

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 170
5441627

BETWEEN

BRYCE TOZER
Applicant

A N D

FRANIX CONSTRUCTION
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Hugh Fulton, Counsel for Applicant
David Dickinson, Counsel for Respondent

Investigation Meeting: 14 April 2014 at Auckland

Submissions Received: At the investigation

Date of Determination: 5 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Bryce Tozer, claims that he was unjustifiably dismissed by the respondent, Franix Construction Limited (Franix) on 9 August, following a refusal by it to pay his agreed remuneration.

[2] The respondent, Franix says Mr Tozer was not dismissed, he chose not to return to work following discussions about Franix's financial situation and the impact on his remuneration. Further, Franix denies the existence of an employment relationship at any time with Mr Tozer. Franix says Mr Tozer, was, at all material times, an independent contractor.

Issue for determination

[3] The issue for determination by the Authority is whether an independent contractual relationship or an employment relationship existed between Mr Tozer and Franix.

[4] If an employment relationship existed, then the Authority has jurisdiction to investigate whether or not Mr Tozer was unjustifiably dismissed by Franix. If no employment relationship existed, then the Authority has no jurisdiction to investigate Mr Tozer's claim that he has an employment relationship problem.

Was Mr Tozer an employee or an independent contractor?

[5] The statutory test for determining this preliminary jurisdictional issue is set out s.6 of the Employment Relations Act 2000 (the Act). Section 6 of the Act states:

Meaning of employee

- (1) *In this Act, unless the context otherwise requires, employee –*
 - (a) *Means – any person of any age employed by an employer to do any work for hire or reward under a contract of service;*
 - ...
 - (2) *In deciding for the purposes of sub-section (1)(a) whether a person is employed by another person under a contract for service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
- (3) *For the purposes of sub-section (2), the court or the Authority*
 - (b) *Must consider all relevant matters including any matters that indicate the intention of the persons; and*
 - (c) *Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[6] The leading case on s.6 of the Act is the Supreme Court decision of *Bryson v. Three Foot Six Limited*¹ to which both counsel referred me. Chief Judge Colgan in *Singh v. Eric James & Associates Limited*² states at para.16 that the inquiry in each case involving s.6 of the Act, is *intensely factual* and at para.17 sets out a number of principles derives from the *Bryson* decision. The Employment Court in *Poulter v.*

¹ [2005] 3 NZLR 721

² [2010] NZEmpC 1

*Antipodean Growers Limited*³ summarised the applicable principles derived from *Bryson* and earlier judicial decision as follows:

- (1) *The Court must determine the real nature of the relationship.*
- (2) *The intention of the parties is still relevant but no longer decisive.*
- (3) *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
- (4) *The real nature of the relationship can be ascertain by analysing the tests that have been historically applied such as control, integration and the 'fundamental' test.*
- (5) *The fundamental test examines whether a person performing the service is doing so on their own account.*
- (6) *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.*

[7] 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.

[8] Mr Davies and Mr Tozer have been friends for some 45 years. Mr Tozer and his wife, Mrs Leanne Tozer often socialised with Mr Davies and his partner Ms Lynette Philips. Mr Tozer and Mr Davies both described the nature of their friendship as close and that they often discussed business and family matters. The breakdown in the working relationship between Mr Tozer and Mr Davies has caused a significant rift in their personal relationship.

[9] Most of Mr Tozer's working life has revolved around his family's removal transport company, Modern Movers Limited (Modern Movers). Mr Tozer had been involved in the operation of Modern Movers for approximately 40 years and this was where he gained his business experience. Mr Tozer was a director of Modern Movers for many years. Mr Tozer had limited experience with employment contracts. Modern Movers engaged "owner drivers" who were contractors before they were transitioned to employment contracts. This was at a time prior to Mr Tozer becoming director of Modern Movers.

³ [2010] NZ EmpC 77, 17 June 2010 at para.[20]

[10] Mrs Tozer also worked for Modern Movers for many years attending to payment of wages, dealing with debtors, creditors and attending to other administrative work.

[11] In 2010/2011, Mr and Mrs Tozer decided to wind Modern Movers down and look for other opportunities. Mr and Mrs Tozer spent most of 2012 attending to the wind down of Modern Movers.

