

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 41/09  
5127668

BETWEEN                      JOHN WILLIAM TE AMO  
   Applicant  
  
AND                                BECON LIMITED  
   Respondent

Member of Authority:      Philip Cheyne  
  
Representatives:            John Shingleton, Counsel for Applicant  
   Denis O'Rourke, Advocate for the Respondent  
  
Investigation Meeting      18 & 19 November 2008 at Christchurch  
  
Determination:              6 April 2009

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**DETERMINATION OF THE AUTHORITY**

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[1] John Te Amo is an experienced businessman who with a group of others formed a company called Good Stuff Investments Limited. The aim of the company was to establish a plant to recover recyclable materials from the commercial waste stream. Becon Limited (as it is now called) is a wholly owned subsidiary of Good Stuff Investments and is the entity that operates the recycling plant located in Christchurch. Mr Te Amo says that he was employed by Becon from October 2007 until April 2008 when he was unjustifiably dismissed. His employment relationship problem is his personal grievance claim and his claims for arrears of wages and holiday pay. Becon on the other hand says that Mr Te Amo was always an independent contractor and never an employee so he cannot claim a personal grievance, arrears of wages or holiday pay.

[2] The task for the Authority is to apply the law about the meaning of an employee in the present circumstances. There are some significant disputes about facts but most of these disputes reflect the enmity that has developed between the parties rather than the true relevance of the disputed issues to the resolution of this

problem. I will focus on resolving only those disputes necessary for this determination.

### **Employee defined**

[3] Under the Employment Relations Act 2000 employee means any person of any age employed by an employer to do any work for hire or reward under a contract of service. In deciding whether a person is employed by another person under a contract of service, the Authority must determine the real nature of the relationship between them. To do that the Authority must consider all relevant matters including those that indicate the intention of the persons but is not to treat as a determining matter any statement by the persons that describes the nature of their relationship. All that is set out in s.6 of the Act.

[4] The leading case is *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721. There the Supreme Court said that *all relevant matters* include the written and oral terms of the contract between the parties; any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice; and features of integration and control and whether the contracted person has been effectively working on his own account.

[5] I will first consider the written and oral terms of the contract.

### **Mr Te Amo's contract**

[6] There is no written contract setting out the terms of the parties' relationship at the relevant time. It is helpful therefore to explain a little of the context in which the parties' wholly oral agreement arose.

[7] A company called Meta NZ Limited operated Christchurch's three waste transfer stations on lease from the Christchurch City Council. Meta is wholly owned by a charitable trust. Some Meta directors and managers offered to buy Meta from the trust but when their offer was declined they resigned to form their own business processing recyclable materials from the commercial waste stream. Mr Te Amo was known to at least some of those involved because of shared business interests between him (or his interests) and Meta. He was invited to participate in the formation discussions which eventually resulted in Good Stuff Investments being incorporated in June 2007 as the investment vehicle and Becon incorporated in September 2007 as

the operational company. Throughout this period Mr Te Amo was operations manager for a company called Reworks Limited pursuant to an agreement between Rework's shareholders. Reworks was partly owned by Meta and partly by Concut Skips Limited, a company in which Mr Te Amo holds a substantial interest. In 2007 it was agreed that Concut Skips Limited would sell its shares in Reworks to Meta and that Mr Te Amo's employment with Reworks would end. Pursuant to that agreement Mr Te Amo's employment with Reworks ended on 10 October 2007.

[8] Richard Lloyd was chief executive of Meta and one of those who offered to purchase the company. When the offer was rejected he resigned and took a leading role in the establishment of Good Stuff Investments and Becon. He and Mr Te Amo had worked closely with one another on business arrangements that eventually resulted in the shared ownership of Reworks and thereafter. It was Mr Lloyd who invited Mr Te Amo to be part of the formation of Good Stuff Investments and Becon. Mr Lloyd's evidence which I accept is that the shareholders of Good Stuff Investments who agreed to work for Becon discussed as a group that he would be chief executive, Mr Te Amo would be a contractor for the plant set-up project and others would have other specific roles as contractors. Mr Lloyd's evidence is that the five people involved as contractors (and the others) all understood that they would be engaged by Becon as independent contractors during the establishment phase of Becon's business. Several of the other contractors gave evidence in support of Mr Lloyd. Only Mr Te Amo is saying that he believed his engagement would be as an employee. On balance I accept Mr Lloyd's evidence that it was understood by all involved including Mr Te Amo that their engagement during Becon's establishment phase was to be as independent contractors not employees.

[9] I should note that there were other iterations of the business to recover recyclable materials from the commercial waste stream but those involved eventually settled on the arrangements described above. What has not yet been but should now be mentioned is that there was also an intention for Becon to employ a full-time operations manager after the establishment phase which was likely to be Mr Te Amo.

[10] Against the context described above there were discussions between Mr Lloyd and Mr Te Amo around the time that Mr Te Amo became free of his Rework's obligations. There is some conflict between Mr Lloyd and Mr Te Amo about precisely what was said but I prefer Mr Lloyd's evidence. They discussed and agreed

a payment of \$35,000.00 for six months payable fortnightly plus GST (\$70,000.00 per annum). Mr Te Amo was asked to speak to Christopher Stent, another of the shareholders, to sort out the payments. The arrangements between Mr Lloyd and Mr Te Amo were sufficiently concluded by 8 November 2007 for Mr Lloyd to report to Becon's board that:

*John Te Amo has been contracted on a management consultancy basis for 6 months to supervise operations (at \$35,000 for initial 6 months) and there are 4 staff members employed so far ....*

I accept that Mr Te Amo probably did not see this report at the time but it accurately reflects Mr Lloyd's discussions with Mr Te Amo; in other words, Mr Lloyd and Mr Te Amo discussed his engagement under a contract for services rather than a contract of service basis.

[11] Over this same period, Mr Stent and Mr Te Amo had a discussion where Mr Te Amo provided his bank account details and was told that a standing GST invoice would be required for the regular payment. I accept Mr Stent's evidence about this discussion. Mr Te Amo told Mr Stent that he had a GST registered partnership with his wife that would be the invoicing entity. Mr Stent completed the bank automatic payment form and described the twice monthly payment as *Becon Canterb Mgnt Fees* which is how the payments are described on Mr Te Amo's bank statements. The regular amount actually paid was \$3,281.25. That was calculated by dividing \$35,000.00 by 6, dividing by two for twice monthly payments and then adding GST. No deduction was made for PAYE. These payments commenced on 19 November 2007 and continued twice monthly until April 2008. Mr Stent's evidence confirms that Mr Te Amo intended through his oral agreement with Mr Lloyd to be an independent contractor. Mr Stent neglected to ensure that a GST invoice was actually provided by Mr Te Amo before initiating the payments or claiming the GST content in Becon's own GST returns but that does not detract from the point just made.

[12] In his evidence Mr Te Amo speaks of describing these payments as *salary* in various conversations he had with Mr Lloyd and others but that does not significantly undermine the other evidence which shows his and Becon's intentions at the time of their agreement. He denies personally seeing the payments described as *Becon Canterb Mgnt Fees* on the bank statements of the account held jointly with his wife and says that he did not realise that GST was included. I note also that no PAYE was

deducted. Mr Te Amo impresses as someone who would know what payments were due to him and would not miss the fact that a payment much larger than expected (on the basis of his evidence) was regularly being paid into his bank account. I conclude that Mr Te Amo knew that he was being paid as an independent contractor in accordance with the common intention.

[13] Mr Te Amo says that it was agreed that he would be the operations manager with responsibility for running the whole site. I prefer Mr Lloyd's evidence to the effect that Mr Te Amo's role was to help set up permanent operations including site preparation, setting up a trial plant and setting up the main plant.

[14] From all this I conclude that the orally agreed terms were for Mr Te Amo to be engaged as an independent contractor.

### **How the relationship worked in practice**

[15] From the outset Mr Te Amo performed his responsibilities with the discretion and flexibility commonly enjoyed by a senior manager engaged under an employment agreement. In light of that conclusion it is not necessary to review details or resolve evidential conflicts about those details. However the way Mr Te Amo worked was also consistent with an experienced businessman actively involved in the day to day work of establishing a new business venture in conjunction with business partners.

[16] In January 2008 Mr Te Amo asked Mr Lloyd to provide proof of his earnings to a financial institution in support of a loan application. There is a letter dated 21 January 2008 from Mr Lloyd on behalf of Becon to the institution (QED). It reads:

*Dear Sharon*

*Employment of John Te Amo*

*I can confirm that John is currently contracted to provide management services to Becon Canterbury Ltd. Due to a restraint on post-employment activity John has been contracted as a consultant until the end of February 2008, at which point it is my intention to offer him fulltime employment as the Operations Manager for Becon's Christchurch business.*

*John's management fee is \$3,281.25 per fortnight. A salary package at least equal to the value of the management fee will be negotiated with John prior to the end of February.*

...

[17] There is a second letter of the same date confirming Mrs Te Amo's earnings as an employee of Becon. It is common ground that Becon employed Mrs Te Amo. There is evidence from Jasmine Hazeldine (Mr & Mrs Te Amo's daughter) that she collected these letters from Mr Lloyd and faxed them to QED. She also told me that she found the originals several months before the investigation meeting, having put them away in her drawer once they were faxed. That evidence rebuts Mr Lloyd's evidence that he gave the letters to Mr Te Amo. There would be some significance in Mr Te Amo not disputing the letter's description of his relationship at the time but he says that he never saw the letters. After the investigation meeting Becon's representative contacted the receivers of QED to get the original letters but was told that Mr Te Amo had already obtained them. Counsel for Mr Te Amo then told the Authority that he had found the originals in his files and (as requested) forwarded them to the Authority. The sworn evidence is in conflict but I do not think it appropriate to use the subsequently provided information to resolve that conflict without further investigation. I will treat Mr Lloyd's letter to QED as confirmation of Becon's view of the arrangement but accept Mr Te Amo's evidence that he never saw his letter until after the relationship ended.

[18] The letter does refer to a forthcoming change to the relationship. On 19 January 2008 there was discussion during a meeting of Good Stuff Investments shareholders about the need to negotiate employment agreements for the two most senior management positions (Mr Lloyd and Mr Te Amo) in time for the commencement of commercial operations then expected to be by March 2008. Mr Te Amo made a diary note on or about 27 January 2008 reflecting his expectations about the terms of an employment agreement. Mr Te Amo says that in February 2008 Mr Stent asked him whether he would be interested in becoming a contractor to Becon. Mr Stent's evidence, which I prefer, is that Mr Te Amo discussed with him a proposal that he remain a contractor to Becon, contrary to the mutual expectation to that point that he would become an employee.

[19] There is evidence from Mr Te Amo and his business advisor to the effect that Mr Te Amo sought his advice in March 2008 about the benefits of becoming a contractor rather than remaining an employee. The advisor's evidence is hearsay to the extent that it supports Mr Te Amo's contention that he always understood his position was that of an employee and it makes no difference to my preference for Mr Lloyd's and Mr Stent's evidence mentioned above. In any event, Mr Te Amo's

deliberations culminated in him putting a proposal to the board of Becon on 1 April 2008. That part of the report reads:

*I would like to take this opportunity to seek the board's input into formalizing a labour contract for myself rather than an employment contract. This was originally to be revisited in February but time has run away.*

*Key facts at present:*

- 1. I currently pay my own fuel, phone, vehicle and safety footwear.*
- 2. I have used my own credit card to purchase consumables to keep Becon running (mainly diesel fuel).*
- 3. I have over \$100k invested in a hook truck and skips currently being used by Becon.*
- 4. I recently spent in excess of \$15k on my container lifter in order to achieve the desired result in Amberley.*
- 5. An accurate record of hours worked for February and March equalled 62.5 hours per week. Annualised that into my current salary works out to \$21.54 per hour, before tax.*

[20] There is a submission for Mr Te Amo that the opening sentence indicates that he understood himself to be engaged under an employment contract at the time he wrote his report. However, his report was in response to the discussions initiated in January 2008 about negotiating an employment contract to apply after the end of the then current arrangement. Read in that context then the report does not convey the understanding argued for. A significant aspect of Mr Te Amo's report for present purposes is the information about the use of his own (or associated interest's) equipment in performing his work for Becon. That is consistent with the original agreement that Mr Te Amo be an independent contractor.

[21] Becon's board discussed Mr Te Amo's proposal. The board decided it preferred to offer Mr Te Amo an employment agreement but had some flexibility to agree on a management contract with him for a year. One of the directors (Denis O'Rourke) and Mr Lloyd were left to progress the matter. In addition the board resolved to formalise an agreement about and pay for the use of Mr Te Amo's equipment. As a result Mr O'Rourke met with Mr Te Amo on 4 April 2008 and presented a draft employment agreement for consideration. I accept Mr O'Rourke's evidence that Mr Te Amo said he wanted to remain an independent contractor. In part that related to a provision in the proposed employment agreement about conflicts of interest included in response to Becon's perception that Mr Te Amo continued to have

some role in the business of Concut Skips despite that business having been sold to a company controlled by Mr Te Amo's daughter and her partner. Mr Te Amo expressed a preference to remain an independent contractor to facilitate his other business interests which included the possibility of operating a pre-treatment plant under contract with Becon to supply Becon with pre-sorted materials. The discussion with Mr O'Rourke was amicable and Mr Te Amo was left to consider Becon's preference for an employment agreement and get advice about the proffered agreement from his solicitor. On 11 April 2008 Mr Te Amo's solicitor responded with various amendments to the proposed employment agreement. Those proposals were unacceptable to Becon and Mr O'Rourke eventually withdrew any offer of employment. Mr O'Rourke also terminated Mr Te Amo's existing contract on the basis of it being a contract for services.

[22] These exchanges near the end of Mr Te Amo's work for Becon demonstrate that both parties at the time considered that there had been no change since October 2007 to the nature of their relationship.

### **Control**

[23] It cannot be said that Becon exercised any significant degree of control over how Mr Te Amo discharged his responsibilities on a day to day basis. There was no hierarchical reporting structure other than an agreement between Mr Lloyd and Mr Te Amo that the latter would not liaise directly with Becon's board. A job description was not established and performance objectives were not discussed or set. Mr Te Amo was not required to produce regular reports. There was a complete absence of the control mechanisms usually established between a company and its senior managers. Mr Te Amo was free to work (or not) the hours and days that suited him. Overall he put considerable time and energy into the establishment of the business consistent with an experienced businessman doing what was necessary to bring a project to fruition.

### **Integration test**

[24] Lord Denning gave the classic description of this test in *Stevenson Jordan & Harrison Ltd v Macdonald* [1952] 1 TLR 101:

*under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his*

*work, although done for the business, is not integrated into it but is only accessory to it.*

[25] For Becon it is said that Mr Te Amo's work could not have been an integral part of its business because it did not have any permanent or comprehensive operation as a materials recovery facility during the time he worked there. I do not accept that position. Mr Te Amo's work was integral to establishing Becon's business. It is not necessary to canvass the fine details of this conclusion other than to say that an outside observer would probably not be able to distinguish Mr Te Amo's role in the business from that of a senior manager engaged under an employment agreement. If this test was decisive Mr Te Amo would be classified as an employee.

### **Fundamental test**

[26] Here, the question is whether Mr Te Amo engaged himself to perform the services with Becon as a person in business on his own account: see *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581.

[27] Mr Te Amo was involved in the formation of the business as a person in business on his own account, as explained above. He (along with others) provided substantial capital to Good Stuff Investments. Mr Te Amo deployed his own (or associated interest's) equipment as indicated by his report mentioned above. In all his endeavours for Becon Mr Te Amo acted as a person in business on his own account.

[28] Above, there is a finding that Mr Te Amo told Mr Stent that he intended to use an existing GST registered partnership between him and his wife as the invoicing entity. No invoices were actually provided by or on behalf of Mr Te Amo and he apparently did not treat the money paid to him as business income for the partnership. However the correct treatment of business income such as that received by Mr Te Amo from Becon is a consequence of the correct legal classification of his status rather than determinative of it.

### **Conclusion**

[29] The integration test points to the conclusion that Mr Te Amo was employed under a contract of service. The control test indicates he was not an employee as does the fundamental test. The oral agreement was for a contract for services and that did not vary while the relationship subsisted. From this I conclude that the real nature of

the relationship was not employment. It follows that Mr Te Amo cannot proceed with a personal grievance or his other claims before the Employment Relations Authority.

[30] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority