

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2013] NZERA Auckland 336  
5412999**

BETWEEN DIANE RUKA  
Applicant  
AND KAIPARA DISTRICT COUNCIL  
Respondent

Member of Authority: Eleanor Robinson  
Representatives: Applicant in person  
Andrew Golightly, Counsel for Respondent  
Investigation Meeting: On the papers and by telephone conference  
Submissions received: 28 May, 23 and 30 July 2013 from Applicant  
11 June and 29 July 2013 from Respondent  
Determination: 2 August 2013

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

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**Employment Relationship Problem**

[1] The Applicant, Ms Diane Ruka, claims that she was unjustifiably dismissed by the Respondent, the Kaipara District Council (KDC). KDC claims that it had not had an employment relationship with Ms Ruka who had been engaged as a volunteer firefighter with the Northern Kaipara Volunteer Rural Fire Force (NKVRFF).

[2] This determination addresses the preliminary issue of whether or not Ms Ruka was an employee as defined in the Employment Relations Act 2000 (the Act), and if she is deemed to be an employee, who is her employer and therefore the correct Respondent in this matter.

**Issues**

The issue for determination is whether or not Ms Ruka is an Employee pursuant to s.6 of the Act, and if Ms Ruka is deemed to be an Employee, of whom.

## **Background Facts**

[3] The KDC is appointed as the Kaipara District Rural Fire Authority (KDRFA) by notice in the Gazette. KDC and KDRFA are effectively one and the same organisation.

[4] The KDRFA engages with the NKVRFF to provide services via a Voluntary Rural Fire Force Agreement (the Agreement). The services provided relate to various fire prevention and fire fighting activities under the direction of the Principal Rural Fire Officer within the designated area. KDC states that the relationship is one of contract for services between organisations rather than a contract of service between an organisation and an employee.

[5] The NKVRFF is provided by KDC with an annual grant in order to partially fund its operation and equipment.

[6] Ms Ruka was a firefighter and also was a warranted Deputy Fire Officer of the NKVRFF.

### *Payment*

[7] Ms Ruka said she had received payments for attendance at fires during the period from 2005 to 2012. These payments had been made by KDC direct into her bank account.

[8] Mr Bob Donald, Rural Fire Officer and Fire Controller for NKVRFF until his retirement in April 2013, explained that the NKVRFF volunteer firefighters would receive no payment for attendance at fires within their own area. However if the firefighter attended a fire outside the NKVRFF area, they would receive a payment based on the National Rural Fire Authority (NRFA) schedule of rates.

[9] Ms Ruka said that if she had initially attended a fire, and then had been recalled to the fire, she had also received a payment in respect of the second and subsequent attendances at the fire. Mr Peter Marshall, Human Resources Advisor of KDC, confirmed that this was correct.

[10] Mr Marshall explained that the payments made to Ms Ruka had been paid through the KDC accounts payable process and not via the normal pay roll procedure because Ms Ruka had not been on KDC's pay roll.

[11] Mr Donald explained that the payments were made by KDC direct into the firefighter's bank account, and that it would be the responsibility of the individual firefighter to deal with any taxation liability arising.

[12] Mr Donald further explained that attendance at any fire, whether within the NKVRFF area or outside it, was purely voluntary on the part of the firefighter.

[13] Ms Ruka confirmed that it had been her decision whether or not to attend a fire and that although she had received payments for attendance at fires outside the NKVRFF area, she would have attended the fires irrespective of any payment.

[14] Mr Donald said that in accordance with the Agreement, the firefighters of the NKVRFF were treated as employees once called to an incident to ensure that the volunteer firefighters had adequate protective clothing and footwear.

[15] Mr Donald also said that in accordance with the Agreement it was the responsibility, initially of the Fire Controller and then of the Fire Manager once on site, to ensure full adherence to s.37 of the Forest and Rural Fires Regulations 2005

[16] Ms Ruka stated that whilst it was a decision for individual firefighters whether or not they attended a fire, the firefighters were expected to provide fire engines to attend the fire, and failure to respond would result in a reprimand.

[17] KDC stated that there was an expectation that a fire vehicle and its crew would attend a call out, however this expectation had not been directed at any particular firefighter who retained the right to choose whether or not to attend the call out. Further, that any reprimand would be directed to NKVRFF and not to the individual firefighter.

[18] Ms Ruka said she had been appointed as a Warranted Deputy Fire Officer of the NKVRFF and confirmed that she had neither expected nor received payment in respect of this position.

## **Determination**

### **Is Ms Ruka an Employee pursuant to s.6 of the Act?**

[19] Section 6 of the Act states:

#### *6. 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; and*

...

(c) *Excludes a volunteer who-*

(i) *Does not expect to be rewarded for work to be performed as a volunteer; and*

(ii) *Receives no reward for work performed as a volunteer*

(2) *In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority ... must decide the real nature of the relationship between them.*

[20] The Health and Safety in Employment Act 1992 defines a volunteer in s. 2 as:

***Volunteer:-***

(a) *Means a person who-*

(i) *does not expect to be rewarded for work to be performed as a volunteer; and*

(ii) *receives no reward for work performed as a volunteer*

[21] In *Bryson v Three Foot Six Limited (No2)*<sup>1</sup> the Supreme Court stated the following:

*“All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters’ equally clearly requires the*

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<sup>1</sup> [2005] 1 ERNZ 372

*Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.*

[22] Accordingly I now proceed to determine the real nature of the relationship between the parties in terms of the contractual relationship, the features of control and integration and whether or not Ms Ruka had been “*effectively working on his or her own account*”.

*Contractual basis*

[23] Employees may be appointed subject to either a collective agreement if a member of a union, or an individual employment agreement if not a member of a union. Pursuant to s. 65 of the Act, an individual employment agreement must include:

- (i) *The names of the employer and employee concerned; and*
- (ii) *A description of the work to be performed by the employee;  
and*
- (iii) *An indication of where the employee is to perform the work;  
and*
- (iv) *An indication of the arrangements relating to the times the  
employee is to work; and*
- (v) *The wages or salary payable to the employee; and*
- (vi) *A plain language explanation of the services available for the  
resolution of employment relationship problems, including a  
reference to the period of 90 days in section 114 within which  
a personal grievance must be raised*

[24] Ms Ruka had not been issued with an employment agreement which complied with s. 6 of the Act by either KDC or NKVRFF, however she is relying the Agreement, in particular clause 2(2), as establishing an employment relationship.

(i) *The Agreement*

[25] The Agreement identifies the parties to it as being the relevant Rural Fire Authority, and the relevant Voluntary Rural Fire Force, in this case KDRFA and NKVRFF. In this sense it differs from an individual employment agreement which, in accordance with s. 65 of the Act, must identify the employee and the employer in addition to other terms and conditions of employment which are personalised to the employee.

[26] The Agreement states at clause 2(2):

*(2) All members of the Voluntary Rural Fire Force are employees of the Rural Fire Authority for the purposes of the Forest and Rural Fires Act 1977 and the Forest and Rural Fires Regulations 1979.*

[27] The wording of the clause limits the qualification of ‘employee’ to “*for the purposes of the Forest and Rural Fires Act 1977 and the Forest and Rural Fires Regulations 1979.*”

[28] I find s. 2(2) of the Agreement to mirror s. 37 of the Forest and Rural Fires Regulations 1979 which states that:

*(1) For the purposes of these regulations, a member of a voluntary force must be treated as if he or she were an employee of the Fire Authority that established the force, and the provisions of the Act and these modifications apply accordingly, with all necessary modifications.*

[29] I find that in terms of clause 2 (2) of the Agreement Ms Ruka was an employee only for the purposes of the Forest and Rural Fires Act 1977 and the Forest and Rural Fires Regulations 1979, and that the clause of itself does not override s. 6 of the Act and the definition of employee.

[30] I find support for this view in the fact that Ms Ruka was a Rural Fire Officer with NKVRFF and s. 13(1) of the Forest and Rural Fires Act 1977 states that the relevant district Fire Authority may “*appoint*” Rural Fire Officers, which can be contrasted with the s.13(2) reference to: “*all such other officers*” who the relevant district Fire Authority may: “*appoint or employ*”.

[31] I do not find that in terms of the Agreement that Ms Ruka was an employee.

(ii) *Payment*

[32] Ms Ruka received no wage or salary in her position as either a firefighter or as a member of the NKVRFF Committee, and stated that she would have attended a fire irrespective of payment. However Ms Ruka had been entitled to request, and did request and receive payment, from KDC when she had attended a fire outside of the NKVRFF area or when she had been recalled to attend a fire.

[33] Although the payment was made directly into her bank account by KDC, the payments had been made via the accounts payable process without deduction of PAYE and Mr Donald confirmed that it had been the responsibility of Ms Ruka as an individual firefighter to account for any tax liability arising therefrom.

[34] Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*<sup>2</sup> that: “*Taxation arrangements, both generally and in particular are a relevant consideration.*”

[35] Pursuant to s. 2 of the Health and Safety in Employment Act 1992 volunteers are defined as persons who do not expect and who do not receive payment for work performed as a volunteer:

***Volunteer-***

(a) *Means a person who-*

(i) *Does not expect to be rewarded for work to be performed as a volunteer; and*

(ii) *Who receives no reward for work performed as a volunteer*

[36] As Ms Ruka had an entitlement to request payment in certain circumstances and was paid, I find that she cannot be considered to be a volunteer in accordance with the provisions of the Health and Safety in Employment Act 1992.

[37] However the fact that I do not find Ms Ruka to be a volunteer does not indicate that Ms Ruka was employee. Rather taking into consideration the sporadic nature of the payments in conjunction with the voluntary nature of attendance at the fires and the taxation situation, I find that the payments made to Ms Ruka were akin to those payments made to an independent contractor in respect of the performance of services.

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

[38] I have considered the fact that, as stated by Ms Ruka, during the latter part of her engagement with NKVRFF these payments were made in accordance with the National Rural Fire Authority Rate. However I do not find that such payments being made in accordance with a certain pay scale indicate an employment relationship when taken in conjunction with the other factors.

[39] I now turn to the way in which the relationship operated in practice by having regard to the features of control and integration, and to the fundamental test of whether Ms Ruka was working on her own account.

#### *Control and Integration*

[40] In accordance with s 12 of the Agreement NKVRFF had to provide and maintain safety clothing for the firefighters and accordingly Ms Ruka had been provided with: “*a suitable fire resistant overall, safety helmet and leather boots*”.

[41] The Health and Safety in Employment Act 1992 makes it a mandatory duty of both employers and those entities utilising the services of volunteers to provide a safe working place and equipment. I do not find that the provision of safety clothing and equipment *per se* to Ms Ruka indicates an employment relationship.

[42] In her capacity as a firefighter Ms Ruka did not have set hours or days of work. In the event of a fire occurring she would be contacted and could decide whether or not she wished to attend.

[43] Although a fire vehicle and its crew were expected to attend a call out and failure to do so could result in a reprimand, I find that, given that the reprimand would be directed at the NKVRFF and not the individual firefighter, together with the absolute discretion of the firefighter to decide whether or not to attend the call out, such an expectation is not an indication of control of Ms Ruka.

[44] As such I do not find that in her capacity as a firefighter Ms Ruka had been subject to the control of either KDC or NKVRFF.

[45] In accordance with the Agreement the affairs of the Voluntary Rural Fire Force are administered by a Committee.

[46] Clause 5 of the Agreement sets out the organisation and management of the Voluntary Rural Fire Force, this being by way of a Management Committee consisting of the Chairperson, and a secretary and treasurer and other committee members to a maximum of 10.

[47] Clause 9 is entitled '**Donation/Compensation for Services**' and states:

(1) *Where the Rural Fire Authority provides an annual grant to cover operating, fire suppression and control costs, the Voluntary Rural Fire Force may not be entitled to payment from the Rural Fire Authority for providing fire prevention services or attending fires within the callout area.*

(2) *Donations by the public in recognition of the Voluntary Rural Fire Force services shall be paid into the Voluntary Rural Fire Force bank account and shall be used as the Management Committee sees fit.*

(3) *The Voluntary Rural Fire Force shall be entitled to request payment for attending vegetation fires outside the callout area.*

[48] In her capacity as a Rural Fire Officer Ms Ruka formed part of the Management Committee of NKVRFF. Membership was granted by a majority of the Committee, members could resign at any time, and a member's resignation could be called for at any time. The position on the Management Committee was not remunerated.

[49] Ms Ruka had the right to attend meetings of the Management Committee including the annual general meeting. I note that attendance at the meetings was not mandatory since a quorum of the Management Committee could transact the business: "*of any General or Annual General Meeting*" in accordance with clause 5(6) of the Agreement.

[50] Although I find that Ms Ruka as a member of the Management Committee could be considered to be integrated into the operation and administration of NKVRFF, I note that the Management Committee had limited control over Ms Ruka as a member.

[51] Ms Ruka had been issued a warrant as an Officer of the Management Committee by KDC, which had the discretion to withdraw the warrant. I find that appointment as an Officer of a voluntary organisation, moreover an unremunerated Officer does not of itself indicate employment, which conclusion is supported by the wording of s. 13(1) of the Forest and Rural Fires Act 1977 which differentiates between "*appoint*" in the case of Rural Fire Officers and s 13(2) which refers to: "*appoint or employ*" in the case of other officers.

[52] Having considered all the circumstances, I find that the issuing or withdrawing of a warrant indicates that Ms Ruka was integrated into the operation of KDC.

[53] I do not find that applying the tests of control and integration, Ms Ruka was an employee of either KDC or NKVRFF.

*The Fundamental Test*

[54] In the sense that Ms Ruka had absolute discretion to decide whether or not to attend a fire inside the NKVRFF area, or outside the NKVRFF area and on recall for payment if so requested, when she had been initially contacted, and moreover could decide whether or not to attend a NKVRFF Management Committee meeting, I find that Ms Ruka could fairly be considered to have: “*been effectively working on his or her own account*”.

[55] I determine that Ms Ruka was not an employee of KDC, or for completeness of NKVRFF, during the period of her providing volunteer firefighting and Management Committee services, and I am unable to assist her further.

**Costs**

[56] Whilst costs are reserved, given the nature of the valuable work which had been undertaken by Ms Ruka in her capacity as a voluntary firefighter I am of a mind to let costs lie where they fall. However, in the event that costs are sought, the parties are encouraged to resolve that question between them.

[57] If the parties fail to reach agreement on the matter of costs, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**