

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 487  
5427476

BETWEEN MORTEZA SARMAST  
Applicant

A N D PETER HADEN  
Respondent

Member of Authority: Anna Fitzgibbon  
Representatives: Applicant in person  
No appearance by Respondent  
Investigation Meeting: 21 October 2013  
Date of Determination: 22 October 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. The applicant, Mr Morteza Sarmast was an independent contractor, not an employee of the respondent, Mr Peter Haden.**
- B. No order as to costs.**

**Non-appearance of respondent**

[1] The respondent, Mr Peter Haden failed to file a statement in reply and failed to attend the investigation meeting. I am satisfied that Mr Haden was properly served with the statement of problem and subsequent correspondence from the Authority together with a notice of investigation meeting. In those circumstances, I proceeded to investigate the matter in the absence of Mr Haden.

### **Employment relationship problem**

[2] The applicant Mr Morteza Sarmast, claims he is owed monies for work performed by him for Mr Haden in early 2013, totalling 120 hours at \$15.00 per hour. The total sum claimed is \$1800.

### **Issue for determination**

[3] The first issue for determination by the Authority is whether an independent contractual relationship or an employment relationship existed between Mr Sarmast and Mr Haden.

[4] If no employment relationship existed then the Authority has no jurisdiction to investigate Mr Sarmast's claim that he is owed monies by Mr Haden for work he performed for it.

### **Issue**

#### ***Was Mr Sarmast an employee or an independent contractor?***

[5] Whether Mr Sarmast was an employee or a contractor is to be determined under s.6 of the Employment Relations Act 2000 (the Act).

[6] Section 6 of the Act states:

#### ***Meaning of employee***

- (1) *In this Act, unless the context otherwise requires, **employee** –*
  - (a) *means any person or 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 – ...*
  - (a) *must consider all relevant matters including any matters that indicate the intentions of the persons; and*

- (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[7] The leading case on s.6 of the Act is *Bryson v. Three Foot Six Limited*<sup>1</sup>. The Employment Court in *Poulter v. Antipodean Growers Limited* summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions at para.[20] 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 determinative of the primary question.*

[8] 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.

[9] Mr Haden trades as Universal Contractors and provides various property services to mainly residential clients including building, gib stopping, painting and plastering.

[10] In early 2013, the applicant, Mr Morteza Sarmast, an immigrant to New Zealand from Iran was looking for work. Mr Sarmast's neighbour Ian, was working for Mr Haden and suggested Mr Sarmast may get some work with Mr Haden also. Ian explained that Mr Haden paid \$15 an hour cash and that no tax was deducted.

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

[11] Mr Sarmast accompanied Ian to work and met Mr Haden. Mr Haden asked Mr Sarmast what kind of work he was able to do. Mr Sarmast, a qualified civil engineer in Iran, explained that he was able to do painting, plastering and could quickly learn to do tiling. Mr Haden told Mr Sarmast that if he had work for him he would pay him \$15 cash but if there was no work, he would not be required and would not be paid.

[12] No employment agreement was discussed or entered into and Mr Sarmast was not required by Mr Haden to fill out any documentation for the Inland Revenue Department. Mr Sarmast did not receive holiday or sick pay and if he did not wish to work, he did not work and if there was no work for him, he did not get paid. No PAYE was deducted from cash payments made to Mr Sarmast by Mr Haden and no GST was paid.

[13] Mr Sarmast worked for Mr Haden for approximately 3 months on this basis, receiving cash on Fridays for the work performed by him during the week. Mr Sarmast's hours of work varied from week to week depending on Mr Haden's requirements and on Mr Sarmast's availability.

[14] Mr Richard Turipa, a work mate of Mr Sarmast worked for Mr Haden on the same basis. Both Mr Sarmast and Mr Turipa say they are owed money by Mr Haden for work performed by them.

[15] Having considered all of the evidence, I find that Mr Sarmast was an independent contractor, not an employee. Mr Sarmast supplied his labour when he was available, if he was not available he did not work and was not paid. Similarly, if Mr Haden had no work for Mr Sarmast he was not required to come in to work and was not paid.

[16] No verbal or written employment agreement was entered in to, there was no suggestion that holiday or sick leave would be paid by Mr Haden, and there was no expectation by Mr Sarmast that he would receive holiday or sick pay. No employment documentation for the IRD was asked for or required by Mr Haden in relation to Mr Sarmast. Mr Sarmast was paid \$15 cash when he worked.

[17] The overall impression from all of the facts in this matter, of the underlying and true nature of the relationship between Mr Sarmast and Mr Haden was that their relationship was that of an independent contract.

[18] For the above reasons, the preliminary issue of the status of Mr Sarmast is that he was an independent contractor, not an employee. Therefore, the Authority does not have jurisdiction to deal with Mr Sarmast's claim against Mr Haden.

[19] I do note Mr Sarmast's unopposed evidence, because Mr Haden did not attend the investigation meeting, that 120 hours of work performed by him for Mr Haden has never been paid despite numerous promises by Mr Haden to do so. This is a matter that Mr Sarmast as an independent contractor is unable to pursue in the Employment Relations Authority but could take further in a forum such as the Disputes Tribunal.

### **Costs**

[20] Mr Sarmast was not represented and so I do not make an order as to costs.

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