

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 99
3020555

BETWEEN BARRY SEXTON
 Applicant

AND PHILLIP LOWE AND PASM
 (NZ) PTY. LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Gregory Denholm, Counsel for Respondent

Investigation Meeting: 23 March 2018 at Auckland

Date of Oral
Determination: 23 March 2018

Written record: 27 March 2018

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

Employment relationship problem

[1] The applicant Mr Barry Sexton says he was employed by Mr Phillip Lowe and by Pasmr (NZ) Pty. Limited (“Pasmr”) from late February 2017 until September 2017. Mr Sexton says he was unjustifiably dismissed by Mr Peter Palvaast, Director, Pasmr in September 2017 and says this dismissal was unjustified. Mr Sexton seeks compensation. Further Mr Sexton says he is still owed unpaid wages by Mr Lowe and by Pasmr and seeks payment.

[2] Mr Lowe and Pasmr deny there was an employment relationship with Mr Sexton.

Issues

- A. Was there a contractual relationship between Mr Sexton and Mr Lowe and Pasmr?
- B. If there was a contractual relationship was the relationship one of employment?

Investigation Meeting

[3] Mr Sexton filed a witness statement and gave evidence as did Mr Palvaast from and on behalf of Pasmr. As allowed under s 174 of the Employment Relations Act 2000 (“the Act”) this determination does not set out all the evidence. Relevant facts and legal issues are set out along with the Authority’s conclusions.

[4] The investigation of this preliminary matter took just over one and a half hours in the Authority.

Relevant Facts**E. Clean NZ Limited**

[5] Mr Sexton is the sole director and shareholder of E. Clean NZ Limited (“E.Clean”), a company in the business of manufacturing and producing car cleaning products. Mr Sexton says he was approached by Mr Lowe in February 2017. Mr Lowe’s Family Trust, the Jabroli Trust, was undertaking contract work for the Fletcher Construction Company Limited (Fletchers) at Auckland International Airport and was looking at expanding its workforce. Mr Sexton is a builder and had just spent a number of months renovating his own home and says he was keen to obtain employment.

Terms of engagement

[6] Mr Lowe and Mr Sexton discussed a working relationship. Mr Sexton says the working relationship was very loose. Essentially what was agreed was that he was to be paid an hourly rate, given plenty of hours of work and would be paid on a weekly basis. The hourly rate negotiated at the time was \$50 which subsequently became \$55 an hour. There were no discussions at the time about holiday pay, sick leave or any other employment related entitlements. After starting work Mr Sexton

says he filled out daily timesheets which had at the top “employee name”, details such as the day of the week, start time, end time, hours of work and job descriptions. Mr Sexton says he was instructed on what he was to do each day and the instructions were reasonably prescriptive.

[7] Mr Sexton says he regularly worked long hours and there were no work or performance issues. Mr Sexton says he received two payments from Jabroli Trust in early March and on 1 April 2017. All other payments from that time on were from Pasmr.

Pasmr (NZ) Pty Limited

[8] Mr Palvaast says he became involved in the matter in February 2017 when he was approached by Mr Lowe, who was an old friend, about the contract with Fletchers.

[9] Mr Palvaast had a company in Australia and Mr Lowe asked whether he would be able to set up a company in New Zealand which would be responsible for the Fletchers contract. Pasmr was incorporated on 20 February 2017. Jabroli Trust ceased trading on 31 March 2017. Pasmr took over the Fletchers contract and began trading under the name Challenger Site Facilitators. Mr Senthoorvelan Krishnamoorthy was the overall supervisor.

[10] Following the change from Jabroli to Pasmr, Pasmr took over payments for all those working for or contracting to the Jabroli Trust. Mr Palvaast says of the approximately twenty people working for Jabroli approximately three were employees. The remainder were independent contractors, most of whom had their own companies and invoiced Pasmr. Steps were taken to have employment agreements and independent contracts drafted but these were never signed.

[11] In July 2017, a formal sub-contract agreement was signed between Fletchers and Pasmr. Mr Palvaast says companies such as E.Clean and others were sub-sub-contractors on that project.

First Issue - Was there a contractual relationship between Mr Sexton and Mr Lowe and Pasmr?

[12] Mr Sexton says he intended to be employed by Mr Lowe and by Pasmr and he was actually employed by them respectively. Mr Sexton says the nature of the

contract entered into between him and Philip Lowe and Pasmr required him personally to provide services to Mr Lowe and Pasmr. The manner in which the contract operated he says made him an employee of Mr Lowe and of Pasmr.

[13] It is my view that there was not a contractual relationship between Mr Sexton and Mr Lowe and Pasmr. There was a contract between E.Clean and Mr Lowe and Pasmr to provide services for the Fletchers contract. However, if I am wrong it is my view the contract between the parties was that of an independent contract and not that of an employment contract.

Second Issue - If there was a contractual relationship was the relationship one of employment?

The Law

[14] Section 6 of the the Act sets out the meaning of employee. There have been a number of decisions on the meaning of s 6 of the Act including *Bryson v Three Foot Six Limited*¹ *Singh v Eric James & Associates Limited*² and *Poulter v Antipodean Growers Limited*³.

[15] In summary, the applicable principles are that the Court or Authority must determine the real nature of the relationship. The intention of the parties is still relevant but no longer decisive and statements by the parties including contractual statements are not decisive of the nature of the relationship. The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as the “control” “integration” and “fundamental” tests. These are historical tests which have assisted the Authority and the Courts to determine this matter. Ultimately, it is the overall impression of the underlying and true nature of the relationship between the parties which is to be taken into account by the Authority or the Court.

Relevant factors in assessing the relationship

[16] Mr Sexton has considerable business experience. He is the owner of E.Clean which he continues to own and operate. The Authority was provided with financial

¹ [2005] 3 NZLR 721.

² [2010] NZEmpC 1.

³ [2010] NZEmpC77, 17 June 2010 at para [20].

records which established that E.Clean issued invoices, paid GST and claimed expenses. It also paid Mr Sexton drawings and a shareholder's salary. Income paid into E.Clean's bank account during the course of Mr Sexton's engagement by Mr Lowe and Pasmr was from not only Pasmr but also from other clients of E.Clean which had been long standing, many for more than ten years.

[17] In my view this is an indication that Mr Sexton had flexibility and was able to continue to operate his own business while contracting to Mr Lowe and Pasmr. Mr Sexton produced E. Clean's financial reports for the year ending 31 March 2017 and for the six month period to 30 September 2017.

[18] The accounts reveal that E.Clean earned revenue from product sales and from construction projects. At the Authority's investigation meeting Mr Sexton explained that E.Clean's income in the financial year ending 31 March 2017 was from building projects for residential clients. Income for the six month period to the end of September 2017 was income derived from Pasmr in respect of the Fletchers contract. There was also income from product sales to clients.

[19] Mr Sexton provided the Authority with details of income for which he was responsible to pay provisional tax. The bank statements provided for E.Clean show the deposits made by Pasmr while Mr Sexton was engaged at the airport on the Fletchers contract. The bank statements also show the other income received by E.Clean. GST payments were also made by E.Clean.

[20] It is my view that Mr Sexton was aware of the difference between an employee and an independent contractor. He chose to carry out his services through his own company E.Clean for work undertaken by him for Mr Lowe and Pasmr and other clients. Mr Sexton organised his financial affairs in a way that gave him a tax advantage.

[21] In *Massey v Crown Life Insurance Company*⁴ Lawton LJ stated:

In the administration of justice, the union of fairness, common sense 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 allow him to deny that he is a self-employed person so that he can claim compensation then in my

⁴ [1978] 2 All ER 576.

judgment the union between fairness, common sense and the law is strained almost to breaking point.

[22] That principle has been applied by the New Zealand Courts and in the employment jurisdiction in *Excell Court v Carmichael*⁵ and in *Chief of Defence Force v Ross Taylor*⁶.

[23] Mr Sexton pointed out to the Authority a number of aspects of his working relationship with Mr Lowe and Pasmr which he said indicated he was employed and was being paid an hourly rate. It is true there were features or indications present that may have suggested the relationship was one of employment. However, in my view there were far more features of an independent contract relationship.

Overall impression

[24] From the evidence the overall impression gained by the Authority of the underlying and true nature of the relationship between Mr Sexton and Mr Lowe and Pasmr was that it was a contract for services, not employment.

[25] It must follow that any claims that Mr Sexton has in relation to the termination of that contract must be determined in a jurisdiction other than the Authority.

Costs

[26] Costs are reserved. If the parties are unable to agree costs, Pasmr has 14 days in which to file a memorandum as to costs. Mr Sexton has 14 days from receipt of the memorandum to file a memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁵ [2003] 1ERNZ 473.

⁶ [2010] ERNZ 61.