

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 100  
5584631

BETWEEN PHIL & DARIA PREECE  
Applicants

A N D HE-DO-KI TRUST  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicants in person  
Ian McGovern, Representative for the Respondent

Investigation Meeting: 17 March 2017 at Kerikeri

Date of Determination: 6 April 2017

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**DETERMINATION OF THE AUTHORITY  
ON A PRELIMINARY MATTER**

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- A. The underlying and true nature of the relationship between the parties was that of an independent contract, not an employment agreement.**
- B. Accordingly, the Authority has no jurisdiction to investigate the employment related claims by Mr and Mrs Preece against the He-Do- Ki Trust (the Trust).**
- C. Costs are reserved.**

**Employment relationship problem**

[1] The applicants, Mr Phil Preece and Mrs Daria Preece say they were employed as caretakers by the Trust from 1 September 2014 until they resigned in late December 2014. The Preeces say they were forced to resign and that their resignations amounted to unjustified constructive dismissals. They seek remedies in respect of their alleged unjustified dismissals. The Preeces point to the following factors in support of their claims they were employed by the Trust:

- Remuneration was \$40,000 (together) per year with basic accommodation;
- Basic wage of \$770 for a shared 40 hr week;
- Tools were supplied;
- They were paid a forty hour week every week even when that included a public holiday;
- They were told each morning of their duties and overseen intently;
- No GST was claimed on wages;
- They filled out timesheets daily.

[2] The Trustees of the Trust, Mr Herbert Willms and Mrs Doris Willms, say the Trust has never employed staff, it has only hired independent contractors who could work independently and with minimum supervision. It was always the Willms' intention that the Preeces were independent contractors providing services to the Trust. The Willms say:

- There was a written independent contract for services;
- The Preeces had flexibility as to how and when they performed the work between themselves and the timeframe within which it was done, as long as it was timely;
- There was never a discussion regarding employment entitlements such as PAYE, holidays, sick leave, KiwiSaver, because there was no employment relationship;
- The Willms' expected the Preeces to be responsible for their own tax and were told their remuneration from the Trust was "GST inclusive".

### **Issue**

[3] The preliminary issue for determination by the Authority is whether the contractual relationship between the Preeces and the Trust was one of employment or was an independent contract.

**Investigation meeting**

[4] As permitted under s.174 of the Employment Relations Act 2000 (the Act), this determination has not set out all the evidence received. The determination states findings and relevant facts and legal issues in relation to the preliminary matter and makes conclusions in order to efficiently dispose of the matter.

[5] The investigation of this preliminary matter took almost one full day in the Authority.

[6] For the Authority's investigation, the applicants, Mr and Mrs Preece filed a short witness statement. Mr and Mrs Willms, Trustees of the Trust each provided a written statement. During the course of the investigation meeting, I spoke to the Preeces' accountant and account's assistant.

[7] Each witness confirmed by affirmation or on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information, and did so.

**Reliability**

[8] Much of the evidence between the parties was in dispute. I found the Preeces' evidence to be inconsistent and unreliable. One example of this was the claim by the Preeces they were entitled to holiday pay and Mr Preece asked for it to be paid. When questioned at the Authority's investigation meeting, Mr Preece agreed he had telephoned the Willms' after leaving the farm in order to give them his GST number. Mr Preece agreed that as an employee he would not be paying GST. I prefer the Willms' evidence where there were conflicts in the evidence.

**Relevant facts**

[9] The Trust owns and operates a farm in Russell which includes guest accommodation (the property). It is a small operation and is not GST registered. In about July 2014, Mr and Mrs Willms decided to advertise for caretakers to assist with maintenance on the farm and with the guest accommodation.

**Application for the role by the Preeces**

[10] Mr and Mrs Preece enquired about the role and Mr and Mrs Willms' daughter, Kirsten responded. In an email to the Preeces on 23 July 2014 she stated:

... We are offering \$40,000/year. On top of that you would receive free accommodation, use of the private beach & use of the spa. The majority of the work would be maintenance and light building work. This means that if you were wanting to get some part time work in your field of expertise on top of that Daria, you could. The hours on the property are flexible, as long as what needs to be done gets finished in a timely manner...

**Interview for the role**

[11] The Preeces met with Mr and Mrs Willms and Kirsten at the property and discussed the role. The Preeces and the Willms' disagree about what was discussed at the meeting.

[12] Mr Willms says the Preeces wanted an independent contractor relationship because flexibility and independence were important to them. The Preeces had a business in Auckland and needed to travel to Auckland to attend to it each week. There were no discussions about holidays, PAYE or other employment entitlements because the Willms' say the arrangement was that the Preeces would contract to the Trust and not be employed by it.

[13] The Willms' say they had only ever engaged contractors, not employees because they wanted contractors who knew what they were doing and worked when required.

[14] Mr and Mrs Willms say the remuneration offered was \$40,000 "all inclusive" for 40 hours a week to be worked by Mr and Mrs Preece together. It was up to Mr and Mrs Preece to arrange the 40 hours work a week between themselves. They were required to fill out timesheets each week and some weeks there were more than 40 hours worked and sometimes less.

[15] The Preeces deny wanting to be independent contractors and say they thought they were to be employees. They did not feel comfortable raising with a new employer, at the interview meeting, issues regarding whether the remuneration was to have PAYE deducted, whether there would be holidays or sick pay or similar employment related questions.

[16] I do not accept this evidence. The Preeces are experienced business people and have experience in employing staff in their various businesses. The Preeces knew that as employees they were entitled to sick and holiday pay, to have PAYE deducted and to require KiwiSaver deductions. They had ample opportunity to raise these matters with the Willms' but failed to do so. In my view this was because they were aware of the true nature of the relationship, which was that of independent contractors not employees.

[17] The Preeces say their Auckland business had been taken over by their son and so it was not necessary for them to travel to Auckland each week. They had debts and wanted a steady income as employees.

### **Contract**

[18] The Preeces worked for the Trust for a month on "trial", after which they met with the Willms' to talk about a contract. The Willms' prepared a written contract and provided it to the Preeces, who took it away to review. The Preeces had no questions about the contract and did not raise any issues about how things had been working during the "trial". The Preeces signed the contract a day or so after receiving and reviewing it.

### **The working relationship in practice**

[19] Mr and Mrs Preece claim that after the first couple of weeks of work, the Willms' cut Mrs Preece's hours because they did not have cleaning work for her. This was because bookings were not yet being taken for the guest accommodation. Therefore, Mr Preece says he did most of the 40 hours work each week which was almost entirely building work.

[20] The Willms' deny this and say that the agreement between the parties was clear and was discussed with the Preeces before they started. They expected Mr and Mrs Preece to work 40 hours a week between them. This meant that in some months Mr Preece would work more hours a week than Mrs Preece. However, when the busy period for the guest accommodation began, in those months Mrs Preece would work more hours a week than Mr Preece. If this was such an issue for the Preeces it is surprising it was not raised with the Willms' at the time they were provided with the contract.

[21] Mr Preece says he reported to Mr Willms every day, was given instructions on his work tasks for the day, used Mr Willms' tools and filled in daily time sheets. Mr and Mrs Preece thought the payment of \$770 a week by the Trust into their bank account, was wages. The Preeces say they had told the Willms' that they would be applying for a special tax code from the Inland Revenue Department( IRD) which would exempt them from paying tax. Therefore, they did not expect PAYE deductions would be made.

[22] Mr Willms says he largely left Mr Preece alone to work and some days did not see him at all. Mr Preece had been told what work needed doing on the property and went ahead and did it. Mr Preece had some of his own tools which he used. The larger equipment, such as the mower and trucks were provided by the Trust for Mr Preece to use.

[23] Mr Preece was not required to complete the work within particular hours each day. Work was varied and included some building but also spraying, mowing and painting. Mr Willms says the payments each week were at the Preeces' request. They had debts and had to show the bank that they were being paid regularly. Accordingly, Mr Willms divided the figure of \$40,000 a year by 52 which amounted to just under \$770 a week. This was the amount paid to the Preeces for payment for services, it was not a salary. It was the Willms' understanding this was GST inclusive, PAYE was never discussed.

[24] With regard to the special tax code, Mr Willms says the first time he heard that the Preeces had applied to the IRD for a special tax code to exempt them from paying tax was when these proceedings were issued in the Authority.

[25] In any event during the investigation meeting, the Preeces' accountant, Mr Peter Barker confirmed that anyone can apply to the IRD for a special tax code depending upon their circumstances, not just employees.

### **Preeces' other business**

[26] The Preeces have another business, the Green Egg Co. Eggs are produced at their farm in Coromandel and sold at markets in Auckland each weekend. When the Preeces took on the position with the Trust, Mr Preece says his son had taken over that business so they did not need the flexibility to manage it.

[27] However, when his son later lost his driver's licence, Mr Preece had to travel to Auckland on Friday afternoons to pick up the eggs to sell at the markets, returning to the property on Saturday evening.

[28] This was another dispute in the evidence. The Willms' say the egg business was something they were told about as a reason for the Preeces wanting to have an independent contract with the Trust. The Preeces wanted flexibility so that they could continue running their business. It is clear the Preeces were ultimately responsible for the egg business and continued during their engagement by the Trust, to issue invoices and receive an income from it.

#### **Meeting on 23 December 2014**

[29] Mrs Preece was unhappy with the hours of work she was receiving and also the type of work she was being required to do. Mrs Preece described some of the work as demeaning. Mrs Preece applied for a job in Paihia. She says when Mrs Willms became aware of this, the latter's attitude towards her changed.

[30] Again, this evidence is disputed. Mrs Willms says she had no concern with Mrs Preece having another job. This was expected and had been outlined in the email to the Preeces, from their daughter, Kirsten on 23 July 2014, before they interviewed for the position.

[31] As long as the work could be done between them, the Preeces had the flexibility to work elsewhere. However, Mrs Willms says Mrs Preece had agreed to do some work on 19 December 2014, had subsequently refused to do it and had failed to return to work that day.

[32] The Willms' decided a meeting was necessary to discuss the working situation and the incident with Mrs Preece. A meeting was held on 23 December 2014 between the Willms' and Kirsten, and Mr and Mrs Preece. The Preeces say they were spoken to and treated very badly at the meeting by the Willms'. They described the Willms' as "attacking" Mrs Preece at the meeting.

[33] The Willms', on the other hand, say they called a meeting with the Preeces following a disagreement between Mrs Preece, Kirsten and Mrs Willms about the work she was to carry out. The Willms' say the meeting was one in which they spoke

directly to the Preeces about the issue with Mrs Preece. However, they disagree that Mrs Preece was “attacked”.

#### **End of relationship - December 2014**

[34] It is common ground that Mrs Preece left the meeting and did not return, nor did she return to work. When asked by Mr Willms if Mrs Preece would be returning to work, Mr Preece said she would not.

#### **Termination of relationship**

[35] Mr Willms asked Mr Preece whether he could do the 40 hours a week work himself, because Mrs Preece was not returning to work. Mr Preece did not want to work 40 hours a week and refused.

[36] At that point the Willms’ say the contract between the Trust and the Preeces had been breached because the Preeces were refusing to do what was required of them under the contract.

[37] The Preeces left the property over the Christmas period and the Willms’ did not know when they would be back. On 30 December 2014, Mr Willms prepared a notice of “instant dismissal”. In it he set out the background leading up to the termination of the contract. Mr Willms stated that because Mrs Preece was refusing to work, she had breached the contract, and as Mr Preece had declined an alternative arrangement where he would pick up all 40 hours, the foundation of the contract and had not been met “which is grounds for immediate dismissal”.

[38] Mr and Mrs Preece were asked to vacate the accommodation they were living in on the property “within 24 hours, cash up on the same day you will leave the property, with your belongings and return all keys”.

[39] Mr Preece refused to sign the notice. Mr Willms prepared another notice requesting the Preeces to vacate the premises on 1 January 2015.

#### **Final meeting - 1 January 2015**

[40] On 1 January 2015, Mr Preece met with the Willms’ and their daughter Kirsten to discuss final payment. Mr Preece says that he requested holiday pay at that meeting. The Preeces had written the calculations of what they believed they were

owed for holiday pay on a piece of paper which Mr Preece says he gave to the Willms' at the meeting. No copy of this note was available to the Authority.

[41] The Willms' deny this and say Mr Preece met with them on the porch of their house to finalise payments between them. Mr and Mrs Preece owed them some money for a mattress the Willms' had purchased for them. Mr Preece had some beemaking equipment which he offered to sell to the Willms', as they made honey on the farm, as part of a settling up with them. An agreed settlement was reached between them.

[42] Mr Willms prepared a written note and Mr Preece signed it. The note stated:

After cashing up on the 1.1.2015 Phil Preece he confirmed herewith to receive as a final payment the amount of 1,107(one thousand one hundred and seven)  
Phil Preece

[43] Mr Preece was paid the sum of \$1,107 which the Willms' believed settled the matters between them. Mr Preece queried GST and was told by the Willms' the amount was GST inclusive, as the Trust was not GST registered. Mr Preece hand wrote "QUERY ON GST" on the signed note.

[44] Mr Preece says he wrote the query about GST on the note because when he asked for holiday pay he was told by the Willms' that, as he was a contractor, he was not entitled to holiday pay.

[45] The Willms' say there was no request for holiday pay by Mr Preece at the meeting. Mr Preece was asking about GST on the settlement amount. It was only a few days after the settlement was reached that Mr and Mrs Willms received phone calls from Mr Preece, and that was the first time he mentioned holiday pay. At the Authority's investigation meeting, Mr Preece said the Willms' had to pay GST on the amount or PAYE.

### **The law**

[46] Section 6 of the Act states:

#### **Meaning of employee**

(1) In this Act, unless the context otherwise requires, employee –

- (a) Means – any person of any age employed by an employer to do any work for hire or reward under a contract of service;
- ...
- (2) In deciding for the purposes of sub-section (1)(a) whether a person is employed by another person under a contract for 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 sub-section (2), the court or the Authority
- ...
- (b) Must consider all relevant matters including any matters that indicate the intention of the persons; and
- (c) Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[47] The leading case on s.6 of the Act is the Supreme Court decision of *Bryson v. Three Foot Six Limited*<sup>1</sup>. Chief Judge Colgan in *Singh v. Eric James & Associates Limited*<sup>2</sup> states at para.16 that the inquiry in each case involving s.6 of the Act, is *intensely factual* and at para.17 sets out a number of principles derived from the *Bryson* decision.

[48] The Employment Court in *Poulter v. Antipodean Growers Limited*<sup>3</sup> summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:

- (1) The Court must determine the real nature of the relationship.
- (2) The intention of the parties is still relevant but no longer decisive.
- (3) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- (4) 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.
- (5) The fundamental test examines whether a person performing the service is doing so on their own account.
- (6) Another matter which may assist in the determination of the issue is industry practice although this is far from being determinative of the primary question.

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<sup>1</sup> [2005] 3 NZLR 721

<sup>2</sup> [2010] NZEmpC 1

<sup>3</sup> [2010] NZ EmpC 77, 17 June 2010 at para.[20]

[49] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s.6 is for the Authority, or the Court, to gain an overall impression of the underlying and true nature of the relationship between the parties.

### **The contract – 1 September 2014**

[50] When considering s.6 of the Act in *May v Armourguard Security Limited*<sup>4</sup> Member Dumbleton stated:

As a matter of principle, where a contract is in writing the words used are to be taken as the expression of the parties' actual intention which, although for the purposes of s6 of the Act is not decisive, is a relevant matter when considering the totality of the relationship between the parties.

[51] The written contract between the Preeces and the Trust is stated to be a "Contracting Work Agreement". It is not expressed in a manner which is very helpful to the Authority in its investigation concerning the nature of the relationship between the parties.

[52] There are indicators in the contract that the relationship was one for services and other indicators that it was more related to an employment agreement. Indicators of an independent contract include:

- No reference to PAYE deductions;
- No reference to Kiwisaver deductions, holiday pay, sick pay or any other entitlements that one would expect in an employment agreement;
- Flexibility as to how hours were to be split between the Preeces.

[53] Indicators of an employment agreement include:

- Daily time sheets were required;
- There was a "trial" period;
- Remuneration was \$40,000 a year.

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<sup>4</sup> *May v Armourguard Security Limited* [2011] NZERA Auckland 208 para.[10]

[54] Having heard the evidence of the Preeces and the Willms' regarding their discussions in September 2014, having viewed the email correspondence from Kirsten to the Preeces which preceded these discussions, and having viewed the contract, it is my view that the parties intended a contract for services, not employment.

### **Financial arrangements**

[55] Mr and Mrs Preece have considerable business experience. They have owned businesses and continue to own and operate the Green Egg Co. The Authority was provided with financial records which established that the Green Egg Company issued invoices, paid GST and claimed expenses. This business continued and income was being paid into the Preeces bank account during the course of their engagement by the Trust. This is an indication that the Preeces had flexibility and were able to continue to operate their business while contracting to the Trust.

[56] The Preeces also have a partnership which owns and operates their farm in Coromandel. The Preeces' accountants have been preparing the accounts for the partnership for approximately 13 years.

[57] Mr Preece has only been employed once, for a short period of time, during his working life. For the remainder of his working life, he has been self-employed or has been in a business which is GST registered. In the businesses owned by them, the Preeces have hired and fired staff and have been responsible for drafting employment agreements, the payment of wages, deducting PAYE and the payment of other employment related benefits.

[58] During the course of the Authority's investigation meeting, I spoke with the accountants for the Preeces, Ms Toni Ainsworth accounts assistant, and Mr Peter Barker chartered accountant, from the Chartered Accounting firm, Peter Barker Accountants. I asked about how the income from the Trust to the Preeces had been treated in the Preece Partnership financial accounts. The income from the Trust was treated as "income from self-employment" and was split equally between Mr and Mrs Preece.

[59] A file note of a conversation between Mr Barker and Mr Preece, which Mr Barker believed was after the contract with the Trust had ended, was kept on the securities file at the Accountancy firm. It was read out to me during the investigation meeting as follows:

Contract for management, GST on contract? Never provided tax invoice. Didn't tell employer should have been +GST, no mention of holidays or stats.

[60] This evidence from the Accountants accords in my view with Mr Willms evidence that holiday pay was not raised by Mr Preece until a few days after they had 'settled up' with the Preeces. At that time Mr Preece queried GST only.

[61] In my view, the Preeces were well aware of the differences between an employee and an independent contractor. The Preeces organised their financial affairs in a way which gave them tax advantages. They were able to offset losses and be exempt from paying tax.

[62] In *Massey v. Crown Life Insurance Co*<sup>5</sup>, Lawton LJ stated:

In the administration of justice the union of fairness, commonsense and the law is a highly desirable objective. If the law allows a man to claim that he is a self-employed person in order to obtain tax advantages for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then in my judgment the union between fairness, commonsense and the law is strained almost to breaking point.

[63] That principle has been applied by the New Zealand Courts and in the employment jurisdiction in *Excell Corp Ltd v. Carmichael*<sup>6</sup> and in *Chief of Defence Force v. Ross-Taylor*<sup>7</sup>.

### **Control test**

[64] There was some control exerted by the Willms' over the work being undertaken by the Preeces. However, that control related to the types of work being performed, not by whom, when or how it was to be performed. The Preeces were left to complete the work between them in a manner that best suited them, as long as it was timely. Mrs Preece was able to secure other work if she chose to do so while remaining engaged by the Trust. The Preeces were able to continue with their egg business while engaged by the Trust.

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<sup>5</sup> [1978] 2 All ER 576

<sup>6</sup> [2003] 1 ERNZ 473

<sup>7</sup> [2010] ERNZ 61

**Overall impression**

[65] There were features or indications present suggesting the relationship may be one of employment. There were more features in my view of an independent contract relationship.

[66] From the evidence, the overall impression gained by the Authority of the underlying and true nature of the relationship between the Trust and the Preeces was that it was one of a contract for services.

[67] It must follow that any claims the Preeces have in relation to the termination of that contract must be determined in a jurisdiction other than the Authority.

**Costs**

[68] Costs are reserved. If the parties are unable to resolve the issue, the Trust has 14 days from the date of this determination to file a submission as to costs. The Preeces have 14 days from receipt of the submission as to costs in which to file their response.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**