

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 133  
**3013872**

BETWEEN TOKA TENAKI  
First Applicant

KIM TENAKI  
Second Applicant

AND RENEW & PROTECT  
LIMITED  
First Respondent

TRAINER INVESTMENTS  
LIMITED  
Second Respondent

TRAINER FAMILY TRUST  
2007  
Third Respondent

**3025834**

BETWEEN RENEW & PROTECT  
LIMITED  
First Applicant

TRAINER FAMILY TRUST  
2007  
Second Applicant

AND TOKA TENAKI  
First Respondent

KIM TENAKI  
Second Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Alyn Higgins, Counsel for the Applicant  
Ken Nicholson, Counsel for the Respondent

Investigation Meeting: 4 and 5 April 2018

Additional documents received: 9 April 2018 from Applicant  
20 April 2018 from Respondent

Determination: 30 April 2018

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## DETERMINATION OF THE AUTHORITY

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**A. Mr and Mrs Teinaki were not employed by the Respondents.**

**B. Costs are reserved.**

### **Employment Relationship Problem**

[1] Mr and Mrs Teinaki allege that they were employees of Renew and Protect. Renew and Protect is the trading name for an entity specialising in the renewal of the exterior of buildings, driveways and fences. Mr and Mrs Teinaki are unclear whether the legal entity behind this trading name is the First, Second or Third Respondent. The Third Respondent claims it trades as Renew and Protect.

[2] Mr and Mrs Teinaki claim they were unjustifiably dismissed on 17 February 2017. They claim for lost wages and other benefits, holiday pay and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] The Respondents deny that Mr and Mrs Teinaki were employees. By way of separate Statement of Problem, the Second and Third Respondents plead that if Mr and Mrs Teinaki were employees, then they breached their duties of fidelity, trust and good faith. They claim, inter alia, financial losses suffered as a result of these breaches. Mr and Mrs Teinaki deny breaching any duties.

[4] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The issues**

[5] The issues requiring investigation and determination are:

a) Was there an employment relationship between Mr and Mrs Teinaki and the Respondent/s?

b) If so, then:

i. Who was Mr and Mrs Teinaki's employer?

- ii. Were Mr and Mrs Teinaki unjustifiably dismissed?
  - iii. If so, what remedies should be awarded?
  - iv. Should these remedies be reduced for blameworthy conduct by Mr and Mrs Teinaki that contributed to the situation giving rise to the grievance?
  - v. Are any arrears of wages or holiday pay owing to Mr and Mrs Teinaki?
  - vi. Did Mr and Mrs Teinaki breach their duty of good faith and/or duty of trust and fidelity?
  - vii. If so, are the Respondents entitled to damages and in what amount?
- c) Should either party contribute to the costs of representation of the other party?

### **Background to relationship**

[6] Renew and Protect is the trading name for the Trainer Family Trust 2007. The Trust has a corporate trustee that is the Second Respondent, Trainer Investments Limited. The First Respondent, Renew and Protect Limited, is a shelf company that does not trade. Mr Trainer is the sole director and shareholder of Renew and Protect Limited and the sole director and 50% shareholder of Trainer Investments Limited.

[7] In July 2016 Mr Trainer was asked to take the role of Pastor at his local church. In anticipation of that role, he said he needed to find someone to take over Renew and Protect. He said the first step was to engage someone to assist him with the administration side of the business including quoting, invoicing and setting up appropriate systems.

[8] Upon hearing Mrs Teinaki had been made redundant from her former role the parties met. The parties agree that at this meeting:

- a. Mrs Teinaki specified her hourly rate as \$30 per hour;

- b. Mr Trainer told Mrs Teinaki that he could only engage her 10 hours per week; and
- c. Mrs Teinaki was to work from home.

[9] Mrs Teinaki said that at this meeting Mr Trainer also asked her to provide invoices. She said she told him that she did not have the capacity to do invoices and didn't want to do them.

[10] Mrs Teinaki started working for Renew and Protect on 11 July 2016. Shortly thereafter Mr Trainer asked her if her husband, Toka Teinaki, would be interested in becoming involved with Renew and Protect with a view to taking over the business or becoming a business partner.

[11] Mr and Mrs Teinaki and Mr Trainer then met. At this meeting the parties discussed Mr Trainer's business proposal and his plans to develop the business. It was agreed that, to enable the parties to make an informed decision as to whether or not to enter a business relationship, Mr Teinaki would work "on the tools". This would enable him to become familiar with the business and to see if the parties were compatible. At Mr Teinaki's request, it was agreed he would be paid \$1,000 per week. There was no discussion about Mr Teinaki's days of work, hours of work or hourly rate of pay.