[12] Franix specialises in residential and commercial construction services to clients throughout New Zealand. According to its website, services provided by Franix include:

*Alterations, renovations, maintenance and refurbishment ...
carpentry, joinery, plumbing, drainage and electrical installation.*

[13] The website goes on to explain that Franix has a *core group of employees, with the ability to expand [its] workforce as required, with a number of qualified, independent and specialist sub-contractors who[it] regularly engage[s].*⁴

[14] At the investigation meeting, Mr David Davies, the sole director and owner of Franix said that Franix has no employees, all those engaged to work for Franix are contractors.

[15] Mr Davies provided the Authority with a copy of a contract entitled “*Independent Sub-Contractor Contract*”, which Mr Davies said is signed by all its contractors and this included both Mr and Mrs Tozer.

[16] On Friday (of Auckland Anniversary weekend) being 27 January 2012, and following the departure of Franix’s office manager, Mr David Deverell, Mr Davies “*got the idea*” to ask Mr Tozer if he was interested in managing Franix’s business. Mr Davies knew Mr Tozer had no experience in the construction industry but knew of Mr Tozer’s business experience at Modern Movers which he thought would be suitable experience for the managerial role at Franix.

[17] Mr Davies and Ms Phillips were having coffee at Columbus Café in St Heliers and Mr Davies rang Mr Tozer to ask if he could join them to discuss possible engagement by Franix. Mr Tozer joined Mr Davies and Ms Phillips and they

⁴ www.franix.co.nz

discussed the prospect of Mr Tozer joining Franix as its Manager. There was no discussion about whether Mr Tozer would be employed by or contracted to Franix.

[18] Mr Davies and Mr Tozer discussed remuneration. Mr Davies suggested an hourly rate, but Mr Tozer, who was aware of some of the issues that Mr Davies had had with his previous office manager, suggested a weekly rate would be more suitable. Mr Tozer commenced at Franix the same afternoon as this coffee shop discussion.

[19] Mr Davies said that Mr Tozer's role at Franix was to oversee administration of contractors, collate the material and external sub-contractor charges, ensure invoices related to the correct jobs, regularly invoice clients, and field telephone calls from clients. Mr Tozer was based at Franix's office where he performed his duties.

[20] Because of public holidays, being Auckland Anniversary and Waitangi Day, the first couple of few weeks of Mr Tozer's engagement were short weeks. Mr Tozer completed time sheets for hours worked and furnished Franix with GST invoices at the rate of \$30 per hour for those weeks. However, after those first couple of weeks, Mr Tozer invoiced Franix at the weekly rate of \$1,500 plus GST, as discussed with Mr Davies.

[21] Within a couple of weeks of his engagement by Franix, Mr Davies and Ms Philips visited Mrs Tozer at her home and asked if she was interested in joining Franix to help set up the Licensed Building Practitioners Directory (LBPD), Mr Davies' new initiative. Mrs Tozer accepted the role and started work immediately. Mrs Tozer was engaged at the rate of \$20 per hour. From the time of Mrs Tozer's engagement, Mr and Mrs Tozer invoiced Franix one GST invoice each week for both their time. The invoices were in the name of their rental property company, Brylee Investments Limited, (Brylee).

[22] Mr and Mrs Tozer had various financial commitments and each week requested that Ms Philips pay their remuneration into one of their 3 or 4 bank accounts. These bank accounts were personal in the joint names or individual names of Mr and Mrs Tozer and one account was in the name of the Tozer Trust.

[23] Mrs Tozer worked in the office along with Mr Tozer on the LBPD until December 2012 when she felt there was insufficient work for her to do. Mrs Tozer

spoke with Ms Philips prior to Christmas 2012 and suggested that she finish given the lack of work. This was agreed and Mrs Tozer did not return to work in January 2013.

Written Contract

[24] Mr Davies says that shortly after Mr and Mrs Tozer commenced work, they were given Franix's usual independent contract to sign. This contract was a "one-size fits all" which Mr Davies said applied to Mr Tozer as Office Manager as well as to tradesmen contracted by Franix on its various projects.

[25] Mr Davies and Ms Philips each say the Tozers' contracts went missing following Mr Tozer's departure from Franix in August 2013. Mr Davies and Ms Philips say they believe the contracts were taken by Mr Tozer who was in charge of the filing cabinet in which the contracts were stored. No evidence was provided to support this claim.

[26] Ms Philips says as soon as Mr Tozer started at Franix she printed the contract off and left it on Mr Tozer's desk for him to sign. When Mr Tozer had not signed the contract after a couple of days she reminded him to sign it. Ms Philips says she saw Mr Tozer sign a document she believed was the contract because of the way in which he and Mr Davies were talking. Mr Antony Mifsud-Houghton, a builder who often worked in the office at Franix says he saw the contract signed by Mr Tozer on his desk because he flicked through the document and saw Mr Tozer's signature. Mr Mifsud- Houghton saw no other signature on the document.

[27] Neither Franix nor the Tozers were able to provide the Authority with a signed copy of the contracts. Mr and Mrs Tozer say they were never given contracts to sign and so could not provide them. Mr Davies and Ms Philips say the contracts were signed as was the policy with all contractors and that Mr Tozer took them from the filing cabinet when he departed in August 2013.

[28] Mr Davies and Ms Philips were given the opportunity to provide the Authority with a record of the Tozers' contract on the computer. Ms Philips explained the document used to create the Tozers' contract was a template which was overridden each time a new contract was created. Despite being given the opportunity to provide evidence as to the footprint which must have been left on the computer when the contracts were created, no such evidence was provided to the Authority. Nor was any evidence obtained or provided to the Authority by Franix that there had been a

forensic investigation of the computer to establish the creation of contracts for the Tozers. This omission is relevant and goes to credibility.

[29] I do not accept independent contracts were created by Franix and provided to the Tozers for signing. I find no independent contracts were given to or signed by the Tozers. Even if my finding is not correct, the existence of signed independent contracts is not determinative of the issue for determination by the Authority regarding Mr Tozer's status as a contractor or an employee. It is one factor to be considered.⁵

[30] It was contended on behalf of Franix that the independent contract which was provided to all contractors including the Tozers was indicative of Franix's intention that its relationship with Mr Tozer was that of an independent contractor not an employee.

[31] When scrutinising the independent contract, it is clear that it was not designed to apply to Mr Tozer's office management role. Rather, it was designed for those sub-contractors who worked on specific projects for Franix. Sub-contractors used by Franix include builders, electricians, painters and similar tradespeople. It is these subcontractors who meet with Franix and the client to determine the work to be completed. Once agreement is reached the particular subcontractor is engaged by Franix to provide a service (painting, electrical, building) for the client's project. The fee charged includes profit which pays for Franix's overheads and administration.

[32] The recital to the independent contract confirms this stating as follows:

"Franix Construction provides quality all trade building services to private and commercial clients. The Company engages Sub-contractors to provide services to a 3rd party("the client" or "clients").

- 1. The sub-contractor is in business on his or her own account and provides skills and other resources("services, tools, etc")*
- 2. The Company and the client determine what work is to be carried out.*
- 3. The Company engages the sub-contractor to provide services to meet the clients requirements.*
- 4. The Sub-contractor is either an individual person operating on his or her own account or an enterprise that will employ or retain*

⁵ Poulter

individual/s who will provide services to the client through the company, under this contract.

5. *The Sub-contractor agrees to be bound by the following terms and conditions of the Company and accepts engagement as an independent Sub-contractor on the following "Terms and Conditions".*

[33] The work performed by Mr Tozer was the same as the work performed by the previous office manager. This work was ongoing primarily office work. The work included organising projects, liaising with contractors, logistics and invoicing. It was work that was required to be done to keep the office administration going and when Franix's previous office manager left, I find that it was a priority for Mr Davies to find a replacement and this was the role offered to Mr Tozer.

[34] As this work was required to keep Franix's business running, it was not the type of work suited to an independent contractor who may or may not make themselves available to do the work. Mr Tozer was given instruction by Mr Davies and Mr Mifsud- Houghton on how to perform his tasks and apart from a short period of time when he went on a pre-arranged fishing trip, he attended the office daily to perform his tasks. Mr Tozer was not able to provide quotes on jobs or do reports as he did not have this expertise. Such work was undertaken by Mr Mifsud- Houghton and Mr Davies. Mr Tozer's work was office administration.

[35] I have already made a finding that a signed independent contract for Mr Tozer did not exist. Even if it did, the terms of the contract are not consistent with being an independent contract, in my view. Eventhough there is a declaration that the contract is an independent contract, not an employment contract there are a number of conditions which suggest strongly that the contract could be regarded as an employment contract. A few such conditions include:

- Para.1 – to abide by the Company's "Terms and Conditions" Franix's instructions,
- Para.5 – to report for work at stipulated hours,
- Para.11 – late reporting for work,

- Para.13- hours of work from 7.30am until 5.00pm Monday to Friday or as required. There are many more such terms which in my view are more consistent with being employment terms.

Financial Arrangements

[36] Mr Tozer invoiced Franix for a regular amount each week by way of a GST invoice. It was clear to me that this was a convenient method by which he was to receive his remuneration and there was never any discussion of other forms of weekly remuneration. Mr Davies requested Mr Tozer to invoice Franix as this was the way in which all those engaged by Franix were treated. This was not a situation in which Mr Tozer set up a company and invoiced Franix along with a number of other clients. The method by which Mr Tozer invoiced and was paid by Franix was a convenient method utilised by Franix and did not in my view indicate that Mr Tozer was in business on his own account.

[37] Mr Tozer was in a different category as an office manager performing managerial tasks to the contractors out in the field working on Franix projects. Those contractors who performed building, painting and electrical type work for Franix could undertake project work for other clients and could appropriately be categorised as contractors, not employees.

[38] I accept Mr Fulton's submission that payment of a regular amount by invoice falls far short of proving a contracting relationship. Mr Fulton relied on the the Supreme Court in *Bryson* where at para [10] it endorsed the findings and conclusions of Judge Shaw that the relationship in that case was one of employment:

*She said that the evidence strongly pointed to his work being done as an integral part of the **Three Foot Six** business. Apart from the way in which pay slips in the form of invoices were prepared there was, the Judge found, no evidence at all of Mr Bryson operating a business on his own account. His income was not linked in any way to the profits or losses of Three Foot Six. He was paid a "regular wage" based on an hourly rate.*

[39] And later the Judgment holds:

[37]Judge Shaw seems to have placed little significance on the evidence concerning taxation arrangements, both generally and particular to Mr Bryson, no doubt because those arrangements appear to have been mere consequences of the contractual labelling of him as an independent contractor."

[40] Similarly Mr Tozer was not operating a business on his own account and the remuneration arrangements were as a consequence of Franix's practice in labelling all those it engaged as independent contractors regardless of the work performed.

Control

[41] Mr Tozer was instructed what to do each day by Mr Davies or Mr Mifsud-Houghton, reported to work in accordance with normal business hours and requested time off to go on holiday. These matters all point to strong control by Mr Davies over Mr Tozer's work.

Reality

[42] Mr Tozer performed his duties in Franix's office. He did not use his own computer and did not have any equipment to undertake his position or role as office manager, nor was he required to do so. Mr Tozer was not an investor in Franix and did not stand to gain by increasing his efforts.

[43] Mr Davies sought to establish that Mr Tozer was operating his own business and referred to a meeting which Mr Tozer had with representatives from Habitat and other emails sent by Mrs Tozer about obtaining properties in Port Douglas as evidence that the Tozers were in business on their own account and wanted to purchase a business. Even if the Tozers wished to purchase their own business, this does not indicate in my view that their relationship with Franix was anything other than an employment relationship.

[44] During the course of the investigation meeting Mr Davies made a number of allegations about Mr Tozer including that he was *useless, did not work full time but was paid full time, spent long hours at lunch with Mrs Tozer, had taken his contracts when he left Franix in August, and that he had stolen a window from a building site which belonged to Franix and installed the window at his own address*. None of these claims were supported by satisfactory evidence and in my view were raised in an attempt to cast doubt on Mr Tozer's integrity rather than for the purposes of establishing his status as an employee or independent contractor. I find these attacks on Mr Tozer were improper and unsubstantiated.

[45] My overall view is that the underlying and true nature of the relationship between Franix and Mr Tozer was that of an employment relationship.

[46] Mr Tozer was an employee. Despite the fact that he invoiced Franix for his services, he was an office manager, who worked regular hours and was paid a regular remuneration. He received and followed instructions from Mr Davies. Mr Tozer undertook work which was required for the ongoing operation of Franix. This was quite different from the work undertaken by the various tradespeople who could more appropriately be categorised as independent contractors.

[47] The financial arrangements were indicators of a contractual relationship, but it is my finding these were indicators only and other features were such that in reality the relationship was that of an employment contract not independent contract.

[48] Therefore, Mr Tozer is able to pursue his personal grievance claim in the Authority which has jurisdiction to deal with it.

Costs

[49] Costs are reserved. Counsel for the applicant has 14 days in which to file a memorandum as to costs and counsel for the respondent has 14 days in which to reply.

[50] In the meantime, a telephone conference will be scheduled in order to timetable the substantive matter towards an investigation meeting.

Anna Fitzgibbon
Member of the Employment Relations Authority