

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 318
3009611

BETWEEN MORGANATHAN NAIDOO
 Applicant

A N D SATYIA NAND
 Respondent

Member of Authority: T G Tetitaha

Representatives: Both parties in person

Investigation Meeting: 10 October 2017 by telephone

Submissions Received: 10 October 2017 from both parties

Date of Oral
Determination: 10 October 2017

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Morgan Naidoo alleges he was employed by Satyia Nand as a registered carpenter. He seeks payment of money owed for work he did in February/March 2016 for Mr Nand. He says he was working fulltime for Mr Nand by February 2016.

[2] Mr Nand denies Mr Naidoo was his employee at all. He says Mr Naidoo was a subcontracted labourer. He says Mr Naidoo received staged payments of fixed amounts when the build reached certain milestones. He points to the fixed payments he made to Mr Naidoo as evidence that there was no agreed hourly rate or employment. The payments made reflected the stage of the build each contract had reached, generating a payment to him and then payment to his subcontracted labourer, Mr Nand.

Law

[3] The issue for determination is whether Mr Naidoo was an employee of Mr Nand. If he is not an employee, the Authority has no jurisdiction to consider his claims.

[4] An “employee” is “any person ... employed by an employer to do any work for hire or reward under a contract of service” (s6(1)). In deciding whether Mr Nand was employed, I must determine “the real nature of the relationship between them” (s6(2)). This assessment includes considering “all relevant matters, including any matters that indicate the intention of the persons” and “is not to treat as a determining matter” any statement by the parties describing “the nature of their relationship” (s6(3)).

[5] All relevant matters may be determined by applying the control, integration and the fundamental tests.¹ The control test considers the degree of control or supervision exercised by the employer over the alleged employee's daily work.² The integration test considers whether the work performed by the alleged employee is an integral part of the business and whether he or she has effectively become “part and parcel of the organization”³ The “fundamental” test the question is whether the alleged employee engaged themselves to perform the services with the employer as a person in business on their own account.⁴

Determination

[6] I have heard evidence from both parties today. In my view Mr Naidoo was not an employee. This is because:

- (a) Mr Naidoo was not at the worksite with Mr Nand. His evidence showed he was there with other labourers not Mr Nand. This showed Mr Nand did not supervise or control his work. He may have agreed the site where work was to occur but otherwise left Mr Naidoo to do the work required.

¹ *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114 (EmpC) at [46].

² *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC).

³ *Bank voor Handel en Scheepvaart NV v Slatford* (No 2) [1953] 1 QB 248 (CA) at 295.

⁴ *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [52].

- (b) Mr Naidoo was not an essential part of Mr Nand's business. Mr Nand sub-contracted work to a number of similar labourers to Mr Naidoo.
- (c) The most important test is the fundamental test. There was clear evidence Mr Naidoo was in business on his own account.
- (d) I accept Mr Nand's evidence the fixed payments made to Mr Naidoo do not show there was any agreement of an agreed hourly rate of \$35 as he suggests. .
- (e) The payments Mr Naidoo received divided by the hours he alleged do not equate to any one hourly rate. The rate varies between \$29.40 per hour up to \$36.78. The evidence of hours worked and payments are more consistent with what Mr Nand states happened, namely that there were staged, fixed amount payments made to Mr Naidoo irrespective of the hours worked. This is consistent with an independent contracting situation not employment.
- (f) I also heard evidence from Mr Naidoo that he was registered for GST. I accept his evidence that he never invoiced Mr Nand and he never paid GST upon the amounts that he received.
- (g) Mr Naidoo did, however, pay his own taxes on the amounts received. That is consistent with Mr Naidoo being a self-employed carpenter.
- (h) Mr Naidoo continued to take other contracting jobs elsewhere throughout the alleged employment until January 2016. He was actively in business on his own account.
- (i) Even after the alleged offer of employment in December 2015 there was no employment agreement offered to Mr Naidoo. The evidence of Mr Nand's alleged offer of employment was too vague to give rise to any certain employment. All indications were that Mr Naidoo was self-employed or in business on his own account.

[7] In my view all of the evidence I have heard indicates Morgan Naidoo was not employed by Satyia Nand. Therefore this application is dismissed. Costs can lie where they fall because both parties represented themselves.

T G Tetitaha
Member of the Employment Relations Authority