

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 243
5561049

BETWEEN

DONALD THOMPSON
Applicant

A N D

MIDDLE EARTH FLYING
SCHOOL LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Richard McNaughton, Advocate for the Applicant
Jeff Lim, Advocate for the Respondent

Investigation Meeting: 10 and 11 August 2015 at Hamilton

Oral Determination: 11 August 2015

Written Record Issued: 14 August 2015

**RECORD OF ORAL DETERMINATION OF THE AUTHORITY ON A
PRELIMINARY ISSUE ONLY**

Employment relationship problem

[1] The employment relationship problem raised by Mr Thompson is that:

- (a) He was unjustifiably dismissed from his employment by Middle Earth Flying School Limited (Middle Earth); and
- (b) That he was unjustifiably disadvantaged.

[2] Mr Thompson seeks immediate reinstatement to his position at Middle Earth, reimbursement of lost income, commissions, compensation for hurt and humiliation together with costs.

[3] Middle Earth denies that Mr Thompson was an employee and says it engaged Mr Thompson as an independent contractor primarily to recruit students for the school and to attend to ancillary functions including student welfare and care.

[4] By agreement with the parties, the investigation meeting was held to determine as a preliminary matter whether Mr Thompson is an independent contractor or an employee. This determination deals with that issue only. If Mr Thompson was an employee, the Authority will have jurisdiction to deal with his personal grievance claims. If Mr Thompson was an independent contractor, the Authority does not have jurisdiction.

Investigation meeting

[5] As permitted under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all the evidence received. The determination states the findings and relevant facts and legal issues in relation to the preliminary matter and makes conclusions in order to efficiently dispose of the matter.

[6] The investigation of this preliminary matter took 1½ days in the Authority. Helpful closing submissions were provided by both representatives at the conclusion of the investigation meeting.

[7] For the Authority's investigation, the applicant, Mr Thompson, provided a written statement and I also took note of two previous affidavits filed by him. His partner, Ms Sue Turner, provided a witness statement and affidavits were provided by Mr Thompson's former partner, Ms Kylie Worth, and Mr Kerry Whitfield who had previously dealt with Mr Thompson. Ms Worth and Mr Whitfield did not attend the investigation meeting and were not questioned on their evidence. I have accordingly given their evidence less weight.

[8] Each witness swore that their evidence was true and correct.

Relevant facts

[9] Mr Thompson was employed by Helipro Aviation Training Limited (Helipro) under a fixed term employment agreement for three months from March until May 2014 at which time he was made redundant. Helipro subsequently went into receivership. Prior to his employment by Helipro, Mr Thompson had a number of different roles including involvement with private training and education organisations. From 2005 to 2010, Mr Thompson was a director of a company called Work Emerge which he established in 2005. It was subsequently struck-off in 2010

after having changed its name to that of Don Thompson International Limited (Don Thompson International).

[10] When Mr Thompson's employment with Helipro ended, he made contact with Mr David Giles of Middle Earth about possible opportunities to work together. Mr Thompson was interested in recruiting students for Middle Earth, particularly international students. Recruitment of students was one of Mr Thompson's skills. Mr Thompson and Mr Giles met to discuss opportunities in June 2014. After the meeting, Mr Thompson rang Mr Mitchell Coombe, who was the general manager of Middle Earth at the time.

[11] On 22 June 2014, Mr Thompson sent an email to Mr Giles and to Mr Coombe which outlined a proposal for Mr Thompson to work with Middle Earth. This email is at p.151 of the applicant's bundle of documents. I now refer to the email, which is as follows:

Hi Mitchell and David,

It has been awesome talking to you over the last few days, and I am very excited about our future working together, at your request I have outlined a proposal for working within the Middle Earth Flying School brand.

I will continue to operate separately as Don Thompson International, my primary role will be to supply students to Middle Earth and i will be remunerated for this based on 10% of the total earnings I bring in with each student. This will be invoiced, and I can be treated as an 'independent contractor' which works much better than PAYE for me, it also means i can maintain control of my work day.

e.g. if a student brings \$10,000 of work to the school I will receive a \$1,000 commission.

I would like to assist with the NZQA and Student Care department of the school, I view this as part of my commission and commitment that I make to international students when i engage them and will most likely spend a few days a week on site at Matamata to aid this. I am also happy to manage any rental accommodations that are required to house students, I have a background in this as currently have students living with me in Tauranga. If possible i would like to manage this, meaning if a profit is made it will be able to help me survive between commission payments.

I am confident that I can supply the school with its target of 2000 flying hours per year, I am also excited by the talk that shares may become available in the company and I agree that one year before a review of this would be a reasonable time frame to enable you to see what i can add to the company. I have made several good

connections with students in the past few days, and hope to secure the first round of students to start later this year. Piece of Cake!

