

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA136/10
5160304

BETWEEN ANDREW JOHN KEACH
Applicant

A N D BROWN & SON CONSTRUCTION
LIMITED FORMERLY OTAGO
BUILDING SERVICES LIMITED
Respondent

Member of
Authority: Helen Doyle

Representatives: Stephen McAuslin, Counsel for Applicant
Nathan Brown Advocate for Respondent

Investigation
Meeting: 27 May 2010

Determination: 29 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The parties want to the Authority to resolve the real nature of their relationship. Andrew Keach says that he was an employee of the respondent. Brown & Son Construction Limited formerly Otago Building Services Limited (Otago Building) say that Mr Keach was an independent contractor.

Second Respondent

[1] Nathan Brown, director of the first respondent was named as second respondent because he had entered into negotiations with Mr Keach to offer him a contractors position and, there was some issue about the ability now of the company to make payment. At this point I am only being asked to establish a preliminary matter and I do not consider there is a basis for Mr Brown to be named as a second respondent. He is not therefore a party to this matter.

Section 6 Employment Relations Act 2000

[2] Section 6 of the Employment Relations Act 2000 provides the meaning of an employee and amongst other matters:

6. *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; and ...*
- (2) *In deciding for the purposes of sub-section (1)(a) whether the person is employed by another person under a contract of 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 –*
 - (a) *must consider all relevant matters, including any matters that indicate the intention of the parties; and*
 - (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[3] The Supreme Court considered s.6 of the Employment Relations Act 2000 in *Bryson v. Three Foot Six Limited (No 2)* [2005] at p 372. The Supreme Court considered the meaning in that section of *all relevant matters* and held they included the written and oral terms of the contract between the parties together with the way in which the parties actually behaved in implementing their contract. Further it was held that all relevant matters 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).

The issues

[4] The issues for the Authority are as follows:

- What was the intention of the parties as ascertained from the terms and conditions of the contract between the parties and the operation of the contract in practice?

- Applying the tests of control, integration and the fundamental test what was the real nature of the relationship;
- Is industry practice a matter in this case that could assist?

Factual background

[5] Andrew Keach was offered a contract for services with Otago Building by Nathan Brown, both a director of Otago Building and a friend of Mr Keach. Prior to that Mr Keach had been an employee for 17 years at an aluminium company.

[6] Mr Keach accepted the position offered on the basis that he would be an independent contractor. A written contract was never entered into. Mr Keach's role was to be that of builders labourer. He was not a qualified builder but as he put it *had an inkling how to build*. There was no evidence to support that there was any concern about his standard of work and he was regarded as having hands on leadership skills.

[7] Initially there was some dispute as to Mr Keach's start date with Otago Building. I was provided with copies of Mr Keach's Inland Revenue documentation for the year 1 April 2007 to 31 March 2008. I am satisfied that that documentation confirms that Mr Keach was likely to have commenced his relationship with Otago Building on or about 1 September 2007. Prior to this Mr Keach had been on ACC as a result of a head injury.

[8] There was discussion with Mr Keach about the rate of pay he would receive. Initially it was \$18 per hour. The hourly rate then increased to \$20 per hour as Mr Brown considered Mr Keach's skills increased.

[9] Mr Keach was generally advised or usually knew where he was expected to work each day. There was an element of flexibility in terms of Mr Keach being able to leave the building site to watch his children play sport or undertake other domestic type tasks. Mr Brown would usually be told if Mr Keach was going off site although he did not accept that it went so far as Mr Keach seeking authorisation.

[10] Mr Keach would submit a timesheet to Mr Brown each fortnight showing the hours he had undertaken. 20% withholding tax was deducted then from payments he received.

[11] Initially Mr Keach provided and used some of his own tools, however in or about mid 2008 he had a discussion with Mr Brown about a tool allowance and from that point on, aside from his tool belt, all other tools and equipment were supplied by Otago Building. Mr Keach was also provided with a van for personal use by Mr Brown and a company cell phone.

[12] When Mr Keach was working on one particular site he was provided with a uniform, which had another company logo on it. Wearing of the uniform was not compulsory although Mr Keach wore his. It was accepted by Mr Brown that Mr Keach was required to fix work which was not up to standard undertaken by other workers at the company.

[13] Mr Keach from time to time discussed his contractual arrangement with others at the building site and that Mr Brown would encourage him to seek advice about his status.

[14] For the year ending 31 March 2008 Mr Keach submitted a tax return as an independent contractor using the same tax specialist as others at Otago Building.

[15] There was no evidence to satisfy me that Mr Keach performed work for other companies or individuals during the period he was with Otago Building aside from one job it appeared for a family member. Mr Brown said that if Mr Keach was away sick or for other reasons, he was not replaced, but others were able to undertake a few extra hours when required.

[16] I was not satisfied from the evidence that Mr Keach ever gave any thought to hiring anyone to help him but he did supervise on occasion the work of others for Mr Brown.

[17] Mr Keach was concerned that Otago Building shut down over the Christmas period and that he was unable to work and earn income over that period. From in or about mid 2008 to January 2009, Mr Keach worked on a site known as Palms Motel. Otago Building was asked to stop work on the site but Mr Keach was asked to stay on and continue working on the site. Mr Brown negotiated Mr Keach's hours and his hourly rate with DS Building Limited that was another building firm that remained on site. Mr Keach was not party to and had no knowledge of the matters that were discussed. His hours and rate of pay remained at \$20 although Mr Brown said that the

amount he received for Mr Keach's work was \$36.00 per hour because he wanted to cover the tools Mr Keach used.

[18] In late 2008, Mr Keach had a discussion with another contractor, Paul McCrone who advised that he was considering changing the status of his workers to employees. Mr Keach I find raised this with Mr Brown and was advised that there was going to be some consideration given to a change in status after Christmas 2008/2009.

[19] Before this could occur, Mr Keach sustained a head injury in or about January 2009 and was unable to work. In February 2009 Mr Keach went to see an accountant, Justin Stent. Mr Stent was provided with a copy of Mr Keach's last income tax return. He was of the view that Mr Keach's work status did not appear to fit the position of an independent contractor. As a result of this view, he contacted Mr Brown to discuss the matter. In doing so, Mr Stent noticed that some of the earnings for 2008 had been recorded as PAYE. Mr Brown advised that this was a mistake and I accept that in all likelihood this was entered by mistake as there was no difference in terms of tax deductions for Mr Keach. Subsequently, however, Mr Stent observed that following the telephone call, the Inland Revenue Department system was updated and Mr Keach's history showed taxation in the current year as withholding tax.

[20] Mr Stent advised Mr Keach to consult a lawyer to discuss the matter as he did not consider that Mr Brown would agree to change Mr Keach's employment status.

Intention of the parties

[21] Notwithstanding there was no written agreement Mr Keach agreed to accept an engagement with Otago Building as an independent contractor. It is difficult to see that there were any particular advantages for Mr Keach with this type of arrangement. There was some perceived flexibility in that Mr Keach would on occasion leave the site and undertake some other tasks. I am not satisfied that these, however, amounted to other jobs as such. There was no evidence of any particular taxation advantages that Mr Keach had by virtue of the arrangement and it is important to set out that Mr Keach did not suggest he be an independent contractor.

[22] Although I am satisfied that the intention of the parties was that Mr Keach be an independent contractor that is the not end of the matter. The Authority is required

to consider the real nature of the relationship between Mr Keach and Otago Building and it is necessary in addition to considering the intention of the parties to consider the real nature of the relationship by applying the control, integration and fundamental tests.

The integration/control test

[23] Mr Keach's skills were those of a builders labourer. He undertook tasks in terms of building for Otago Building and was, I find, subjected to an element of control. He corrected others, not his own employees, mistakes by redoing work that was below standard and was in all likelihood sometimes introduced by Mr Brown on site as the foreman. Mr Keach felt his position was different from that of another contractor who was engaged by Otago Builders. Mr Keach referred to him as a true independent contractor. That is, in my view, because Mr Keach was in essence part and parcel or integrated into Otago Building whereas the other independent contractor was not such an integral part of Otago Building but maintained his own business on his own account. He was paid an hourly rate that was set rather than by results and was using tools supplied by Otago Building for an extended period of employment.

[24] I find that the integration/control test favours Mr Keach.

The fundamental test

[25] The fundamental test requires the Authority to consider whether Mr Keach was performing services for Otago Building in business on his own account. Mr Keach was not registered for GST. He did not submit invoices to Otago Building but rather time sheets. Mr Brown says that this was an agreed basis for payment because it was easier for Mr Keach.

[26] Mr Keach did not employ other people. Although I accept Mr Keach would have considered whether he could claim any expenses, I place some emphasis on Mr Stent's evidence that in fact there were no real expenses that he was able to claim as he was provided with a van and a cellphone regardless of the state or origin of those two items.

[27] I am further strengthened in my view that Mr Keach was not in business on his own account because when he was left at the Palms Motel it was Mr Brown who negotiated his rate of pay which was in fact higher than what Mr Keach received. Mr

Keach did not have the ability in those circumstances to set his own fee or increase his earnings.

[28] There was no evidence to suggest that Mr Keach engaged in any other significant work aside perhaps from a small job for a family member. There is no evidence to support that Mr Keach was even aware that that was something he could do. I do not conclude, therefore, that this was Mr Keach's choice to only work for Otago Building.

[29] I find that Mr Keach was not providing services on his own account to Otago Building. This test favours Mr Keach. I did not hear any evidence in this case as to the practice of engaging builders labourers as contractors and there is no assistance therefore from industry practice.

Determination

[30] I find that the real nature of the relationship between Andrew Keach and Otago Building was that of employment.

[31] Although Mr Keach had skills, I am not satisfied it could be said that he was contracting his skills. He was required to fix others' work and to, in effect, supervise others who were also classified as contractors. There was some flexibility but also I find from the evidence regularity in terms of his hours.

[32] In conclusion, I find that the real nature of the relationship was that of employment from September 2007 until the relationship ended in January 2009.

Costs

[33] I reserve the issue of costs. Mr McAuslin, has until 19 July 2010 to lodge and serve submissions as to costs and Mr Brown, on behalf of Otago Building, has until 9 August 2010 to respond to the same.

Helen Doyle
Member of the Employment Relations Authority