IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

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AA 12/08

	BETWEEN	MICHAEL BAMBURY Applicant
	AND	ELATION LIMITED T/A KOMODO PREMIUM BAR First Respondent
		JERRY SEWTER Second Respondent

Member of Authority:	Dzintra King
Representatives:	Penelope Stevenson, Counsel for Applicant Michael Smyth, Counsel for Respondent
Investigation Meeting:	9 October 2007
Submissions received:	30 October 2007 and 14 November from Applicant 7 November 2007 from Respondent
Determination:	17 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a claim for breach of contract and arrears of wages, outstanding holiday pay, one month's remuneration in lieu of the contractual notice period, and penalty for breach of the employment agreement. Also at issue are the identity of the employer and whether or not the applicant was an employee or a contractor. The applicant has filed the matter against Jerry Sewter and Elation Limited trading as Komodo Premium Bar. The applicant asserts that both Mr Sewter and Elation Limited were his employers.

Issues

[2] There are six issues to be determined.

1. Who are the parties to the arrangement?

2. What was the real nature of the relationship between the parties and did it change over the 3½ years of the relationship?

3. Was there a variation and/or waiver of the original written agreement between the parties such that the terms upon which the applicant would be paid remuneration altered in January 2006?

4. What sums were owing to the applicant upon termination of the agreement?

5. And if so, were such sums offset by loans owing from the applicant to the second respondent?

6. Are the applicants liable for a penalty?

The employment arrangement

[3] There is a signed document headed "*Individual Employment Agreement*" which states that it is made in terms of section 65 of the Employment Relations Act 2000. The parties to this agreement are Jerry Sewter, Elation Limited trading as Komodo Premium Bar and Michael Bambury. It states that Mr Bambury has been employed primarily as club manager, that the workplace location will be the Komodo Premium Bar in Parnell and that the days and hours of work will be flexible, by arrangement and generally at night. Pay is to be 20% of gross turnover exceeding $5,000 per week and is to be paid by automatic payment to a nominated bank account no later than Thursday of the following week. A pay slip was to be provided. However, payments were not made by automatic payment. The document also provides for two week's annual holidays and requires absences for any reason to be notified to the employer's representative (Jerry Sewter) not later than the normal start time on each day of absence. Either party must give one month's notice of termination. Mr Bambury has signed the agreement as employee, and Mr Sewter signed the agreement as the employer's representative on 12 March 2003. A number of the provisions of this agreement were never carried out.

[4] Mr Sewter is the sole director and shareholder of Elation Limited. Mr Bambury contended that he had no knowledge whatsoever of Elation Limited. However the agreement was drawn up by a solicitor instructed by Mr Bambury, not one instructed by Mr Sewter. Mr Bambury obviously had to have knowledge of Elation Limited or he could not have conveyed that information to the solicitor who drew up the agreement. The respondent in these proceedings, regardless of whether there is a contract of service or a contract for services, is Elation Limited trading as Komodo Premium Bar, not Jerry Sewter.

The nature of the relationship

[5] Section 6 (3) Employment Relations Act 2000 states that when determining whether a person is an employee or not the Authority must:

> (a) *consider all relevant matters, including any matters that indicate the intention of the person; and*
>
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[6] In *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 Shaw J set out the principles relevant to cases assessing the nature of the employment relationship. Those principles were as follows:

1. The Court must determine the real nature of the relationship.

2. The intention of the parties is still relevant but no longer decisive.

3. Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.

4. 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.

5. The fundamental test examines whether a person performing the services is doing so on their own account.

6. Another matter which may assist in the determination of the issue is industry practice, although this is far from determinative of the primary question.

[7] Although the contract between the parties is headed *Individual Employment Agreement* and is purportedly made pursuant to s.65 of the Employment Relations Act, given the circumstances of this case I am far from satisfied that this document can be taken as being indicative of the intention of the parties. This is because of the unusual circumstances where it was Mr Bambury who was responsible for the drawing up of the agreement and instructed a solicitor to that effect, and not Mr Sewter. I am satisfied that Mr Sewter did not see this agreement until it was presented to him by Mr Bambury, and that Mr Bambury indicated that he expected and wanted Mr Sewter to sign the agreement then and there. Mr Sewter therefore did not have any opportunity to discuss this matter with a legal representative and take advice on it.

[8] It is also clear to me that while the parties had discussions about the remuneration rate there were no discussions regarding the employment status of Mr Bambury. Mr Sewter said Mr Bambury insisted on being paid cash and without deduction of tax. He also said that Mr Bambury did not give him his bank account number or IRD number for payment purposes, although Mr Bambury had deposed that he had done so. I accept Mr Sewer's account of events.

[9] Mr Sewter said it was his understanding that Mr Bambury would be an independent contractor as the previous bar managers had been. Mr Sewter said Mr Bambury told him he wanted to be paid that way because he had financial problems. At the time that the agreement was entered into Elation Limited was not registered for PAYE with the IRD. Mr Sewter said it seemed sensible to make payments in this way because Mr Bambury's remuneration or fee was linked directly to the success of the bar, namely the turnover. Mr Bambury was given complete discretion to run the bar as he saw fit. Mr Sewter said he virtually treated Mr Bambury as a partner in the business, albeit that he did not have a shareholding. Mr Bambury agreed that he was responsible for almost every aspect of running the venue with the exception of the accounts. Mr Sewter's evidence was that Mr Bambury was dyslexic so he did the accounts. Mr Sewter even made a will dated 28 April 2006 in which he left Mr Bambury a 51% shareholding in the business.

[10] At the time that Mr Bambury started working for Elation Limited he was also working for Harvey Norman. In the first three months of Mr Bambury's tenure the turnover of the bar only went above $5,000 per week on five occasions. That meant Mr Bambury was receiving very little by way of payment. This was consistent with someone who was working as an independent contractor. Eventually he gave up the Harvey Norman job. I accept that this was entirely of Mr Bambury's volition, not because of any pressure applied to him by Mr Sewter.

[11] Mr Bambury was solely responsible for hiring and firing staff, and had complete discretion to run the bar as he saw fit. Mr Sewter sometimes complained to Mr Bambury that he had hired too many staff and that was a contributing factor to the poor profitability of the business. Although Mr Sewter was the director of Elation Limited, the reality was that the day to day business was being run by Mr Bambury. Mr Bambury had no fixed hours and worked solely to meet the needs of the business. Mr Bambury had the knowledge required to deal with the mechanics of running the bar. I accept that Mr Sewter was very reliant upon Mr Bambury, particularly in the early part of the relationship to run the bar. It was not a relationship of master and servant. The applicant had the ability to take on other jobs and he certainly did that initially when he worked for Harvey Norman.

[12] I do not accept Mr Bambury's evidence that he did not know that he was being paid gross and thought that he was having tax deducted. Mr Bambury had access to the takings of the business and was therefore well able to work out what his entitlement was. He could have been under no illusion that payments were being made to him on a gross basis without deduction for PAYE. He did not take sick leave and was not paid holiday pay.

[13] There were a number of meetings and conversations between the parties about the remuneration rate that Mr Bambury was receiving. Eventually Mr Bambury was accepting a share of the profit of the business on a 50:50 basis between Mr Bambury and Mr Sewter. That agreement was reached in December 2005. At that stage Mr Sewter told Mr Bambury that he thought the bar did not have sufficiently long opening hours and urged him to consider increasing the trading hours, perhaps starting after work drinks and opening on a Thursday for a ladies' night as had previously been discussed on several occasions. Mr Sewter said that he hoped that they would be able to turn things round by making him accountable for the expenses of the business.

He said fresh flowers were replaced by plastic ones, staff numbers and shifts decreased, and the bonuses he would regularly pay the staff from the till on a good night ceased. He also cut down his actual working hours and on some evenings would disappear for some time leaving the bar to be run by other members of staff. There was no indication that on such occasions Mr Bambury felt it necessary to telephone Mr Sewter and let him know that he was not going to be there. These factors are all indicative of Mr Bambury having a considerable degree of control over his employment. He decided who was to be employed, he decided how much was going to be paid, he decided how many shifts there would be, he decided whether or not bonuses were going to be paid, he decided how many hours the bar was going to be open and he decided what hours he was or was not going to work.

[14] The respondent's submission is that the real nature of the relationship from March 2003 until May 2005 was one that was more akin to that of a partnership. The respondent says that in May 2005 there was a change to the employment relationship. When I queried the rationale for this it was based very largely upon the fact that at that point Elation Limited registered with the IRD for PAYE, and that Mr Sewter talked to Mr Bambury about his being paid wages and having PAYE deducted. Mr Bambury also said he wanted to take more control of the business. However, the evidence before me does not lead me to the conclusion that Mr Bambury did take more control of the business, or that the basis of the working relationship changed in any way at all. The only thing that changed was the method of the payment of the remuneration. The basis on which payments are taxed is not by itself sufficient to determine the nature of the relationship. At the stage that the move was made to tax Mr Bambury on a PAYE basis there was no evidence that there was any discussion between the parties that the actual nature of the relationship had changed in any way. The discussions were simply about tax.

The intention of the parties

[15] Despite the existence of the individual employment agreement I cannot in the circumstances hold that this is in any way properly indicative of the intention of the parties. This is because it was, as I have said, formulated entirely on the instructions of Mr Bambury and that I am satisfied that neither party discussed or turned their minds to the nature of the employment relationship. Mr Bambury said he thought that Mr Sewter said he believed it to be a contractor relationship the same way previous

relationships with his previous manager had been. I accept that he had that intention. I find that the parties intended to go into business together and that Mr Bambury was to manage the bar and that he was to have complete discretion to do that. I do not find that that changed throughout the course of employment.

How did the relationship work in practice?

[16] In practice the parties behaved as if Mr Bambury was a contractor, not an employee. This is indicated by the discretion he had to run the business as he saw fit. The fact that his remuneration was linked to the performance of the business, that he did not have regular hours, that he did not have to report to Mr Sewter any absences, that he took no sick leave and no holiday pay. Mr Bambury had a free hand in the running of the business, and Mr Sewter deferred to him in that.

[17] Mr Bambury did not put any capital at risk and did not provide his own tools. These were all provided by Mr Sewter. Mr Bambury took on staff and promised them paid wages. Mr Bambury said in evidence that he took a financial risk with the job, that it was a huge risk. He said he felt that he had a stake in the business because he had built it up. He said he had to run major decisions past Mr Sewter and averaged between 60 and 80 hours a week. He did this because he believed that he had a stake in the business and his remuneration depended upon his increasing the turnover. Mr Bambury clearly saw himself as profiting from his input into the business. The intention of the parties was that if the business was successful, Mr Bambury would take the benefit of this as well as Mr Sewter doing so. That Mr Sewter recognised this is evidenced by his leaving 51% of the shares in the business to Mr Bambury in his will. There was an absence of control and the opportunity for Mr Bambury to profit from the sound management of the business. All these are features of the arrangement and the conduct of the relationship which confirm its true nature as being a contract for services.

[18] I do not find that there was any change in that relationship during the course of the employment. Having found that the relationship, both at its conception and at its termination, was one of a contract for services and not a contract of service, I have no jurisdiction to determine the other matters that are before me.

Costs

[19] If the parties are unable to agree on the matter of costs, the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority