-subsidised employee was paid by Quantum in accordance with the agreed contractual hours but that Mr Michael was paid in accordance with the hours set out on the relevant time sheets. I find this situation to be indicative of an independent contractor relationship.

[46] When Mr Michael did accept allocated work, I find that he often returned early to the Quantum offices. Although he remained at the Quantum offices during until 4.00 p.m. or sometimes later, the evidence establishes that he was drinking rather than working.

[47] Mr Michael's early return to the Quantum offices was not raised as a concern with him even though this impacted upon the job allocation completion by the WINZ- subsidised employee working with him.

[48] The effect of Mr Michael not working on days when work was available to be allocated I note also impacted upon the WINZ subsidised employees who had to be allocated to a different supervisor on that day. However Quantum raised no concern about this with Mr Michael.

[49] Whilst engaged on a job which had been allocated to it, Quantum exercised no control over this, Mr Michael being unsupervised on that job throughout.

[50] I find that Quantum exercised control over the jobs allocation; however Mr Michael had control over whether or not he accepted the job allocation, how he carried out the work and whether or not it was completed.

[51] As regard integration, I find that Mr Michael was free to work or not work on certain days. He did not have to work regular hours as did the other WINZ-subsidized employees and his payment was made in accordance with the hours on the time sheets rather with an agreed number of hours.

[52] Although Mr Michael was issued with a work van and equipment, I find that this was the case with the other independent contractors engaged by Quantum, and not determinative of an employment relationship.

[53] Mr Michael said he was engaged as a Team Leader, which is disputed by Mr Grubb and I find that the time sheets for the early part of Mr Michael's employment indicate that he was working with another contractor rather than as a Team Leader on those occasions.

[54] Therefore whilst I accept that there was some degree of integration, I do not find it determinative of an employment relationship.

The Fundamental Test

[55] Quantum did not calculate, deduct or pay PAYE on behalf of Mr Michael. Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*⁴ that: "*Taxation arrangements, both generally and in particular are a relevant consideration.*"

[56] I do not accept that Mr Michael was not aware that Quantum considered his position to be that of independent contractor in light of the agreed intention that that be the case with Mr Grubb, with the conversation with Mr Patterson just prior to his engagement as an independent contractor, and the request from Mr Michael to be employed after his engagement as a contractor.

[57] Mr Michael had worked as both an employee and as an independent contractor prior to the engagement at Quantum. He was therefore in a position to understand the differences between the two. He did not query the personal taxation position, specifically why Quantum was not calculating, deducting or paying PAYE and ACC contributions on his behalf, which I would have expected him to do had he genuinely believed his status to be that of an employee.

[58] Despite stating that he worked a regular 45 hour week between 7.00 a.m. to 4.00 p.m. Monday to Friday, Mr Michael confirmed that he was paid only for the hours stated on the time sheets which fell far short of 45 per week, and he did not challenge this basis throughout the major part of his employment with Quantum.

[59] Mr Michael was free to accept other work during his engagement with Quantum. Whilst he says he did not do so and there is no evidence that he did, I find that he was nonetheless entitled to do so from Quantum's point of view.

⁴ [2010] NZEMPC 1

[60] Taking all the circumstances before me into consideration, I therefore determine that Mr Michael was an independent contractor whilst working for Quantum.

[61] As Mr Michael is determined to be an independent contractor whilst working for Quantum, I have no jurisdiction to determine his other claims against Quantum.

Costs

[62] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from that date of service to lodge and serve submissions in reply. No submissions will be considered outside that time frame.

Eleanor Robinson
Member of the Employment Relations Authority