

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 486/10
5283479

BETWEEN DAVID JOHN BALDWIN
 Applicant

AND BOSSI'S HAIR AND BEAUTY
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: The Applicant In Person
 C Thompson, Advocate for Respondent

Investigation Meeting: 28 July 2010 at Rotorua

Submissions Received: 11 August 2010 for the Respondent
 26 August 2010 for the Applicant

Determination: 18 November 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Baldwin, says that on 24th September 2009, he was unjustifiably dismissed from his employment at Bossi's Hair and Beauty salon. However, the respondent, Bossi's Hair and Beauty Limited, ("Bossi's") say that Mr Baldwin was not an employee. Rather, he was a self-employed contractor working from Bossi's premises under a mutual agreement between the parties. As the outcome of a conference call convened by the Authority on 1st June 2010, the parties accept that before any anticipated investigation into the substance of Mr Baldwin's alleged personal grievance can take place; the Authority is required to determine a preliminary issue. This is: Was there an employment relationship between Mr Baldwin and Bossi's or was he a self-employed contractor?

Background facts and evidence

[2] It is commonly accepted that until around June 2009, Mr Baldwin owned and operated a hairdressing salon in Rotorua. For various reasons, Mr Baldwin was forced to close the salon and seek an alternative source of income.

[3] The evidence of Mrs Pauline Klaus, the Managing Director of Bossi's, is that some time in June 2009, Mr Baldwin came to her hairdressing salon and requested her contact details from her staff. Because of information received from her staff as to Mr Baldwin's poor dress standard, Mrs Klaus says that she was reluctant to have any contact with him but eventually she did meet with Mr Baldwin at a local café. The evidence of Mrs Klaus is that Mr Baldwin advised that he needed to work seven days a week as he had debts after having to close his salon. Mrs Klaus told Mr Baldwin that she had been considering opening her salon for 7 days a week over the summer period. Mrs Klaus says that she explained to Mr Baldwin that she could not afford to, nor was she prepared to, take on more staff, as she still had some employees who "were not meeting their targets."

[4] Mrs Klaus attests that the discussion then led to them discussing an arrangement whereby Mr Baldwin could operate independently from her salon and he suggested a 60%/40% split of the income earned by Mr Baldwin, with him being paid the 60%. Mrs Klaus also says that Mr Baldwin told her that he would want to use his own colours and product but this was unacceptable to her as there was not room to store his materials at the salon and also, her salon exclusively used L'Oreal products. Mrs Klaus was only prepared to agree to a 50/50 split of income. There was also some discussion about Mr Baldwin being paid by cheque after presenting an invoice and Mrs Klaus agreed to consider "the proposal."

[5] A further meeting took place between Mr Baldwin and Mrs Klaus. The evidence of Mrs Klaus is that she presented the following to Mr Baldwin:

- (a) There would be a contractor arrangement with payment to Mr Baldwin on a 50/50 basis in regard to the income he generated from clients.
- (b) Mr Baldwin would use his own colours until he could convert his clients to the salon's standard L'Oreal product.

- (c) Mr Baldwin could set his own charge out rates.
- (d) Mr Baldwin would present himself in a tidy and professional manner.

Mrs Klaus says that Mr Baldwin agreed to this and she advised him that she would drop off a contract at his shop for him to sign as well as another standard form for Mr Baldwin to complete, and the L'Oreal manual.

[6] The evidence of Mrs Klaus is that on or about 1st July 2009, she dropped off a copy of a contract and a form for Mr Baldwin to record his contact details on. Mrs Klaus also bought the salon chairs that Mr Baldwin had for sale and asked Mr Baldwin for a GST receipt which he "wrote out on a blank sheet of paper."

The relevant documents

[7] In regard to the contract that Mrs Klaus refers to, this is a relatively standard employment contract (used for Bossi's employees) that Mrs Klaus has modified to reflect that Mr Baldwin would be a contractor. Unfortunately, the modification was very badly executed in that the term "Employer" is consistently used alongside the term "the Contractor." For example, the parties to the "Contract" are recorded thus:

1. *Bossi's Hair & Beauty Ltd (the Employer)*
2. *David Baldwin (Independent Contractor)*

There follows consistent references to "the Contractor" throughout the contract; used in conjunction with the term "the Employer."

[8] There are many such ambiguities throughout the document. I accept the evidence of Mrs Klaus that it was always intended that Mr Baldwin would be an independent contractor and that she sought to reflect this in the contract. Unfortunately, her attempts to produce a suitable document have not been successful and indeed the final product is neither one thing nor another and is open to various interpretations. Mrs Klaus acknowledges that the document is ambiguous and not well drafted as she has had no previous experience making such modifications. I also record that Mr Baldwin says that until the contract document was produced for the purpose of the proceedings, he had never seen it before and he says that he was "flabbergasted" to see this document and he alleges that is a "fraud." But I do not accept this to be so and I prefer the evidence of Mrs Klaus about this and also generally, where there is conflict on substantive matters. I conclude that it is more

probable that not that Mr Baldwin did receive the contract document and that he was most likely to have been aware of its content, albeit he did not sign or return it. But in any event, given the content of the document as referred to above and Mr Baldwin's denial in regard to receiving it, its overall value as tangible evidence is problematic.

[9] The other document that Mrs Klaus refers to is headed: *Staff Job Application Bossi's Hair & Beauty*. It is an application form issued to potential employees. Mr Baldwin acknowledges that he received a copy of this before commencing work at Bossi's but did not fill it in. As I understand it, Mrs Klaus expected Mr Baldwin to fill in the relevant provisions so that she had a record of his contact details. Sometime after commencing work at Bossi's salon, Mr Baldwin was given another copy. He filled in the relevant sections of the form; and signed it. Mr Baldwin says that he perceives this document to be a contract, and because there is a reference in the "*Office Use Only*" section to "*IR 12 completed*" he "assumed" he was on wages. Given that Mr Baldwin told the Authority that he had been in business for ten years and had employed 10-15 people, it is difficult to accept that he cannot tell the difference between a standard information form and an employment contract. Nonetheless, I have to say that this document was not appropriate for the purposes that Mrs Klaus envisaged, given the nature of the intended relationship.

Commencement at Bossi's salon

[10] Mr Baldwin commenced working at Bossi's salon on 13th July 2009. The evidence of Mrs Klaus is that because she "implicitly" understood that Mr Baldwin had "contractor status," she did not ask him to complete a Tax Code declaration or "load" him onto the payroll system. Mrs Klaus says that Mr Baldwin never at any time approached her regarding issues relating to payments or PAYE tax.

The hours of work

[11] The common evidence is that Mr Baldwin controlled his own hours of work. Mrs Klaus says that in the first week of working at Bossi's, he informed her that he would not work late nights as he played poker two nights a week. Mrs Klaus did not question this, as because Mr Baldwin was an independent contractor, the hours he worked were his prerogative. Mrs Klaus says that on Saturday 25th July 2009, Mr Baldwin told her that he was going to "check out" another salon in Tauranga. He then subsequently was unavailable to work on Wednesdays as he had contracted to work at

the Tauranga salon. The further evidence of Mrs Klaus is that during his third week at the Bossi's salon, Mr Baldwin informed her that that he would not be working Wednesday and Friday of each week. Then on his fourth week at the salon, he informed Ms Klaus that he would not be working Wednesday, Friday and Saturdays of each week. Mr Baldwin does not take issue with any of this and says that because it was "quiet" at Bossi's he "checked a few salons out" and that it allowed another Bossi's employee, Ms Jessica Caulfield, to have more work after she returned to work following an injury.

[12] The evidence of Ms Natasha Graham, an employee who has worked at Bossi's for about three years, is that she observed that if Mr Baldwin didn't have any clients he would leave the salon and that he "managed" his own start and finish and break times. Mr Baldwin says that he had no control over the hours he worked and that he was expected to be at the salon until 5:00p.m. each working day and that he was told when to have his lunch break. A written statement from Ms Caulfield informs that she and Mr Baldwin were told when to start and finish and to coordinate lunch breaks, but looking at the appointments book for Mr Baldwin for the short time he was at Bossi's, it appears that on many days, due to the lack of clients, there was considerable flexibility as to when he was required to work or not.¹ The evidence of Mrs Klaus is that Mr Baldwin changed his work schedule from week to week and when business was quiet he did not come in and was working at a salon in Tauranga. Mrs Klaus says that Mr Baldwin told her he had to pay \$50 "for the chair" and kept the rest of the income from clients for himself.

Payments and Invoices

[13] After the first week of Mr Baldwin working at Bossi's, Mrs Klaus calculated 50% of the income generated by him. She asked Mr Baldwin for an invoice. Mr Baldwin says that he didn't have any invoices so he went to the \$2 Shop and bought a receipt book. The documents before the Authority are headed *TAX INVOICE/STATEMENT* and cover a period of seven weeks. The invoice for the first two weeks is set out in reasonable handwriting:

To Bossi

From Dave Baldwin Hairdressing

¹ The evidence of Mrs Klaus is that Ms Caulfield left Bossi's on 11 November 2009 and subsequently "unsuccessfully" raised a personal grievance.

with the respective sums being \$880.00 and \$623.50 – GST inclusive.

The invoices for weeks 3, 4 and 5 are written in a rough scrawling manner:

To Bossi

From Dave Baldwin

with the respective sums being \$578.00, \$302.50 and \$439.00 – GST inclusive. Then for weeks 6 and 7 the invoices are to *Bossi Hair and Beauty* with the respective sums being \$522.00 and \$322.40 – GST inclusive.

[14] Mrs Klaus says that when she asked Mr Baldwin for his GST number she was referred to the “receipt” he gave her when she bought the salon chairs off him. So while Mr Baldwin wrote out all of the other details on the invoices, Mrs Klaus inserted the GST number and it is obvious on two of the invoices that Mr Baldwin has written over the GST number. The evidence of Mrs Klaus is that Mr Baldwin refused to provide invoices for the last three weeks albeit it appears that he was subsequently paid.

[15] There is a letter from the company’s accountants:

Our client engaged the services of Mr Dave Baldwin, as a contractor, from 13 July 2009 to September 2009. Mr Baldwin issued invoices to our client for work completed during this period. When these invoices were paid by our client the GST content was claimed in the appropriate GST period.

The Authority has also sighted a ledger report that sets out the payments made to Mr Baldwin for eight weeks with the GST component appropriately calculated.

Tools and Product

[16] When Mr Baldwin came to Bossi’s he brought with him his own equipment including products, work trolley and stool, steriliser and combs and brushes. Mrs Klaus says that while this caused a “significant amount of clutter” she understood that as a contractor, Mr Baldwin would bring his own tools and equipment.

Clients

[17] Mr Baldwin brought with him to Bossi’s a list of clients from his business and their contact details. Mrs Klaus says that Mr Baldwin arranged all of his own appointments.

Termination of the arrangement

[18] The circumstances pertaining to the departure of Mr Baldwin from Bossi's do not require a close examination at this point given that the preliminary matter needs to be determined first. It appears that a number of issues arose in regard to Mr Baldwin's general behaviour which Mrs Klaus attempted to discuss with Mr Baldwin at a meeting in a local café on 24th September 2009. It is enough to say that there was an unpleasant exchange with Mrs Klaus returning to the salon. It seems that Mr Baldwin returned to the salon a short time later and verbally abused and swore at Mrs Klaus; whereby she requested that Mr Baldwin should leave. The evidence of Mrs Klaus is that Mr Baldwin told her that she; "couldn't fire him as he worked for himself." Mrs Klaus says that on the day that Mr Baldwin left (24th September 2009), he took with him his client list along with his equipment.

Analysis and Conclusions

[19] The primary question for determination is: Did an employment relationship exist between Mr Baldwin and Bossi's Hair and Beauty Limited? The onus is upon Mr Baldwin to establish the existence of a contract of service between him and Bossi's.² If he is not able to establish that an employment relationship exists there is no jurisdiction for the Authority to continue its investigation into his alleged personal grievance.

[20] Any analysis of the factors that the Authority must consider in determining this question begins at section 6 of the Employment Relations Act 2000 ("the Act"). It provides"

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 homemaker; or
 - (ii) a person intending to work; but
 - (c) excludes a volunteer who-
 - (i) does not expect to be rewarded for work to performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer.

² *McDonald v Ontrack Infrastructure Ltd* [2010] NZEMPC 132, 5 October 2010.

- (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.

[21] While applying s 6 in determining whether there was an employment contract of service/employment relationship between Mr Baldwin and Bossi's, the Authority must also be cognisant of the traditional tests adopted by the Supreme Court in *Bryson v Three Foot Six Ltd*,³ namely the intention, control, integration and the fundamental tests and the use of those tests (where applicable) to establish the real nature of the relationship. But of course each case must be determined on its own particular facts without unquestioning adherence to any particular formula.

The intention of the parties

[22] On the basis of the evidence available, I conclude that it is more probable than not that the intention of Mrs Klaus and Mr Baldwin was that Mr Baldwin would be an independent contractor. This is evident from their initial discussions and the terms that were agreed upon at their second meeting. Mrs Klaus then attempted to record the nature of the relationship in a written contract. As already mentioned, the attempt was not very satisfactory, but nonetheless, I find that the mutual intention was that Mr Baldwin would be an independent contractor. I also conclude that it is more probable than not that Mr Baldwin understood that he was an independent contractor, and I believe that he found that status to be acceptable until the relationship ended suddenly on discordant terms. That the parties intended that Mr Baldwin should be an independent contractor is also evident from the payment arrangements. Mr Baldwin was paid 50% of the client income that he generated (as agreed) and he presented an invoice albeit Mrs Klaus had to include the GST number. I gained the impression that Mr Baldwin was not particularly interested in providing appropriate paperwork regarding the business relationship and it was left to Mrs Klaus to do this. Mr Baldwin's lack of appropriate business application is also evidenced during the sale of

³ [2005] ERNZ 372.

his salon chairs. In summary, I find that the intention of the parties was that Mr Baldwin would be an independent contractor.

Control and integration

[23] As evidenced by Mr Baldwin's comings and goings (for example to the Tauranga salon) and the acceptance of Mrs Klaus that he was able to do this as an independent contractor, I conclude that Mr Baldwin was not under the control that one would expect to see in an employer/employee relationship. There is some evidence that Mr Baldwin may have had to comply with providing coverage during the lunch break but that on its own does not reflect any particular control of Mr Baldwin by Bossi's. Rather, it appears to more a matter of ensuring that there was someone present at the salon while others took their lunch break. Apart from the lunch break coverage from time to time, and the hours of opening for the salon, it appears that Mr Baldwin had absolute freedom to come and go as he pleased and work whatever days he wished. I accept that there may not have been sufficient client business available at Bossi's for Mr Baldwin to make the income he required and hence he sought work elsewhere. But that is indicative of Mr Baldwin being an independent contractor whereby he had the freedom to canvas for income elsewhere. While it seems that Mr Baldwin assisted other staff with showing them how to use the product colours that he had available, there is no particular evidence that he was integrated into the business.

The fundamental test

[24] Put simply, the fundamental test examines whether a person providing services is doing so on their own account. The weight of the evidence points to Mr Baldwin operating on his own account as evidenced by the presentation of an invoice each week upon which he received 50% of the income that he had created. Mr Baldwin was also at liberty to pursue business outside of Bossi's salon and he freely did so. Mr Baldwin had his own clients and made his own bookings to suit the days that he was at Bossi's and not working elsewhere and he had absolute freedom to come and go as he pleased. While he did not have any involvement in the provision of the premises or overall infrastructure it is clear that he entered into a business arrangement with Mrs Klaus whereby he would have full use of Bossi's infrastructure for which he paid 50% of the income he generated. It was a relatively simple business arrangement which both parties envisaged would be mutually beneficial, albeit that outcome did not come to fruition for Mr Baldwin or Bossi's for various reasons.

Determination

[25] Applying the provisions of section 6 of the Employment Relations Act 2000 and the accepted tests confirmed by *Bryson*, and upon the consideration of all relevant matters, I find that the true nature of the relationship between Mr Baldwin and Bossi's is that Mr Baldwin was an independent contractor. He was not an employee. It follows that because there was not an employment relationship existing between the parties the Authority does not have jurisdiction to investigate the alleged grievance raised by Mr Baldwin and that matter must lapse accordingly.

Costs: Costs are reserved. The parties are invited to resolve this issue themselves if they can. As a general guideline, given that the matter took about half a day, and the established tariff based approach of the Authority to costs, a likely award of costs, subject to the content of any submissions, will be approximately \$1,500. In the event that the parties are not able to reach an agreement, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions in response.

K J Anderson
Member of the Employment Relations Authority