

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 133
5607082

BETWEEN

KAREN SMITH
First Applicant

ANTONI SMITH
Second Applicant

AND

ASPECT GROUP (2015)
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: David Beck for Applicant
Jeff Goldstein for Respondent

Investigation Meeting: 15 August 2016

Determination: 16 August 2016

**PRELIMINARY DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr and Mrs Smith were not employees of Aspect Group (2015) Limited.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Antoni and Mrs Karen Smith contend they were employees employed by Aspect Group (2015) Limited (Aspect Group) from 19 August 2015 until 18 November 2015 when they were unjustifiably dismissed. Aspect Group denies Mr and Mrs Smith were employees and say it had never entered into an employment relationship with either of them.

[2] The parties have not yet attended mediation. The question of whether Mr and Mrs Smith were employees or independent contractors has become a barrier to the parties attempting to resolve their difficulties through mediation. By agreement this determination deals only with the discreet issue of jurisdiction as to whether Mr and Mrs Smith were employees or independent contractors.

[3] 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 Smith and Aspect Group 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.

Background

[4] Aspect Group is based in Christchurch and carries on the business as a building, painting and decorating service.

[5] Mr and Mrs Smith were working as interior plasterers for Maiden Construction Limited in 2015. On 10 August 2015 Maiden Construction Limited announced proposals to restructure its business with the loss of 35 jobs in the unskilled labour, plastering and painting areas.

[6] After receiving this notification Mrs Smith saw an advertisement seeking senior and junior plasterers on the website Myjobspace.co.nz and advised Mr Smith. The advertisement was in the name of Aspect Painters Limited (a previous name of Aspect Group).

[7] Following a meeting with Mr Jason Gray, Managing Director, Mr and Mrs Smith started working for Aspect Group on 20 August 2015. The relationship came to an end on or about 18 November 2015.

Credibility

[8] This matter is to be determined on issues of credibility. I have carefully evaluated the evidence. I have heard and considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration there is and in particular what documentation exists to support one version or another.

[9] The onus of proof is the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. I have found this very difficult as neither of the main witnesses was more convincing than the other and when I have reviewed the evidence from Mr Smith and Mr Gray I have found areas of their evidence which simply do not seem credible. Where there is a dispute in the evidence I have accepted the evidence, which based on the documents produced to the Authority seems on balance to be the more credible.

Issues

[10] The issue for this determination is the preliminary matter of whether Mr and Mrs Smith were employees or independent contractors.

Determination

[11] Whether Mr and Mrs Smith were employees or contractors is determined under Section 6(1) of the Employment Relations Act (“the Act”) which states:

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 (as the case may be) must determine the real nature of the relationship between them.

[12] Section 6(3) states:

For the purposes of subsection (2), the court of the Authority-

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.

[13] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd.*¹

[14] The Employment Court in *Poulter v Antipodean Growers Limited*² summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.

¹ [2005] ERNZ 372.

² [2010] NZEmpC 77 at [20].

- 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 analyzing 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.

[15] 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 then to apply the three tests known as the control, integration and fundamental or economic reality test.

[16] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.³

Intention of the parties

[17] There was no written documentation signed by the parties to demonstrate their intention at the time the arrangement for work was entered into.

[18] Mrs Smith viewed a job advertisement on www.myjobspace.co.nz seeking senior and junior plasterers. The advertisement lists the contact person as “Tina” and provides her contact number. Mr Smith did not contact the number listed on the advertisement but did an internet search for Aspect Painters Limited and contacted Mr Gray directly. The advertisement specifies that the work is full time.

[19] Mr and Mrs Smith say that after contacting Mr Gray by telephone they met with him at a worksite on Monday 17 August 2015 where they were offered \$35.00 an hour plus a work van if they could start immediately.

[20] Mr Gray says he received a telephone call from Mr Smith on 13 August 2015 advising him that they were looking at redundancy at Maiden Construction Limited and were looking for work as plasterers. Mr Gray says he then met Mr and Mrs Smith

³ Ibid at [21].

later that day on a worksite and explained to them the nature of the engagement the applicable rate and that payment would be on submission of an invoice.

[21] Mr Gray says Mr and Mrs Smith told him they were happy to sub-contract to Aspect Group as they were planning to start their own plastering business, called Silverline Interior Plastering Limited (Silverline). Silverline was incorporated on 30 September 2015. The sole director and shareholder is recorded as Mr Antoni Smith.

[22] Mr Gray says he met with Mr and Mrs Smith again on 16 August 2015 at which time they were shown how to complete an invoice and were advised that withholding tax would be deducted from the invoice at the rate of 20%. Mr Gray says he also gave Mr and Mrs Smith a copy of Aspect Group's standard contract for services (labour only) with an hourly rate of \$35.00 per hour excluding GST.

[23] There was a dispute about the dates meetings took place. Mrs Smith told me that when she was putting dates together for the statement of problem she used her diary to assist her. The diary does not record any meetings with Mr Grey either during the period 13 – 17 August 2015 or the following weekend. The diary has not been of any assistance in resolving which dates Mr and Mrs Smith met with Mr Grey.

[24] I have preferred the evidence of Mr Gray as being the most likely. Mr and Mrs Smith were advised on 10 August 2015 that their jobs with Maiden Construction Limited were in jeopardy. They were on notice that there was to be a two week consultation period. The advertisement Mrs Smith viewed when looking for alternative employment (which Mr Smith says they did immediately after receiving notification about the redundancies) had a closing date of 14 August 2015.

[25] I find it is more likely than not that Mr Smith telephoned Mr Gray on 13 August 2015 and that he and Mrs Smith met with Mr Gray later that same day.

[26] I have concluded that when Mr and Mrs Smith met with Mr Gray on 13 August 2015 all three were on the same page with respect to the nature of the relationship. The intention of Mr and Mrs Smith was to start their own business and sub-contracting with Aspect Group was a means to achieve this. In reaching this conclusion I have accepted the evidence of Mr Darryl Sutton that Mr and Mrs Smith asked whether he would consider sub-contracting to them once their new company had been set up.

[27] I have also accepted the evidence of Mr Gray that he discussed with Mr and Mrs Smith the nature of the relationship being a contracting relationship and that payment would be on production of an invoice.

[28] Overall I have concluded that the intention of the parties was that the relationship be a contracting relationship and not an employment relationship.

The control test

[29] This test examines the extent to which the activities of Mr and Mrs Smith were controlled by Aspect Group.

[30] Mr and Mrs Smith say they were provided with a van including the diesel required for running the van, the equipment and materials necessary for them to undertake their work, uniforms with Aspect Group branding and personal protective equipment (PPE).

[31] Mr Gray acknowledges that he provided Mr and Mrs Smith the van and that Aspect Group covered the costs of running the vehicle. Mr Gray told me Mr and Mrs Smith did not have a suitable vehicle to carry their equipment. He told me he provided the van on a temporary basis because Mr Smith had told him he was intending to set up his own business which meant he would be getting his own van in the near future.

[32] Mr Gray also says he provided Mr and Mrs Smith with high visibility gear (the uniforms and PPE referred to by Mr and Mrs Smith). I have accepted Mr Gray's evidence that he provided the high viz gear to Mr and Mrs Smith after Mr Smith had noticed it in his garage and enquired about whether they could have some on the basis that it would be good advertising for Aspect Group. Mr Gray consented and supplied the high viz clothing but did not require Mr and Mrs Smith to wear it.

[33] Mr and Mrs Smith provided their own tools including scaffolding to undertake their work, but it was common ground that Mr Gray provided at least one piece of heavy machinery and would provide the materials such as the plaster necessary for the work to be undertaken.

[34] Mr and Mrs Smith were left unsupervised to undertake their work. There were no timeframes set in which each job had to be undertaken and the quality of their work was not reviewed on a regular basis.

[35] I am satisfied Mr and Mrs Smith decided on the hours they would work. Mrs Smith told me that they started at 7.30am each day because that is what they had traditionally done. Mr Smith told me the hours were to accommodate his family needs.

[36] Mr Gray did inform Mr and Mrs Smith of jobs that needed to be completed during the day if such jobs came up.

[37] I have concluded that Mr and Mrs Smith undertook their work with little or no supervision, which may be indicative of a contracting relationship but also equally is indicative of an employment relationship. However, they provided their own tools including the scaffolding required for them to undertake their work and they were free to set their own hours of work. Mr and Mrs Smith did not charge Aspect Group for the time taken to travel between sites to undertake work. These factors are indicative of a contracting relationship.

[38] Factors indicative of an employment relationship include the provision of a van including the fuel and materials, such as the plaster, for the work to be undertaken.

Integration test

[39] This test examines the extent to which Mr and Mrs Smith were integrated into Aspect Group's business. That is whether the work undertaken by Mr and Mrs Smith was integral to the business and whether Mr and Mrs Smith had become part and parcel of the business.

[40] The work undertaken by Mr and Mrs Smith could have been undertaken by either employees or sub-contractors.

[41] Aspect Group provided a full service to clients including building, plastering and painting of repairs and new building work. It could do that by engaging sub-contractors to perform each aspect of the work, or employ workers.

[42] I consider the work performed by Mr and Mrs Smith was an integral part of Aspect Group's business because in order for the painters to do their work Mr and Mrs Smith had to complete theirs. Without this work being done Aspect Group could not complete its work for its clients. However, the work could have been undertaken by either an employee or a contractor and so is not strongly determinative of Mr and Mrs Smith's status one way or the other.

Fundamental test

[43] This test examines the extent to which Mr and Mrs Smith took on financial risk themselves in providing their services to Aspect Group including whether they were in business for themselves.

[44] Mr and Mrs Smith produced and submitted invoices at the end of each week stipulating the number of hours they had worked and the amount to be paid with a deduction of 20% as tax. Mr and Mrs Smith were not registered for GST so there was no GST added to the amounts claimed.

[45] The invoices were accompanied by time sheets which recorded the time taken for each job including the address of the job so that the work could be itemised for the clients and the clients charged for the work.

[46] Other contractors working for Aspect Group gave evidence of their ability to work for others as they wished. Mr and Mrs Smith told me they did not work for anyone else because they were kept busy with the work Aspect Group provided to them.

[47] Mr and Mrs Smith were not in business for themselves – their invoices were addressed to each of them personally. They were not registered for GST and did not pay ACC levies or carry insurance cover.

[48] The invoices issued to Aspect Group had withholding tax of 20% deducted. This calculation was made by Mrs Smith prior to submitting each invoice.

[49] Mr and Mrs Smith's personal IRD records show that for the duration of their engagement with Aspect group Mr and Mrs Smith were subject to scheduler payments

for their tax whereas for their employment at Maiden Construction Limited they had PAYE deducted from their weekly pay.

[50] The cost for the jobs undertaken by Mr and Mrs Smith had already been confirmed by Aspect Group with the client before Mr and Mrs Smith were advised of the address and job to be undertaken. Mr Gray would however, check with Mr Smith about the time Mr Smith estimated the job would take, but only to check what profit Aspect Group would achieve on completion of the job.

[51] Mr and Mrs Smith could charge for each hour spent on each job but were unable to set a price to allow them to make a profit. They had a standard charge out rate for each hour worked and had to account for each hour to Aspect Group. They did not benefit from any increased profit to Aspect Group by undertaking their work in a lesser time than set by Aspect Group with its client.

[52] The fundamental test has elements of both an employment relationship and a contracting relationship.

Industry practice

[53] There was little evidence as to the industry practice. Mr Gray's evidence is that when he worked in Rotorua it was uncommon for companies to sub-contract all aspects of the work to be carried out but that in Christchurch it was quite common.

[54] Both parties conceded that industry practice is mixed and it could be argued that traditionally the industry is characterised by contracting.

Overall impression

[55] The overall impression from all of the facts in this case of the underlying and true nature of the relationship between Mr and Mrs Smith and Aspect Group is that of an independent contractor.

[56] Evidence shows that the hourly rate for employees employed to undertake plastering work ranges between \$15 and \$30 per hour. Mr and Mrs Smith were engaged at the rate of \$35 per hour which is significantly higher than the hourly rate they enjoyed as employees at Maiden Construction Limited. Mr and Mrs Smith provided invoices at the end of each week on which they themselves calculated and

deducted 20% tax. Had Mr and Mrs Smith been GST registered at the time they could have charged GST in addition to the \$35 hourly fee for their time.

[57] Mr and Mrs Smith provided their own tools for their work including scaffolding. At the commencement of the relationship Mr and Mrs Smith intended to start their own business and consistent with that they incorporated a company on 30 September 2015 although I accept the company was never active.

[58] At a meeting on 24 September 2015, Mr Stuart Manuel outlined to all of those engaged by Aspect Group the proposed changes to the structure of Aspect Group. This included a proposal that all contractors be engaged as employees. During this meeting, Mr Smith made it clear that it was his preference to be an employee.

[59] I find the evidence shows that on balance it is more likely than not that Mr and Mrs Smith were independent contractors. The Authority has no jurisdiction to investigate their claim that they were unjustifiably dismissed.

Costs

[60] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Aspect Group shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr and Mrs Smith 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.

[61] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority