

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Maria Osborne (Applicant)
AND Te Runanga O Kirikiriroa Trust Incorporated (Respondent)
REPRESENTATIVES Simon Menzies, Counsel for Applicant
Alex Hope, Counsel for Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 18 October 2005
SUBMISSIONS RECEIVED 28 October 2005
18 November 2005
DATE OF DETERMINATION 7 March 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] Ms Osborne claims that she was unjustifiably dismissed – effective from 12 August 2004. She asks the Authority to find that she has a personal grievance and award her the remedies of 3 months’ loss of wages and \$10,000 in compensation. Ms Osborne also claims that she is owed holiday pay.
The Te Runanga O Kirikiriroa Trust (“the Trust”) deny Ms Osborne’s claims on the grounds that she was not an employee, and even if it is found that she was an employee, she was not dismissed.

Background

(a) **Engagement**

- [2] In October 2003, the Trust was contracted by Te Puni Kokiri to carry out a Local Government Education Project Contract – the Strategic Communication Plan. The Trust sought potential referrals from Work and Income New Zealand (“WINZ”) to fill Field Worker positions. Ms Osborne was referred for one of the positions by her Case Manager at WINZ and was given a job description for the position. The job description is quite detailed. It provides that the “**Condition of Employment**” is “Independent Contractor” but there is no other detail of what that means.
- [3] The evidence Ms Osborne is that she understood the term to mean “self employment” and the period of engagement would be six months. However, Ms Osborne also says that she was advised by the WINZ Case Manager that the position was: [“for a fixed term with employee

status and that WINZ were not subsidising the wages.”

- [4] Ms Osborne was interviewed for a Field Worker position. Her evidence is that during the interview it was explained that if she was a successful candidate for the position, her questions regarding what the term independent contractor meant would be answered. Ms Osborne was a successful candidate and via a letter dated 7 May 2004, from the Chief Executive Officer of the Trust, Ms Mere Balzer, Ms Osborne was offered the position.

The letter opens:

“I am pleased to offer you the position of Field Worker (full-time) with Te Runanga O Kirikiriroa Trust (Inc).”

- [5] It was further conveyed to Ms Osborne that:

“During your term of employment, should any developments arise relating to the position, the objectives may be modified (by agreement) to reflect such changes.”

Further into the letter, the “*Conditions of Employment – Key Elements*” are set out. These include:

- The rate of remuneration - \$10.49 per hour, payable fortnightly.
- The hours of work – 30 per week.
- A work timetable for the 4 week training period

Ms Osborne was requested to provide details of her bank account, IRD number and her driving licence. Ms Osborne commenced training for the Field Worker position on 10 May 2004.

- [6] Ms Aroha Waetford was a Policy and Planning Analyst in the Human Resources team at the Trust at the time. Ms Waetford says that on 10 May 2004, she provided Ms Osborne with a copy of a *Contract for Services* and informed Ms Osborne that she could have a few days to consider the content. The evidence of Ms Osborne is that along with the other Field Workers, she did not receive the document until approximately 4:10pm on Friday 14 May 2004. Ms Osborne says that an hour was allowed to discuss the contract as a group and she then signed it. The evidence about the date of receipt of the contract is inconclusive but it is signed by both women and dated 14 May 2004.

- [7] Part 1 of the contract provides the term – “**Independent Contractor**” and sets out the following:

“1.1 The parties agree that the Contractor/Field Worker is and shall be treated as an independent contractor and no employer/employee relationship is created by the Agreement or the dealings between the parties.

1.2 The parties acknowledge that they understand the significance of the distinction between independent contractor and employee and willingly enter into this agreement on that understanding.

1.3 The contractor will be responsible for payment of any GST or PAYE that is owed [sic] the Department of Inland Revenue as a consequence of this contract.”

Throughout the contract, the term “Contractor” prevails. The term of the contract is from 10 May 2004 to 5 November 2004; “subject to potential contract extension.”

[8] Clause 9 of the contract provides for termination:

“9.1 Either party, without reasons, may terminate this contract by giving the other party one days notice in writing.

9.2 Notwithstanding the provisions of sub-clause 9.1 the Runanga may terminate the contract without notice for a serious breach of any of the provisions of this contract or a serious breach of conduct.”

Finally, the contract provides that it is: “Signed by the Contractor _____ on its own behalf.”

(b) **Departure**

[9] The Trust owns a video camera that at times was used in the field. It seems that it was thought that Ms Osborne and other Field Workers may have used it on the weekend of 7/8 August 2004 and subsequently it could not be found. On or about 9 August 2004, Ms Waetford asked Ms Osborne if she knew of the whereabouts of the camera. It seems that Ms Osborne took exception to being asked about the camera as she perceived that she was being accused of stealing the camera. Ms Waetford had some concerns about how upset Ms Osborne was and reported her concerns to Ms Sandra Eru, the Human Resources Manager for the Trust.

[10] The evidence of Ms Eru is that she decided to meet with Ms Osborne and attempt to “smooth things over.” The two women met and Ms Eru says that she reassured Ms Osborne that she was not being accused of stealing the camera and that everyone was being asked about it as there had been several thefts at the Trust before the camera disappeared. Ms Eru says that Ms Osborne appeared to accept the assurance about the camera and that Ms Osborne then went on to convey that prior to working for the Trust she had been happy babysitting her grandchild each day at her home. Ms Eru says that Ms Osborne told her that she had only taken the work at the Trust because she would have had a 26 week stand down from being paid the unemployment benefit if she had refused to work.

[11] Ms Eru felt that Ms Osborne was implying that working for the Trust was an inconvenience for her and her family. Ms Eru concluded that it was in the best interests of Ms Osborne and the Trust to explore any options that might be available rather than having Ms Osborne being dissatisfied about having to continue to work for the Trust. Ms Eru decided to meet with the WINZ Case Manager to ascertain if the stand down could be waived for Ms Osborne if she ceased working for the Trust. Ms Osborne was not made aware of Ms Eru’s intentions as Ms Eru did not want to raise Ms Osborne’s hopes that the stand down period would be waived.

[12] However, on 10 August 2004, at the daily staff karakia session, mention was made of the missing camera as part of a list of equipment that had recently gone missing from the Trust. The evidence of Ms Balzer is that Ms Osborne stood up and announced to the attendees at the karakia session that she had been accused of stealing the camera and that this accusation; [“was a threat to her children, her family and their good name.” Ms Osborne then went on to say that she did not want to work for the Trust, and was only doing so because otherwise she would lose her employment benefit for the 26 week period and if it were not for that, she would leave immediately.

[13] Ms Balzer subsequently explained to Ms Osborne that the enquiry had only been made of Ms Osborne regarding the whereabouts of the camera as it was thought that it may have been used while Ms Osborne was at the Frankton market the previous Saturday. Ms Balzer says that because Ms Osborne was obviously distressed and had made it clear that she did not want

to continue to work for the Trust, she instructed the Human Resources team to make enquiries with WINZ to see if the stand down period could be waived.

- [14] Following a meeting with the WINZ Case Manager, Ms Eru met with Ms Osborne and conveyed to her that the Case Manager had given an assurance that Ms Osborne would not be financially disadvantaged if she was; [“excused from working for the Trust.” The evidence of Ms Eru is that the reaction of Ms Osborne was she was unhappy that Ms Eru had spoken to the WINZ person. Ms Osborne then raised her employment status and became angry. Ms Eru says that:

“I got extremely frustrated with her and told her she was a “stupid woman” because I was trying hard to protect her benefit in order to make her happy but she would not accept that I was trying to help her. At the end of the discussion Maria asked if she could go and I told her that she could. She then announced to the staff members who were sitting around the lunch table that she had been fired.”

- [15] The evidence of Ms Osborne is quite different. She says that about 12:30 pm on 12 August 2004, Ms Eru asked her to accompany her to Room 34. Ms Osborne says that upon entering the room, she was informed by Ms Eru that her employment was terminated – effective immediately. Ms Osborne says that upon questioning why her employment was being terminated, Ms Eru responded; [“that she could sack me on the spot without giving a reason and for me to read my contract again. Ms Eru said that she had spoken to Renta Poli, my Work Broker at WINZ, to reinstate my benefit without hardship to me. I told Ms Eru that I would be lodging a personal grievance against her for unjustified dismissal. She told me I could do what I liked, that I was a stupid thicko and nothing sunk in my head, it had to be repeated several times before the penny dropped.”

- [16] The further evidence of Ms Osborne is that she asked Ms Eru again for the reason for her dismissal and was told that she had terminated her own contract in that two members of the staff had complained about comments that Ms Osborne had made at the karakia on 10 August and they were offended. Ms Osborne says that when asked to elaborate, Ms Eru told her that the two staff members had said that Ms Osborne had said that she did not want to continue to work at the Trust.

- [17] Ms Osborne says that she denied that she expressed any dissatisfaction about working for the Trust or that she intended to resign. The evidence of Ms Osborne is that:

“Following my denial, Ms Eru got angry and stood up in an intimidating manner repeating that I was “a stupid thicko.” She would not listen to what I had to say and kept ranting and raving. She told me to leave Te Runanga and as she left the room she repeated that I was “a stupid thicko.”

- [18] Ms Osborne says that she sat outside for about 10 minutes thinking about her financial position. She then re-entered Room 6 and told other staff present that she had “got the boot.” Ms Osborne also says that Ms Eru came on the scene and waved her contract in her face and reminded her and the other staff present to read their contracts again and then ordered them from the room. Ms Osborne says that Ms Waetford then entered the room and told her to leave. After some brief discussion about being paid for 30 hours for the week, she left.

Analysis and Conclusions

- [19] There are two primary issues that fall to be determined.

1. Was Ms Osborne an employee or a contractor?
2. If Ms Osborne was an employee, was she dismissed?

Was Ms Osborne an employee?

[20] If this matter was being determined under the regime of the Employment Contracts Act 1991, then it is most likely that the express terms of the contract between the parties would prevail and Ms Osborne would be found to be a contractor, and there the matter would rest. However, under the provisions of s 6 of the Employment Relations Act 2000, the Authority, in determining the real nature of the relationship between the parties, must consider all relevant matters including any matters that indicate the intentions of the parties. And, the Authority is not to treat as a determining matter any statement by the persons that describes the nature of their relationship. 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

[21] (a) *The terms of the contract*

While under the Employment Relations Act 2000, the written terms and conditions of employment are no longer determinative, they remain an element to be considered.² On the basis of the express terms of the contract entered into and the events leading up to Ms Osborne signing the contract, I have no doubts that the Trust intended that Ms Osborne would be an independent contractor, despite the contrary wording in the offer of appointment. However, while there is some evidence that Ms Osborne knew that it was intended that she be a contractor (albeit she had some reservations), the effect of what the Trust intended was never properly explained to her, nor did she understand the substantial differences between being engaged as a contractor rather than an employee. This is particularly evident by the lack of understanding on her part as to the tax requirements that were left to the Trust to take care of.

[22] While the contract presented by Trust contains express terms in regard to a contract for services, I find that the approach taken by the Trust was irresponsible and sadly lacking in regard to ensuring that Ms Osborne was fully aware of what she was entering into. Furthermore, I find that the contract presented to Ms Osborne was quite inappropriate for the circumstances. Indeed, I have no doubts that the provisions of sub-sections (2) and (3) of section 6 of the Employment Relations Act exist largely to prevent the type of sham contract that the Trust presented to Ms Osborne, the purpose of such contracts most probably being to deprive her, and others, from the statutory benefits available to an employee.

[23] In conclusion, if it was just the express terms of the contract that should be considered, then it could be found that Ms Osborne was a contractor. However, apart from the fact that I cannot help but conclude that this contract is a sham, the Employment Relations Act requires a wider approach.

[24] (b) *Other relevant matters*

I conclude that Ms Osborne was almost totally integrated into and under the control of the Trust in regard to how she carried out her duties. This included her training and participation in Trust activities such as the daily karakia. The hours of work were as decided by the Trust and had to be recorded in a time sheet that was signed by Ms Osborne and her manager. She was required to work either at the premises of the Trust or at outside venues as determined by the Trust. It was not possible for her to undertake other engagements. The remuneration was a very basic hourly rate of \$10.49 and the Trust had to make the PAYE tax deduction

¹ *Bryson v ThreeFoot SixLtd* [2003] 1 ERNZ 581 at 585.

² *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585.

arrangements, quite simply because Ms Osborne had no knowledge of what was required. Ms Osborne was not in business on her own account. She had not the slightest hint of being in business and had been on a WINZ benefit for some time before coming to the Trust.

- [25] Upon a consideration of all relevant matters, I find that Ms Osborne was an employee and hence entitled to pursue a personal grievance under the provisions of the Employment Relations Act. Under the provisions of the Holidays Act, Ms Osborne is also entitled to be paid holiday pay at the rate of 6% of her gross earnings, being the gross sum of \$262.46.

Was Ms Osborne dismissed?

- [26] There is considerable conflict pertaining to the evidence of Ms Osborne, Ms Eru and Ms Balzer as to what occurred at the relevant times. There is also some confusion about the dates that certain events occurred. However, overall, I prefer the evidence of Ms Eru and Ms Balzer to that of Ms Osborne and accept that Ms Osborne had made it clear that she was not happy with her employment at the Trust and had expressed that view to Ms Eru, and again at the karakia on the morning of 10 August 2004.
- [27] I conclude that Ms Eru made a genuine attempt, in the best the interests of Ms Osborne and the Trust, to give Ms Osborne a viable option to leave the employment of Trust should she wish to do, so, without any disadvantage being incurred in regard to being paid by WINZ. Unfortunately, Ms Osborne perceived the advice that Ms Eru conveyed to her about her benefit not being affected if she chose to leave the Trust, as being a dismissal. That was a mistaken perception on the part of Ms Osborne but also consistent with other negative and mistaken perceptions that she appears to have reached during her employment with the Trust.
- [28] I find that on 12 August 2004, following her discussion with Ms Eru, Ms Osborne then asked if she; “could go” and was informed by Ms Eru that she could. Ms Osborne then informed other staff that she had been dismissed. Ms Eru was under the impression that Ms Osborne has decided to leave her employment at the Trust but Ms Eru also knew that Ms Osborne had a perception that she had been dismissed.
- [29] I find that Ms Osborne was not dismissed. Nonetheless, I accept that she may have had a genuine perception (albeit mistaken), that she had been dismissed. That then raises the issue of whether a “cooling down” period should have been allowed in order that firstly, Ms Osborne could consider her position, and secondly, for the Trust to enter into some further discussion with her to ascertain her intentions regarding her employment.
- [30] Having viewed Ms Osborne and assessed her overall attitude towards her employment at the Trust, I conclude that the relationship was tenuous at best and that Ms Osborne had more probably than not, concluded that she no longer wanted to be there. While ideally the Trust could have made a better effort the next day, to ascertain from Ms Osborne more precisely what her intentions were, given her overall attitude and perception of the people at the Trust, I conclude that it is unlikely that anything would have changed, and therefore no fault should be assigned to the management of the Trust.

Determination

1. I find that Ms Osborne was an employee and not a contractor and hence is entitled to the benefits provided by the Employment Relations Act and the Holidays Act.
Te Runanga O Kirikiriroa Trust Incorporated is ordered to pay Ms Osborne holiday pay of the gross sum of **\$262.46**.
2. I find that Ms Osborne was not dismissed and that she left her employment of her own free will, hence she does not have a personal grievance and the remedies that she seeks are not available to her.
3. Given the overall outcome of this matter, in that both parties were partially successful, it is ordered that costs should lie where they fall.

Ken Anderson
Member
Employment Relations Authority