*Regards,
Don Thompson*

(Mitchell: To aid me in getting set up, can I please have access to a school e-mail account, for ease of marketing I would like to use the title 'International Business Manager', it's easier when dealing with students if they think it is just a single company.)

[12] Mr Thompson immediately began undertaking recruitment work for Middle Earth.

[13] Mr Thompson said his original intention was as stated in the email, to contract his services to Middle Earth. However, Mr Thompson says the arrangement changed drastically within a matter of months and he took on more and more work and effectively started to run Middle Earth's operations. Mr Thompson says the changes to the arrangement meant he became an employee of Middle Earth.

[14] Middle Earth was established by Mr Giles in 2007 so that he could continue his passion for flying and because he enjoyed flight instruction. It is a small operation which has never made a profit. Middle Earth has only employed one person in the period of its existence, and that is Mr Celroy Mascarenhas who was employed as a B category flying instructor in November 2014. Middle Earth only ever had one or two students. Mr Giles hoped to increase, and did increase student numbers, after entering into the arrangement with Mr Thompson.

[15] From the evidence so far, it seems to me Mr Giles wished to increase student numbers when taking on Mr Thompson and then wished to bring Mr Thompson and Mr Coombe on as shareholders in the business.

[16] Middle Earth says the independent contractor relationship with Mr Thompson never changed after the email of 22 June 2014. It says Mr Thompson voluntarily took on more work than had been agreed but that Middle Earth never agreed to employ him to do such work and did not do so.

The law

Employment relationship or independent contractor relationship?

[17] Section 6(1) of the Employment Relations Act 2000 (the Act) provides:

An employee... *is any person ... employed by an employer to do any work for hire or reward under a contract of service.*

[18] In deciding whether Mr Thompson was employed by Middle Earth, the Authority must determine “... *the real nature of the relationship between them*” (s.6(2) of the Act). This assessment includes considering “...*all relevant matters, including any matters that indicate the intention of the persons...*” and “*is not to treat as a determining matter*” any statement by the parties describing “*the nature of the relationship*” (s.6(3) of the Act).

[19] In considering all relevant matters under s.6 of the Act, the Authority shall apply tests such as control, integration and what is known by the shorthand of the fundamental test.

[20] The Authority must examine the terms and conditions of the contract and the way in which it actually operated in practice before it is possible to examine the relationship in light of the control, integration and fundamental tests.

[21] The advocate for the applicant referred me to the well-known case of *Bryson v. Three Foot Six Ltd*¹. When the intention of the parties has to be gathered partly from documents but also from oral exchanges and conduct, the terms of the contract are questions of fact².

[22] The Employment Court in *Poulter v. Antipodean Growers Ltd*³ summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:

- (a) *The Court must determine the real nature of the relationship;*
- (b) *The intention of the parties is still relevant but no longer decisive;*
- (c) *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship;*
- (d) *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’.*

¹ [2005] ERNZ 372

² *Bryson* at para.[20]

³ [2010]NZ EmpC77,17 June 2010 at para[20]

- (e) *The fundamental test examines whether a person performing the service is doing so on their own account;*
- (f) *Another matter which may assist in the determination of the issue is industry practice although this is far from being determinative of the primary question.*

[23] 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.

Intention

[24] This is the starting point. The email of 22 June 2014 from Mr Thompson, in my view, is clear. From the outset of the relationship, Mr Thompson said he wished to operate separately as Don Thompson International. Mr Thompson, in the email, referred to invoicing and being treated as an independent contractor. Mr Thompson also referred to the fact that this arrangement would be better for him than would a PAYE arrangement. There were details in the email referring to commissions payable on work introduced by Mr Thompson. Finally, Mr Thompson requested the title of International Business Manager as it would be easier for students to deal with him as a single company, i.e. as part of Middle Earth as opposed to having two companies.

[25] In my view, Mr Thompson is an experienced businessman. Mr Thompson has been a director/shareholder in a number of companies spanning a number of years. It is apparent to me that Mr Thompson was well aware of the differences between an independent contractor relationship and an employment relationship.

[26] It is my view that the original intention of the parties was that their relationship was to be that of an independent contractor relationship.

Financial arrangements

[27] Mr Thompson says a number of factors changed the relationship from that of independent contract to employment relationship. I am going to go through some of the tests now, but I do not accept Mr Thompson's statement.

[28] Mr Thompson was not paid wages or a salary nor did he ask for wages or a salary to be paid to him. The agreement was always that Mr Thompson receive a 10% commission of earnings on students introduced by him to Middle Earth. When questioned about why he did not receive a salary, Mr Thompson told the Authority that he understood Middle Earth was in financial straits and so did not wish to burden it further and indeed wished the money to stay within the business so that it could grow. Mr Thompson also said he expected to have shares in Middle Earth. As an owner, Mr Thompson did not want to take money out of the business.

[29] In my view, this conduct is a relevant factor and appears to be inconsistent with the conduct of an employee. An employee is paid in wages and has a raft of other entitlements such as KiwiSaver, holiday pay and sick pay. Mr Thompson did not avail himself of any of these entitlements. Mr Thompson, in my view, did not see himself as an employee and did not act as one.

[30] Mr Thompson paid for various items himself. These items were on behalf of Middle Earth and can be seen in Mr Thompson's Westpac bank accounts which were provided to the Authority. Items include:

- (a) The payment for a disabled toilet seat valued at \$89;
- (b) The payment of \$520.60 to Groupead Asia. This was for students to sit examinations;
- (c) Another example of a payment was \$85 to an unpaid instructor.

[31] When questioned about why he did not ask Mr Giles, the owner of Middle Earth, to pay for these items, Mr Thompson's response was that the items needed to be paid for and that Mr Giles would simply say the matter was Mr Coombe's responsibility. Mr Thompson received reimbursement for these items when he asked Mr Coombe for reimbursement.

[32] Mr Thompson also asked for and received \$2,000 in advance, on account of commissions owed to him for students he introduced to Middle Earth. Mr Thompson did not invoice Middle Earth for his services despite being asked to do so by Mr Coombe. Mr Thompson said to the Authority that he wanted the money to stay in the business.

Shares

[33] It was envisaged by Mr Giles, Mr Thompson and Mr Coombe that they would be third each shareholders in Middle Earth. Mr Giles says shares in Middle Earth were to be valued and offered for purchase to Mr Thompson and Mr Coombe. Mr Coombe also understood this to be the process that was required. However, by the time Mr Thompson's role at Middle Earth ended in June 2015, the shares had not been valued or offered for purchase.

[34] There are a number of emails from Mr Thompson which confirm in my view that he understood he was to be offered shares or that they may be available to him and in my view this is another relevant factor when considering the employment relationship/independent contractor argument.

[35] The emails are contained in the applicant's bundle of documents. The first one which I refer to is at p.17 of the bundle. It is an email from Mr Thompson on 29 July 2014 to a Mr John Read. The relevant extract is as follows:

I have taken a role with Middle Earth with the intent of taking shares shortly. It's going ok at the moment. I think there is a lot of mutual benefit the two companies working together John. Lots of benefits for both companies.

[36] The next email is at p.34 of the bundle of documents. This is an email from Mr Thompson to Marcomm01. The relevant part is:

With change comes opportunity. I now have shares in my very own flying school.

[37] The next email is at p.32 and it is an email from Mr Thompson dated 17 March 2015 to Mr Coombe:

I have a fear that because the serious issues are increasing I might not get paid for my invoices of 10% for each student who starts learning to fly nor 30% shares in Middle Earth Flying School Limited.

[38] The final email I want to refer to on this particular issue is at p.28 of the bundle and is an email of 23 March 2015 from Mr Thompson to a Sri Devi:

Are you still recruiting? I have got shares in my own flying school now ...

[39] In my view, this is how Mr Thompson operated as an independent contractor with what he thought to be a stake in the business.

Control

[40] Much was made by Mr Thompson of the daily tasks he said he performed for Middle Earth which indicated a high level of control by Middle Earth over him and as such suggested an employment relationship.

[41] I do not accept that Middle Earth exercised the level of control that Mr Thompson says it did. The following factors are relevant:

- (a) Mr Thompson did not have a job description;
- (b) Mr Thompson was not required to keep certain hours;
- (c) There was no performance monitoring;
- (d) Mr Thompson came and went as he pleased and sent text messages or emails to inform Middle Earth of his movements.

[42] With regard to this last point, one example is an email from Mr Thompson on 6 June 2015 to Mr Coombe and Mr Giles. This document is at p155 of the bundle of documents, which says amongst other things:

I won't be at the next monthly meeting. I will be out of the country from the 18th to the 24th.

[43] There were also text messages provided to the Authority between Mr Giles and Mr Thompson in which Mr Thompson was letting Mr Giles know where he was in terms of sickness suffered by his children.

The underlying and true nature of the relationship

[44] My overall impression is that the relationship was that of an independent contractor, not an employment relationship and I so find.

Determination

[45] As a result of my findings, the Authority does not have jurisdiction to investigate Mr Thompson's personal grievance claims against Middle Earth. Any

claims that Mr Thompson may have against Middle Earth cannot be dealt with in this jurisdiction.

Costs

[46] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are unable to do so, then Middle Earth has 14 days from the date of this determination in which to file a memorandum as to costs and Mr Thompson has a further 14 days within which to respond. The memoranda are to include details of how and when costs were incurred accompanied by supporting evidence.

Anna Fitzgibbon
Member of the Employment Relations Authority