[12] Mr Teinaki started working for Renew and Protect on 5 September 2016.

### **Issue 1: Was there an employment relationship?**

[13] The first issue I need to determine is whether or not Mr and Mrs Teinaki were employees. To do so I must first decide whether or not they fall within the definition of employee under s 6(1) of the Act. If they were not employees the Authority has no jurisdiction to determine their claim.

[14] In order to determine whether or not Mr and Mrs Teinaki were employees, the Authority must determine the real nature of the relationship between the parties. This assessment includes considering all relevant matters, including any matters that indicate the intention of the persons. The Authority is not to treat as a determining matter any statement by the parties describing the nature of their relationship.

[15] The Supreme Court in *Bryson v Three Foot Six Limited (No. 2)* addressed what “all relevant matters” in s 6(3) (a) of the Act means.<sup>1</sup> It said:

“All relevant matters’ certainly 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. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. 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 require the Court or 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 ... ”

### *Intention*

[16] In the present case there was no written employment agreement. However, this is not decisive in determining the parties’ intentions.<sup>2</sup> In the case of oral contracts, intention is to be derived from the parties’ statements at the time and the commercial environment in which the contract was made and, if that is not sufficiently clear, from their subsequent conduct and dealings<sup>3</sup>.

[17] It is not sufficiently clear one way or the other whether, at the outset of the parties’ working relationship, the parties’ common intention was that Mr and Mrs Teinaki were to be employees or independent contractors. The parties agree they did not discuss this with each other. For reasons that shall become apparent however, I am satisfied the parties’ subsequent conduct and dealings support an intention that Mr and Mrs Teinaki were engaged as contractors.

### *The September meeting*

[18] On or about 14 September 2016 a meeting took place between Mr and Mrs Teinaki, Mr Trainer and his daughter Hannah McQueen. Ms McQueen is a chartered accountant.

[19] During this meeting Ms McQueen spoke to an email that she had prepared beforehand. I have viewed this email. This was emailed to Mr Trainer on 28 August

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<sup>1</sup> [2005] ERNZ 372.

<sup>2</sup> *D’Arcy-Smith v Natural Habitats Ltd* [2015] NZEmpC 123.

<sup>3</sup> *Page v Waipu Citizens and Services Club Inc*, unreported, AEC 1/98.

2016. It was titled “Agreement of Understanding” and was between Mr Trainer as “business owner” and Mr and Mrs Teinaki as “intended business partners”.

[20] Ms McQueen said she told Mr and Mrs Teinaki during this meeting that they were contractors. This is supported by her email that provided, inter alia:

Mike wants to work with Kim and Toka as an investment in the future of the business. Kim has been contracted to develop the internal systems of the business.

Toka has been contracted to help understand and deliver the business service to customers, which will then help grow the business’ profitability and size.

Kim and Toka will contract to the business until 31 December 2016.

[21] Mr and Mrs Teinaki deny that Ms McQueen referred to them during the meeting as contractors. They said she called them employees. I find this unlikely.

[22] Ms McQueen was clear in her recollection of the meeting. Her memory was reinforced by the email she had prepared ahead of the meeting. I find it more likely than not that she referred to Mr and Mrs Teinaki as contractors. Had she not done so then it is likely that, upon receipt of the email notes from Ms McQueen, Mr and Mrs Teinaki would have raised an issue that the notes were inaccurate. They did not.

[23] I am further fortified in my view by the parties’ discussions during the meeting about the payment of tax. Mrs Teinaki said Ms McQueen told them that withholding tax (WT) was a way tax could be deducted before it was paid to her and Mr Teinaki. It is unlikely that Ms McQueen would have discussed withholding tax if she had told Mr and Mrs Teinaki that they were employees. Ms McQueen said, and I find her evidence credible, that she told Mr and Mrs Teinaki:

[10] I explained to Toka and Kim that they may prefer to pay the tax themselves as it was my understanding that their cashflow was tight, so suggested it might be beneficial to them to manage their tax themselves (if they felt comfortable doing so) so they had the use of the funds in the meantime. However, if they wanted to ensure that tax was deducted as they went, then they needed to select WT with the IRD.

[20] ...I explained that they would be responsible for paying their own tax, insurance and ACC – as other subcontractors to Renew and Protect do. They understood this. I asked if they would prefer that we deduct and pay their tax until the end of the financial year, as you can do in your first year of trading. I recall reiterating more than once, that the same amount of tax would be paid under both options – it is just one deducts the tax as you go, the other gives you the money

to play with for a little bit longer, before having to pay it to the IRD – all tax is deducted from the GROSS amount agreed to be paid by Mike.

*Applicants' requests for Withholding Tax Forms*

[24] On 16 September 2017 Mrs Teinaki emailed Ms Roberts asking her to arrange WT forms to be emailed to her. Ms Roberts worked at material times for Ms McQueen's company who were the Respondents' accountants. Ms Roberts responded by email:

In relation to the WT tax forms for you and Toka, Hannah is away from the office today so I am unable to clarify what I was to send you. Are you going on payroll to have PAYE or WT from your income moving forward? Or were you after exemption forms (for WT) so Toka didn't have to have the 20% withheld for your contracting income up to Christmas.

[25] Mrs Teinaki did not respond to Ms Roberts' email. Ms Roberts then spoke to Ms McQueen on her return to the office. She said she was told that Mr and Mrs Teinaki were paying their own tax for the remainder of the year and therefore no tax was to be withheld by Renew and Protect. This understanding was relayed to Mrs Teinaki in an email dated 21 October 2016.

[26] Mrs Teinaki responded reminding Ms Roberts of her requests for WT forms and advising that Mr Trainer had assured her that their taxes were being paid. It is telling that she raised no issue about the deduction of PAYE. This is despite Mrs Teinaki acknowledging that she was aware that PAYE was the tax that needed to be deducted for employees. Mr and Mrs Teinaki's concern was to obtain WT forms and to ensure that WT was being deducted. This concern was reiterated during the investigation meeting.

[27] Ms Roberts then phoned Mrs Teinaki. She advised again that she was not instructed to deduct tax from the money she was paying them. She said she told Mrs Teinaki that she could assist them with their tax returns to ensure costs and expenses were offset against their income. She said she never heard anything back from Mrs Teinaki about this and therefore assumed they were attending to this themselves.

*Respondent's requests for invoices*

[28] In her correspondence of 21 October 2016 Ms Roberts also asked Mr and Mrs Teinaki for invoices to support the payments that had been made to them. No

objection to the supply of invoices was raised by Mr and Mrs Teinaki. Mrs Teinaki said she was aware that invoices were provided by contractors.

*The Applicants' other actions*

[29] In addition to the foregoing matters:

- a. Mr and Mrs Teinaki did not request an employment agreement
  - i. Mrs Teinaki said she had a good understanding of her obligations and rights as an employee under the Act. In addition she said she understood the differences between contractors and employees, having been engaged as both during her career.
  - ii. Whilst Mr and Mrs Teinaki's written statements said they asked for employment agreements, during the investigation Mrs Teinaki conceded that she had not asked for an employment agreement but rather had asked for an agreement recording "whatever our relationship is".
- b. Mr and Mrs Teinaki were not paid holiday pay.
  - i. Mrs Teinaki was paid a sum of \$600 over Christmas 2016. Mr Trainer says the money was a gift. Emails I have viewed show that Mrs Teinaki offset the \$600 against monies owing to her for services carried out when she first started working. Whichever is the case; both parties agree the payment of \$600 was not payment for services rendered during this period.
  - ii. The parties agree that Mr and Mrs Teinaki were not paid annual leave or statutory leave entitlements when they did not work for two weeks over Christmas 2016. Mrs Teinaki said Mr Trainer told them that if there was no work then they would not be paid. She said they told him that was "fair enough".
- c. During January 2016, when Mr and Mrs Teinaki were looking to purchase Renew & Protect, they were provided with the Renew and Protect's Profit and Loss statements for the months of July 2016 through to December 2016. These statements show contractor payments but not wages. They

also expressly state that they do not include the “Admin Contractor”. Mr and Mrs Teinaki did not raise any issue about this at the time.

[30] Intention is only one of the relevant matters for consideration. Section 6(3) requires the Authority to consider all relevant matters including intention but does not elevate intention over those other matters, which include the control test, the economic reality test, and so forth. I therefore move to address those tests.

### ***Control Test***

[31] The control test looks at the degree of control or supervision exercised by the employer over the alleged employee's daily work. The test asks whether the alleged employer had the right to control the person alleged to be an employee.

[32] Assessing matters under this heading, I find:

- a) Mrs Teinaki controlled when and where she worked. She worked from home at her request. She said she generally worked 2 hours per day although this fluctuated depending on her commitments. The respondents had no control over her hours or days of work.
- b) All tools and equipment required for the performance of Mrs Teinaki's role were provided by her. The exception was:
  - i. A mobile phone. This was used to answer phone calls from clients. Mrs Teinaki said a mobile phone was also provided to her by another company who she had contracted to for 10 years. In these circumstances I do not see the provision of phone by Renew and Protect as indicative of an employment relationship.
  - ii. A tablet. I am satisfied the tablet was not provided for the purpose of attending to the duties Mrs Teinaki was engaged to provide. The evidence was that these duties required the use of a desktop computer. This computer was provided by Mrs Teinaki. The tablet was more likely provided in anticipation of the parties' future business relationship.
- c) With regards to Mr Teinaki:

- i. The respondents provided Mr Teinaki with the work he undertook.
- ii. Mr Trainer directed the dates when work was to be undertaken and where. Mr Teinaki had no control over this however he did determine his start and finish times.
- iii. Mr Teinaki had no experience carrying out the work to be performed. He therefore required training and supervision.
- iv. The tools and equipment required for Mr Teinaki's role were provided by the Respondents.

[33] The foregoing factors indicate a relationship of employment for Mr Teinaki and a contracting role for Mrs Teinaki.

#### ***Integration Test***

[34] This test considers whether the work performed by Mr and Mrs Teinaki was an integral part of the business and whether they had effectively become "part and parcel" of the organisation.

[35] I find that the work Mrs Teinaki did was not an integral part of the business. Mrs Teinaki worked from home and primarily used her own equipment to perform her role. Her role, as she said, was primarily to attend to the administration side of the business. At material times she undertook a similar role for other entities, as a contractor, for the same length of time and charged those entities the same or a similar amount to that charged to Renew and Protect. I conclude, in those circumstances, that Mrs Teinaki was not integrated substantially into the business favouring a finding of a contractual relationship.

[36] Mr Teinaki was integrated into the business. He was provided with a company branded t/shirt, cap, work vehicle and business cards. He attended a trade-show as a representative of the business. However, these factors must be balanced against the commercial arrangement in place between the parties. Mr Teinaki had to be involved in all facets of the business to enable the parties to decide whether or not to pursue a business partnership. He was consulted over the purchase of the work van, and the format of the business website, as a prospective business partner. I am

satisfied in these circumstances that, whilst Mr Teinaki was integrated into the business, this was not because he was an employee.

### *Fundamental Test/Economic Realty Test*

[37] This test requires consideration as to whether Mr and Mrs Teinaki were effectively working in business on their own account. In *Downey v New Zealand Greyhound Racing Association Inc*, the Employment Court indicated that the fundamental test requires an examination of whether and how the applicant structures his or her alleged self-employed business.<sup>4</sup> The Court noted aspects such as the methods of payment, taxation and the description of the applicant's business inserted in the GST invoices as indicative of the applicant operating in business on his own account.

[38] Assessing matters under the fundamental test, I am satisfied Mr and Mrs Teinaki were operating in business on their own account. In reaching this finding I have been influenced by the following factors.

### *Contracting to others*

[39] Mrs Teinaki operates a business known as Kim Teinaki Consulting. At material times she contracted to at least three entities other than Renew and Protect.

[40] In regards to two of these entities:

- a. The work she performed was similar to that undertaken for Renew and Protect.
- b. The hourly rate she charged was similar or the same as that charged to Renew and Protect, namely \$30 for one role and \$29 for the other.
- c. She worked the same amount of hours as that worked for Renew and Protect, namely 10 hours for each entity each week.

### *Incorporating a Company*

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<sup>4</sup> (2006) 3 NZELR 501.

[41] During the period Mr and Mrs Teinaki provided services to Renew and Protect, they took steps to incorporate a company which was substantially similar to Renew and Protect.

[42] Email correspondence shows that Mr and Mrs Teinaki were to finish all works with Renew and Protect on 17 February 2017. Later email correspondence records that Mr Teinaki was still employed as at 19 February 2017. Mr and Mrs Teinaki said that they met with their accountant on 17 February 2017 to sign the forms necessary to incorporate their company. These forms were dated the same date although the new company was registered several days later.

*Liability for payment of tax*

[43] I am satisfied, on balance, that Mr and Mrs Teinaki were responsible for payment of their own tax at material times.

[44] Mrs Teinaki asked to be paid the sum of \$30 per hour. She worked 10 hours per week. The bank statements show she was paid \$300 per week. Mrs Teinaki must have known from the first payment she received that no tax was being deducted. Despite this knowledge, she did not raise any issue about the deduction of tax from her income until after Mr Teinaki started. At this time she requested WT, not PAYE, to be deducted from her earnings.

[45] Renew and Protect paid Mr Teinaki the sum of \$1000 per week. This was the sum Mr Teinaki said he specified. He said this sum was to match the remuneration he was receiving from his former role. Mr Teinaki's bank statements show that he was paid a sum of \$40,352.16 net by his previous employer. This equates to a weekly sum of \$776 net. It is more likely than not that the parties intended the \$1000 to be paid gross of tax.

[46] Mr and Mrs Teinaki set aside money from their income to satisfy their tax obligations. Mr and Mrs Teinaki's bank statements show that prior to Mrs Teinaki starting with Renew and Protect they saved \$60 per week for tax. Mrs Teinaki said this was to cover her tax liability for the jobs she contracted to. Shortly after Mrs Teinaki started with Renew and Protect this sum was increased to \$100 per week. No other roles were taken on by Mrs Teinaki at this time. Mrs Teinaki then increased her tax savings to \$140 per week when she started other contracting roles.

[47] I note, for completeness, that I did consider the undated agreement signed on or about 7 November 2016. This document was signed by Mr Trainer and Mr and Mrs Teinaki and was headed “Thoughts on future direction of Renew & Protect and agreement till early 2017”. However, I am not satisfied this agreement supports a finding that Mr and Mrs Teinaki were employees or that the Respondents agreed to be liable for payment of Mr and Mrs Teinaki’s income taxes and ACC levies at all material times.

[48] The agreement to pay tax and ACC levies was only for the period from 31 October 2016 until “2017 when a new business plan will be proposed”. Mr and Mrs Teinaki remained liable for tax and ACC levies outside of this timeframe. Based on the correspondence exchanged between the accountants shortly after the parties’ relationship ended, the tax payable was calculated based on the WT rate of 20% not PAYE. The ACC levies were calculated based Mr and Mrs Teinaki being contractors.

#### *Tax Code Declaration*

[49] Mr and Mrs Teinaki said they knew that WT was different than PAYE. I am satisfied they were aware, prior to their termination, that WT was the tax paid by contractors.

[50] Following termination Mr and Mrs Teinaki each completed an IR 330 Tax Code declaration. These declarations were filed with the IRD and I understand have not, to date, been amended.

[51] The declarations insert the tax code “WT”. Mr and Mrs Teinaki say this was a mistake, or alternatively that they inserted this under duress to enable a settlement to occur. I find this unlikely. I find it more likely that they inserted the tax code WT because they understood they were contractors.

[52] The uncontested evidence is that, whilst Renew and Protect provided the IR 330 forms to Mr and Mrs Teinaki, they did not require them to put a particular code on the form to enable a settlement to be reached between the parties.

[53] Mr and Mrs Teinaki said they spoke to IRD before completing their declarations. Ms Roberts' uncontested evidence was that IRD provides advice to parties to assist them to complete the declarations correctly.

[54] In order to complete the declaration, it is more likely than not that Mr and Mrs Teinaki read the declaration, and the explanations provided, because:

- a. The IRD declaration provides a detailed explanation as to the tax codes to be used depending on the work carried out.
- b. One of the codes to be used is the tax code "WT". The form explained this code is "*not for employees, they are for people who are independent contractors*". Mr and Mrs Teinaki handwrote the tax code "WT" on their declarations.
- c. The explanation also states "*if you are receiving payment for any of the types of work listed below on contract, enter the activity name in the box at Question 2 on page 1*". A detailed list of 25 activities is provided. One of these activities is "*contracts wholly or substantially for labour only in the building industry*". This was the activity Mr and Mrs Teinaki wrote on their declarations.
- d. Different tax rates are specified depending on the activity chosen. The tax rate specified in the IRD declaration as payable for the activity chosen by Mr and Mrs Teinaki is 20%. The amounts claimed in the Amended Statement of Problem for unpaid tax use this same rate of tax.

[55] The foregoing factors indicate a contract for services.

### ***Industry Practice***

[56] There is insufficient evidence of industry practise one way or the other.

### ***Finding on Issue 1***

[57] Standing back and looking at the matter overall I conclude, on the balance of probabilities, that Mr and Mrs Teinaki were contractors. Whilst there are elements that, when viewed in isolation, may suggest they were not employees, these factors

must be weighed against the commercial background. Namely, the parties' intention to enter into a business partnership.

[58] The Authority does not therefore have jurisdiction to hear this matter. On this basis it is unnecessary for me to reach a finding on the other issues before the Authority.

### **Costs**

[59] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[60] If they are not able to do so and an Authority determination on costs is needed the respondents may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicants will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[61] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

Jenni-Maree Trotman  
Member of the Employment Relations Authority

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].