

Your attention is drawn
to the non-publication
order contained in this
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 550
3045191

BETWEEN

CHARMAINE PETEREIT
Applicant

AND

PROJECT DE-VINE TRUST
Respondent

CHRISTOPHER ROWSE
Second Respondent

CELIA BUTLER
Third Respondent

NEIL CLIFTON
Fourth Respondent

JOHN MCKIE
Fifth Respondent

ROBERT KENNEDY
Sixth Respondent

Member of Authority: Vicki Campbell

Representatives: Maree Kirk for Applicant
Tony Stallard for Respondent

Investigation Meeting: 24 September 2019

Oral Determination: 24 September 2019

Record of Oral
Determination: 26 September 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. **Ms Petereit was an independent contractor and was not an employee. The Authority does not have jurisdiction to investigate and determine her claims.**
- C. **Costs are reserved.**

Non-publication Orders

[1] Ms Petereit has applied for non-publication orders with respect to her personal and family finances. An interim order was granted on 11 February 2019 that such information was to remain confidential to the respondents, their legal advisers and must not be copied or otherwise distributed beyond those persons or discussed at all with any person outside of that group. In making that order the Authority recognised that the documents have been provided for the purposes of these proceedings and must only be used for that purpose.

[2] At the beginning of the investigation meeting Project De-Vine Trust (the Trust) and Mr Chris Rowse (second Respondent) applied to extend the non-publication orders to include the information contained in paragraph 66 of Ms Petereit's written witness statement. Ms Petereit had no objections to the application and the application was granted.

[3] I now confirm the non-publication orders granted on 11 February and at the investigation meeting should now be made permanent.

Employment relationship problem

[4] Ms Petereit has lodged a number of claims against the Trust and its trustees including personal grievances for unjustified disadvantage, unjustified dismissal, claims the Trust and its Trustees breached the statutory duty of good faith and implied contractual obligations Ms Petereit says the Trust and Trustees owed to her.

[5] The Trust denies the claims and says the Authority does not have jurisdiction because Ms Petereit was not an employee but was at all times engaged as an independent contractor.

[6] This determination deals only with the preliminary issue as to the real nature of the relationship between Ms Petereit and the Trust. If Ms Petereit was not an

employee the Authority will have no jurisdiction to investigate and determine her claims.

[7] As permitted by s 174E of the Employment Relations Act 2000 (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 as a result. It has not recorded all evidence and submissions received.

Project De-Vine Trust

[8] The work of the Trust started in 2010 as a community led weed busting group championed by Mr Rowse. The group assisted landowners overwhelmed by invasive plants. It operated under the umbrella of The Royal Forest and Bird Protection Society (Forest and Bird) for six years receiving support from Forest and Bird with finance, governance and legal assistance as it expanded with grants and contracted work.

[9] Funding applications for the work carried out in the weed control area were completed in the name of Forest and Bird. Members of the local committee of Forest and Bird managed the operations under the grants however, Forest and Bird retained accountability for the delivery of the funded services.

[10] In July 2016 an independent charitable trust was established in the name of Project De-Vine Trust with four founding trustees, Mr Rowse, Mr John McKie, Ms Celia Butler and Mr Bob Kennedy (all of whom had been involved in the local committee for Forest and Bird).

[11] Forest and Bird had been successful in a significant grant application for weed control which provided funds for work to be undertaken over a three year period. After the establishment of the Trust this grant and other contracts were transferred from Forest and Bird to the new Trust. Forest and Bird remained accountable for the use of the funds from the grant.

[12] In ensuring the Trust had the capacity to deliver the funded services the Trust agreed to an audit of the Trust being undertaken by an external agency appointed by Forest and Bird. The audit covered governance, management, financial and health and safety systems. Since 2017 the Trust has been implementing recommendations

made in the Audit report which confirmed the Trust was able to deliver the funded services.

