

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 26  
5523683

BETWEEN THOMAS MORLAND  
Applicant

AND ROGER PALMER  
Respondent

Member of Authority: Christine Hickey

Representatives: Thomas Morland, Applicant  
Roger Palmer, Respondent

Investigation meeting: 10 November 2016

Submissions: Further evidence received from both parties after the  
investigation meeting with the last relevant document  
received on 16 December 2016

Determination: 15 February 2017

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Thomas Morland claims that he worked for Roger Palmer. He says Mr Palmer owes him unpaid wages amounting to \$13,416 (net). He also claims 8% interest<sup>1</sup> per annum for 27 months.

[2] Mr Palmer says that Mr Morland was never an employee, but was an independent contractor. He says Mr Morland entered into a contract with him to do concrete crushing work. Mr Palmer says that he has not paid Mr Morland for the contracted services as he has a counterclaim relating to rent that Mr Morland owes him.

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<sup>1</sup> There was no agreement between the parties that Mr Palmer would pay interest. The maximum rate of interest the Authority can, in its discretion, impose is currently 5%.

[3] Mr Morland says he was Mr Palmer's employee at the old Malt Works site from 10 January 2013 until January 2014. He also has a record of hours worked on 25 April 2014.

[4] Mr Morland says he agreed to forgo weekly or other regular payments of his wages in order to accumulate a deposit of \$10,000 towards the purchase of a property he intended to buy from Mr Palmer. Mr Morland says that Mr Palmer agreed to sell him the land.

[5] Mr Palmer disagrees and says he was never going to sell Mr Morland the land Mr Morland wished to buy. Now that deal is totally off the table, Mr Morland claims that \$10,000 and a further \$3,416 as wages.

### **Preliminary issue**

[6] The first issue I need to determine is whether Mr Morland was an employee. If he was not the Authority does not have jurisdiction to investigate and determine his claim for wages owed.

### **Procedural background**

[7] This matter has a long history within, and outside, the Authority. Mr Morland lodged his statement of problem on 13 October 2014. Mr Palmer's statement in reply was received on 4 November 2014.

[8] I held a case management telephone conference on 24 November 2014. Both parties were legally represented at that point. I referred the matter to mediation.

[9] On 28 November 2014, Mr Palmer's lawyer notified the Authority that Mr Palmer was not represented any longer.

[10] On 15 January 2015, Mr Morland told the Senior Authority officer the matter had not been resolved in mediation and that he was considering his options. He stated his options were to proceed in the Authority or in the Disputes Tribunal. He said he would advise the Authority how he wished to proceed.

[11] On 13 March 2015, Mr Palmer submitted a hand-written document, the purpose of which was not clear, except to make allegations of (past) dishonesty against Mr Morland.

[12] Mr Morland next contacted the Authority on 29 October 2015. He advised he was going to see his lawyer that day for advice as to how to proceed.

[13] On 27 November 2015, Mr Morland's lawyer wrote to the Authority advising that he was acting for Mr Morland in an appeal in the District Court against the outcome of a Disputes Tribunal proceeding between Mr Morland (claim) and Mr Palmer (counterclaim). He advised that the subject matter of the Disputes Tribunal claim was "the subject matter of the claim before the Authority."

[14] He advised that he considered the claim in the Authority should still be on foot, pending confirmation from Mr Morland that he wished to proceed with the Authority claim.

[15] On 4 February 2016, Mr Morland's lawyer advised that Mr Morland wished to pursue his claim in the Authority.

[16] On 13 July 2016, Mr Morland's lawyer advised that the District Court quashed the agreed settlement that Mr Morland and Mr Palmer reached in the Disputes Tribunal.

[17] Judge Smith ordered the Disputes Tribunal to rehear the claim and counter-claim:

... with particular attention as to whether they are both within the Tribunal's jurisdiction.

[18] In effect, the reason he overturned the settlement was that the Authority, not the Tribunal, has exclusive jurisdiction to determine whether a person is an employee.

[19] Having read the District Court judgment, I asked what the status of Mr Morland's claim to the Disputes Tribunal was. On 23 August 2016, the Ministry of Justice emailed confirmation that it considered Mr Morland's claim was not within the Disputes Tribunal's jurisdiction, and that Mr Palmer had withdrawn his counterclaim.

[20] On 13 September 2016, I issued a notice of direction that I would hold the investigation meeting on 10 November 2016. I made timetabling directions for all the parties' relevant documents to be supplied on dates prior to the investigation meeting. I am satisfied both parties were aware of the directions I made prior to the investigation meeting.

[21] On 7 October 2016, the Authority was notified that Mr Morland would represent himself.

[22] The investigation meeting proceeded. Under oath or affirmation, I heard evidence from Mr Morland and his witness, Catherine Cavell-Stephens, Mr Palmer and his witnesses, Michael Peters and Dominic (JJ) Kelly.

### **Credibility, reliability and relevance of evidence**

[23] It has been a feature of these proceedings that each party has pointed to historic situations to attempt to prove the other's dishonesty. I cannot say that I was greatly impressed with the reliability of either party. They are deeply personally invested in winning their disputes/s with and against one another. They are also deeply invested in making each other look bad. In addition, the stress of the disputes between them and Mr Palmer's advanced years seem to have resulted in some confusion for him.

[24] However, I have not relied on witness demeanour or past charges against or convictions of either party (raised by the other) to assess the credibility and reliability of the evidence presented.

[25] I have relied on such documentation as there was, Ms Cavell-Stephens', Mr Kelly's and Mr Peters' evidence, and my common sense, to assess what was the more likely scenario when evidence from Mr Morland and Mr Palmer was contested, as most of it was.

[26] A number of pages of documents were produced by both parties that were not relevant and I have not taken them into account. I have taken into account relevant documents.

[27] As permitted by s 174E of the Employment Relations Act 2000 (the Act), I have not recorded all the evidence and submissions received from the parties. I have stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified the order made as a result.

### **Determination**

[28] Mr Morland bears the onus of establishing on the balance of probabilities that he was an employee.

[29] Section 6 of the Act defines an ‘employee’ as:

- (1)(a) ... any person of any age employed by an employer to do work for hire or reward under a contract of service, and
- (2) 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.
- (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...

[30] The law requires the Authority to determine the “real nature of the relationship” between the parties. That requires considering all relevant matters including any that indicate the parties’ intentions. Section 6(3)(b) of the Act states that any statement by the people involved describing the nature of the relationship is not determinative.

[31] 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 decision in *Bryson v Three Foot Six Ltd.*<sup>2</sup>

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<sup>2</sup> [2005] ERNZ 372.

[32] The Employment Court in *Poulter v Antipodean Growers Limited*<sup>3</sup> summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the 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.

[33] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice, then to apply the three tests known as the control, integration and fundamental or economic reality test.

[34] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.<sup>4</sup>

***How did the arrangement come about?***

[35] Mr Morland and Mr Palmer had some quasi-business dealings with one another for some months, or possibly years, before Mr Morland began concrete crushing work at the old Malt Works.

[36] Previously, Mr Morland had been living on and using the Malt Works site for his business making replica cars. However, the original period of occupation was ended early. Mr Palmer then agreed Mr Morland could live in his motorhome on

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<sup>3</sup> [2010] NZEmpC 77 at [20].

<sup>4</sup> Ibid at [21].

some land at Kaiapoi owned by Mr Palmer. That land is almost next door to where Mr Palmer lives. Mr Palmer also agreed that Mr Morland could store his large amount of goods, tools and machinery there. There is no clear evidence of what rental arrangements there were, if any, between Mr Morland and Mr Palmer for use of the land.

[37] Mr Morland had been on an invalids benefit for a long time and remained on the benefit for the duration of his cordial relationship with Mr Palmer and for the whole time he worked at the Malt Works.

[38] In about January 2013, Mr Palmer gained a demolition contract for the demolition of the old Malt Works. Mr Palmer talked to Mr Morland about helping him with the work required. Mr Morland's evidence is that Mr Palmer offered him \$25 per hour in the hand, or net. That is, Mr Palmer would pay the tax before paying Mr Morland \$25 per hour.

[39] Mr Palmer's evidence is that Mr Morland originally asked to be an employee and to be paid \$25 per hour. It is not clear whether Mr Palmer understood that request to be a before- or after-tax amount.

[40] Mr Morland did not know what the gross, or before tax amount, offered to him was. It is very unusual for an offer of an hourly rate to be net, not gross and for an employee not to know the gross hourly amount they are working for. It is also almost invariable that an after tax amount is not a round number, such as \$25. This aspect of Mr Morland's evidence is hard to believe.

[41] Mr Morland never gave Mr Palmer his IRD number. Mr Palmer never asked for it. Mr Palmer has not paid any tax on Mr Morland's behalf.

[42] Mr Palmer says he did not agree to pay Mr Morland by the hour and instead told Mr Morland he would pay him \$1 per cubic metre of concrete crushed. He says that he had accepted the demolition contract on a volume basis and that was the basis on which Mr Morland and he proceeded. Mr Palmer also says he was paid in lump sums over time, and as it turned out on an irregular basis, and so would not have agreed to employ Mr Morland on a weekly or other regular wage.

[43] There was no evidence from either party about what they agreed about how, or how often payments were to be made.

[44] Mr Morland originally assisted with setting up the concrete crushing machine. He then operated it, initially on his own.

***Intention of the parties***

[45] There is no written documentation, such as an employment agreement or a contract for services, from the beginning of the concrete crushing engagement that demonstrated the parties' intention.

[46] The only document annexed to the statement of problem (and the amended statement of problem, which increased the amount of unpaid wages sought) was a handwritten document signed by Mr Morland. It says:

Roger Palmer owes Tom Morland \$10,000 as at 29-8-2014 Prior Earlier for Contracting and agrees that it can be credited to the Purchase of 779 Main North Rd upon the above contract becoming Unconditional.

[47] Mr Morland says that the majority of the document is in his handwriting but that Mr Palmer added the words "as at 29-8-2014", "Prior Earlier" and "upon the above contract becoming Unconditional". Mr Palmer denies that he wrote any of the words. However, I accept Mr Morland's evidence, supported as it was by handwriting analysis.

[48] Mr Morland says he signed that document under duress, and that Mr Palmer was also supposed to sign it but that instead he took two copies of it away, never signing any of the copies.

[49] Mr Morland gave very little evidence of what pressure Mr Palmer applied to him, and why he felt not only under duress to sign the document but to draft it himself. He said that he had persistently asked to be paid but that Mr Palmer always put off paying him and then agreed to credit a lump sum of \$10,000 towards the purchase of the property.

[50] Mr Morland said that when he asked to be paid Mr Palmer would ask him what he wanted the money for and give it to him for that, such as a \$2,000 cheque for

a dental bill<sup>5</sup>, or buy him what he wanted, such as, oil, spark plugs, gas bottles and a little trolley jack.

[51] I do not consider that Mr Morland was under duress when he wrote the majority of the document and signed it. I do not consider he was under the type of threat or pressure that led his will to be overborne. I do not consider his free will and judgment had been displaced.

[52] A further requirement for legal duress of the kind Mr Morland asks me to accept occurred is that he had no reasonable alternative but to sign the document. I simply do not accept that. Mr Morland strikes me as the kind of person with a very strong will. By his own evidence, and that of Mr Palmer, Mr Morland is an experienced businessman who had been the director of several companies and the operator of a number of types of businesses. I accept that for a period during his engagement with Mr Palmer he was unwell and suffering from a heart condition. However, he has not proved that he wrote and signed the document under duress.

[53] I consider the document evidence that, as at 28 September 2014, both Mr Morland and Mr Palmer considered that Mr Morland had undertaken contracting services and therefore, was not an employee.

[54] The same document is evidence that he and Mr Palmer were negotiating about the sale and purchase of 779 Main North Road.

[55] Mr Morland produced two other documents related to the property – an unsigned lease agreement and an unsigned sale and purchase agreement. The vendor in the draft sale and purchase agreement was a trust that Mr Morland understood to own the property. I consider these documents show that Mr Morland was intent on buying the property.<sup>6</sup>

[56] Mr Morland has made no claim for annual leave or other statutory leave entitlements. That also tends to support that he considered the relationship was a contract for services, that is, that he considered himself an independent contractor not an employee.

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<sup>5</sup> However, there is no evidence of when this was and it may have been before Mr Morland started doing concrete crushing work.

<sup>6</sup> In addition, an excavator and trailer from the Trust or Mr Palmer.

*The control and the integration tests*

[57] The control test examines the extent to which Mr Palmer controlled the activities of Mr Morland. I accept that Mr Palmer controlled the days and the time work took place on the site. Some of that control re times was set by regulatory or statutory limits on industrial noise because the demolition was taking place in an area that contained residential premises.

[58] Other than that there was not much control exerted, such as supervision. That is because it was a clear, project-based job. The only tasks Mr Morland had were to separate materials other than concrete, and to crush the concrete.

