

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 262  
5408366

BETWEEN                    KYLEE SOANES and  
   MICHAEL BROWN  
   Applicants

A N D                            CARDRONA ADVENTURE  
   PARK LIMITED  
   Respondent

Member of Authority:      Rachel Larmer

Representatives:            Applicants in person  
   Ian and Debbie Soanes, for Respondent

Investigation Meeting:      19 June 2013 by telephone conference

Date of Determination:      20 June 2013

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**DETERMINATION OF THE AUTHORITY**

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**A      The Authority does not have jurisdiction to investigate the applicants' claims because the parties were not in an employment relationship.**

**Named respondent**

[1]      By consent the name of the respondent is changed to Cardrona Adventure Park Limited.

[2]      The Statement of Problem and Statement in Reply named Ian and Debbie Soanes<sup>1</sup> (Mr and Mrs Soanes) as the respondent. Both parties subsequently advised the Authority that the correct respondent was Cardrona Adventure Park Limited (the respondent) which is owned by Mr and Mrs Soanes who are the shareholders and

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<sup>1</sup>      Ian Soanes is Kylee Soanes' father and Debbie Soanes is her stepmother. Mr Brown is Ms Soanes' partner.

directors. I am therefore satisfied the pleadings and evidence has been served on the named respondent.

### **Employment relationship problem**

[3] Ms Kylee Soanes and her partner Michael Brown (the applicants) have filed claims for unjustified dismissal and wage arrears with the Authority.

[4] The respondent disputes the Authority's jurisdiction to investigate the applicants' claims. It says the parties were never in an employment relationship. The respondent says the parties entered into an Agreement for the applicants to manage the respondent business which made it clear the applicants were in business on their own account.

[5] Apart from one limited exception which does not apply here,<sup>2</sup> the Authority only has jurisdiction to investigate claims involving parties who are or were in an employment relationship so the jurisdiction issue was investigated as a preliminary issue. This determination relates to the jurisdiction point only.

[6] The jurisdiction issue was investigated by Authority during an investigation meeting which was conducted by telephone conference because the witnesses lived in different locations and none of them were able to travel to Auckland. The applicants and Mr and Mrs Soanes provided information in advance of the investigation meeting and they were all questioned by telephone.

### **Issue**

[7] In order to decide whether the parties were in an employment relationship the Authority must determine the real nature of the parties' relationship.

### **What is the real nature of the parties' relationship?**

[8] Section 6(1) of the Employment Relations Act 2000 (the Act) defines an employee as a person employed to work for hire or reward under a contract of service.

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<sup>2</sup> Section 134(2) of the Act.

[9] When deciding whether the applicants were employed by the respondent under a “*contract of service*”<sup>3</sup> (i.e. as employees) section 6(2) of the Act requires the Authority “*to determine the real nature of the relationship.*”

[10] In doing so the Authority must consider all relevant matters, including the stated intention of the parties, but it is not to treat the label the parties put on their relationship as determinative.<sup>4</sup>

[11] The leading case on the s.6 definition of employee in the Act is the Supreme Court decision in *Bryson v. Three Foot Six (No 2) Ltd.*<sup>5</sup> The Supreme Court in *Bryson* set out a number of principles to be considered when determining the real nature of a relationship. These are considered below.

#### *Written terms*

[12] The parties entered into a written Agreement dated 3 August 2012. The agreement was between the respondent as “*Owner*” and the applicants as “*Manager*” (the term manager is used in the Agreement to refer to both applicants).

[13] The Agreement provides for the applicants to manage the respondent business, which provided quad bike and monster truck rides. The Agreement did not provide for the payment of wages or salary. The applicants were to be paid a “*management fee*” which equalled the net profit<sup>6</sup> of the respondent while they managed the business. The management fee was payable monthly in arrears, seven days after the monthly business report had been provided by the manager to the owner.

[14] This meant the applicants bore the full risks of the business but would also take any profit the business made whilst under their management. The assumption of risk and the ability to profit from the successful application of personal effort is a feature of a relationship in which the person providing their services is in business on their own account. I consider the assumption of risk by the applicants is strongly indicative of an independent contractor relationship instead of an employment relationship.

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<sup>3</sup> Section 6(1) ERA.

<sup>4</sup> Section 6(3) ERA.

<sup>5</sup> [2005] ERNZ 372 (SC).

<sup>6</sup> Sales less costs of sales and outgoings.

[15] Clause 5 of the Agreement identifies the limitations on the manager. These include that the manager was subject to the “*overall direction and control of the owner*” in performing management duties and the manager required the owner’s prior written approval regarding leasing arrangements, to borrow money or to settle legal proceedings. The manager could not assign or subcontract the contract. These limitations are consistent with an employment relationship so tend to suggest the applicants were not independent contractors.

[16] Clause 17 of the Agreement was headed “*No implied relationships*” and states that “*Nothing in this Agreement constitutes either party as [...] employee of the other party [...]*”. This indicates the parties did not intend to enter into an employment relationship. However, under s.6(3)(b) of the Act, the parties’ stated intention is not determinative of the status of their relationship. All relevant factors must still be considered.

[17] Clause 22 of the Agreement which deals with resolution of disputes provides for arbitration prior to any legal action other than injunctive relief. The reference to arbitration is inconsistent with an employment relationship<sup>7</sup> but consistent with a contract for services. This suggests the applicants were not employees.

[18] Overall I consider the written terms of the Agreement indicate the parties had entered into a contract for services not a contract of service (i.e. an employment relationship).

#### *Operation of the relationship in practice*

[19] Apart from the applicants deciding to pay themselves wages (discussed later) there was no evidence that the parties diverged from the written terms and conditions in the Agreement. There was also no evidence that they supplemented the written terms and conditions by the way the relationship operated in practice.

#### *Control test*

[20] Despite clause 5 in the Agreement providing that the applicants were subject to the owners’ control I find that the applicants acted almost entirely autonomously. They decided how to run the business, when to open and close the business, what

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<sup>7</sup> Which is governed by employment law which cannot be contracted out of

services to provide and how that would occur as well as what work related activities they would or would not do on any given day.

[21] Mr and Mrs Soanes gave the applicants training before they took over management of the business and the former were available to the latter by phone to answer queries. I find Mr and Mrs Soanes were almost completely absent from the business because whilst it was managed by the applicants the Soanes travelled around to shows with their monster truck. There was no evidence they directed or controlled the work the applicants did.

[22] I consider Mr and Mrs Soanes exercised a minimal if any level of control over the applicants. The respondent showed and told the applicants what was necessary in order to run the business but the day-to-day running of the business was left in the applicants' hands. It was up to the applicants to decide when they opened the business and how they actually carried out their management duties and maximised the profit of the business.

[23] I consider that the control test favours the existence of an independent contractor relationship, not an employment relationship.

#### *Integration test*

[24] The focus of the integration test is on the extent to which the applicants were in all respects an integral part of the business. I find that this test is neutral in that the applicants did not obviously have a stand-alone or external or internal role with the respondent.

#### *Fundamental or economic reality test*

[25] The question in terms of the fundamental test is whether the applicants engaged in business on their own account.

[26] I consider that the evidence suggests that they did because they were able to profit if the business was doing well. Likewise they took risk in that they were not entitled to be paid wages or salary under the Agreement because their sole remuneration was a management fee based on the profits of the business.

[27] I consider this test points to the applicants being independent contractors, not employees.

### *Industry practice*

[28] There was no evidence about industry practice, so I do not draw any conclusions about that.

### *Common intention*

[29] I find that there was no common intention to enter into an employment relationship. There was no discussion about the payment of salary or wages prior to the Agreement being entered into. Clause 17 of the Agreement suggests the parties intended to enter into an independent contracting arrangement.

### *Taxation arrangements*

[30] The applicants had not set themselves up for tax purposes as if they were in business on their own account. I consider indicates the parties were more likely to be in an employment relationship.

### *Wage payments*

[31] During the relationship Ms Soanes processed “wage payments” for her and Mr Brown. Ms Soanes received three wage payments and Mr Brown received one wage payment from 03 August to 15 October 2012 being the period during which they managed the business.

[32] Mr and Mrs Soanes say that the applicants were not authorised to pay themselves wages. They say they applicants’ decision to pay themselves wages was on their own initiative, was contrary to the terms of the Agreement and without the respondent’s agreement. The Soanes say that the respondent’s accountant has coded the applicants’ wage payments as drawings from the business.

[33] Although wage payments will normally support the existence of an employment relationship I consider the circumstances of the wages paid in this case do not support the existence of an employment relationship.

### *Tools and equipment*

[34] All of the plant, tools and equipment needed to run the respondent business remained on the premises while the applicants managed the business. I consider this

is a neutral factor because the nature of the business means this arrangement could apply equally to an independent contractor or an employment relationship.

*Other*

[35] While the applicants managed the respondent business they also lived in Mr and Mrs Soanes' rental property and looked after their animals. The respondent paid for all outgoings and for the applicants' food costs. This suggests the applicants were managing the respondents business on their own account.

**Outcome**

[36] After carefully weighing all relevant factors I find the balance of convenience weighs against the existence of an employment relationship. I consider the evidence favours the existence of an independent contractor relationship.

[37] I therefore find that it is more likely than not that the parties were not in an employment relationship. In the absence of an employment relationship the Authority does not have jurisdiction to investigate the applicants' claims.

**Costs**

[38] The parties were not legally represented so the issue of costs does not arise.

**Rachel Larmer**  
**Member of the Employment Relations Authority**