

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mark Grenville Harvey Ward (Applicant)
AND Twin Turbines Limited (Respondent)
REPRESENTATIVES Mark Ward in person
Clive Bennett, Advocate for Respondent
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 29 November 2005
DATE OF DETERMINATION 7 December 2005

DETERMINATION OF THE AUTHORITY

[1] The applicant seeks a declaration that he was an employee of the respondent in the period from May 2002 to August 2003 and is entitled to additional wages and to holiday pay entitlements accrued in that time. The respondent insists that the applicant was an independent contractor who was paid in full and is not owed holiday pay or any additional pay.

[2] The respondent has ceased trading and applied to be removed from the Companies Office Register. The Registrar of Companies publicly notified that application in May 2005 (*New Zealand Gazette*, 5 May 2005, p1767). The Inland Revenue Department, I was told by the respondent, has lodged an objection to the removal because of an issue as to whether there is any outstanding tax liability for payments made to the applicant.

[3] The applicant confirmed that he seeks a declaration because he needs to know if he was an employee or an independent contractor in order to resolve matters with IRD. Because of the respondent's understanding of the relationship between the parties, it made no deductions for PAYE or withholding tax from its payments to the applicant. The applicant considers he was an employee and the respondent is liable to pay any PAYE owing to the IRD. The respondent considers that the applicant was an independent contractor and liable to pay his own tax.

[4] This Authority cannot resolve tax matters. It can determine the real nature of the employment relationship between the parties. Any tax liabilities that may follow from that determination are a matter for the parties and IRD.

Employment relationship problem

[5] This problem was filed on 26 November 2004 with a reply from the respondent filed on 19 December 2004 and mediation held on 1 February 2005. A change of representative resulted in the applicant filing an amended statement on 7 July 2005 with an amended reply filed on 26 August 2005. The parties were directed to attend further mediation but were unable to resolve the matter.

[6] During the investigation meeting I questioned the applicant, Mark Ward; the respondent's director Mike Kramer; his fellow director and brother Andrew Kramer; and Pat Kramer, the respondent's bookkeeper and Mike Kramer's wife. Mr Ward and Mike Kramer had filed detailed written briefs and provided a number of relevant documents. The parties had the opportunity to question witnesses and sum up their case at the end of the meeting.

[7] The applicant's amended statement of problem had raised a claim of unjustified dismissal. He abandoned that claim at the investigation meeting as a claim developed by a representative no longer representing him. Mr Ward accepted that he was given notice because the respondent's business had failed to gain sufficient orders for its wind turbine machines; the directors had kept him informed and the notice was no surprise; his arrangements with the respondent provided for no redundancy payments; and Andrew Kramer had tried to find him another job which he had looked at but was not interested in pursuing. The respondent in turn did not need to pursue a "90 day issue" in relation to the dismissal claim, raised for the first time this year. Mr Ward was given notice verbally on 24 July 2003, confirmed in writing on 30 July 2003 and his last day of work was 29 August 2003. His original personal grievance application, in relation to his employment status and wage recovery, was raised by an earlier representative on 8 October 2003. There is no issue as to whether that application was within the statutory period for raising a personal grievance.

[8] To determine this matter I must resolve the following issues:

- What was the initial agreement between the parties; and
- What was the real nature of the relationship; and
- If there was an employment relationship, whether the applicant has any additional entitlements?

Terms of the original agreement

[9] The Kramers' business involved developing and marketing wind turbine machines with a view to winning orders for production of them. In early May 2002 a recruitment consultant who knew about their business introduced Mr Ward to them. Mr Ward had trained as an aviation technician with South African Airways in the late 1970s and early 1980s. He had recently arrived in New Zealand and was looking for work.

[10] The applicant says he was offered and accepted a job at \$21 an hour as the turbine blade section supervisor for the respondent. He was provided a letter confirming the job offer which he used to complete a work permit and visa application granted on 30 May 2005. He says he was then asked by Mike Kramer to work for a lesser amount of \$11 until the company got orders for turbines and could afford to pay more. He also says he was told that once orders started coming in, he would have his pay backdated at the higher rate to the beginning of his work.

[11] I do not accept the applicant's account of this sequence of events. I consider the account of the respondent's witnesses is more likely and accords more closely with the documents provided by both parties.

[12] I find it more likely than not that Mr Ward came to work for the respondent in the following way. He met with Mike Kramer at his house on 8 May 2002. Mr Kramer offered work on the basis of \$11 an hour and agreed to help with Mr Ward's work permit application. Mr Kramer drafted one letter setting out the terms, including the \$11 hourly rate, which reflected the true agreement between Mr Ward and the company. At the same time he drafted a second letter intended to be shown to the Immigration Service ("the second letter"). The second letter included a higher rate of \$21 an hour because Mr Kramer thought this made the application for a position described as a

supervisor more credible. In fact there were no staff to supervise. The application was to be made on the basis that the job was within the category of aircraft fitters, a priority area because of a shortage of local workers with those skills. Mr Kramer also had the job advertised in a local newspaper on 24 May. A lack of responses to the advertisement was a factor which would support the granting of the application.

[13] On 30 May 2002 Mr Ward took his work permit application, the second letter and the newspaper advertisement to the Immigration Service. That same day he was granted a two-year work permit to work for the respondent.

[14] Mr Kramer told me the second letter as a “device” to help Mr Ward get the work permit. I am satisfied that it was, in legal terms, a sham, that is both parties knew it did not represent the true state of affairs between them. The real agreement was the \$11 an hour letter. This is confirmed by a copy of that letter provided by Mr Kramer. Mr Ward had signed and annotated the letter: “*I accept this offer as per date 12/05/2002*”. Mr Ward told me the annotation and signature were his and made on that date, the day he collected both letters from Mr Kramer’s house. There was no such annotation on the second letter.

[15] That Mr Ward was a willing participant in this process was apparent from another aspect of the evidence. He told me initially that he could not work until he had a permit and only started work on 30 May. It later emerged that he began work at the respondent’s premises from 14 May and was paid for it. The first payment made to him, according to the company records, on 7 June 2002, supposedly covered only the period 30 May to 8 June. However Mrs Kramer volunteered that she had thought it better to “fiddle” the figures to fit the pay for work done in the earlier fortnight into the later pay period stated in company records so that it was not apparent that Mr Ward had begun working for the respondent before his work permit was granted.

[16] Mr Ward’s acceptance of this arrangement from the beginning is also supported by the fact that at no time during his time working for the respondent did he complain or ask to have the pay rate increased. During the investigation meeting he told me that he understood “*that we had not made sufficient sales to increase and backdate it. Mike and Andrew kept me up to date on a daily basis with news of orders.*”

[17] I find that Mr Ward agreed to work at the hourly rate of \$11 an hour with any prospect of pay increases dependent on the business winning orders for its machines.

Real nature of the employment relationship

[18] Where there is an issue as to whether a person is an employee or an independent contractor, the Employment Relations Act 2000 (“the Act”) requires the Authority to determine the real nature of the relationship. All relevant matters are to be considered, including indications of the intentions of the parties. Any statement of the parties describing the nature of their relationship – including the ‘labels’ they use – does not decide the matter but may be a “significant pointer”: *Cardy Business Ltd v Bizaoui* (unreported, EC Auckland AC 16/05, 24 March 2005) at [44].

[19] The tests developed by the courts – of “control”, “integration” and “economic reality” – assist in the analysis.

[20] As described by the Court in the *Cardy Business Ltd* case:

No status case is ever completely clean-cut. Some elements of the parties’ arrangements will favour one status, and others the alternative. The exercise is to weigh these factors to determine where the preponderance of them lies and, therefore, the nature of the relationship.

Some factors are neutral: that is, they do not tend to indicate either the existence of a contract of service or other arrangement, here a contract for services. Such factors will include arrangements entered into and performed that can be undertaken either by an employee or independent contractor.

- **Terms of agreement**

[21] The starting point of the analysis is any terms agreed between the parties. In this case, those terms are found the letter setting out “an offer of employment” and signed as being accepted by the applicant on 12 May 2005.

[22] It has strong indicators of being an employment agreement. Mr Kramer says this was because it was drafted at the same time as the second letter intended to convince the Immigration Service that Mr Ward had a suitable job.

[23] The letter is headed “offer of employment”. It says “the position is a permanent one” with a two-week notice period. It says the pay rate is “including holiday pay” and that “holiday pay is as specified in the employment act [sic]”. It states the company is “unable to offer redundancy payment at this stage”. It refers to a grievance procedure and sets out “grounds for dismissal”. It states the location and hours of work, including breaks and standard weekly hours.

[24] I do not accept Mr Kramer’s suggestion that the apparent employee-nature of these provisions was intended as a framework if the respondent was able to offer the applicant employment in the future but were meanwhile intended to be on an independent contractor basis only.

- **Economic reality**

[25] The agreement states that the applicant was to be paid fortnightly “on submission of an invoice”.

[26] Mr Ward says the term “contractor” was not used at any stage in his discussions with the Kramers but accepts arrangements were made for his hours to be recorded on invoices and that the Kramers told him that they themselves were paid on the basis of submitting invoices. Mike Kramer, Pat Kramer, their son Richard Kramer, and Andrew Kramer all worked for the respondent on the basis of submitting invoices. The lack of orders for machines meant only some of Andrew and Mike Kramer’s invoices were in fact paid.

[27] Mike Kramer and Andrew Kramer appeared, from their evidence, to believe submitting an invoice automatically made a person an independent contractor. That may appear to be the case from their personal experience but the submission of invoices is only one of many factors considered at law in determining who is an employee. The widespread misuse of such arrangements, in some cases to avoid statutory obligations under employment laws or to gain advantages under tax laws, does not legitimate them or determine the proper outcome in this particular case.

[28] I am not convinced the arrangements made to pay Mr Ward based on invoices are sufficient to support the view that he was therefore in business on his own account. The invoices were generated by the company. Mrs Kramer arranged this. She did it for the other three Kramers and it was easier for her to do it for Mr Ward than for himself. The invoices simply recorded his hours and pay rate. He saw the invoices only after the amounts they recorded had been directly credited to his nominated bank account. In reality they were pay slips.

[29] There were no clear arrangements made regarding PAYE or withholding tax that might have clarified the nature of the relationship earlier. Mr Ward accepts that the Kramers had reminded him to put aside money for tax but says he did not understand the reason for that. In January 2003 he sought advice from an accountant who advised him that he was an employee and that his employer was responsible for deducting PAYE tax from his fortnightly pay. Although the copies of invoices provided to him made no reference to tax, he proceeded on the belief that he was receiving nett wages and that the respondent would make any necessary tax payments to IRD.

[30] Mr Ward took no financial risk and had no financial investment in the work undertaken. He had no opportunity to profit from sound management in performing his tasks.

[31] In the latter part of 2002 Mr Ward took a night job at a supermarket to boost his income. I do not accept the respondent's suggestion that taking a second job is necessarily indicative of a contractor status. Many employees have more than one job. Mr Ward was still required, and did, work for the respondent during its standard hours. It was not a situation where he determined which hours and at what times he worked at the respective workplaces, which would have been more indicative of a contractor relationship.

[32] Mr Ward also arranged to take four weeks leave during December 2002 and January 2003 while his children were visiting from South Africa. The respondent suggests this is an indicator that Mr Ward was free to come and go and decide when to work and not to work. At best I consider this to be a neutral factor in this case and not outweighing other factors more strongly indicating he was an employee.

- **Integration**

[33] Mr Ward's work was clearly integrated into the respondent's business. He worked at its leased factory or workshop premises each working day, except when on leave. Any tools and all the materials required were supplied by the respondent. He was paid an hourly rate rather than by results or a set price.

- **Control**

[34] Mr Ward's work mostly involved working on preparation of models and moulds for the fibreglass blades of the prototype wind turbine machines. He also assisted when required on shifting and holding metal parts. Mike Kramer told Mr Ward that he would not be "clock watching" but Mr Ward was generally expected to work a standard day.

[35] Mike Kramer was working on design elements of the machines and was often absent from the workshop premises. When he was there he would advise Mr Ward on weights and resins for the blades and how to prepare the moulds but considered Mr Ward's work was otherwise largely unsupervised. Andrew Kramer was at the workshop every working day and said he was Mr Ward's supervisor and "*I would direct Mark on what I wanted him to do*".

Determination

[36] I find that, after making the broad inquiry required under s6 of the Act and the legal tests, the real nature of the relationship between the applicant and the respondent for the period from 14 May 2002 to 29 August 2003 was that of employee and employer.

[37] In light of my earlier finding on the terms of employment agreed between the parties, I find that the applicant is not entitled to any additional wages. He accepted during the investigation

meeting that he was paid for all hours worked at the rate of \$11 an hour. I do not find he was entitled to be paid for those hours at the rate of \$21 an hour.

[38] The applicant is entitled to payments for annual leave and public holiday entitlements under the Holidays Act 1981 in force at the time of his employment. While his terms of employment purported to include holiday pay in his hourly rate of pay that is of no effect under the provisions of s33 of that Act prohibiting contracting out of the statutory entitlements.

[39] The applicant took unpaid leave during December 2002 and early January 2003. He had no other paid leave during the period from 14 May 2002 to 29 August 2003.

[40] The applicant's entitlement to pay for annual holidays earned but not taken in this period can be calculated from the agreed summary of payments made to him in that time. He was paid a total of \$27,192. Six per cent of that total is \$1631.52. The applicant is entitled to that amount, less the applicable rate of income tax.

[41] Mr Ward was not paid for any public holidays in the time he worked for the respondent. By my reckoning 12 public holidays fell in that period (2002: Queen's Birthday (3 June); Labour Day (28 October); Christmas Day; Boxing Day; 2003: New Year's Day; 2 January; Auckland Anniversary Day (29 January); Waitangi Day; Good Friday (18 April); Easter Monday (21 April); Anzac Day; and Queen's Birthday (2 June)). The applicant is entitled to a day's pay (\$88) for each of those 12 days, less the applicable rate of income tax.

Declaration

[42] To resolve this employment relationship problem, I declare that the applicant was an employee of the respondent for the period from 14 May 2002 to 29 August 2005. The applicant is entitled to payment to him by the respondent of:

- the sum of \$1631.52, less tax, for holiday pay;
- the sum of \$1056.00, less tax, for public holiday pay.

[43] The respondent is ordered to pay those amounts to the applicant.

[44] According to the Companies Offices records accessible by way of the internet at the date of this determination, the respondent is still a registered company, and as such a legal entity (Companies Act 1993 s15). Mike Kramer's evidence was that the company has no assets and its bank account is closed.

[45] The extent to which the applicant is able to enforce payment of the amounts to which he is entitled is a matter for him to consider. The nature of the employment relationship, however, is now determined and this may assist the parties to resolve any outstanding issues with IRD.

Costs

[46] The applicant's amended statement of problem sought costs. An advocate prepared that amended statement but Mr Ward abandoned its additional claims at the meeting and reverted to his original claim that he had prepared and filed in November 2004. He represented himself in the investigation meeting.

[47] In these circumstances no award of costs appears warranted and I make none. If the applicant does consider there are grounds for an award of costs, he may apply to the Authority within 28 days

of this determination being issued. No later application will be considered. In the event that the applicant does seek costs, the respondent will be provided with an opportunity to make submissions before any decision is made.

Robin Arthur

Member of Employment Relations Authority