[13] The Trust's core operational work is and has been the targeting of specific weed species throughout the Golden Bay area. Mr Rowse told me that while working under the auspices of Forest and Bird the society provided all administration, legal and other services. Once the Trust was established the Trust took responsibility for office accommodation, accounting and other services including administration.

[14] The Trust had been established for only six months when it engaged Ms Petereit. While there was funding to help with operating costs it was limited. Some contracts provided for management costs but all work undertaken had to be assigned to the funded grant or a specific contract. The Trust was bound to a limited number of hours for management tasks under the contracts taken over from Forest and Bird.

[15] These matters became issues of concern during Ms Petereit's tenure as Mr Rowse became concerned Ms Petereit was undertaking tasks that could not be assigned to particular projects and this could and did have an impact on the operational budget.

Fairlight Limited

[16] Fairlight Limited is a company owned by Ms Petereit and her husband. Since 1996 both Ms Petereit and her husband have used the company as a vehicle to run and operate businesses and to enter into contracts to provide services as independent contractors.

[17] Prior to entering into the contract with the Trust Ms Petereit had undertaken contracting work through Fairlight for SEANZ from July 2007 to February 2009 and then for Waikato District Council during 2014 and 2015.

The Trusts Engagement of Ms Petereit

[18] In November 2016 Ms Petereit met with Mr Rowse to discuss a job opportunity that was coming up at the Trust. The role was for an Operations Manager to manage the operational delivery of the Trust's field work. Mr Rowse was at that time the Trust's Chair and was providing between 20 and 30 hours of volunteer work to the Trust as its Project Director. Mr Rowse received reimbursement of his

expenses but received no payment for the hours he contributed to the work of the Trust.

[19] In January Ms Petereit was provided with a copy of a proposed contract entitled “Independent Contractor Agreement”. The proposed parties were the Trust and Fairlight. On 3 January Ms Petereit invited Fairlight’s accountant to cast his eye over the proposed contract.

[20] In his feedback the accountant raised a concern about the Trust deducting withholding tax and instead suggested changes to the wording in the contract to make Fairlight responsible for all tax and other payments. The Trust agreed to these changes and the contract was duly signed by both parties with Ms Petereit signing on behalf of Fairlight on 9 January 2017.

Legal Principles

[21] Ms Petereit says she was an employee of the Trust from 9 January 2017 until the relationship ended on 19 October 2017. The onus of establishing whether Ms Petereit was an employee rests with her on the balance of probabilities. The starting point for the Authority is Section 6(1) of the Employment Relations Act (“the Act”) which states:

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.

[22] Section 6(3) states:

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 the relationship.

[23] 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.*¹

¹ [2005] ERNZ 372.

[24] The Employment Court in *Poulter v Antipodean Growers Limited* summarised the following applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:²

- 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 analyzing 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.

[25] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice, then to apply the three tests known as the control, integration and fundamental or economic reality test.

[26] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.³

[27] The Court in *Atkinson v Phoenix Commercial Cleaners Ltd* noted:⁴

Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties’ common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix’s employee.

Intention of the parties

[28] There was a written contract setting out the terms applicable to the relationship between the Trust and Ms Petereit. The parties to the contract were the Trust and Fairlight Limited. The contract clearly identifies it as being an independent contractor agreement.

² [2010] NZEmpC 77 at [20].

³ Ibid at [21].

⁴ [2015] NZEmpC 19 at [58].

[29] Clause 27 of the contract stipulates that in performing the services under the contract “...the contractor is an independent contractor to the Trust and is not an agent, partner or employee of the Trust.”

[30] On 6 January 2017 Ms Petereit received the amended contract which had been signed by the Trust. In his covering email Mr Rowse expressed his desire that the correct wording for the taxation clause had been found to keep both the Trust and Fairlight’s accountants happy. In response Ms Petereit told Mr Rowse she was sure the right wording would be found so that the intent of the contract was clear. That is that Fairlight would take responsibility for the payment of tax. Ms Petereit provided Mr Rowse with Fairlight’s GST number in response to his request for it.

