

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 91  
3078512

BETWEEN                      KALIAPPAN CHETTY  
   Applicant  
  
AND                                NICHE MEDIA NZ LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Ron Chetty, advocate for the Applicant  
   Martin Pouwels, representing the Respondent  
  
Investigation Meeting:        3 February 2021  
  
Submissions and/or  
further evidence                3 February 2021  
  
Determination:                 5 March 2021

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Kaliappan Chetty, claims that he was constructively dismissed by the Respondent, Niche Media NZ Limited (Niche Media). Mr Chetty also claims that he is owed monies by Niche Media in respect of wage arrears and holiday pay.

[2]     Niche Media denies that it constructively dismissed Mr Chetty and claims that he was an independent contractor during the time that he worked for Niche Media.

**Issues**

[3]     This determination addresses as a preliminary issue whether or not Mr Chetty was an employee or an independent contractor whilst working for Niche Media.

## **The Authority's investigation**

[4] 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. It has not recorded all evidence and submissions received.

### **Background**

[5] Niche Media is a communications company specialising in effective communications into the Ethnic and 'hard to reach' audiences in New Zealand, working with communications campaigns for various organisations, and processing the Ethnic communications for approximately eighty Ethnic media companies. Mr Martin Pouwels is the sole director and main shareholder.

[6] In early 2012 Niche Media had need of assistance in the financial area of its operation. The accountant for Niche Media knew Mr Chetty, a contractor in the financial sphere, as a result of their respective involvement with various businesses. He recommended Mr Chetty to Niche Media as someone who could assist with its financial situation.

### *Engagement 2012*

[7] Mr Pouwels stated, and Mr Chetty confirmed, that he (Mr Chetty) commenced working at Niche Media in 2012 on an independent contractor basis for two days a week.

[8] Mr Chetty was responsible for providing Niche Media with financial assistance in most areas including preparing GST returns, processing of data, and drafting financial statements.

[9] Mr Pouwels said that Mr Chetty provided Niche Media with invoices for payment on a monthly basis, for approximately \$2,400 per month, although over time and by agreement these amounts increased to approximately \$3,000 per month, plus additional invoices from time to time for \$455 per month. He had authorised the invoices and arranged for payment, handing the authorised invoice to Mr Chetty for filing.

[10] The contractual payments were identified as 'Casuals' (sic), initially in the Niche Media MYOB general ledger section headed 'Wages and salaries' and subsequently in the 'Maintenance & Repairs' section.

[11] After 10 August 2018 Mr Chetty incorporated a property company, Shakti Investments Ltd, and provided invoices from that company for his services, which were paid by Niche Media.

[12] Mr Pouwels said he had provided Mr Chetty with an independent contractor agreement at the outset of his engagement by Niche Media, however Mr Chetty had not returned it.

#### *Payroll operation 2014*

[13] Mr Chetty said when he had commenced his engagement with Niche Media he declined to accept responsibility for the payroll operation in Niche Media and had recommended Crystal Payroll Ltd as the appropriate payroll company to process the payments to the employees. Mr Pouwels had agreed to this suggestion.

[14] Mr Pouwels said that Mr Chetty had sole control of the payroll and was the only person to interface with Crystal Payroll Ltd. Mr Chetty's email address for Niche Media was [accounts@nichemedia.co.nz](mailto:accounts@nichemedia.co.nz) and an email dated 28 November 2014 from Mr Chetty to Crystal Payroll Ltd states:

Attached timesheet for November 2014. As discussed please update your data base for emails only to - [accounts@nichemedia.co.nz](mailto:accounts@nichemedia.co.nz).

[15] Mr Chetty said his involvement with the Niche Media payroll was limited to providing Crystal Payroll Ltd with new employee information and timesheets for the employees. Once Mr Chetty had provided Crystal Payroll Ltd with the details of a new employee and a timesheet, it processed the payments making all necessary deductions and transferring the appropriate net payment to an employee's bank account.

[16] Mr Chetty had entered himself on the Crystal Payroll Ltd system as an employee in 1 November 2014. He said that he was at that time working full-time for Niche Media and was paid on a contractual basis submitting and being paid via invoices, and also received a salary through the payroll system with PAYE being deducted. Mr Chetty said Mr Pouwels was aware of, and had authorised, his being reimbursed through the payroll.

[17] Mr Chetty said he had provided his own timesheets to Crystal Payroll Ltd which he had authorised. He confirmed that there was no oversight because the entire accounting operation was his responsibility.

[18] Mr Pouwels said he had no knowledge that Mr Chetty had been placed on the Niche Media payroll, and was receiving a salary payment from Crystal Payroll Ltd because he had allowed Mr Chetty, whom he had fully trusted at that time, to have full control of the payroll and all correspondence between Crystal Payroll Ltd and Niche Media.

[19] Mr Chetty said that all employees could view their pay details via a network link and Mr Pouwels could have seen that he was receiving a salary payment. Mr Pouwels said he could see his own pay but he did not view those of other employees although he authorised the payroll costs.

[20] Mr Pouwels said his understanding had been that Mr Chetty had continued to provide services to other companies as an independent contractor whilst working at Niche Media.

[21] Mr Paul Doyle, General Manager, said that his understanding was that Mr Chetty, who was infrequently in the Niche Media offices, was a contractor, and said that Mr Chetty provided invoices to Niche Media for his services.

[22] Mr Doyle said it was common knowledge amongst the other employees at Niche Media that Mr Chetty was a contractor who had other clients.

[23] Mr Chetty denied that he had completed work for other companies apart from Niche Media, although he had confirmed that he owned a property management company, Shakti Investments Ltd, incorporated on 10 August 2018, which received contractual payments from Niche Media.

[24] Mr Pouwels said that Mr Chetty did not have to obtain permission to take time off from his duties to Niche Media, and he was not paid for holidays, but to his knowledge only on production of an invoice for work carried out and the hours worked as an independent contractor.

[25] Mr Chetty confirmed that he had taken a month long holiday in India and another in Fiji during which time he had continued to invoice Niche Media for work carried out on its behalf whilst overseas.

*July 2019*

[26] Mr Pouwels said he had noticed an increase in the payroll costs during 2019 and had asked Mr Chetty for a breakdown of sick leave and other costs, however Mr Chetty had not provided him with this.

[27] Mr Pouwels said he had insisted on receiving the information concerning the payroll costs, but Mr Chetty had not provided the requested information and had resigned.

[28] Mr Chetty said that he had felt compelled to resign because the relationship between him and Mr Pouwels had become untenable.

### **Was Mr Chetty an employee or an independent contractor whilst working for Niche Media?**

[29] In proceeding to determine whether Mr Chetty was employed by Niche Media as an employee or engaged as an independent contractor I apply s.6 of the Employment Relations Act 2000 (the Act) which provides:

#### **6 Meaning of employee:**

- (1) In this Act, unless the context otherwise requires, **employee** –
  - (a) Means a person of any age employed by an employee to do any work for hire or reward under a contract of service ...
- (2) In deciding ... 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)... or the Authority-
  - (a) must consider any 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

[30] In *Bryson v Three Foot Six Limited (No2)*<sup>1</sup> 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 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 and common intention*

[31] In *Cunningham v TNT Express Worldwide (NZ) Ltd*<sup>2</sup> the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship.

[32] Mr Pouwels said he had provided Mr Chetty with an independent contractor agreement at the outset of Mr Chetty's engagement by Niche Media. The agreement headed: "Individual Independent Contractor Agreement" had not been returned by Mr Chetty, who denied he had received it.

[33] I find that although the terms of the Agreement provided by Niche Media are those which would apply between parties engaged in an independent contractor relationship, it has not been signed. There is no written employment agreement between the parties.

[34] I find that there is no written contract between the parties and consequently no assistance from its terms in determining this matter from that source.

[35] Turning to common intention it is agreed by both parties that Mr Chetty was engaged in 2012 as an independent contractor. Mr Chetty's role was to provide assistance to Mr Pouwels and Niche Media by untangling the financial confusion in which Niche Media's previous accountant had left the accounts and financial systems.

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<sup>1</sup> [2005] 1 ERNZ 372

<sup>2</sup> [1993] 1 ERNZ 695

[36] There is no dispute that Mr Chetty was efficient and that Mr Pouwels had complete confidence and trust in him. To an unwise extent Mr Pouwels enabled Mr Chetty to exercise control over all Niche's financial areas of operation, allowing him to introduce and be the sole liaison point with Crystal Payroll Ltd. Mr Pouwels only became involved when he became aware of an increase in payroll costs.

[37] I find that the common intention between the parties at the outset was that Mr Chetty would be an independent contractor.

#### *Control and Integration*

[38] In examining whether Mr Chetty was an employee or an independent contractor whilst working for Niche Media I find that the evidence establishes that Mr Chetty had flexibility in carrying out the financial duties. There were no set parameters to a working day or week, and it was for Mr Chetty to determine whether or not he carried out work from the Niche Media office or from another location.

[39] Although Mr Chetty's evidence was that he worked full-time for Niche Media, Mr Pouwels evidence in contradiction was that the work Mr Chetty was required to do took no more than ten hours work for Niche Media each week.

[40] This is to some extent corroborated by Mr Doyle's evidence that Mr Chetty was infrequently present in the Niche Media offices, and significantly by the evidence of Ms Raewyn Johnson, Finance Manager, who joined Niche Media following the departure of Mr Chetty.

[41] Ms Johnson said she worked four days a week for another company, and completed the financial work required by Niche Media on two days each month.

[42] Whilst an accountant's work is integral to a company's operation, it can be, and frequently is, provided by contractors and I find that the evidence does not support Mr Chetty being integrated into the Niche Media operation as an employee.

[43] In respect of the control operated by Niche Media, the evidence is that Mr Chetty operated in an autonomous manner. He chose the hours he worked, the location and his manner of performing his duties.

[44] Mr Chetty had full control over the payroll with no oversight from Mr Pouwels. There is no evidence that Niche Media exercised any control over the work carried out on its behalf by Mr Chetty.

[45] There is no evidence that Niche Media required Mr Chetty to apply for annual leave and receive authorisation before taking annual leave.

[46] I find that these circumstances are indicative of a contractor relationship. However they have to be balanced against considerations of contractual intention between the parties and examination of the question of whether Mr Chetty was in business on his own account, the fundamental test.

#### *The Fundamental Test*

[47] During the time he was engaged at Niche Media Mr Chetty provided Niche Media with invoices and received into his bank accounts contractual services payments. These appeared in the MYOB general ledger and later in the 'Maintenance & Repairs' section, identified as "Casuals" (sic).

[48] In August 2018 Mr Chetty incorporated Shakti Investments Ltd and payments were made to that payee on a regular basis from that date.

[49] In addition Mr Chetty was receiving payments through the Crystal Payroll Ltd. Mr Pouwels denied that he was aware of that being the case. I accept his evidence on that point noting that the relationship came to an end following Mr Pouwels' request for information explaining the increased payroll costs.

[50] Whilst there is no evidence that Mr Chetty received monies from other clients during the time he worked at Niche Media, his evidence was that Shakti Investments Ltd received rental income from tenants in the properties he owned.

[51] Despite his inclusive on the Niche Media payroll and his assertion that he worked full time for Niche Media, there is no evidence supporting that he carried the level of work duties commensurate with a full time position.

[52] In fact Mr Chetty had full autonomy to conduct the role for Niche Media as he wished, when he wished and where he wished. This provided him with the degree of flexibility and hours required to be worked to be able to carry out work on his own

behalf, noting that he operated Shakti Investments Ltd during his engagement with Niche Media, invoicing Niche Media for the services it provided to Niche Media.

[53] Having considered all the circumstances, I determine that Mr Chetty was an independent contractor whilst working for Niche Media.

### **Costs**

[54] Costs are reserved. While costs are reserved, I note here that, subject to its submissions, Niche Media represented itself and, unless it incurred legal costs, it is therefore unlikely it has grounds to claim a contribution to any fair and reasonable costs.

[55] If Niche Media does wish to claim it may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Chetty 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.

[56] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**