[59] Later, another worker, Chris Ramage, was engaged to assist with the crushing operation. Mr Morland says Mr Palmer directly employed Mr Ramage. He says he first met Mr Ramage one day when Mr Palmer was taking him to work and stopped to pick up Mr Ramage.

[60] Mr Morland is supported in his assertion by Ms Cavell-Stephens' evidence. Mr Ramage did not appear as a witness. Ms Cavell-Stephen's evidence is that Mr Ramage is still engaged in some way with Mr Palmer so was unwilling to give evidence against him in these proceedings.

[61] Some of Ms Cavell-Stephens written evidence was 'coached' by Mr Morland, or written to his specification, and influenced by the fact that he had called her as a witness. For example, she wrote:

Chris and Tom were working for WAGES and definitely not as contractors (as they supplied no machinery, tools, vehicle or travel to and from work. Neither were registered for GST.

...

Tom and Chris worked where decided by Roger Gordon Palmer therefore they had no control as a Contractor! would have.

[62] Ms Cavell-Stephens' oral evidence was reliable simply because she was not personally invested in the outcome, or necessarily interested in assisting Mr Morland. Her main motivation was to ensure her boarder, Chris Ramage, was treated fairly.

[63] Ms Cavell-Stephens has no professional expertise in assessing and applying tests related to whether or not a person was an employee. However, I accept her

evidence that as far as she, and Mr Ramage, knew he was paid directly by Mr Palmer. She was aware of that because she saw Mr Palmer handing Mr Ramage cash. Mr Palmer admitted he directly gave Mr Ramage cash from time to time but asked me to believe he did so out of the kindness of his heart to help Mr Ramage out. He says he gave Mr Ramage money while also stating very firmly that Mr Ramage was not his employee but was Mr Morland's employee or sub-contractor.

[64] At the investigation meeting, Mr Palmer handed me a typed statement or letter signed by Mr Ramage. In it Mr Ramage appears to:

...swear and declare , that we Christopher Ramage, Tom Morland, all worked sub contracted to Roger Palmer, involving ... concrete crushing ... at the old malt works.

...

That I have full praise for Roger Palmer, who continually praised the sub contractors, and fully paid up ...

[65] I consider that Mr Palmer typed this statement, or had it typed, and asked Mr Ramage to sign it. Mr Ramage has low literacy skills. The statement is not in affidavit form and Mr Ramage was not present to answer questions under oath or affirmation. I put no weight on this statement.

[66] Mr Palmer says Mr Ramage was introduced to him as an employee of, or sub-contractor to, Mr Morland's contracting operation.

[67] I do not accept that. I consider it proved that Mr Palmer engaged Mr Ramage, not Mr Morland.

[68] Mr Palmer was not always on site and so did not always manage or supervise Mr Morland or Mr Ramage.

[69] Mr Palmer's witnesses gave evidence that they were both contractors on the Malt Works job. I accept that. Mr Palmer asks me to conclude that means that Mr Morland was also an independent contractor. However, that is not conclusive. I consider it more likely that Mr Ramage, particularly given his low level of sophistication and literacy, was not an independent contractor but an employee. Not all workers on the same site and the same job need be in the same relationship with Mr Palmer. However, I accept that Mr Palmer generally preferred to engage contractors.

[70] The integration test examines the extent to which Mr Morland was integrated into Mr Palmer's business. That is, whether the work undertaken by Mr Morland was integral to the business and whether Mr Morland had become part and parcel of the business.

[71] Mr Morland's work was integral to the project largely because there were so few workers on the project. In addition, he has engineering skills that were sometimes called on to maintain the crusher and keep it working.

[72] Mr Morland got a ride to and from the work site every day with Mr Palmer. He says that is evidence of him being Mr Palmer's employee. That could be indicative of an employment relationship. However, in this case, I consider it more an example of convenience for Mr Morland given that Mr Palmer lived very close to him, the work site was not close to home and Mr Palmer and Mr Morland were friendly at the time. In addition, at some time during their cordial relations with each other, Mr Morland was disqualified from driving.

[73] Mr Morland and Mr Ramage worked closely together. Mr Morland wrote down what hours Mr Ramage worked and got Mr Ramage to sign the hours as correct. That shows some amount of integration into Mr Palmer's business, as I have already established that Mr Palmer engaged Mr Ramage. However, it was a very small work team and Mr Morland considered Mr Ramage a friend whose hours needed to be accurately recorded. He was aware that Mr Ramage has a low level of literacy. I consider that he assisted in recording Mr Ramage's hours more as a friend than a fellow employee, or as his employer.

[74] Mr Morland was provided with all the tools required of him to perform his role, principally the crusher. That can be an indicator of an employment relationship. However, in this case it is not determinative of the situation.

[75] The control and integration tests are not determinative of whether Mr Morland was an employee.

***Fundamental test***

[76] This test examines the extent to which Mr Morland took on financial risk in providing his services to Mr Palmer, including asking whether he was in business for himself.

[77] Mr Morland says he has always operated his businesses under a company, and that he did not have a company to undertake the work he did for Mr Palmer. He asks me to take that as proof he was an employee. He denies he ever used the trading name of Morland Contracting, which Mr Palmer says was the entity Mr Morland was trading under during their dealings. There is no legal requirement that a contractor needs to operate under the auspices of a company.

[78] Mr Morland's evidence was also that despite not having a current company he had replica cars he had made and from time to time sold them. In fact, when I asked how he survived for so long only on the invalids' benefit without being paid for work by Mr Palmer, he told me he had sold one of his cars for \$16,000 while working for Mr Palmer, or shortly before that. I consider that to have been a business transaction. I am not convinced Mr Morland never did business otherwise than under a company.

[79] Mr Morland tells me he has not made income-tax returns for about 15 years. Tax returns are no longer compulsory. An absence of tax returns does not mean Mr Morland was not in business for himself.

[80] Mr Morland kept a diary of hours worked. That could be indicative that he was working for an hourly pay rate, rather than a cubic metre rate. However, that is not conclusive evidence that he was an employee. Contracting work could equally be charged for by an hourly rate. I consider Mr Morland kept a record of the hours worked at the Malt Works for his own purposes, perhaps to assess whether the amount of work he was doing was being adequately remunerated. It is not conclusive evidence he considered himself an employee.

[81] Mr Morland was free to take on other work so long as he put in the necessary time at the Malt Works. He and Mr Ramage did a job for Mr Peters demolishing a garage in New Brighton. They were paid \$50 each an hour and a bottle of vodka between them.

[82] Mr Morland did not provide any invoices to Mr Palmer. Mr Palmer did not ask him for any. That could be seen as indicative of an employment relationship rather than a business or contracting relationship. But that is only if Mr Morland and Mr Palmer were conventional businessmen, which they were not. They relied largely on informal ways of doing business.

[83] An example of their unconventionality is that Mr Palmer suggested to Mr Morland that he could say that he was paying rent in cash and so claim an accommodation supplement, from the Ministry of Social Development, in addition to his invalids benefit. I am satisfied Mr Palmer signed one document (20 September 2012) that reads that Mr Morland was liable to pay him \$200 per week rent. Mr Palmer signed another (20 October 2012) document saying he had received \$200 per week in cash from Mr Morland making a total of \$2,200 so far. Mr Morland presented those documents to the Ministry to claim the accommodation supplement. Mr Palmer knew that the documents would be presented to the Ministry.

[84] I am satisfied that both men knew that it was incorrect that Mr Morland paid rent of any amount to Mr Palmer. To Mr Morland's credit, he seems to have resiled from his position that he should claim the accommodation supplement and cancelled it in May 2014 "due to a tenancy dispute".

[85] Mr Morland told me that he did some work for Mr Palmer on the rural land they both lived on. It seems that Mr Morland was not paid in cash for this and did not expect to be. It is not clear whether he was paid in kind, such as the right to live on the land, or was just helping his then friend.

[86] Mr Morland did take on some risk, and that was in relation to whether he would be able to purchase the Main North Road property. I consider Mr Morland's actions tend towards him being in business, although somewhat under the official radar.

### ***Industry practice***

[87] There was no evidence about what current industry practice is.

**Conclusion**

[88] Mr Morland and Mr Palmer were working together in a way that each considered beneficial. I consider the real nature of the relationship was as two self-interested businessmen who each believed that they would gain some benefit from their engagement with one another.

[89] Mr Morland does not neatly fit the usual understanding of a person in business on his own account. However, his dealings with Mr Palmer were more like business dealings. Mr Morland was not an employee of Mr Palmer. Therefore, the Authority does not have jurisdiction to determine his claim.

**Costs**

[90] Mr Morland and Mr Palmer were not represented at the investigation meeting. There were no written submissions presented to me prepared by a lawyer or professional advocate. Therefore, the parties would not usually be entitled to claim costs.

Christine Hickey  
Member of the Employment Relations Authority