

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 9
3000104

BETWEEN EDWARD JOSEPH FRASER
Applicant

AND ROBIN ANDREW PAGE AS
THE DIRECTOR OF
CHATHAMS DIRECT
LIMITED AND CHATHAMS
DIRECT 2012 LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Mr Fraser in person
No appearance for the Respondent

Determination: 13 January 2017

DETERMINATION OF THE AUTHORITY

A. Edward Joseph Fraser was an employee of Chathams Direct Limited, or Chathams Direct 2012 Limited in 2014 and 2015.

Employment relationship problem

[1] Edward Fraser has applied for a determination that he was an employee of Chathams Direct Limited when he worked as a deck hand fishing for cod and for crayfish during 2014 and 2015.

[2] Mr Fraser had a serious accident in 2015 and had a traumatic brain injury. He is eligible for earnings related compensation for the extended period that he was unable to work at all and for the period that he was only able to work part-time while he was recuperating. His injury was not a work-related injury but occurred during the

period that he says he was an employee of Chathams Direct Limited or Chathams Direct 2012 Limited (both to be referred to as CDL).

[3] ACC has declined to pay earnings related compensation to Mr Fraser because it is not satisfied that he was an employee at the relevant time. It bases that conclusion on a view expressed to it by the IRD, which says that it has had no PAYE paid on Mr Fraser's behalf by CDL, or by the sole director Robin Andrew Page, and therefore it considers Mr Fraser not to have been an employee at the relevant time.

[4] On 23 July 2015, Mr Page filled in a form sent to him by ACC in which he appears to have agreed that Mr Fraser had been an employee who began employment on 1 October 2014.

[5] Mr Fraser's bank statements show regular payments being made by "Chathams Direct".

[6] Both companies have been removed from the Companies Register. However, Mr Page was the owner/operator of the fishing business that CDL operated while Mr Fraser worked for it.

[7] The Authority, Mr Fraser, and his advocate, Justin Young, of Community Law Waikato, have undertaken a number of steps to make Mr Page aware of the proceedings in the Authority. In addition, prior to proceedings being lodged with the Authority Mr Fraser and Mr Young had communicated directly with Mr Page seeking his co-operation to write to the ACC to confirm that Mr Fraser had been an employee.

[8] I held an investigation meeting by telephone on 13 January 2017 when Mr Fraser gave affirmed evidence. Mr Fraser told me that Mr Page is "on the island" and checks his email regularly but does not respond to emails. Amongst other methods for getting in touch with Mr Page, the Authority has emailed him notification of the proceedings¹ and of the teleconference.

[9] Mr Page has not provided ACC with the information Mr Fraser asked him to, and has not responded to any Authority correspondence. Nonetheless, I am satisfied that Mr Page has had notice of the proceedings and notice of today's teleconference.

¹ Including the application and the documents lodged with it.

Therefore, I proceeded to undertake my investigation in his absence, as I am empowered to do.

The relevant law

[10] The Employment Relations Act 2000 (the Act) gives the Authority² the exclusive power and jurisdiction to determine whether a worker was an employee or not.

[11] Mr Fraser bears the onus of establishing on the balance of probabilities that he was an employee of CDL.

[12] Section 6 of the Act defines an *employee* as:

- (1)(a) ... any person of any age employed by an employer to do work for hire or reward under a contract of service, 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...

[13] Generally, the law requires the Authority to determine the “real nature of the relationship” between the parties. That requires considering all relevant matters, including any that indicate the parties’ intentions.

[14] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd.*³

[15] The Employment Court in *Poulter v Antipodean Growers Limited*⁴ summarised the applicable principles:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.

² And the Employment Court as the case may be.

³ [2005] ERNZ 372.

⁴ [2010] NZEmpC 77 at [20].

- 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 been 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.

[16] In *Poulter*, the Court concluded that ultimately it is necessary to gain an overall impression of the underlying and true nature of the relationship between the parties.⁵

Intention of the parties

[17] There was no written employment agreement or other similar documentation demonstrating the intention of the parties at the time the arrangement for work was entered into. However, it is likely that Mr Fraser was asked to provide his IRD number and tax code to CDL.⁶

[18] The beginning of the working relationship occurred when the skipper of the vessel told Mr Fraser CDL was looking for another deck hand. Mr Fraser confirmed with Mr Page that he was interested in the role and he was taken on.

[19] Mr Fraser’s intention was to be an employee. He understood that the terms of his engagement were that the gross amount of his earnings would be 10% of the value of the catch per trip. His evidence is that Mr Page withheld 2% of the trip catch value for PAYE and ACC levies, which he believed Mr Page was paying to the relevant authorities on his behalf.

[20] Mr Fraser’s evidence is that he received variable amounts when he was paid but that each amount was 8% of the value of the catch for the relevant trip or trips.

⁵ Ibid at [21].

⁶ In the ACC003 document Mr Page completed he agreed that Mr Fraser’s tax code was M and gave Mr Fraser’s IRD number.

[21] The intention of the parties at the beginning of the relationship was that Mr Fraser was to be an employee. That intention did not alter by any change in practice over the entire period of employment.

The control test

[22] This test examines the extent to which CDL controlled Mr Fraser's work activities. Mr Fraser was at all times under the direct supervision of the skipper, who he understands was also an employee of CDL.

[23] It is typical of workers on board fishing vessels to be under the control of the skipper. This factor is not determinative of whether Mr Fraser was an employee.

[24] Mr Fraser was provided with all the tools required of him to perform his role. They were always on the boat. CDL provided most of the personal protective equipment Mr Fraser required, such as leggings, smock and a jacket. He wore his own boots and purchased himself a jacket that was in better condition to the ones provided by CDL. However, it was his choice to provide and wear his own jacket. He was not required to do so.

[25] CDL provided Mr Fraser with a cooked lunch and/or dinner every day that he worked. He did not need to bring his own food.

[26] CDL's provision of the equipment and tools Mr Fraser required to undertake his work is strongly indicative of an employment relationship.

Integration test

[27] This test examines the extent to which Mr Fraser was integrated into CDL's business. That is, whether the work undertaken by Mr Fraser was integral to the business and whether Mr Fraser had become part and parcel of the business.

[28] The work Mr Fraser undertook was vital and integral to the business and tends to indicate that he was an employee.

Fundamental test

[29] This test examines the extent to which Mr Fraser took on financial risk himself in providing his services to CDL, including whether he was in business for himself.

[30] Mr Fraser's evidence is that he turned up to work, worked and got paid. He did not issue any invoices to CDL, he did not make tax returns in which he deducted any work expenses. He had no work expenses.

[31] The tax he owed to IRD had been deducted at source in the normal course of events for an employee. The fact that IRD has not received the PAYE from Mr Fraser's employer cannot be used as a factor that can determine that Mr Fraser was not an employee.

[32] In Mr Fraser's attempt to get Mr Page to communicate with ACC to agree that CDL was Mr Fraser's employer, Mr Fraser sent Mr Page Facebook messages. Mr Page replied to those messages one of which reads:

Wot ever u want I got behind and will have to pay ird anyway and I have paid heaps of acc I will pay you 7%⁷ that was deduct for acc through that period of u working ...

[33] Mr Fraser responded:

All I wanted was pay slips from you ...

[34] I conclude that Mr Fraser was not in business for himself when he undertook work for CDL.

Industry practice

[35] Mr Fraser's evidence is that there are between 10 and 15 fishing vessels doing the type of work he did for CDL on the island. Only two of those vessels engage deck hands as contractors. The rest of the boats engage deck hands as employees. Mr Fraser also says he has worked on different fishing vessels and was always an employee, including a period about 10 years ago when he worked for Mr Page.

⁷ Without an ability to question Mr Page about this, I accept instead Mr Fraser's evidence that Mr Page withheld 2% of the total catch value to pay ACC levies and PAYE.

[36] I am satisfied that the industry practice in the Chathams is generally that deck hands are engaged as employees.

Conclusion

[37] Weighing up all of the evidence, my conclusion is that Mr Fraser has proved the real nature of the relationship was one of employer and employee.

Christine Hickey
Member of the Employment Relations Authority