

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 34
5317052**

BETWEEN CRISTINA CASARES
 Applicant

AND AAV NEW ZEALAND
 LIMITED (trading as Oktober)
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Brian Henry, Counsel for Applicant
 Christopher Toogood Q.C., Gemma Mayes, Counsel for
 Respondent

Investigation Meeting: 1 December 2010 at Auckland

Determination: 24 January 2011

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Ms Cristina Casares, claims that she has been unjustifiably disadvantaged in her employment. Specifically Ms Casares claims that she is owed a commission by the Respondent, AAV New Zealand Limited, trading as Oktober (“Oktober”), as a result of introducing a contract to the business under the doctrine of quantum meruit.

[2] Oktober claims that Ms Casares was not an employee but an independent contractor providing services. As such, Oktober claims that Ms Casares has no entitlement to a commission either on a contractual basis or a quantum meruit basis.

Issues

[3] The issues for determination are:

- a. Whether Ms Casares was an employee or an independent contractor when providing services to Oktober.
- b. If Ms Casares is deemed to be an employee, whether she was unjustifiably disadvantaged by not receiving a commission payment in respect of introducing a contract to Oktober.

Background Facts

[4] Ms Casares had been involved in the New Zealand Film and Television Industry (“the Industry”) for more than eight years prior to her involvement with Oktober. Ms Casares is a shareholder and director of La Luna Studios Limited (“La Luna”), an animation studio company, and was a member of a number of the Industry associations, including as Founder and a Board Member of Board of “Women in Animation New Zealand”, and as a Board mMember of ‘Film Auckland’.

[5] Ms Casares had met Mr Bruce Everett, Managing Director of Oktober, prior to his employment at Oktober in October 2009. Following his employment, Ms Casares approached Mr Everett to ask if there was a possibility of employment for her with Oktober.

[6] There were discussions held between Ms Casares, Mr Everett and Mr Ganesh Raj, the Account Director of Oktober. Ms Casares met with Mr Raj separately on two occasions and Mr Raj emailed Ms Casares with a proposed position description which provided under a section headed remuneration for a weekly retainer and for a commission scheme. This position description was not signed by the parties and the details of a proposed commission scheme were not agreed or finalised by the parties.

[7] On 18 November 2009 the parties entered into an agreement entitled “AAV NZ Ltd Freelance Agreement” (“the Freelance Agreement”) which was signed by the parties, and which identified Ms Casares as “Freelancer”. Details as outlined in the contract were:

- Freelancer Services: Account Manager

- Start date: 18/11/09
- End date: 16/12/09
- Extended Term: To be discussed prior to the completion of this contract
- Rate: \$1200.00 per week less applicable taxes
\$150.00 for total buyout for mobile phone usage for the four week period.
- General :

2. The relationship between the Freelancer and Oktober is and shall be for all purposes that of a Freelance Contractor and neither this Agreement nor anything contained or implied shall constitute the relationship of employer and employee between the parties.

- Proprietary Rights:

All ideas, concepts, copyright, inventions, patents, trade marks or other products or processes developed or created either in whole or part by the Freelancer arising from or in connection with the activities of Oktober shall be the sole property of Oktober, and the Freelancer agrees to execute any document required to give effect to this.

[8] Ms Casares said that her duties as Account Manager were focused on bringing Television Commercials, Retail and Corporate work to Oktober in the short term, and Television Series and Feature Films in the long term.

[9] Mr Everett stated that Ms Casares sales targets as set out in the Freelance Agreement, which commenced on 18 November 2009 were to secure:

- 2 x Retail or Corporate projects with a combined value of \$25,00 (that must start within the contract period);
- 2 x 3D projects (that must be confirmed within the contract period, but that could start later): and
- Long Form project relationships that would benefit Oktober in the next 6 months.

[10] La Luna invoiced Oktober on a fortnightly basis. The invoices were itemised as being for '*Cristina Casares – Sales and promotion services*' at a rate of \$1,200 per week including Goods and Services Tax at 12.50%. Included on the majority of the invoice copies produced was an amount claimed in respect of a '*Personal Laptop*', and on one invoice copy an amount claimed in respect of '*Mobile Phone Expenses*'. There was an invoice copy provided dated 6 May 2010 for '*4 HP Workstations and HP Flat Monitors*' .

[11] Mr Everett said that payment of the invoices was made direct into La Luna's bank account.

[12] The end date of the Freelance Agreement was 16 December 2009. The Freelance Agreement made provision for an extended term which would be discussed by the parties prior to the end date. In accordance with this provision, Ms Casares worked on 17 and 18 December 2009, and then recommenced work on 11 January 2010 under the terms of the Freelance Agreement.

[13] During February and March 2010, there were informal discussions between Ms Casares and Mr Everett concerning the basis of her ongoing engagement with Oktober, but there was no resolution and Ms Casares continued to work under the terms of the Freelance Agreement.

[14] Oktober Animation was a joint venture business, established on 17 May 2010, in which Oktober was a shareholder. Mr Everett said that Ms Casares, who had an aspiration to run a successful animation studio, became aware that the producers at Oktober Animation were recruiting.

[15] On 6 May 2010 Ms Casares offered one week's notice of termination of the Freelance Agreement to Mr Everett, as she was accepting a position with Oktober Animation, a joint venture company between Oktober and Backyard Animation Pictures.

Determination

Was Ms Casares was an employee or a contractor when working for Oktober?

[16] Ms Casares gave evidence to the effect that she was an employee when working for Oktober and was therefore able to bring a personal grievance under s 103 (1)(b) of the Employment Relations Act 2000 (“the Act”).

[17] In deciding whether Ms Casares was employed by Oktober as an employee, I apply s.6 of the Act which provides:

“s.6 Meaning of employee:

1. In deciding ... whether a person is employed by another person under a contract of service, the ... Authority-... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2)... or the Authority-

(a) must consider all relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[18] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

“All relevant’ matters certainly includes 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

¹ [2005] 1 ERNZ 372

operated in practice. It is important that the Court or the Authority should consider the way in which 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 requires the Court or the 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 in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test".

Contractual basis

[19] Ms Casares stated that: *"the industry practice is to call the staff a neutral word "freelance contractor", and that "The 'WETA' case was notorious in the industry."* The 'WETA' case is *Bryson v Three Foot Six Limited (No 2)* referred to in the preceding paragraph. Although Ms Casares amplified this statement by explaining that she was unaware of the detail of the case, only of the outcome, I find it significant that Ms Casares was aware of the case, and I accept her statement that the case was notorious within the Industry in which she both worked and employed people, within a company of which she was both a shareholder and director.

[20] Against that background Ms Casares entered into discussions with Mr Everett and Mr Raj as to the nature of her proposed involvement with Oktober. Whilst the written and oral terms of an employment contract are not conclusive as to the common intention of the parties, they are an indication of the common intention.

[21] Mr Everett stated that Oktober in engaging Ms Casares, hoped to bring in new work before the Christmas period, and that Mr Raj was seeking support in order to target sales and also wanted to try new initiatives. As Ms Casares had considerable experience in the Industry and was a keen networker, Oktober hoped that she would enable them to attract more visual effects business and develop opportunities for long-term production projects, including animation.

[22] Mr Everett explained that Oktober at that time employed approximately 55 employees and engaged 70 independent contractors. Mr Everett explained that Oktober engaged contractors in the core business and the sales business, these included Ms Casares and Ms Sally Jones. HR and PR and Marketing were contracted out functions. Experienced in the Industry himself, Mr Everett explained that he was quite clear as to the distinction between an employee and an independent contractor.

[23] Mr Everett said that he and Mr Raj discussed various options with Ms Casares regarding the nature of her proposed involvement with Oktober and initially considered structuring an employment relationship. Mr Everett said that it was Ms Casares who insisted on being employed as an independent contractor in order that she could carry on operating La Luna, retain control of her taxes and could write off company expenses.

[24] Ms Casares said that she had taken advice from her accountant who had advised that other expenses could be discounted under the Freelance Agreement. Ms Casares said that all she had wanted was to work as an Animation Producer and as what she was being offered would be the same income on either an employee or an independent contractor basis, she saw the Freelance Arrangement as having tax advantages.

[25] Ms Casares explained at the Investigation Meeting that she had not queried paying her own tax as it was more important to her that the commission structure was clarified and agreed.

[26] I find it significant that Ms Casares was experienced in the Industry, was involved in La Luna as shareholder and director, engaged people to work for La Luna, and had advice from her accountant before entering into the Freelance Agreement.

[27] The Freelance Agreement was quite explicit in stating under clause 2 of the 'General' section that the terms of the agreement did not '*constitute the relationship of employer and employee between the parties*'. This is further borne out by the fact that the Freelance Agreement does not contain the mandatory requirements as set out under s.65(2)(iii), (iv) and (vii) of the Employment Relations Act 2000 as being

included in an Individual Employment Agreement, indicating that it is a contract for services rather than an employment agreement between employer and employee.

[28] Mr Everett said that while Oktober had been prepared to agree to an employment agreement, the impetus for the Freelance Agreement came from Ms Casares, to whom it was important that she retained her independence. Mr Everett said that after the expiry date in the Freelance Agreement on 16 December 2009, Ms Casares continued to perform in accordance with its terms as he and Ms Casares had agreed it would continue to apply notwithstanding the expiry of the initial agreement.

[29] During February and March 2010 Mr Everett said there were informal discussions between himself and Ms Casares. Although centred on the rate Ms Casares was being paid under the Freelance Agreement, these discussions incorporated new arrangement options, which Mr Everett said included employment relationships and a contract for services on a commission only basis. However Mr Everett stated that these alternative options were not acceptable to Ms Casares and the terms of the initial Freelance Agreement remained in place.

[30] Ms Casares recorded her view of these discussions and summarised her view in a document attached to an email dated 8 April 2010. This document stated; *“Discussions summary: think over the weekend and decide if I want to stay as contractor or if I want to accept employee position”*

[31] Ms Casares said that the reason she would not agree to a change in status was her concern that it might affect the situation as regards the commission she might earn.

[32] Ms Casares said that the ‘Proprietary Rights’ clause in the Freelance Agreement was indicative of an employment agreement. Mr Everett said that the proprietary rights clause was a standard provision in Oktober’s Freelance Agreements, set out to record that all intellectual property rights created in connection with Oktober’s activities belonged to Oktober. Mr Everett explained that this was standard practice for contractors, as unlike employees, contractors were not covered by copyright legislation. It was particularly relevant as contractors might, like Ms Casares, use their own computer equipment.

[33] Mr Everett stated that Ms Casares did not receive any remuneration for the period between Christmas and New Year when she did not work, consistent with the status of an independent contractor. Ms Casares said that there was a payment made in accordance with the invoice dated 15 December 2009, representing payment for this period. Mr Everett explained that Ms Casares had continually contacted Mr Raj requiring payment over this period due to personal financial hardship and that Mr Everett had agreed to make her a one-off ex-gratia payment in response to her application. This explanation is given credence by the fact that the invoiced amount is for \$1,000.00 only, an amount which does not correlate to the remuneration rate outlined in the Freelance Agreement.

[34] I am not persuaded by Ms Casares assertion that she believed in this context that the term ‘freelance contractor’ was a neutral word. I find that Ms Casares made an informed decision about the contractual nature of her relationship with Oktober and that the full circumstances surrounding the formation and continuation of that contractual basis with Oktober are indicative of the common intention of the parties, which was that the relationship of Oktober and Ms Casares was that of principal and independent contractor. This is supported by Ms Casares own comment in the document attached to the email dated 8 April 2010 in which she stated: “*Discussions summary: think over the weekend and decide if I want to stay as contractor or if I want to accept employee position*”

[35] I now turn to the way in which the relationship operated in practice by having regard to the features of control and integration, and to the fundamental test of whether Ms Casares was working on her own account.

Control and Integration

[36] Ms Casares said that her position as Accounts Manager was a position integral to Oktober. As Accounts Manager she was expected to report to Mr Raj, to work from 9 a.m. to 5 p.m. daily and to offer an explanation if she was ever late to the office.

[37] Mr Everett stated that the position of Accounts Manager was not fundamental to Oktober but a new initiative to Oktober, and as such Ms Casares was employed as an independent contractor to bring in new business to Oktober.

[38] While the Freelance Agreement referred to the freelancer services being provided for 40 hours per week, Mr Everett said that Ms Casares had flexibility on when these hours were worked, having no set start or finish times, and that Ms Casares often left early in the afternoon to attend functions.

[39] Further that Mr Raj gave Ms Casares considerable autonomy, and provided little supervision or close direction of the performance of her work. Mr Everett refuted the assertion that Ms Casares had to provide explanations if she were late, although he did acknowledge that there might have been concern if she was late attending meetings which had been arranged.

[40] Ms Casares said that in February 2010 she was instructed to take on the role of Marketing and PR which was fundamental to Oktober and could not be contracted out.

[41] Mr Everett stated that Ms Casares was not meeting the sales targets expected in the Accounts Manager role and that therefore she was contracted to provide PR and Marketing services. Mr Everett said that PR and Marketing work was regularly contracted out, within Oktober and other businesses in the Industry, and explained that before, during and after Ms Casares period of engagement, Oktober's overall PR and Marketing had been handled by another contractor, based in Australia.

[42] I do not find evidence that Ms Casares was subject to the control of Oktober in the provision of services, or that her position was integral to Oktober.

The Fundamental Test

[43] Ms Casares was not remunerated through the Oktober PAYE system but instead La Luna invoiced Oktober for Ms Casares sales and promotion services and the monies were paid by Oktober direct into La Luna's bank account. La Luna also invoiced for GST which implies that it was providing the services of Ms Casares. The method of invoicing follows the terms of the Freelance Agreement, namely that

“Companies are exempt from withholding tax, so please state clearly on your invoice to Oktober your company name”

[44] Ms Casares said that she believed the invoices to be a mere formality because the weekly remuneration rate was a fixed amount in the Freelance Agreement. I am not persuaded by this argument. However of itself, I do not find the method of payment to be conclusive of the true nature of the relationship, although it is suggestive of an independent contractor relationship.

[45] Ms Casares states that although she remained a shareholder of La Luna, she made numerous introductions solely on Oktober’s behalf. While working for Oktober Ms Casares said that she worked for a client of La Luna on one occasion only.

[46] Mr Everett said that Ms Casares was not prevented under the Freelance Agreement from undertaking work for other companies, providing that she ensured the confidentiality of Oktober’s business was maintained, and stated that Ms Casares, while providing services to Oktober, continued to undertake projects with other parties on behalf of La Luna.

[47] Ms Casares stated that it was expected by Mr Everett and Mr Raj that any client of La Luna who contacted her would be directed to Oktober. However Mr Everett stated La Luna offered different services to Oktober and that not every current or potential client of La Luna would be considered a potential client of Oktober.

[48] Mr Everett stated that Ms Casares following her engagement by Oktober continued to represent and promote La Luna in relation to industry trade organisations at functions she attended rather than Oktober, although Ms Casares denied that this was the case.

[49] Although there is no independent evidence to substantiate Mr Everett’s assertions as to Ms Casares’ promotion of La Luna, I accept that the terms of the Freelance Agreement did not preclude Ms Casares from such activity and clearly that on at least one occasion she had carried out client work for the benefit of La Luna without any interference or objection apparent from Oktober.

[50] Ms Casares said that Oktober provided all of her equipment, other than her personal laptop. This included a desk, a chair, Oktober stationary, an email address and telephone, which would not be indicative of the employment relationship since an independent contractor working at a company's premises could expect to be provided with the same in order to carry out their services, but which also included numerous software applications supplied by Oktober.

[51] Mr Everett said that Ms Casares used her personal laptop, and mobile telephone, for which Oktober was invoiced by La Luna. Additionally La Luna invoiced Oktober for the sale and purchase of 4 computer monitor workstations upon the termination of the Freelance Agreement. These computer monitors Ms Casares said had been used by international students from Taiwan who were hosted by La Luna and subsequently were hosted by Oktober under the mentorship of Ms Casares.

[52] I find that there is sufficient evidence to indicate that Ms Casares was in business on her own account.

[53] I determine that Ms Casares was an independent contractor during the period of her providing services to Oktober.

Was Ms Casares unjustifiably disadvantaged by not receiving a commission payment in respect of introducing a contract to Oktober.

[54] As I have determined that Ms Casares was not an employee but an independent contractor when working for Oktober, there is no necessity to determine the issue of entitlement by Ms Casares to a commission payment from Oktober.

[55] However for the sake of completeness I note that there were no terms in respect of a commission structure agreed by the parties. Even if my determination had been that Ms Casares was an employee, which it is not, the Authority has no power, as set out in clause 161 (2) of Act, to fix new terms and conditions of employment.

Costs

[56] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority