

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Daniel Pech (Applicant)

AND Frederic Developments Limited (First Respondent)
AND Captain Hook's Jolly Roger Restaurants Limited (Second Respondent)
AND Jolly Roger Restaurant Limited (Third Respondent)
AND Jolly Roger Restaurant (Manukau) Limited (Fourth Respondent)

REPRESENTATIVES Mark Nutsford, Advocate for Applicant
Paul Wallace, Advocate for Respondents

MEMBER OF AUTHORITY Leon Robinson

INVESTIGATION MEETING 16 August 2005

DATE OF DETERMINATION 17 August 2005

PRELIMINARY DETERMINATION OF THE AUTHORITY

The Problem

[1] The problem between these parties is whether Mr Daniel Pech ("Mr Pech") was unjustifiably dismissed.

[2] The identity of his alleged employer is also problematic, but principally it is denied that Mr Pech was ever an employee. This Determination deals with that preliminary issue.

The Facts

[3] Mr Pech makes his application to the Authority citing four corporate entities in the alternative as his alleged employer. Those corporate entities are all limited liability companies and all have as director one Mr Keith Eric Wagner ("Mr Wagner").

[4] Mr Pech now agrees that he was told he was engaged by the first respondent Frederic Developments Limited. I find accordingly that he entered into a contractual relationship with that corporate entity.

[5] There is a direct conflict between Mr Pech and Mr Wagner about whether Mr Pech was initially informed he was a labour-only contractor as opposed to being informed he was an employee.

[6] Mr Wagner vehemently denies Mr Pech's claims and says that Mr Pech was a labour-only contract carpenter "plain and simple" on a rate of \$22.00 per hour for the duration of a project from 17 August 2004 until its completion on 18 December 2004.

[7] I need not resolve the initial contest. While Mr Pech was first engaged as a carpenter, by October 2004 he was appointed as Project Manager. That development is also evidenced by a document executed by both Mr Wagner and Mr Pech on 26 October 2004 endorsed as an employment contract. I set out the text of that document in its entirety:-

*CAPTAIN HOOK'S JOLLY ROGER RESTAURANTS LTD –
Franchisor Company*

JOLLY ROGER RESTAURANT LTD – Lessee Company

*JOLLY ROGER RESTAURANT (MANUKAU) LTD – holding
Company
888 GREAT SOUTH ROAD
MANUKAU CITY N.Z.*

*FREDERIC DEVELOPMENTS LTD
PROPERTY DEVELOPING AND
ENGINEERING COMPANY*

*26th October04
PHONE 64-9-2681586*

*FAX 64-9-26871589
MOBILE 02744712888*

*EMPLOYMENT CONTRACT
BETWEEN THE ABOVE COMPANIES AND DANIEL PECH
JOB DESCRIPTION*

Daniel is employed as the Project Manager until this restaurant is open and operating. Under the terms of this contract his hourly rate is \$27 per hour.

At this point Daniel Pech will be employed as one of the restaurant managers on a permanent ongoing basis.

*Signed
Keith Wagner*

*Signed
Daniel Pech*

Director

[8] Mr Wagner says that despite the plain ordinary meaning of the document, it does not evidence an employment relationship but rather an engagement in a broad sense. He says such engagement is the labour-only contractor arrangement he alleges.

[9] I do not agree and I accept Mr Pech's evidence that he was given the document when he asked Mr Wagner for an employment agreement. The discussion progressed to a commitment of further employment at the completion of the project and culminated in his appointment as Project Manager. I find that the document evidences the parties' intention that as Project Manager, Mr Pech was an employee. In that position he was paid \$27.00 per hour.

[10] There is also a letter apparently prepared on 23 October 2004 on the same letter-head with this advice:-

TO WHOM IT MAY CONCERN

Daniel Pech is employed by the above companies in permanent and on going employment.

His annual income is in the bracket of \$40,000 - \$50,000

*Yours faithfully
Keith Wagner*

DIRECTOR

[11] I accept that Mr Wagner prepared that document at Mr Pech's request. Mr Pech required the testimonial to obtain finance. I regard this advice as further evidence of an employment.

[12] Mr Pech's employment came to an end in December 2004. The manner in which it did is contentious.

The Determination

[13] Section 6 of the *Employment Relations Act 2000* sets out the tests for determining what constitutes a contract of service. The Authority must determine the real nature of the relationship.

[14] The intention of the parties is still relevant but is no longer decisive. 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.

[15] Mr Pech was given his instructions by Mr Wagner each evening for the following day. He was informed of what work was required. Mr Pech reported to Mr Wagner and took instruction from him.

[16] As project manager, Mr Pech supervised the work of contractors. He would monitor work loads and activities and give instruction as to how tasks were to be carried out. He also co-ordinated materials management and maintained contact with some suppliers. He communicated daily with Mr Wagner on this co-ordination.

[17] I find that there was significant control imposed on Mr Pech. This control was exercised by Frederic Developments Limited through Mr Wagner over Mr Pech's work and how and when he performed it. That degree of control over Mr Pech during his working day was significant and I conclude that such control was characteristic of an employment.

[18] I find too that as Project Manager, Mr Pech was an integral part of the Frederic Development Limited's operation in the project and his engagement as such was not an adjunct function of the operation.

[19] I find that Mr Pech was not operating from the basis of his own business operation and he was not in business on his own account. There is no evidence that he was and nor is it alleged.

The Resolution

[20] For all the above reasons, **I determine that Mr Pech was engaged by Frederic Developments Limited as an employee.**

[21] I consider the parties ought now be directed to mediation with the benefit of my concluded views as to Mr Pech's status. Accordingly, pursuant to section 159(1)(b) of the *Employment Relations Act 2000*:-

- (i) The parties are to use mediation and attempt to reach an agreed settlement of their differences; &
- (ii) The mediation is to be undertaken before **14 September 2005**;

- (iii) A copy of this Determination will be provided to the Department of Labour's Auckland Mediation Service together with a request for the Mediation Service to arrange a suitable date and time for mediation services to be provided.
- (iv) Mr Nutsford is to advise the Authority of those arrangements and to further advise the Authority of the outcome of the mediation at which time a telephone conference will be scheduled to make arrangements for an Investigation Meeting.
- (v) In making this direction, I remind the parties of section 159(2) of the *Employment Relations Act 2000* which provides as follows:-

"Where the Authority gives a direction under subsection (1)(b) or subsection (1)(c), the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences, and proceedings in relation to the request before the Authority are suspended until the parties have done so or the Authority otherwise directs (whichever first occurs)."

Leon Robinson
Member of Employment Relations Authority