



[4] For the purposes of this determination, the only issue is whether the applicants are, in truth, employees of Summit or not. I have made it clear to both parties that I must resolve that issue before considering other matters. The reasons for this course of action are obvious. If the applicants are not employees, then the Authority has no jurisdiction to deal with their complaints and in consequence it is inappropriate for the Authority to even entertain consideration of those matters unless and until jurisdiction is established.

### **Issues**

[5] I intend to deal with the matter under the following headings:

- (a) The statutory position;
- (b) The common law;
- (c) The real nature of this relationship.

### **The statutory position**

[6] Section 6 of the Employment Relations Act 2000 confers on the Authority the power to determine whether a relationship is one of employment or not. In doing that, pursuant to subsection (2) of the section, the Authority must determine *the real nature* of the relationship between the parties.

[7] Furthermore, pursuant to subsection (3), the Authority must consider all relevant matters including those that go to intention but critically ... *is not to treat as a determining matter any statement by [the parties] that describes the nature of their relationship.*

[8] It seems to me to follow that the Authority ought to approach the matter in a practical, commonsense way, looking at all the factors available and particularly to be cautious about placing too much weight on evidence of the parties' intentions.

[9] In particular, I consider that the existence of documentation emanating from one party which suggests a particular conclusion ought not to be seen as conclusive of the intention of both parties.

## **The common law**

[10] In *Bryson v. Three Foot Six Limited* [2005] 3 NZLR 721, the Supreme Court considered all of the traditional common law tests for identifying whether the relationship was one of employment or not. At paragraph 5 of its judgement, the Supreme Court set out the applicable principles as follows:

*The Court must determine the real nature of the relationship. The intention of the parties is still relevant but no longer decisive. Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*

*The real nature of the relationship can be ascertained by analysing the tests that have historically applied such as control, integration and the “fundamental” test. The fundamental test examines whether a person performing the services is doing so on their own account.*

*Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.*

[11] In that connection then, the integration test sought to measure how far it could be said that the individuals performing work were integrated into the organisational structure of the entity creating the work which required performance. Similarly, in the assessment of the control test, the issue was whether the individuals providing the work were controlled by the individual or entity who required the work performed or whether they controlled matters themselves. Questions posed in this connection would include whether the individuals have control of their own hours of work or whether they are directed by the other party to perform work at particular times or in a particular way.

## **The real nature of this relationship**

[12] I am satisfied on the balance of probabilities that the relationship between these parties was a contractual one rather than an employment one. A number of factors lead me to that conclusion and I am supported in reaching that decision by the fact that an application of all but one of the old common law tests would achieve that result.

[13] The evidence is clear that when the relationship between the parties was first inaugurated, Summit offered a contractual relationship. It produced and had signed by the applicants’ relevant agreements which unequivocally expressed the relationship

as a contractual one. Although they chose not to do so, the applicants were encouraged to seek legal advice before signing the agreements.

[14] I am satisfied that the choice Summit made to have these particular parties engaged on a contractual basis was a business decision made for proper purposes and that it was not a business decision made simply to avoid the possible liability attaching to an employment relationship. I am also satisfied that, on the evidence I heard, other people performing similar work to the applicants were also engaged on exactly the same sort of basis and with the same rationale and justification.

[15] Conversely, there were people in the Summit organisation who were employees, and demonstrably so. But essentially these were people who were not to be incentivised by the marketing process which Summit told me was a significant factor in its decision to engage marketing people as contractors.

[16] I accept Summit's evidence that the applicants were offered a training course on registration for GST and that they did in fact participate in that training programme but, notwithstanding that, failed to register for GST and thus failed to get the very benefits of the relationship which its structure could have provided.

[17] It seems clear from the evidence that the relationship between the parties deteriorated over time, principally because of the increasing pressure on Summit's cashflow and Summit's attempts to reduce costs. A series of intemperate emails between the parties is relied on by the applicants as evidence that Summit directed the applicants to work certain hours or, in particular, reduce some work (especially administrative work).

[18] I accept that those emails do show Summit attempting to control expenditure but I do not think it necessarily follows that this means the relationship is one of employment. Summit contend they attempted to get compliance with earlier agreed limits on expenditure and/or they sought to respond appropriately to the deteriorating financial position. It must be available to a commercial entity to do that and the fact of those actions is not, in my opinion, determinative of an employment relationship.

[19] It could not be said, on the facts, that the applicants were integrated into the Summit management chain, because the management chain was entirely separate from the marketing activities undertaken by the contractors.

[20] I have commented on the intention of Summit. The applicants say they always intended to be employees, but the nature of their engagement by Summit would seem to cast some real doubt on whether that intention could ever properly be realised. Mr Carson told me that both of the applicants knew they were contractors and said so at the time that they were engaged, but even if that is not true, I am influenced by the fact that Summit went to the trouble of ensuring that the applicants had the information about GST registration and thus the potential benefits of self-employment before the relationship was very old. The fact that the applicants chose not to register for GST is entirely their affair, but that they had the opportunity to understand the potential benefits of that courtesy of their principal, does suggest that if they had a different intention from Summit at the time the relationship formed, they took no real steps to implement it. Again they were offered the opportunity of obtaining legal advice on the document which they signed but chose not to do so.

[21] The control test requires an assessment of the relevant strength of the parties in determining who does what and when. The applicants say there were told what to do and when to do it by Mr Carson and that is broadly speaking true. However, why Mr Carson does this is because he claims (accurately in my view) that the documents on which the applicants agreed their engagement required certain attendances and not others. He simply sought to ensure that Summit was only being asked to pay for what it contracted for. Towards the end of the relationship, Mr Carson became more interventionist still, because Summit was having serious financial problems. The fact that he then issued further instructions (some I must say in rather imperious terms) is simply a function of the times.

[22] I have reflected earnestly on the applicants' view that by those directions, Mr Carson effectively changed a contractual relationship to an employment relationship. I do not think that can be right. The underlying relationship must be one thing or the other and cannot in my view mutate. However, taken alone, it might be said that the control test is suggestive of employment in the present case because there appears to be directions of particular kinds of work and work at particular times.

[23] The fundamental test, in the words of the Supreme Court in *Bryson* requires the Authority to examine whether the person performing the services is doing so *on their own account*. I am satisfied on the evidence before me that the applicants were working *on their own account*. The structure of the relationship and the supporting

paper trail tend to confirm the contractual relationship. The applicants were offered help in becoming registered for GST on engagement, were paid against claim sheets for hours completed, worked effectively unsupervised (although within a band of hours previously agreed with Summit), were not paid holiday pay, sick pay or any of the other usual incidents of employment, and could have worked for others if they chose to.

[24] In making these findings I accept that I am preferring the evidence of Summit to the evidence of the applicants. That is not to be taken as indicative of any views about the honesty or integrity of the applicants. I was impressed with the applicants' demeanour and integrity; I just reach the conclusion that they have misunderstood the nature of their relationship with Summit. I accept this will have been exacerbated by the troubled relationship each appears to have had with Mr Carson whose methods of communication will not always have endeared him to the applicants.

[25] I am satisfied then that the real nature of the relationship is one of commercial contract rather than employment despite the appearance of control being exerted by Summit.

### **Determination**

[26] It follows that I am not satisfied that the applicants have an employment relationship with Summit and, that being the position, I can take the applicants' complaints no further. If they have grievances with Summit, then, of necessity, they will need to pursue those grievances in another forum.

### **Costs**

[27] Costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority