

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Deon Cheer (Applicant)
AND SCS Contractors Limited (Respondent)
REPRESENTATIVES Rowland Ingram, for Applicant
Anthony Vlatkovich, for Respondent
MEMBER OF AUTHORITY Marija Urlich
INFORMATION RECEIVED 8, 22 and 25 August
DATE OF DETERMINATION 18 September 2006

DETERMINATION OF THE AUTHORITY OF A PRELIMINARY ISSUE

Employment relationship problem

[1] This determination deals with the issue of Mr Cheer's employment status. He says he was an employee. SCS says Mr Cheer was an independent contractor.

[2] By consent of the parties this matter is determined on the papers. The parties have filed affidavit evidence in support of their respective positions and written submissions. I record that the parties have attended mediation.

What was the "real nature" of the relationship?

[3] To determine the question of status the Authority must determine the real nature of the parties' relationship. To do so the Authority must consider all relevant matters, including any indication of the parties' intention, but is not to treat any description of the relationship by the parties as determinative¹. All relevant matters include the written and oral terms of the agreement between the parties, the behaviour of the parties in implementing that agreement and the application of the historical common law tests of control, integration and the fundamental test².

[4] In his evidence Mr Cheer says he answered the following advertisement in the Situations Vacant column of the North Shore Times on Friday, 24 February 2005:

Spouting Installer
*Required to install all types of
spouting. Experience
preferred but not essential as
full training provided. Must
have own vehicle. Top rates to
trustworthy person.
Phone (09) 424-1028 or
0274 435363*

¹ Section 6 Employment Relations Act 2000

² *Bryson v Three Foot Six Limited* [2005] 2 NZELR 137

[5] Lionel Stone, a director of SCS, says in his affidavit that Mr Cheer answered the following advertisement which the company had placed in the local newspaper:

SPOUTING INSTALLATION SUBCONTRACTORS

An opportunity to be an independent, self employed person with an excellent income. We now require additional subcontractors to complete spouting installations on existing and new homes. You will need to have practical hands, no problems with heights and have your own vehicle. We will provide the work and although experience is preferred, we will give full training. Immediate start to trustworthy person. Phone 09 424 1028 or 0274 435363

[6] Mr Vlatkovich has attached to his closing submissions a copy of the above advertisement placed in the North Shore Times, Situations Vacant column, 3 March 2005. Mr Stone has not identified in his affidavit when or where this advertisement was placed or how he knew this was the advertisement Mr Cheer replied to. There is no evidence that the parties discussed during the interview which advertisement Mr Cheer had inquired about. The advertisements are significantly different; one expressly seeks a subcontractor and the other does not. It may be that the parties were at cross purposes as to the nature of the relationship from the outset.

[7] Mr Cheer attended an interview with Mr Stone on Friday, 4 March 2005 and commenced work on Monday, 7 March 2005. There is no dispute that following terms were agreed:

- (i) Mr Cheer would be paid \$12 per hour;
- (ii) there would be a training period;
- (iii) Mr Cheer would invoice SCS for the hours worked; and
- (iv) Mr Cheer was given a confidentiality agreement and application form to sign.

[8] Mr Stone avers that his habitual practise was to offer a four week trial period during which the person's suitability for the role could be assessed. Mr Stone does not aver that he told Mr Cheer this. Given the advertisements both refer to training being provided, I find it is more likely that this was what the parties discussed. There was no evidence that the parties discussed what would occur following the completion of training.

[9] When Mr Cheer commenced work with SCS he was not registered for GST. In his first affidavit Mr Cheer has annexed an invoice addressed to Rainaway, the trading name of SCS, and dated 4 April 2005. The invoice sets out a calculation based on hours worked and the agreed hourly rate, which totals \$684. There is no claim for GST and no GST registration number recorded on the invoice. Mr Stone has averred that the invoice was paid once the hours were approved. A second invoice has been provided to the Authority. It is the original invoice amended to correct the hours claimed, the total is recalculated and records that GST was included in the price. It seems likely that these amendments were all part of the approval process Mr Stone refers to at paragraph 12 of his affidavit. There is no evidence that the amendments were discussed with Mr Cheer.

[10] Mr Stone avers that SCS did not maintain full control over Mr Cheer's work activities. Given that SCS directed Mr Cheer to undertake training as a spouting installer, including the use of specialised machinery, provided him with tools necessary to perform his duties, paid him for work performed during this period and altered the invoice he submitted to reflect what it believed to be the actual hours he worked, indicates SCS maintained a close level of control over Mr Cheer's work activities.

[11] During the period of his engagement with SCS Mr Cheer was not registered for GST and did not hold a valid tax exemption certificate from IRD. Mr Stone avers that all contractors with SCS must comply with these requirements, along with obtaining tools, purchasing a suitable vehicle and taking out public liability insurance. Mr Stone avers that the trial period is the time during which these requirements can be met. If someone undertaking training with

SCS is not required to comply with these requirements at the outset of the relationship then how can they be said to be in business in their own account?

[12] The application and confidentiality forms provided to Mr Cheer from Mr Stone are respectively headed "*staff/contractor application form*" and "*staff/contractor confidentiality agreement*". It is unclear from these unexecuted documents what Mr Cheer's status was; they could apply to a contractor or an employee.

[13] Mr Cheer's engagement with SCS ended on the evening of Sunday 10 April 2005 when Mr Stone telephoned him to advise things weren't working out.

Determination

[14] I am not satisfied, on the information received, that during his engagement with SCS Mr Cheer could be described as operating as a spouting installation subcontractor in business on his own account. The advertisements and forms provided by SCS do not clarify the situation; neither do the discussions between the parties. SCS's requirement that the requisites for setting up as a contractor be fulfilled after the successful completion of the training period points to the relationship, at least during this phase, being that of a contract of service. The conduct of the parties ie, SCS's failure to identify on the forms provided what Mr Cheer's proposed status was, its requirement that Mr Cheer not complete the process of setting up as contractor before the start of the training period, its direction of that training, and in particular the equipment Mr Cheer should be trained on and the approval process for the invoice, meet the historical common law tests for a contract of service. For the reasons set out above I find Mr Cheer was an employee.

[15] The parties are directed to attend mediation.

Costs

[16] Costs are reserved.

Marija Urlich
Member of Employment Relations Authority