IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

File Number: 5047968
Determination Number: WA 93/07

	BETWEEN	Michael Roland Baugen Applicant
	AND	Gavin & Susan Ure t/a Affordable Plumbing & Gas Limited Respondents

Member of Authority:	G J Wood
Representatives:	Michael Baugen on his own behalf Fergie Mackay for Respondents
Investigation Meeting:	21 March 2007 at Wanganui
Submissions Received:	By 9 May 2007
Determination:	13 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Michael Baugen, claims that he was an employee of Gavin and Susan Ure and was unjustifiably dismissed by them. By contrast the respondents, Mr and Mrs Ure, claim that Mr Baugen was never employed by them, but was a contractor, and in any event any grievance he subsequently raised was out of time.

[2] Although Mr and Mrs Ure trade as Affordable Plumbing & Gas Limited they have taken no issue with them being cited directly as respondents in this matter.

[3] While the out of time issues would not deal with any monies owing as wages by Mr and Mrs Ure to Mr Baugen, these matters will not be able to be determined by the Authority if Mr Baugen was not an employee of Mr and Mrs Ure. I therefore determined to deal with the contractor/employee and 90 days issues by way of a preliminary investigation meeting.

The Facts

[4] Mr Baugen is a qualified painter and decorator who was required to find other work because of health reasons. After a long period running businesses on his own account (Mr Baugen was self employed between 1992 and 1997, during which time he was GST registered and operated a commercial business) he suffered a serious setback to his health and spent between approximately 1997 and 2004 on the Invalids Benefit.

[5] As this was antithetical to his strong work ethic he decided to retrain as a plumber and drainlayer. He took up an adult apprenticeship in May 2004 working for a different plumber to Mr Ure, who is also a plumber and registered drainlayer. As that plumber was unable to financially support Mr Baugen through his apprenticeship he remained on the Benefit.

[6] The apprenticeship agreement was to last for two years, in which time Mr Baugen would learn on the job and through study at Polytechnic. As well as an apprenticeship agreement, Mr Baugen was required to obtain a limited certificate to show that he was working under the supervision or in the employment of a registered drainlayer. In Mr Baugen's words matters between the original plumber and Mr Baugen *did not work out*, but by then he had already gained the confidence and friendship of Mr Ure. Mr Baugen approached Mr Ure in order that he might complete his apprenticeship and then go one to operate on his own as a registered plumber and drainlayer. After Mr Ure made inquiries of his accountant and the Plumbers, Gas Fitters and Drainlayers Board, Mr and Mrs Ure agreed to take on Mr Baugen on the understanding that he was a *sub-contractor* to them. Mr Ure was advised by the Board, as later confirmed by Board representatives that:

> *The relationship between the parties to a training agreement centres on teaching and learning. In this case you undertook to teach the skills and knowledge associated with drainlaying and Michael undertook to learn. While the training agreement uses the generic terms "employer" and "trainee" it is not unusual for the actual contractual relationship to differ from that. In the drainlaying industry, the prevalent requirement is that the "employer" and "trainee" both hold the appropriate licences issued by the Plumbers Gasfitters and Drainlayers Board to work legally. The holding of these licences was confirmed by the ITO prior to the training agreement being registered.*

[7] Board records show that Mr Ure agreed to supervise Mr Baugen for the period of his apprenticeship and that Mr Baugen was subsequently registered as a drainlayer on his own account on 26 January 2007.

[8] The relevant legislation requires a limited certificate holder in the first two years to work under the supervision and in the presence of the registered person who is named as the limited certificate holder's supervisor, but whether or not the limited certificate holder works as a self

employed contractor or an employee is not matter under the Board's jurisdiction. In particular, the relevant registration makes it clear that the limited certificate holder must be someone who is either in employment or under supervision.

[9] Furthermore, while apprenticeship training agreements must be treated as part of an employee's employment agreement, that is only when the nature of the relationship between the parties is already that of employer and employee.

[10] I accept that while Mr Ure was undertaking his assessment of the legal position with his accountant and the Board, Mr Baugen started working for him under the previous arrangement, namely that he continued to receive the Benefit and received no remuneration. From Mr Ure's perspective, however, this was unsustainable. He therefore reached agreement with Mr Baugen within 3-4 weeks of him starting work that he become a sub-contractor to the Ures for the period of his apprenticeship

[11] Mr Ure told Mr Baugen that he wanted him to work as a subcontractor at the rate of $25 per hour and that he would be responsible for his own tax arrangements. Mr Baugen agreed to this as it meant that he would be able to complete his apprenticeship. He knew that he was being paid $25 per hour, rather than a more standard apprenticeship wage, because he had to provide for his own tax. In fact he had saved up several thousand dollars in the course of his working relationship with Mr and Mrs Ure for this purpose.

[12] The Apprenticeship Training Agreement between Mr Baugen and Mr Ure was not, however, completed until after Mr Baugen started invoicing the Ures for his work. Thus Mr Baugen subsequently invoiced the Ures each week for his work, including any travel fees. Mr Baugen was only ever paid after submitting an invoice and only for those hours he worked on jobs for Affordable Plumbing. The Ures charged Mr Baugen's work out at the rate of $40 per hour.

[13] Mr Baugen spent far more time working in the Ures' business than he charged them for, as is consistent with his work ethic. On one occasion in particular he assisted Mr Ure in constructing and preparing a building that the Ures used for their plumbing business. This was done to help out the Ures and Mr Baugen did not charge for any of the time he spent assisting them. Similarly, Mr Baugen did not charge travel time to and from various jobs, although there was no reason why he could not have, except that he did not do a lot of work outside of the Wanganui area. In fact Mr Baugen worked close to a five day, 40 hour week, but invoiced on average between 25-30 hours per week, being those hours that he was directly working on a paying job on behalf of the Ures.

[14] To assist Mr Baugen the Ures gave Mr Baugen some spare tools and some T shirts containing the logo that the Ures plumbing business operated under, Affordable Plumbing. While the Ures assisted Mr Baugen in the purchase of a vehicle for his work, I accept that it was not supplied by the Ures. Rather the Ures facilitated the purchase of the vehicle from one of their relatives.

[15] Mr Ure accepts that he did not provide as much direct supervision as the apprenticeship agreement may have required. He noted that he treated Mr Baugen in the same way that he was treated when an apprentice, and that it was not practical, for example, to have two people on a tiny job. Mr Ure did, however, ensure that he worked directly with Mr Baugen on areas where he was not trained or licensed to work, such as sanitary plumbing. In particular, I accept the evidence that any work involving drainlaying as opposed to drain clearing involved Mr Ure working with Mr Baugen directly.

[16] Mr Ure also arranged for other plumbers to provide Mr Baugen with training in areas that his business did not operate in, so that Mr Baugen might meet his apprenticeship training requirements. For instance, Mr Baugen did some work for a plumber who specialised in drain clearing.

[17] As a result of that training, Mr Baugen decided in early 2005 to purchase some drain clearing equipment of his own, which he did with the support of the Ures, who agreed to give him all their drain clearing work in future. The cost of the equipment was substantial, being around $20,000. From that point on Mr Baugen invoiced the Ures at a separate rate for work done using the drain clearing equipment, naturally at a much higher charge. He also obtained at least five private jobs, using his own equipment and operating on his own account, outside of those done for Affordable Plumbing, where he invoiced clients independently from Affordable Plumbing.

[18] Furthermore, Mr Baugen placed an advertisement in the Yellow Pages that year, under the "Drainage Contractor and Consultants" category, advertising his services under the name Action Drainage. He offered services for blocked drains and storm water separations and specialised drainage video camera work, as a registered drainlayer, giving his home number and his cell phone number as contacts.

[19] Mr Baugen claims that the Ures wanted him to advertise his equipment in the Yellow Pages in association with Affordable Plumbing Services. The fact of the matter is, however, that the ad is in the name of Action Drainage, and there is no mention of Affordable Plumbing, which had its own ad in a completely different section of the Yellow Pages.

[20] I accept that tensions developed between Mr Baugen and the Ures from that point, particularly as Mr Baugen believed he did not have as much opportunity to use the equipment as he hoped, because of his commitments to the Ures. For instance the Ures were upset on one occasion when Mr Baugen was expected by them to be on one job when he had left it to go and do some drain clearing work for another plumber. There were also problems from Mr Baugen's viewpoint over the Ures occasionally using other plumbers for draining clearing work in breach of their agreement with him.

[21] The next year the relationship between Mr Baugen and the Ures came to an end. For reasons given later it is not necessary to traverse the details of the subsequent issues, except to say that the issue of contracting as opposed to being an employee became important to Mr Baugen, but the Ures would not accept that Mr Baugen had ever been their employee.

[22] The parties attended mediation, but despite further discussions have been unable to resolve matters. It therefore falls to the Authority to make a determination.

The Law

[23] The first issue for determination is whether Mr Baugen was employed by an employer to do any work for hire or reward under a contract of service. In determining this question the Authority must determine the real nature of the relationship between the parties. It must consider all relevant matters including any matters that indicate the intention of the parties and is not to treat as a determining matter any statement by the parties that describes the nature of their relationship [Section 6 refers].

[24] These issues have been dealt with in *Bryson v. Three Foot Six Limited (No 2)* [2005] ERNZ 372 (SC) at 386:

> "…It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests. Hence the importance, stressed in *TNT*, of analysing the contractual rights and obligations."

[25] The comments in the dissenting judgment of McGrath J in *Three Foot Six Limited v. Bryson* [2004] 2 ERNZ 526 (CA) at 534 are also useful:

"… at common law there is no single indicator test. Control over the manner in which work is performed is not decisive but, subject to countervailing considerations, a high degree of control may point to an engagement being a contract of service, as may the high degree of integration of the work being done into the principal's business. Indications that a relationship may be in the nature of a contract for services include the engaged person's ownership of the tools with which the work is done, the chance of profit or risk of loss, and whether remuneration is at a rate turning on the volume of product (or service) delivered. It has also been said that:

*The question can only be resolved by examining the whole of the various elements which constitute the relationship between the parties (*Montreal v. Montreal Locomotive Works Ltd *[1947] 1 DLR 161, 169 per Lord Wright, cited in* Market Investigations Ltd *at p.184)*

[23] As indicated, s.6(2) requires that the assessment be of "the real nature of the relationship". The Act's emphasis on the real nature of the relationship requires that, in cases where the real nature of the work as constituted by the agreement's substantive terms and its objective features point clearly to an employment relationship, there will be little scope for the parties to agree that the relationship is nonetheless a contract for services. In cases where the real nature of the relationship is less certain, the parties will have greater freedom to constitute their relationship in either way."

Determination

[26] Despite Mr Baugen's protestations now, it was clear that at the time of him entering into the relationship with Mr and Mrs Ure it was their common intention that the relationship be one of contractor and sub-contractor, as they called it. Mr Baugen was keenly aware that that was the only relationship which Mr Ure would countenance and thus Mr Baugen could not continue with his apprenticeship unless he agreed to Mr Ure's request. Furthermore, Mr Baugen complied with the request and put aside money to pay for the tax on income he earned as a sub-contractor. That is not, however, a determining matter. It is simply one to be put into the mix in determining the real nature of the relationship.

[27] The main factor pointing towards an employment relationship is the nature of an apprenticeship, centring as it does on teaching and learning. Mr Baugen is right to point out that it is difficult to be seen as in business on one's own account when one party is a "master" and the other is an "apprentice". In the normal course of events I would accept that an apprentice is most likely to be an employee, whatever label the parties put on their relationship. There is nothing in the industry training legislation, however, which dictates that this relationship must be one of employment. As highlighted above, I conclude that the wording is deliberately ambiguous. It clearly does not require all industry training agreements to be employment agreements. There was no evidence of industry practice one way or the other.

[28] Similarly, the reference to industry training agreements being part of an employment agreement clearly pre-supposes that the agreement in question is an employment agreement.

[29] Mr Baugen may well be correct in stating that Mr Ure breached the provisions of the Plumbers, Gasfitters and Drainlayers Act 1976, in that Mr Baugen worked on occasions without

being under the direct supervision or in the presence of Mr Ure. That may be a breach of that Act, but does not affect the real nature of the relationship between the parties, except to reinforce the above point that apprentices are to be supervised in the course of learning and being taught the plumbing trade.

[30] It was clear that as a primary source of Mr Baugen's income the Ures had a deal of control over Mr Baugen's working day, albeit that he only invoiced them for work actually done. Certainly Mr and Mrs Ure expected Mr Baugen to be generally available to work for their business and Mr Baugen was required to inform them when he was not available. On the other hand, I conclude that he was able to do work on his own account, provided he had not already committed to working for the Ures. Because of that I conclude that the control test does not favour either an employment or contracting relationship.

[31] Mr Baugen was integrated into the Ure's operations in the sense that the Ures were his primary client. On the other hand he independently purchased a major piece of equipment and operated it on many occasions separate to the Ures' business. This is highlighted by the Action Drainage advertisement in the Yellow Pages. Just because Mr Baugen did not obtain a substantial amount of work using that equipment does not mean that that point can be ignored. The same point applies in respect of tools and equipment. It follows that Mr Baugen was not greatly integrated into the Ures' business and this factor favours a contracting relationship.

[32] Under the fundamental test it is important to ascertain whether Mr Baugen was in business or acting on his own account, rather than being an employee. Mr Baugen clearly has experience in business and in the taxation requirements that go with it. He was thus organised to pay taxes as a self employed person, when he agreed, however reluctantly, with Mr Ure to take up as a sub-contractor, in order to complete his apprenticeship. The fact that Mr Baugen's income was dependent on the hours he invoiced the Ures rather than when he was at Affordable Plumbing's business premises indicates that he was in business on his own account. Most importantly, he purchased a significant piece of equipment with which to be able to branch out further into business on his own account. The fact that this was not as successful as Mr Baugen would have liked, does not change the fact that this equipment gave him a substantial opportunity (which was not integrated into the Ure's business) to earn income on his own account. Therefore an assessment under the fundamental test points clearly to the relationship being one of contracting rather than employment.

[33] In conclusion therefore, while I accept that it is difficult to reconcile an apprenticeship (with all the training and supervision that goes with it) with that of a contracting arrangement, the law

allows it. Furthermore, the particular circumstances of this case - involving an adult apprentice with business experience invoicing only for the hours actually worked on jobs, operating expensive equipment available for use outside of the Ure's business, and thus with the profit or loss resulting from the work done by Mr Baugen being within his own control to some extent, and where the intention of the parties was clearly to engage in a relationship of contracting, the real nature of the relationship was not one of employer and employee. I therefore dismiss Mr Baugen's claims for want of jurisdiction.

Costs

[34] Costs are reserved.

G J Wood
Member of Employment Relations Authority