[31] Ms Petereit signed the contract on 9 January 2017 on behalf of Fairlight. Invoices were lodged under Fairlight’s name and the payments were made by the Trust to Fairlight. The financial records produced by Ms Petereit show that she benefited from the commercial arrangements as she was able to claim expenses that are not available to employees and benefitted by paying a reduced tax contribution to the Inland Revenue.

[32] While contractual statements asserting the nature of the relationship are not decisive, the whole tenor of the contract and the way Ms Petereit operated under it point to the intent and nature of the relationship being one of independent contractor.

[33] I am satisfied the common intention of the parties at the outset was to enter into a commercial arrangement and that Ms Petereit was not to be an employee. This is evidenced by the documentation formally recording the relationship.

Control

[34] The control test looks at the degree of control or supervision exercised by the employer over the work performed. The greater the level of control, the more likely a contract of service exists.

[35] Consistently with a contract for services the contract at clause 5 provides for no supervision to be undertaken on a day to day basis. Schedule 1 of the contract sets out the Services to be provided and in particular states:

- a) the services to be provided were to be directed by the Project Director (Mr Rowse);
- b) that Ms Petereit through Fairlight was to be available 50 to 80 hours each fortnight with a split of 35 to 65 hours based in the Trust's office and the balance to be field based work;
- c) most work should be conducted on ordinary weekdays between 8 am and 5 pm; and
- d) paid rest breaks to be taken during each uninterrupted three-hour period of work and a 30-60 minute unpaid lunch break between the start and finish times when they are more than five hours apart;
- e) any time taken for personal reasons had to be negotiated with the Project Director and Ms Petereit was required to inform the Project Director of her availability at least two weeks in advance.

[36] These provisions are more indicative of an employment relationship than a contracting relationship.

[37] Ms Petereit told me that in practice she was required to be at the office every morning at 8 am to give instructions and directions to team leaders as to their work for that day. Mr Rowse denies this. He told me Ms Petereit was free to arrive at the office whenever she wished and that the Team Leaders would have already sorted matters before the start of each day's work.

[38] Ms Petereit was critical of the amount of information she was required to provide to Mr Rowse about her daily activities. She told me she was required to give details of who she was meeting and why, when she was logging time as chargeable to the Trust. Ms Petereit says that requiring this level of detail was micromanaging her.

[39] On balance I find it is more likely than not that Mr Rowse's need for information was not because he was exerting control over how and when Ms Petereit did her work. Rather, the information was critical to ensure Ms Petereit's time could be properly assigned. As set out earlier, the Trust operated a limited overhead budget.

There was no capacity in the main funded services budget for administration or management tasks and so all tasks had to be assigned to either the limited operations budget or to a specified contract budget.

[40] Ms Petereit also points to a performance review meeting conducted by the Trust in April 2017 to demonstrate the amount of control exerted by the Trust. The contract signed by Fairlight expressly provided for a performance review at quarterly intervals. In Schedule 3 to the contract dates for the review were recorded as being on or before 3 April and 3 July 2017. The review undertaken by the Trust in April 2017 was carried out in accordance with the contractual terms.

[41] Fairlight was unable to delegate or sub-contract its services under the contract and Ms Petereit had to perform them personally. I am satisfied Ms Petereit did not have the freedom to maintain or increase her earnings through her work for the Trust. However, she was free to contract with other parties and did so in September 2017 while she was continuing to provide services to the Trust. Fairlight entered into a contractor relationship with Tasman District Council under which Ms Petereit provided services.

[42] Some aspects of the contract point to the relationship being akin to an employment relationship and there were elements of control in the working activities. Ms Petereit was required to report on her activities to the Trust, was expected to be available during normal working hours to complete the contracted hours. As noted by the Court in *Singh v Eric James & Associates Limited* such elements of control are not uncommon in non-employment situations.⁵

[43] In conclusion I find the control test is not determinative of either a relationship of employment or an independent contracting relationship.

Integration

[44] This test examines the extent to which the work performed by Ms Petereit was an integral part of the business and whether she had effectively become “part and parcel” of the organisation as opposed to being an adjunct to the business.

⁵ *Singh v Eric James & Associates Limited* [2010] NZEmpC 1 at [23].

[45] The work undertaken by Ms Petereit for the period of her involvement with the Trust was integral to the business but could have been undertaken equally as an employee or in some other capacity.

[46] Ms Petereit attended Trust meetings and at the meeting on 13 February 2017 was appointed as a signatory on expenditure as she was more available than Mr Rowse.

[47] The contract provides Fairlight with the delegated authority to order and purchase goods and services on behalf of the Trust up to \$500 per month with individual purchases of up to \$200. At the Trust meeting on 13 February these authorities were increased significantly. The Trust approved for Ms Petereit to authorise expenditure on behalf of the Trust of up to \$500 for fixed assets, \$2,500 for supplies and \$2,000 for contractors' payments. At a subsequent Trust meeting the Trustees reduced this delegated authority and required Mr Rowse to approve purchases of fixed assets of more than \$200.

[48] At the investigation meeting Mr Rowse told me Ms Petereit was given these delegated authorities so that she could approve expenditure and invoicing as necessary.

[49] It is not common practice to provide such authority to a contractor however, I have accepted the evidence from Mr Rowse that it was necessary for the effective running of the Trust's operations.

[50] Ms Petereit provided her own car and telephone as expenses for the Fairlight business, although Ms Petereit was assigned an email address through the Trust. Fairlight rendered invoices for services provided by Ms Petereit which included GST.

[51] The integration test has elements of an employment relationship and elements of a contracting relationship. Overall the test points away from an employment relationship.

Fundamental or Economic Realty

[52] This test examines the extent to which Ms Petereit took on financial risk herself in providing her services to the Trust including whether she was in business for herself. In *Downey v New Zealand Greyhound Racing Association Inc.* the Court

indicated that the fundamental test requires an examination of whether and how Ms Petereit structured her business.⁶

[53] The question to be asked is whether Ms Petereit engaged herself to perform the services for the Trust as a person in business on her own account?⁷ I am satisfied she did.

[54] Ms Petereit has produced the financial statements for Fairlight. Those statements show Ms Petereit benefited from the commercial structure employed by her when entering into the contract in a way that is not available to employees. Ms Petereit submitted GST invoices for her services in the name of Fairlight rather than her own name. She was content to retain that status to enable deductions against income for taxation relief.

[55] Ms Petereit previously had experience as a contractor operating through the commercial structure of Fairlight and I find it is more likely than not that she knew the nature of the engagement at the time it was entered into.

[56] In all of the circumstances of this case I conclude Ms Petereit was in business on her own account.

Industry practice

[57] The evidence indicates it was common practice for there to be a variety of arrangements within the industry. Forest and Bird engaged volunteers, contractors and employees and this was the model used by the Trust when it was setting up. Ms Petereit herself took on a second contractor arrangement through Fairlight with Tasman District Council while still engaged under the contract with the Trust.

[58] Industry practice shows the engagement of contractors is not uncommon and while industry practice has not been determinative I have concluded Ms Petereit was one of those who was not engaged as an employee.

⁶ *Downey v New Zealand Greyhound Racing Association Inc.* (2006) 3 NZELR 501 at [34].

⁷ *Ibid.*

Overall impression

[59] Standing back and considering the evidence as a whole I have concluded Ms Petereit was engaged as an independent contractor under a contract for services by the Trust. She knew the true position when she took up the role and acted accordingly in that status in virtually every respect.

Costs

[60] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Trust shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Petereit shall have a further 14 days in which to file and serve a memorandum in reply. 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 “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority