

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 273
5552241

BETWEEN RAEWYN REED and ROSS
 REED
 Applicant

A N D TANIWHA FARMS LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Hamish Burdon for the Applicant
 Lucy Tucker for the Respondent

Investigation Meeting: 7 September 2015

Submissions Received: 7 September 2015

Oral Determination: 7 September 2015

Date of Record of Oral
Determination: 9 September 2015

DETERMINATION OF THE AUTHORITY

**A. Mr and Mrs Reed were not in an employment relationship with
 Taniwha Farms Limited.**

B. Costs are reserved.

Employment relationship problem

[1] Mr and Mrs Reed have asked the Authority for a declaration that they were employees and not independent contractors when they worked for Taniwha Farms Limited (Taniwha Farms).

[2] Taniwha Farms had previously entered into a 50/50 Sharemilking Agreement with the owner of the farm, Mr Richard Le Fleming. Mr Bryce Ede is a director and shareholder of Taniwha Farms.

[3] On 7 May 2014, Mr and Mrs Reed signed a Contract Milking Agreement (the Agreement) which sets out the terms under which they would manage the farm located in Otorohanga. Despite the wording in the Agreement Mr and Mrs Reed say the way the Agreement worked in practice means they were employees.

[4] As permitted by s.174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr and Mrs Reed and Taniwha Farms but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[5] The issue for determination by the Authority is whether Mr and Mrs Reed were independent contractors or employees.

Were Mr and Mrs Reed independent contractors or employees?

[6] Mr and Mrs Reed claim the relationship they had with Taniwha Farms is more akin to an employment relationship than that of independent contract. In support of their claim they say that they did not have the same level of knowledge as those engaged by Taniwha Farms when they entered into the agreement and were ignorant and naïve when undertaking the venture.

[7] Mr and Mrs Reed acknowledge that the common intention of both themselves and Taniwha Farms was to enter into a contracting relationship. They say this changed in November 2014 when they were told they had to ask for permission for time off and in December 2014 when they received an email from Mr Ede purporting to issue a warning and advising Mr and Mrs Reed that employees could be instantly dismissed for abusive conduct.

[8] Further, while the agreement provided for Mr and Mrs Reed to undertake other work, when Mr Reed took on a full time truck driving position in 2015, the Agreement was terminated.

The law

[9] Whether Mr and Mrs Reed were employees or contractors is determined under s.6(1) of the Act which states:

In deciding for the purposes of s.1A 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.

[10] Section 6(3) states:

For the purposes of subsection (2) the Court or the Authority must consider 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 persons that describes the nature of the relationship.

[11] *Bryson v Three Foot Six Ltd*¹ is the leading case in New Zealand which sets out the test for determining whether an individual is an employee or an independent contractor.

[12] The applicable principles to be derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions are, first, the Authority 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.

[13] 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.

[14] 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 and then to apply the three tests known as the control, integration and fundamental or economic reality test. It is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.

The agreement

[15] The Agreement states that the relationship is neither that of employer or employee nor of a partnership or joint venture. The Agreement required Taniwha Farm and Mr Le Fleming to provide all tools and equipment necessary to meet the requirements of the job while Mr and Mrs Reed were required to provide a two-wheel motorbike and general tools.

¹ [2005] ERNZ 372.

[16] The Agreement provided for the payment of \$105,000 plus GST per annum, paid in equal instalments of \$10,062.50 which was the GST-inclusive amount. In addition, Taniwha Farms would provide motorbike fuel, two sets of wet weather gear and half of the relief costs.

[17] Where set production targets were met, a bonus of \$2,000, \$3,000 or \$1,000 per kilogram milk solids was payable. In addition, Mr and Mrs Reed would receive a one-off dead cow bonus of \$2,000 with a deduction of \$400 for each dead cow. The Agreement does not specify whether the bonus payments were inclusive or exclusive of GST.

[18] The Agreement specifically required Mr and Mrs Reed to manage the farm in accordance with the directions and instructions of Taniwha Farms and Mr Le Fleming. The agreement also allowed Mr and Mrs Reed to undertake work for other persons.

[19] A penalty of \$775 per week would be incurred where Mr and Mrs Reed did not provide two full time staff fulfilling farm responsibilities. Any penalties incurred by Taniwha Farms and Mr Le Fleming from the dairy company would be met by Mr and Mrs Reed.

[20] The Agreement suggests Mr and Mrs Reed take every second weekend off but required time off during calving to be by negotiation with Taniwha Farms. Mr and Mrs Reed were provided with 24 days annual leave per annum with a preference that two weeks be taken in winter and two weeks be taken in summer.

[21] The Agreement required Mr and Mrs Reed to be responsible for the payment of all taxes and levies such as income tax, GST, fringe benefit tax and ACC for themselves and their employees.

[22] If for any reason a third party was required to fulfil any part of the agreement, the greater of an hourly rate of \$60 per hour or \$300 per day would be deducted from moneys owed to Mr and Mrs Reed.

[23] I am satisfied that while some of the terms of the Agreement were not standard terms, I have accepted the evidence of Mr Roy Johnson that variations to the Contract Milking Agreement are possible. In particular, this Agreement required the payment

of a set fee plus GST irrespective of the kilogram milk solids achieved. The Agreement provided for the payment of bonuses for over-achievement of the targeted kilogram milk solids and the evidence of Mr Reed is that they were on target to achieve the payment of bonuses but for the termination of the Agreement.

[24] Mr Ede's evidence that the Agreement was structured in the way it was, was because he and Mr Le Fleming had agreed that they wanted to give a young couple a chance to learn the business of managing a farm. That evidence is plausible. It is not in dispute that Mr and Mrs Reed were inexperienced in managing a farm.

[25] If the payment under the agreement had been based on cents per kilogram milk solids, Mr and Mrs Reed would not have received any payments until September 2014. Instead, Mr and Mrs Reed received their full first payment under the Agreement in June 2014.

[26] In November 2014, Mr and Mrs Reed notified Mr Ede that they were taking time off from 23 December and would be back in New Zealand on 31 December 2014 with a return to work date of 3 January 2015. Mr Ede emailed Mr and Mrs Reed that they should have "ok'd" their plans with him before booking their holiday to ensure he was around while they were away. This email did not constitute a requirement that Mr and Mrs Reed seek permission for taking time off but was notification of a requirement that Mr and Mrs Reed check with Mr Ede so that he could be available during their absence.

[27] In December 2014 when Mr Ede wrote to Mr and Mrs Reed purporting to issue a warning and advising Mr and Mrs Reed that employees can be instantly dismissed for abusive conduct, he was setting out clearly conduct that would be expected in an employment relationship and not one if the parties were truly independent contractors.

The intention of the parties

[28] In 2014, Mr Reed contacted Mr Le Fleming and inquired about a possible contract milking position on his farm. There was no position available at that time but when the contract for the Contract Milker in place at the time of Mr Reed's inquiry fell through, Mr Le Fleming contacted Mr Ede and advised him of Mr and Mrs Reed's interest. As events transpired, Mr Ede emailed Mr Reed on 28 April 2014 setting out the proposed package for the now vacant role. The email stated that the contract was

a contracting relationship with payment of \$105,000 plus GST for the 12 month term of the contract.

[29] Mr Reed received a proposed agreement on 6 May and signed it on 7 May 2014. Mr and Mrs Reed did not ask to be employees and Mr Reed was looking to increase his skill levels from his current position as 2IC on a local farm.

[30] Mr and Mrs Reed were clearly intending to operate as independent contractors. This is evidenced by them setting up a partnership to operate their obligations under the agreement after signing the agreement. The agreement was set out as a Contract Milking Agreement with a number of standard industry clauses for such arrangements. In submissions Mr and Mrs Reed acknowledged the common intention of both themselves and Taniwha Farms was to enter into a contracting arrangement.

The control test

[31] This test examines the extent to which the activities of Mr and Mrs Reed were controlled by Taniwha Farms. The greater the level of control, the more likely it is that the relationship was one of employer and employee.

[32] Mr and Mrs Reed were regularly given instructions on the jobs to be completed on the farm. This was provided for in the Agreement, as was the requirement for any farm purchases to be authorised by Taniwha Farms.

[33] I am satisfied the running of the farm was largely left to Mr and Mrs Reed with the exception of one-off jobs requiring to be done from time to time. Neither Mr Ede nor Mr Le Fleming were present on the farm for extensive periods of time and neither Mr or Mrs Reed were subject to any close supervision on a day-to-day basis. An analysis of the control test points to Mr and Mrs Reed being free to operate the milking aspect of their work without any direct supervision.

[34] I find there was control exerted over Mr and Mrs Reed's duties and that Mr Ede and Mr Le Fleming issued regular instructions of tasks that had to be completed. Mr Reed acknowledged that he did ask questions of Mr Le Fleming, Mr Ede and Mr Johnson and that they provided him guidance from time-to-time.

[35] There are clearly some elements of control present in the relationship but there are equally clearly elements of Mr and Mrs Reed being in an autonomous relationship in the daily completion of their obligations under the agreement.

Integration test

[36] This test examines the extent to which Mr and Mrs Reed were integrated into Taniwha Farms' business. The contract milking work performed by Mr and Mrs Reed was integral to the business. The work could be performed either by Mr and Mrs Reed personally or by relievers. Both the partnership of Mr and Mrs Reed and Taniwha Farms were liable for 50% of the payment to relievers. Mr Reed would advise Mr Ede of the information relating to relievers to allow payment to be made. On some occasions, Mr Reed paid the relievers his 50% by way of cash payment and at other times Mr Ede would deduct Mr Reed's portion of the payment from the monthly payment under the agreement.

[37] The integration test does not appear to be strongly determinative of Mr and Mrs Reed's status one way or the other.

Fundamental test

[38] This test examines the extent to which Mr and Mrs Reed took on financial risks themselves when providing their services to Taniwha Farms.

[39] Mr and Mrs Reed engaged an accountant who prepared financial statements for them. In the financial statements, the income is described as "*agreement milking income*". Mr and Mrs Reed have completed GST returns.

[40] Mr and Mrs Reed were paid each month. The agreement required payment on the 21st of each month. More often than not, the payments were either made earlier or later than the 21st. The payments were reduced by the power account for the accommodation and payment for relievers.

[41] Mr and Mrs Reed provided two farm bikes and all other equipment was provided by Taniwha Farms in accordance with the Agreement.

[42] Until commencing their relationship with Taniwha Farms, Mr Reed had always been an employee. The partnership was set up to allow Mr and Mrs Reed to undertake the Agreement with Taniwha Farms. They were able to profit from the relationship to the extent set out in the Agreement which included the opportunity to

increase production and receive bonus payments and by virtue of being able to claim taxable deductions from their income.

[43] Mr and Mrs Reed never raised any concerns with Taniwha Farms during the relationship that they had not received paid sick leave or that they wished to be employees. They took responsibility for accounting for their own tax and income to IRD. In doing that, they were able to and did claim expenses not available to employees such as depreciation of their vehicles.

[44] The fundamental test has strong elements of a contracting relationship.

Industry practice

[45] The evidence around industry practice has led me to conclude that the practice, with respect to contract milking arrangements, vary and that while Federated Farmers has a suggested template agreement, others such as accountants and farm advisers also have their own suggested template documents.

[46] There is no dispute that it is a common practice in the industry to have independent contract milkers working on farms.

Overall impression

[47] The decision as to whether Mr and Mrs Reed were employees or independent contractors is balanced in favour of an independent contracting relationship.

[48] The overall impression from all of the facts in this matter of the underlying and true nature of the relationship between Mr and Mrs Reed and Taniwha Farms is that of an independent contractor.

[49] Mr and Mrs Reed specifically set up a formal partnership arrangement to operate the new business opportunity as contract milkers. They accepted responsibility at all times for the payment of their own tax and benefited from being able to write-off expenses relating to their farm vehicles and other expenses. Mr and Mrs Reed undertook their work without any close supervision and were able to work their own hours.

[50] Mr and Mrs Reed signed a document which is clearly entitled "*Contract Milking Agreement*" which set out the terms under which they would be engaged including a term that stated they were not employees.

[51] Mrs Reed is no stranger to being in business. She was a director and joint shareholder with Mr Reed for over eight years. During this time, it is more likely than not that Mrs Reed in particular would have understood the tax benefits and implications associated with running a business. It was Mrs Reed who attended the accountant's office to set up the partnership which operated under the Agreement.

[52] In January 2015, Mr Reed was offered and accepted employment as a truck driver. Mr Reed said he started looking for full time work early as the agreement was to expire at the end of May and he wanted to make sure he had work. The agreement was still on foot when Mr Reed commenced that employment. This is not an action an employee could contemplate but was something Mr Reed believed was able to be done under the terms of the Agreement which allowed him to undertake other work.

Determination

[53] Mr and Mrs Reed were not employees and I am unable to be of further assistance to them.

Costs

[54] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Taniwha Farms shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr and Mrs Reed shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority