**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 321/10
5289008

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| | BETWEEN | TIMOTHY NEILL<br>Applicant |
| | AND | MICHAEL NOORD<br>First Respondent |
| | AND | M & S NOORD<br>CONTRACTING LIMITED<br>Second Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | Applicant in person<br>Steve Franklin, Counsel for Respondent |
| Investigation Meeting: | 9 July 2010 |
| Determination: | 12 July 2010 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Tim Neill says he started work as a part-time tractor driver for Michael Noord on 29 October 2009 but was dismissed the following week after an argument about the length of hours he was required to work.

[2] Michael Noord denies Mr Neill was his employee. He says Mr Neill was engaged as an independent contractor. However if Mr Neill was an employee, Mr Noord says the employment relationship was with M&S Noord Contracting Limited (MSNCL), not him personally.

[3] The Authority has investigated as a preliminary issue whether Mr Neill was an employee or an independent contractor and, whatever its real nature, whether the relationship was with Mr Noord or MSNCL.

**The investigation**

[4] For the purposes of the investigation written witness statements were provided by Mr Neil, his wife Lorraine Neil, Mr Noord and his wife Shona Noord. Mr and Mrs Noord are both directors of MSNCL. At the investigation meeting the witnesses, under oath or affirmation, answered questions from the Authority member. Each party had the opportunity to ask additional questions and provided closing submissions.

**Issues**

[5] The preliminary issues for determination are:

(i) Was Mr Neill engaged as an independent contractor or employed as an employee; and

(ii) If he were employed as an employee, was that relationship with MSNCL or rather with Mr Noord personally?

**Legal principles**

[6] On the first issue of determining whether a person is employed by another person under a contract of service, section 6 of the Employment Relations Act 2000 (the Act) requires the Authority to "*determine the real nature of the relationship between them*". In doing so it must:

(i) "*consider all relevant matters, including any matters that indicate the intention of the persons"*; and

(ii) not treat as determinative any statement by the persons that describes the nature of their relationship.

[7] The principles to be applied are summarised in case law as follows:[1]

(i) The Authority must determine the real nature of the relationship.

(ii) The intention of the parties is relevant but not decisive.

[1] *Bryson v Three Foot Six Limited* [2003] 1 ERNZ 581 (EC); [2005] ERNZ 372 (SC).

(iii) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.

(iv) The real nature of the relationship can be ascertained by analysis under the tests that have been historically applied such as control, integration, and the "*fundamental*" test.

(v) The fundamental test examines whether a person performing the services is doing so on his or her own account.

(vi) Another matter which may help determine the issue is industry practice.

[8] In addition to considering those principles, an overall assessment should be made of the underlying and true nature of the relationship, consistent with s.6(2) of the Act.[2]

[9] On the second preliminary issue, the doctrine of "*undisclosed principal*" may apply where a person, acting on behalf of a company, employs someone without disclosing that he or she is acting on behalf of that company.[3] In such circumstances, the employee may choose to proceed against the company or the person who acted on its behalf.[4]

**How the problem arose**

[10] In September 2009 Mrs Noord placed an ad in the *Whakatane Beacon* stating:

> *Tractor drivers required for harvesting season, must have Class 2 licence, experience preferred. Phone Mike Noord* [phone number omitted].

[11] Mr Neill telephoned Mr Noord and explained he had the necessary licence but no previous experience for such work.

[12] Mr Noord initially selected another applicant for the job but when that person took up work elsewhere, Mr Noord contacted Mr Neill on 19 October 2009.

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[2] *Poulter v Antipodean Growers Limited* [2010] NZEmpC 77 (Judge Perkins) at [20]-[21].
[3] *Cowan v Baggstrom* (unreported, EC WC 39/99, 13 July 1999, Shaw J).
[4] *Cuttance t/a Olympus Fitness Centres v Purkis* [1994] 2 ERNZ 321.

[13] On 20 October, they met and Mr Noord spent two hours showing Mr Neill how to operate the tractor.

[14] At the end of that training session, Mr Neill, as he puts it, "*raised the possibility of working on a contract basis rather than for wages*".

[15] I find from the evidence of Mr Neill, Mr Noord and Mrs Noord that the ensuing brief conversation had the following elements:

(i) Mr Noord said he had other people working as contractors but he would check with Mrs Noord and if that was okay he "*wouldn't have a problem*" with Mr Neill working on that basis.

(ii) Mr Noord referred to an hourly rate of $13 while training and of $18 for top drivers. He also said there was work through to February, dependent on weather conditions.

(iii) Mr Neill suggested being paid more than those rates if he were to be a contractor, to cover ACC costs and what he would otherwise get as holiday pay if he were an employee.

(iv) Mr Neill said he was GST registered and had worked elsewhere on a contractor basis in the past.

[16] Mrs Noord's evidence confirms that Mr Noord did discuss that proposal with her, which she agreed with "*in principle*". However, Mr Noord accepts he did not then confirm any such arrangement with Mr Neill. He had three opportunities to do so: first, on 28 October when he telephoned Mr Neill to arrange a further training session; secondly, on 29 October when he worked with Mr Neill for more than six hours; and thirdly, on 2 November when he rang to talk to Mr Neill about working that day.

[17] Mr Noord says that, because he and Mrs Noord had no problem with Mr Neill working on a contractor basis, "*I felt we had a contract*".

[18] On 2 November, Mr Neill worked from around 9.30am to 10.30pm. Along with another person also working to MSNCL that day, he carried out baling work on on several properties. Mr Noord came to join in with the work around 8.30pm and

about an hour later Mr Neill stopped his tractor to clear a blockage in the baler. He then complained to Mr Noord about working long hours without a break.

[19] Mr Neill was not called for work on either of the two following days and rang Mr Noord on the afternoon of 4 November. The conversation became an argument. Mr Noord initially offered Mr Neill more baling work on 6 November. However, Mr Neill continued to talk about long hours without breaks and Mr Noord then said the arrangement was not working out and "*it was best that we no longer persevered*".

[20] The resultant position of the parties is that:

(i) Mr Neill says he was dismissed – either by not being called for work after 2 November or by what Mr Noord said on the telephone call on 4 November; and

(ii) Mr Noord says Mr Neill was an independent contractor who no longer wanted the work offered and had not even sent an invoice for the hours he did work.

**Determination**

*Real nature of the relationship*

[21] I find that during his hours of training on 29 and 30 October and his work on 2 November, Mr Neill was an employee. By 4 November, at the latest, that relationship was over – whether that was by dismissal or some other unjustified action of the employer is yet to be investigated. I make this finding for the following reasons.

[22] The evidence confirms that both Mr Neill and the Noords were open to the prospect of working under a supposed "*contractor*" arrangement. Mr Neill proposed one but Mr Noord confirmed no acceptance of that proposal was ever communicated to Mr Neill. Mrs Noord's evidence confirms that Mr Neill intended trying to negotiate better pay rates than those suggested by Mr Noord. I do not accept that a contractor arrangement was confirmed by the mere silence of Mr Noord on the basis that he would only get back to Mr Neill if Mrs Noord did not okay the suggestion. There was no acceptance and no certainty of terms.

[23] In the five or so years over which the Noords had operated their agricultural contracting business they had engaged staff as either employees or contractors – by oral agreement without any formal documentation. Those working on a contract basis provided a regular invoice for payment of hours worked at an agreed hourly rate. One employee – who was given in their evidence as an example and who also worked for them on a dairy farm – did additional tractor driving on a casual basis for their agricultural contracting business. He was paid an hourly rate for that driving work.

[24] While Mr Neill had indicated a willingness to formalise a contractor arrangement and, I accept, intended doing so if suitable terms were agreed, neither that statement nor that intention is decisive of the real nature of the relationship.

[25] In the hours he did work, and may have continued to do so, all aspects of the work were under the control of the employer – what hours and days would be worked, what equipment would be used, and how and where the work was to be carried out.

[26] The work of the tractor drivers was integral to the work of the business for activities such as mowing, conditioning, swathing, baling, and bale wrapping.

[27] While Mr Neill was prepared to operate on his own account, no agreement was made to do so. Neither do I accept he was or would have been free to pick and choose when he would work, as such an arrangement would have been unsatisfactory for the Noords' business fulfilling its own contracts with landowners or lessees. Neither would it have been acceptable for him to delegate others to work in his place.

[28] While I accept supposed labour-only contract arrangements are common in this industry, so too is casual or fixed-term employment on an hourly rate (as demonstrated in the Noords' own business), so there is no particular industry practice which is decisive here.

[29] Making an overall assessment, the true and underlying nature of Mr Neill's relationship was clearly that of an employee. He bought no plant to the business, unlike one independent contractor working for MSNCL who had his own tractor. Neither did Mr Neill have any prospect – on an hourly rate – of profiting from working faster or more efficiently.

[30] This was not merely casual work on an as-and-when-required basis. Mr Noord had confirmed tractor driving work was likely to be available every day

through the season until February. The only restriction on the availability of work was the weather – a feature of the nature of the work and the industry.

*Who was the employer?*

[31] While Mr Noord may have acted in his role as a director of MSNCL, neither that capacity nor the existence of the company was ever communicated to Mr Neill prior to him raising a personal grievance.

[32] Mr Noord accepted in his oral evidence that he made no reference to it in his telephone or face-to-face conversations with Mr Neill.

[33] Signage reading *M&S Noord* is painted on MSNCL's tractors, balers and trucks. Mr Neill must have seen this signage when he worked and drove a tractor. However, that signage did not alert him to the existence of the limited liability company. Mr Noord acknowledged in his oral evidence that a third party could not tell from that signage whether the business was owned and operated by one individual, a partnership or a company.

[34] While, I accept, Mr Noord did not intend to personally employ Mr Neill, either as an employee or contractor, he did not disclose the existence of MSNCL to him. Accordingly, the company was an undisclosed principal and Mr Neill is entitled to proceed against Mr Noord in his personal capacity or MSNCL.

[35] By consent, MSNCL was joined as a second respondent.

**Further steps**

[36] Having determined Mr Neill was an employee, it may be that the parties can now resolve the personal grievance he has raised. The parties are directed to further mediation for that purpose under s159 of the Act.

[37] Under s159(2), the parties must comply with this direction and attempt in good faith to reach an agreed settlement of their differences.

[38] If they are not able to do so, Mr Neill may seek an investigation by the Authority into his personal grievance application.

[39] The question of costs (for legal expenses of Mr Neill), if any, are reserved.

Robin Arthur
Member of the Employment Relations Authority