IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2012] NZERA Christchurch 212
5367783

	BETWEEN	ANDREW BURTON Applicant
	AND	BEST REMOVALS OTAGO LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Applicant in person Diana Hudson, Counsel for Respondent
Investigation Meeting:	17 July 2012 at Alexandra
Submissions received:	On the day
Determination:	27 September 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Andrew Burton says that he was an employee of Best Removals Otago Limited and that he is owed money for unpaid wages together with costs that he had incurred with respect to both Disputes Tribunal and Employment Relations Authority proceedings.

[2] Best Removals Otago Limited (BROL) says that Mr Burton was an independent contractor whose services were paid for on the basis of invoices issued with GST in the name of Burton Insurance Brokers Limited (Burton Insurance) rather than in person.

The issues

[3] The Authority will have to determine whether Mr Burton was an employee under a contract of service or an independent contractor under a contract for services. If the answer to that question is that Mr Burton was an employee, then the Authority

can go on to determine whether he is owed money for unpaid wages and related costs. If the answer to that question is that Mr Burton was an independent contractor under a contract for services, then the Authority has no jurisdiction in this matter and the parties will have to return to the Disputes Tribunal.

The law

[4] Section 6 of the Employment Relations Act 2000 provides the meaning of employee:

> *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*
>
> *(b) includes –*
>
> *(i) a homeworker; or*
>
> *(ii) a person intending to work; but*
>
> *(c) excludes a volunteer who –*
>
> *(i) does not expect to be rewarded for work to be performed as a volunteer; and*
>
> *(ii) receives no reward for work performed as a volunteer; and*
>
> *…*
>
> *(2) In deciding for the purposes of subsection (1)(a) whether a 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 subsection (2), the court or the Authority –*
>
> *(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*
>
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[5] The leading judgment on s.6 is that of the Supreme Court in *Bryson v. Three Foot Six (No.2)* (2005) NZSC 34, 2005 ERNZ 372. The principles identified by the Supreme Court in *Bryson* were summarised by Chief Judge Colgan in the Employment Court judgment of *Singh v Eric James & Associates Ltd* [2010] NZEmpc 1 at [17] including:

- Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law.

- The Authority or the Court, in deciding whether a person is employed under a contract of service, is to determine "*the real nature of the relationship between them";* s 6(2*).*

- The Authority or the Court must consider "*all relevant matters"* including any matters that indicate the intention of the persons; s 6(3)(a).

- The Authority or the Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship; s 6 (3)(b).

- *"All relevant matters"* include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship.

- *"All relevant matters"* will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.

- *"All relevant matters"* include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

- Until the Authority or Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental test.

- Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor.

- Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.

- Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether there may be a consequence of the contractual labelling of a person as an independent contractor.

The background to the agreement

[6] David Harris, known as Mitch, is the owner and manager of BROL. BROL is involved in the furniture relocation business with local, international and national clients. The business operated from two depots; one in Dunedin and one in Cromwell. In late 2007 there was a relocation of the depot in Alexandra to Cromwell. Shortly after the relocation, Mr Harris saw an advertisement in the local Cromwell paper placed by Mr Burton. Mr Burton had retired from his business in 2006.

[7] Both men recall differently what was said in the advertisement. A copy of the advertisement was not available. Mr Burton said that in the advertisement he was offering expertise as a consultant in business mentoring matters including restructuring. Mr Harris said that he was drawn to the advertisement because it mentioned insurances, cold calling and sales. He said he needed somebody because of the recent move from Alexandra to Cromwell to go out and *drum up work and do cold calling.*

[8] Mr Harris telephoned Mr Burton and invited him to a meeting at his home. Mr Burton said that he was advised by Mr Harris at that time that he would take him on *for six months at $20 per hour and GST*. Mr Harris did not accept the time frame on the period with which Mr Burton would be involved with his company. Mr Harris said that Mr Burton was insistent that he would invoice BROL for the work he did under his company Burton Insurance as it was GST registered. Mr Burton could not recall any discussion about the company. I conclude that there was in all likelihood mention by Mr Burton of Burton Insurance even if Mr Burton was not insistent, as Mr Harris says he was about its involvement. There was discussion about what the

role would entail including Mr Burton visiting prospective clients and introducing the business to them. Mr Harris said in his evidence that the days worked and hours were to be completely flexible so that Mr Burton could continue with his business interests. Mr Burton said that he had no such interests. The agreement between the parties was never written down and all terms were oral.

[9] Mr Burton is an intelligent man who has operated his own insurance brokering business. He sold that business in 2006 but retained Burton Insurance, a company that was incorporated on 20 June 1997. Mr Burton had not been in an employment relationship since in or about 1992. Mr Harris responded to Mr Burton's advertisement on the basis that Mr Burton had skills he wished to use at BROL. At the initial discussion with Mr Burton and Mr Harris, this was not a situation of unequal bargaining power that can be found in some cases. There was an agreement reached at the outset that the relationship would be other than an employee/ employer relationship.

Operation of that agreement in practice

[10] Mr Burton commenced work with BROL on 21 January 2008. Mr Burton had retained the entire collection of invoices issued for a little over the three year period to BROL. The invoices I saw were in the name of Burton Insurance and described the work being paid for as *consultancy fees.* Ms Hudson helpfully prepared a spreadsheet which Mr Burton took no serious issue with, of the payments made to Mr Burton for hours that he was undertaking work for BROL and leave.

[11] Shortly after Mr Burton commenced his duties, he was provided with a business card to leave with clients. Mr Burton provided the Authority with a copy of the business card that states he was an administration/sales manager. Mr Burton did not accept what he suggested to put on the card. In any event the card speaks for itself. Mr Harris described the card as a business tool to leave with businesses visited by Mr Burton. I accept that evidence as likely.

[12] As or about the time Mr Burton commenced work with BROL, an advertisement was placed in a Wanaka paper that referred to BROL and Andrew Burton by name. Mr Harris said that he was unaware of this advertisement which Mr Burton said continued to run for three years. Mr Burton said that the advertisement was approved by Mr Harris. I think it is likely that Mr Harris knew at

least at the start of its placement about the advertisement. I accept that he may not have been aware that it simply continued to be placed in the paper.

[13] Mr Burton said that after a period of about six weeks from 21 January 2009, the nature of the work he undertook changed from the sales focussed role to an office clerk when an administrator left. Mr Harris did not agree with that evidence. Mr Harris said that the only person in the office for much of the time in 2008 was himself and that there was no administrator in the office when Mr Burton commenced. His partner did come to work in the office as a part-time administrator until she had a stroke in November 2009 and was in hospital. He said that at this time Mr Burton did provide telephone and administrative cover and Mr Harris spent more time on the road. Mr Harris said that Mr Burton continued however with his cold calling and encouraging sales.

[14] Mr Burton accepted that part of his work was to obtain new sales and provide information about the BROL business. He said though that as from 4 March 2008 he worked in the administrative role starting at 8.30am and finish at 5pm. He said that during this time he did invoices, answered the telephone, dealt with queries about quotes for shifting household loads, got the *smoko*, got the mail, and did the banking, the debtor ledger claims and insurance. At or about this time, that is very early in 2008, Mr Burton said he asked Mr Harris on one occasion for an employment contract but that Mr Harris did not really respond to him. Mr Harris said that he was never asked for an employment agreement by Mr Burton. He said that he has been an employer for many years and is aware of the requirement to provide employment agreements.

[15] There was a significant dispute about Mr Burton's duties and when and how they changed. I find that Mr Harris was quite hands off in monitoring what Mr Burton did and how he spent his time. There was no description of the services that Mr Burton was providing on the invoices issued by Burton Insurance. The hours BROL were invoiced for did increase from early April 2009 in a way that would reflect full time work although there are fluctuations to the hours from 66 hours per fortnight to 87 and even 93. I accept Mr Burton's evidence that he did in all likelihood perform some administrative duties from about 2008 but I find that he also continued undertaking visits to generate business and sales and increase awareness of the company.

[16] Initially Mr Burton used the BROL van when he travelled to encourage business but that changed and then he started using his own vehicle. Mr Burton advised the Authority that he did not claim expenses in terms of the travel.

[17] Mr Burton said that when he wanted to take leave he would advise Mr Harris of this and that Mr Harris would be aware of the dates that he was to be away. BROL never paid Mr Burton any holiday pay. Mr Burton would inform of the period he would be away but the evidence did not support any approval as such was required. Mr Burton took a lot of leave the records reflect from his work with BROL. In 2008 which was not quite a full year he had seven weeks leave, which is quite a number of weeks even allowing for a shutdown of the business over Christmas. Mr Burton took a further seven weeks leave in 2009 and ten weeks leave in 2010. The leave was not taken all at once but throughout the year.

[18] Mr Harris discussed with Mr Burton reducing his days to three days a week in or about late 2009 or early 2010. From that point, Mr Burton only worked on Monday, Tuesday and Wednesdays but a full day on each. Mr Burton describes matters as uneventful between the parties until he was booked in for major back surgery on 14 March 2011. He obtained a doctors certificate from his surgeon advising that he would be away from work for 12 weeks until 15 June 2011.

[19] Shortly before 15 June, Mr Burton called in to see Mr Harris and at that point Mr Harris advised Mr Burton that he should not start for a further six weeks or until 1 August 2011. Mr Harris however did not accept Mr Burton's evidence that he agreed Mr Burton could come back to BROL on 1 August. He said that he advised him and was quite clear with him that there was no work for him.

[20] Mr Burton said that he duly started back with BROL on 1 August 2011 and continued for about three weeks until 18 August he received an email advising him that his invoices were queried. Mr Burton was unable to read the email from Mr Harris until 22 August 2011. I shall come to his response shortly. Against a background of disputed evidence I have placed some weight on Mr Harris's email of 18 August 2011. It was sent before any dispute of status was apparent. Mr Harris says *I don't see the need of your services in your past capacity as a consultant in my mind they finished when you had your back injury problems*. He suggests that he would be happy to negotiate a new arrangement with Mr Burton where he does a sales drive for new and existing clientele as follow up to his previous visits. He said he

would be happy to negotiate an arrangement where Mr Burton handled the *claims* [insurance] and *perhaps the debtors ledger*. Mr Harris goes on to say that *I want a specific agenda which doesn't overlap with your personal business, rotary or computer time*. In relation to the reference to *computer time* it was common ground that Mr Burton would use BROL computer from time to time for his personal business as he had broadband issues where he lived. The email does not support in my view that Mr Harris regarded Mr Burton as an employee.

[21] Mr Burton replied on 22 August 2011 that day explaining his position with attendances at work leading to the invoiced hours. On that same day Mr Harris responded to Mr Burton advising that it was his intention to terminate his contracted position as consultant effective immediately. Further correspondence took place between Mr Harris and Mr Burton in relation to the unpaid invoices.

[22] A claim was then lodged with the Disputes Tribunal by Mr Burton. He referred to the parties to the claim as Burton Insurance and BROL. The Disputes Tribunal Referee in a decision issued on 13 December 2011 ordered that the matter be adjourned for three months and that the Director of Burton Insurance, Mr Burton, was to advise of progress. The Dispute Tribunal Referee formed an opinion there was a reasonable chance a relationship between the parties was an employment one and not a contractual one which would be outside the jurisdiction of the Disputes Tribunal.

Intention of the parties

[23] I find that the relationship between Mr Burton and BROL commenced as an independent contractor arrangement. It is clear from the verbal discussions what was intended by both parties. Mr Burton referred to his company during the discussions as an entity already registered for GST.

[24] I find that there was a common intention that Mr Burton was not to be an employee. I do not find that intention changed during the over three years of the relationship. The only evidence to the contrary was Mr Burton saying in early 2008 that he should have an employment contract but that Mr Harris did not respond to that. Such a suggestion was never repeated. The first time a clear possibility of employment was raised by the Disputes Tribunal Referee. I do not consider the reference by Mr Harris in correspondence with ACC to Mr Burton as an employee to be a determinative factor.

The economic reality or fundamental test

[25] The Authority considers under the test whether Mr Burton, in providing services to BROL, does so as a person in business on his own account.

[26] Mr Burton submitted GST invoices in the name of Burton Insurance to BROL for the entire period of the relationship. Mr Burton said in evidence that there was no tax benefit to him in this. I find it unlikely that Mr Burton was not aware of any tax benefit. Mr Burton had the expertise of an accountant to prepare his accounts and tax records.

[27] His tax summary shows him receiving a *shareholder employee salary* from Burton Insurance. The invoices sent to BROL were not always for the same amount and to a degree I find that Mr Burton/Burton Insurance could increase earnings by the performance of more work. Whilst Mr Burton did not claim vehicle expenses for using his own car he was able to claim such expenses. Mr Burton had been in business for some years before commencing with BROL.

[28] Mr Burton says that he was restricted and was unable to undertake any other work. The hours invoiced for did fluctuate and there was no evidence that Mr Burton could not simply have advised his unavailability in the same way he did when he needed leave and worked elsewhere. There was no clear restriction on him. There is argument I find that Mr Burton, if he was employed, was employed by his own company. I accept Ms Hudson's submissions that the economic reality test favours a finding that Mr Burton was not an employee of BROL.

Control and Integration

[29] Mr Burton placed weight on the control and integration tests. At the outset I accept that what Mr Burton did particularly in the administrative role could have been undertaken by an employee or an independent contractor. Specific control though particularly over hours worked and what work was undertaken I find was more limited than in an employment relationship.

[30] Mr Burton sent his invoices to the Dunedin office and it was not until in or about the end of 2009 that some more details in the invoices was requested. There was little control when Mr Burton undertook the sales type activities. There was no evidence of any performance type sale measures being implemented.

[31] I accept that Mr Harris may have supervised and directed activities within the office and that would be a factor favouring an employment relationship. Ms Hudson in her submission described any change and focus on administration as an interim change only when Mr Harris's partner became very unwell. That was not Mr Burton's view. A change or limit to work available for Mr Burton was clearly signalled by Mr Harris in his email of 18 August 2011 that would support this type of work was not indefinitely available.

[32] It is also clear that Mr Burton had the flexibility to stop work for periods when he wished. I find that the ability to be away with advice but not approval does not favour a finding that Mr Burton was subject to the control an employee would have been and/or that he was fully integrated into the business as opposed to being an accessory to it.

[33] Mr Burton had a business card but that is not determinative in this case because something was required to be left with clients so that there would be an advantage to BROL from the call. There was also an advertisement in the paper that had Mr Burton's name but I have not found Mr Harris was aware of the continued publication of the advertisement.

[34] There are factors in the relationship when the control and integration tests are applied that are consistent with an employment relationship. There are also factors that are inconsistent with an employment relationship. On balance though I find the factor of control and integration slightly favour a contracting relationship.

Determination

[35] I have considered the evidence before me. Some of the matters are finely balanced and in such a case ultimately the intention of the parties is important and determinative.

[36] The Employment Court in *Chief of Defence Force v. Ross-Taylor* [2010] ERNZ 61 observed at para.[30] *it is a very serious matter for either the Employment Relations Authority or this Court to find, notwithstanding the clear intention a capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually agreed, after those arrangements have terminated, that the real nature of their relationship was completely different.*

[37] I find that both Mr Burton and BROL intended to enter into a contract for services and that was the real nature of the relationship. The Authority has no jurisdiction to deal with Mr Burton's claims and both parties should return to the Disputes Tribunal to deal with the matter of outstanding money owing and costs.

Costs

[38] There were matters in this case that did require a careful analysis and Mr Burton had been pointed in the direction of the Authority after lodging with the Disputes Tribunal.

[39] I will reserve the issue of costs however I may well take these matters into account.

Helen Doyle
Member of the Employment Relations Authority