

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 76  
5633930

BETWEEN PHILIP MOORE  
Applicant

A N D LEISURETIME PORTABLE  
BUILDINGS LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Steve Richardson, Advocate for Applicant  
Jannah Stringer, Counsel for Respondent

Investigation Meeting: 15 February 2017 at Christchurch

Submissions and Further Information Received: 15 February and 21 February 2017, from the Applicant  
15 February, 22 February and 20 March 2017, from the Respondent

Date of Determination: 16 May 2017

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**DETERMINATION OF THE AUTHORITY**

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- A Philip Moore was not in an employment relationship with Leisuretime Portable Buildings Limited. Although there are some factors that could point towards an employment relationship, viewed overall, the real nature of the relationship was not one of employment.**
- B The Authority therefore does not have jurisdiction to deal with Mr Moore's claims.**
- C Costs are reserved and failing agreement a timetable has been set for lodging and serving of submissions.**

**Employment relationship problem**

[1] Philip Moore says that he was employed by Leisuretime Portable Buildings Limited (Leisuretime Portable) from 11 January 2016, after it purchased a business he was working for as a contractor, until he was dismissed in circumstances he says are unjustified on 30 March 2016.

[2] Leisuretime Portable says that it did not employ Mr Moore but engaged him as a labour only contractor. It says that a number of issues led to an agreement with Mr Moore to bring the contract for services to an end.

[3] Mr Moore seeks the following:

- Payment of his statutory minimum entitlements including accrued holiday pay and statutory holidays
- Payment of lost wages and holiday pay on those lost wages
- Compensation for loss of dignity and humiliation
- Costs.

[4] Leisuretime Portable does not accept the Authority has jurisdiction to determine Mr Moore's claim and says that it has no further liability to him.

**The issues**

[5] The issues for the Authority to determine in this matter are as follows:

- (i) Was Mr Moore an employee or contractor between the period 11 January to 30 March 2016. If Mr Moore was a contractor then the Authority does not have jurisdiction to deal with his claim. If Mr Moore was not a contractor but was employed then the following issues arise;
- (ii) How did the relationship end and was it by agreement;

- (iii) If Mr Moore's employment was terminated and he was dismissed then was his dismissal justified;
- (iv) What remedies is Mr Moore entitled to and are there issues with respect to mitigation and contribution.

### **Was Mr Moore a contractor or an employee?**

#### *Definition of an employee*

[6] An employee is defined by s 6 of the Employment Relations Act 2000 (the Act) as a person employed to do work under a contract of service. In order to determine the status of the relationship the Authority must determine its real nature. That means that the Authority has to consider all relevant matters and not determine the matter simply on the basis of how either party may describe the nature of their relationship.

#### *Real nature of the relationship*

[7] Guidance to determining the real nature of the relationship and "all relevant matters" is provided by the Supreme Court in *Bryson v Three Foot Six Limited*.<sup>1</sup> It was held in *Bryson* that the terms of a contract, both written and oral and any changes to those terms, are relevant because they may reflect the common intentions of the parties as to how they agreed the relationship would be.

[8] The Authority should consider how the relationship operated in practice because the Supreme Court said that was important to determine its real nature. The Supreme Court also referred to an assessment of features of control, integration, and whether the person has effectively been working on his or her own account. The Supreme Court stated that it was only possible to examine the relationship in light of the three tests set out above after the examination of the contract and its terms and conditions and the way it operated in practice.

#### *Mr Moore's previous relationship with the business Leisuretime Portable purchased*

[9] Mr Moore worked as a contractor for Leisuretime Caravans Limited (Leisuretime Caravans), a business that made houses on wheels, fabricating trailers. Initially he undertook this work from home and then from in or about October 2015

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<sup>1</sup> *Bryson v Three Foot Six* [2005] NZSC 34, [2005] ERNZ 372 at [32]

from the factory site. He would invoice Leisuretime Caravans \$600 for each completed trailer and could complete the trailers in about 10 hours. He said that he fabricated about one trailer a week and at the same time carried on with other work, primarily work undertaken for car yards.

*Purchase of business by Leisuretime Portable*

[10] Leisuretime Portable, after negotiations from November 2015, purchased the portable construction business from Leisuretime Caravans Limited entering into a contract for sale and purchase on 11 December 2015.

[11] After Leisuretime Portable took over the business Mr Moore continued through December 2015 to fabricate trailers on site and invoice Leisuretime Portable for each completed trailer in the sum of \$600 as he had done with Leisuretime Caravans. One of the directors of Leisuretime Portable is Daryl Shackleton. His evidence was that when the business was purchased all those working for Leisuretime Caravans Limited were labour only contractors working on an hourly rate. Mr Moore was the exception invoicing on completion of his work.

*Change to arrangements*

[12] Prior to Christmas Mr Shackleton and Mr Moore had a discussion. Mr Moore in his oral evidence said that Mr Shackleton approached him and said that he was not happy to pay \$600 for each trailer. Mr Moore was to come up with an hourly rate and work 8am to 5 pm Monday to Friday otherwise Mr Shackleton said he would get someone else to do the work. Mr Moore said that he would need to talk to his partner Donna about working in this way and about an hourly rate. After discussing the matter with Donna Mr Moore confirmed to Mr Shackleton that he was willing to work for \$30 gross per hour. Mr Moore said that he cancelled all his other contracting work because he thought that full time employment would give him a steady income and paid leave and he could still earn about \$1,000 net per week as he had done as a contractor. He said that he would never have agreed to undertake the work for \$30 per hour if he was not to be an employee with paid leave and other benefits.

[13] Mr Shackleton said that he discussed with Mr Moore a labour only contract in which he would work between the hours the factory was open for an hourly rate. He said that this discussion followed his knowledge that extra work was available as Leisuretime Portable was going to build North Island trailers in Christchurch and he

was aware that Mr Moore wanted more work. He said that he agreed to \$30 for an hourly rate less withholding tax and that Mr Moore would supply his time during the hours 7.30am to 5.00pm Monday to Thursday and 7.30 am to 3pm on a Friday. Mr Shackleton said that he would not have provided an hourly rate for an employee to do the work Mr Moore did for \$30 per hour but would have paid \$25 per hour.

*Intention*

[14] In the absence of any written contract or employment agreement against the background set out it is difficult to find a common intention about the relationship. I have formed however a clear view that there was no mention of a relationship of employment. The oral evidence did not support that. Mr Shackleton considered that Mr Moore was engaged as a labour-only contractor and Mr Moore said he believed as he was working full time for wages he was an employee.

[15] Accordingly I turn to look at how the relationship actually operated in practice.

*Time sheets, pay slips, taxation and hours worked*

[16] During the investigation meeting I asked for all the timesheets and payslips for the relevant period and these were provided by Ms Stringer after the meeting.

[17] The changed way of working commenced from 11 January 2016. Mr Moore completed the hours he worked on a timesheet from that date. Mr Shackleton said he regarded that as an invoice. Each time sheet is headed up “contractor hours for Leisuretime Portable Buildings Limited.” There is then a line for the “Contractor full name” alongside which Mr Moore on all timesheets wrote his name and then there is a line at the bottom of the timesheet “signed by contractor” alongside which Mr Moore signed. The time sheets also provided that a half hour lunch break must be taken every day and that no Sunday work is to be undertaken.

[18] Lunch breaks and Sunday work instructions would have been less likely to have been included on a timesheet in that manner if the relationship had been one of employment. That is because when work is undertaken is not usually at the discretion of an employee and any payment for full time work would have taken into account an unpaid lunch break. Mr Moore when he gave his evidence said that he thought the timesheet that was provided by Leisuretime Portable said something different but

having now been provided with a full set of timesheets I confirm they all refer to contractor hours. The time sheets are more consistent with Mr Shackleton's intention about the relationship.

[19] On his first time sheet Mr Moore wrote his IRD number and the account into which he was to be paid. He said that he was given an IR 330 form to complete but did not complete it because he was waiting for an employment agreement. It is difficult to see how the two matters are related but the result is that no guidance can be gleaned from what tax code Mr Moore put on that form.

[20] Mr Moore was paid through IMS payroll which Mr Shackleton said was used to pay all workers. Mr Moore was paid under tax code WT and withholding tax is reflected on Leisuretime Portable's employer monthly schedule as applying from 11 January 2016.

[21] The payslips are somewhat confusing as they referred to a deduction of PAYE. Mr Shackleton said the IMS payroll does not differentiate between employee and contractor. Each payslip does however refer to the tax code as WT and the amount 20.0% and Mr Moore's job title as Contractor. Mr Moore raised no issue, notwithstanding those clear signposts by way of timesheet and payslip about how the relationship was seen by Leisuretime Portable, with Mr Shackleton. That is not however the end of the matter in considering the real nature of the relationship,

[22] Mr Moore said that the agreement was to work 8.00am to 5.00pm Monday to Friday and Mr Shackleton said that work was to be undertaken within those hours, albeit with reduced hours on a Friday. I set out below a chart with the hours worked by Mr Moore over the period of time between 11 January and 30 March 2016.

<b>Week ending</b>	<b>Hours worked</b>	<b>Hourly rate</b> \$	<b>Gross</b> \$	<b>Net</b>
17 January 2016	31	30.00	930.00	744.00
24 January 2016	38	30.00	1,140.00	912.00
31 January 2016	51.5	30.00	1,545.00	1,236.00
7 February 2016	49	30.00	1,470.00	1176.00

14 February 2016	34	30.00	1,020.00	816.00
21 February 2016	39	30.00	1,170.00	936.00
28 February 2016	45.5	30.00	1,365.00	1,092.00
6 March 2016	43	30.00	1,290.00	1,032.00
13 March 2016	41	30.00	1,230.00	984.00
20 March 2016	34.5	30.00	1,035.00	828.00
27 March 2016	32.5	30.00	975.00	780.00

[23] As can be seen from the table the hours worked each week varied. They were not consistent. Some weeks Mr Moore worked on a Saturday. The first week under the new regime Mr Moore only worked 4 hours on the Tuesday and 1 and a half hours on the Friday. That can be contrasted with the long hours he worked for the week ending 31 January 2016 when worked except for Wednesday when he worked 9 hours, Monday to Saturday for 8 and a half hours each day.

[24] Sometimes Mr Moore's timesheet reflected an hour for a lunch break as opposed to a half an hour and on occasion at a different time to when lunch may usually be taken. That would be less usual in an employment relationship. On Friday 18 February 2016 Mr Moore did not take a lunch break at all. These matters suggest a degree of flexibility not seen as often in an employment relationship.

### *Supervision*

[25] There was some supervision of Mr Moore although I was not satisfied from the evidence it was particularly extensive. Mr Moore had his own spot in the factory where he fabricated the trailers and he was a skilled steel fabricator. Mr Shackleton said that he would have a look at the trailers Mr Moore was fabricating and did require some changes from time to time. Mr Moore with his level of specialisation he knew what was required and attended to the work accordingly.

[26] Mr Shackleton formed a view that Mr Moore came and went as he wanted. Mr Moore said that if he left early or during the day he informed and/or asked for

approval from the leading hand. Mr Moore did leave early from time to time or take time off during the day to attend to personal matters. He had longer lunch breaks from time to time. He may well have advised the leading hand where he was going but I am not satisfied that it was to the extent of seeking approval. This was a source of frustration for Mr Shackleton because of work load and was one of the issues discussed at the time the relationship ended.

[27] Mr Moore said that he asked for two weeks leave in May not long before the relationship ended and Mr Shackleton approved the leave. This was raised in a letter from Mr Richardson dated 18 April 2016 to Mr Shackleton as a factor supporting an employment relationship. Mr Shackleton in his response by email dated 3 May to Mr Richardson said about that matter:

Philip did not ask me if he could take 2 weeks off. I did not approve it. This is how the conversation went from Philip. In mid may I won't be here for 2 weeks as I will be sailing around the pacific and I won't give a shit about building trailers.

There was inadequate evidence to support that advice about leave went to the point of seeking approval.

#### *Equipment and rules*

[28] Mr Moore had a lot of his own tools and equipment but he said that he started using the equipment supplied by Mr Shackleton from January 2016. He used Leisuretime Portable's welder which he noted was better than his, grinders and cutting equipment. Mr Shackleton supplied some protective gear.

[29] It appeared that before January 2016 Mr Moore had smoked in the factory. Mr Shackleton told him from January that he had to smoke outside. Mr Moore acknowledges that he was caught two or three times after that by Mr Shackleton smoking in the factory. That is a health and safety rule that applies to contractors and employees alike.

#### *End of the relationship*

[30] On 29 March 2016 Mr Shackleton telephoned Mr Moore. What was said during the call is in dispute. Mr Moore said that he was told to go home and come in

the next day at lunch time for a meeting. Mr Shackleton's evidence was that Mr Moore confirmed he was leaving for the day early to pick up his grandchildren.

[31] There was some dispute about what was said at the meeting the next day on 30 March. Mr Shackleton agreed that he discussed advertising a role for a welder although he could not be sure whether it was on that day or later when Mr Moore came in to pick up his gear and equipment. Mr Shackleton said that the advertisement was placed because of a need for extra staff and not to replace Mr Moore. Mr Moore understood that Mr Shackleton had been conducting interviews for the role and he saw the advertisement as being for a replacement for his role.

[32] I find it likely that there was some discussion at the meeting about concerns Mr Shackleton had about Mr Moore. Mr Moore thought these matters had been dealt with and resolved earlier as there were adequate explanations. At this point I do not need to set the issues of concern out. Some were more serious than others. Mr Moore said that he asked Mr Shackleton if he was being fired and said Mr Shackleton confirmed he was.

[33] Mr Shackleton said that Mr Moore told him that the contracted hours did not suit him as he had other commitments and wanted to return to painting cars for car dealers as it paid in cash. Mr Shackleton said that they both agreed Mr Moore would no longer work for Leisuretime Portable and no issues were raised about the termination of the contract or that Mr Moore felt he was an employee. Mr Shackleton said that there were no issues raised later when Mr Moore came to pick up equipment and tools belonging to him.

## **Conclusions**

### *Control and integration.*

[34] The Employment Court in *D'Arcy-Smith v Natural Habitats Limited*<sup>2</sup> considered whether a person was engaged on a labour only contract and found that the relationship was not that of employer/employee. Mr D'Arcy –Smith had worked five days a week and averaged eight hours a day with little scope to increase his earnings. In that case it was concluded that the particular circumstances meant that while the high level of control and integration pointed toward an employment relationship it did

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<sup>2</sup> *Graham D'Arcy-Smith v Natural Habitats Limited* [2015] NZEmpC 123

not do so strongly. It was stated by Judge Inglis<sup>3</sup> that the inquiry into the nature of the relationship is an intensely factual one.

[35] The work Mr Moore undertook could have been undertaken by an employee or an independent contractor. Mr Moore is a skilled steel fabricator and the control over his work was not as close or extensive as a result although I accept may have increased. Mr Moore was told about the work to be completed and then he carried out that work. He worked predominantly on one aspect of the business operation of Leisuretime Portable, the fabrication of trailers.

[36] His level of integration may have increased when he worked more hours in the factory although he undertook his work usually by himself and not as part of a team. Mr Moore notwithstanding he had his own tools and equipment used the equipment of Leisuretime Portable and was provided with some safety gear from 11 January 2016. The hours he worked were somewhat variable and whilst Mr Moore felt more restricted in undertaking other matters during the hours the factory was open there is evidence to support that he did finish early on some days or extend his lunch break. I find it was more likely that while Mr Moore advised that he was leaving work it was more to inform than to obtain permission.

[37] There are factors in this case when control and integration is applied that are consistent with an employment relationship but there are factors that are consistent with a contract for services. Having regard to all the circumstances I do not find these factors strongly weigh in favour of an employment relationship.

#### *Fundamental*

[38] Under this test I need to consider whether Mr Moore was effectively working on his own account during the period 11 January to 30 March 2016. Mr Richardson relies on the changed payment method in his written submissions and submits that no expenses during the period 11 January to 30 March 2016 were recorded as being claimed unlike for the earlier period. The only record from IRD I have is for the limited material period and all that shows is the deduction of withholding tax for that particular period so is not particularly persuasive. I accept that from 11 January 2016 payments were made into a different bank account but I am not satisfied that advances matters significantly.

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<sup>3</sup> Above n 2 at [55]

[39] There was a change from invoicing to withholding of tax. Mr Moore was asked for example to split the cost for one trailer which overlapped the period before and after 11 January. Half of the costs were invoiced and half was paid on the basis of an hourly rate.

[40] Leisuretime Portable did not pay Mr Moore for statutory days and did not pay PAYE or ACC on his behalf. There was no evidence of payments for holidays or sick days. There was limited but still some scope for Mr Moore to increase his earnings by working additional hours which he did on occasion on a Saturday.

[41] I find weighed and considered in context this test favours a contracting relationship.

[42] In conclusion there are factors that point toward and away from an employment relationship.

[43] Ultimately though putting these matters into context I find that the real nature of the relationship was not one of employment. The way the relationship operated in practice was more in line with an agreement for a labour only contract with an agreed hourly rate and withholding tax deducted. The hourly rate was proposed by Mr Moore after a discussion he had with his partner. Often with an employment relationship the rate of pay is determined at least in the first instance by the employer. The circumstances of the changed arrangement were that Mr Moore invoicing for one trailer per week at \$600 was not sustainable for Leisuretime Portables and Mr Moore was clear that a change to the contract was required if he was to continue undertaking work for the company fabricating trailers. There was no evidence that an employment relationship was suggested at that time or that the relationship if it was to continue would be on a basis other than a contracting relationship.

[44] Mr Moore says that he intended an employment relationship and believed it was one. To the extent that Mr Moore may have drawn certain conclusions about the nature of the relationship this was not a situation where the Leisuretime Portable concealed what it considered the relationship to be. Mr Moore could not have been unaware that Leisuretime Portable regarded him as a contractor. Every day he completed a time sheet that stated he was a contractor and he signed his time sheet as a contractor once a week. His payslip had an element of confusion I accept about

PAYE but it also referred to his job title as a contractor and that withholding tax was deducted at 20%.

[45] Matters reached a stage where both Mr Moore and Mr Shackleton were unhappy about elements of the relationship and the contract came to an end. The Authority does not have jurisdiction to deal with Mr Moore's claims and to the extent that there are issue that he wishes to pursue he will need to make an application to the Dispute Tribunal.

### **Costs**

[46] I reserve the issue of costs. If agreement cannot be reached then Ms Stringer has until 29 May 2017 to lodge and serve submissions as to costs and Mr Richardson has until 12 June 2017 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority