

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Marcel De Witte (Applicant)
AND AGR Matthey (NZ) Limited (Respondent)
REPRESENTATIVES Michael Keall, Counsel for Applicant
Margaret Robins, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 28 April 2006
DATE OF DETERMINATION 10 May 2006

DETERMINATION OF THE AUTHORITY

[1] Mr Marcel de Witte claims he has been unjustifiably dismissed from AGR Matthey Limited (“AGR”) and seeks reimbursement for lost wages, compensation for hurt and humiliation, and costs. Mr de Witte also claims he is owed commission payments for the months of April, May and June 2005.

[2] Mr de Witte is the shareholder and director of several companies. In April 2003 he sold moulds and patterns together with the goodwill, plant and machinery belonging to Anvil Jewellery Limited to AGR. Mr de Witte says he then entered into an employment agreement for a fixed period of three years expiring on 16 April 2006. Mr de Witte says that in May 2005 he was told he was no longer required and was given two hours to vacate his work space but continued to work for AGR from different premises until June 2005.

[3] AGR denies Mr de Witte was an employee of the company. AGR says Mr de Witte signed a commercial agreement to provide specific design and technical assistance for a period of three years, but that as a result of his actions the commercial relationship was brought to an end.

[4] By agreement with the parties this determination is limited to the issue of whether Mr de Witte was an employee or an independent contractor.

The Law

[5] The nature of employment relationships is governed by section 6 of the Employment Relations Act 2000. The tests applicable to establishing the real nature of the relationship include consideration of :

- analysis of the terms and conditions which the parties have agreed to;
- the intention of the parties – although this is not decisive;
- analysis of the historical control, integration tests and the fundamental test (which examines whether a person is performing the services on their own account); and
- industry practice.

(*Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114; and *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585; *Bryson v Three Foot Six* [2003] 1 ERNZ 581 (EC) and *Bryson v Three Foot Six*[2005] 3 NZLR 729 (SC) .

Terms and conditions agreed to

[6] Mr de Witte has been involved in the jewellery trade for about 34 years. He is the owner and director of Anvil Jewellery Limited. Anvil Jewellery Limited in turn, is the only shareholder of a subsidiary company called Goldmark Jewellery Limited. During the course of his relationship with AGR, Mr de Witte also operated a sole proprietorship called Greenstone Design, which was entity invoiced by AGR for the rental of the office space used by Mr de Witte

[7] On 17 April 2003 Mr de Witte signed a document entitled “Handmade Chain Manufacturing Operation Sale and Consultancy Agreement”. The document was an agreement between Mr de Witte and AGR which required AGR to purchase equipment and patterns from Mr de Witte.

[8] It was common ground that Mr de Witte drafted the original agreement which was largely unchanged before it was signed by the parties. The document contains none of the usual matters one would expect to find in an employment agreement. For example it did not mention annual leave, sick leave or hours of work.

[9] The agreement states, inter alia,:

- ...
- [Mr] de Witte will contract to AGR Matthey for a period of three years to provide the design and technical skills required to successfully operate the chain manufacturing business.
- Remuneration will be calculated in each of the three years at the rate of \$0.80 (New Zealand) per gram of production for the first 100,000 grams and \$0.50 (New Zealand) per gram thereafter.

[10] The document specified that the payment for the chain making was to be GST exclusive with the parties agreeing to account for GST in accordance with the relevant law.

[11] Mr de Witte received an advance of \$50,000, against commission due in the first year of the agreement, with a promise that the minimum commission to be paid, irrespective of production quantity would be \$50,000 for each year of the agreement.

[12] Mr de Witte promised not to provide the same services to any other chain manufacturer during the period of the contract. It was common ground that Mr de Witte was free to provide other jewellery making services to other clients and that he did so.

[13] It was also common ground that Mr de Witte came and went as he wished and did not report to anyone at AGR. Mr de Witte would see his own personal clients in his office, which he leased from AGR, and that he would undertake work for his clients at a bench located in AGR's manufacturing room.

[14] During Mr de Witte's relationship with AGR he took time off to attend a conference in the USA. He sought no approval for attendance at the conference, making his own arrangements. Neither did he seek permission to take any time off work. I am satisfied that he advised AGR that he would be absent, but that is quite a different thing to asking permission to be absent.

[15] I am satisfied that there were no terms or conditions either express or which could be implied through the conduct of the relationship that would be indicative of an employment relationship.

Intention of the parties

[16] In answer to questions at the investigation meeting Mr de Witte told me it was always his intention to invoice AGR through his own company, Anvil Jewellery Limited which is GST registered, to keep everything simple. It is common ground that Mr de Witte invoiced AGR regularly and the invoices were generated by him and provided to AGR for payment and included an amount for GST.

[17] Mr de Witte also told me that he believed that provided GST invoices provided him with tax advantages and that he believed this was something most people did when income came from a number of different sources.

[18] Mr de Witte had previously employed up to 60 staff in his own business. As already mentioned in this determination, the signed agreement between the parties contained none of the usual terms and conditions one would expect to see in an employment agreement. I consider it unusual for an employer of Mr de Witte's experience to leave such important terms and conditions out of an agreement if it had been intended to constitute an employment agreement.

[19] From 1999 Mr de Witte had operated as an independent contractor to AGR providing similar technical assistance in both wax casting and gold chain making and design. I accept the submission from Margaret Robins, on behalf of AGR that given the history between Mr de Witte and AGR if Mr de Witte had intended to fundamentally change the nature of the relationship when the new agreement was signed it would have been recorded in the agreement.

[20] I find the intention of both parties was that the nature of Mr de Witte's relationship with AGR was to be that of independent contractor.

Was Mr de Witte in Business for himself?

Control Test

[21] As already set out in this determination Mr de Witte did not report to anyone at AGR. He was free to come and go at will and did so. He undertook work for his own personal clients at any time he wished and used the office at AGR for this purpose.

[22] Mr Keall submitted Mr de Witte was treated as a senior employee and was frequently involved in training, recruitment and supervision of staff involved in the manufacturing business. I do not accept that submission. The evidence shows that Mr James Price was the supervisor in charge of the chain manufacturing. The evidence also shows that Mr de Witte was only involved in one recruitment and that was when Ms Clare Goldsworthy was absent from the office and the interview need to go ahead. I accept that from time to time, Mr de Witte was asked about the skills of potential employees as they related to chain making, but he had no authority to employ staff and did not make any decisions as to who would be employed.

[23] I find that AGR did not impose any control on Mr de Witte on how, when or where he provided his services.

Integration test

[24] The question for the Authority is whether Mr de Witte was employed as part of the business and whether his work was being done as an integral part of the business.

[25] Mr de Witte originated and made new designs for AGR. The designs were then manufactured by the staff of AGR. Mr de Witte provided technical assistance to the staff who manufactured the chains he had designed.

[26] Mr de Witte's expertise and design making was integral to the business of AGR. However, this is not determinative of the matter.

Fundamental test

[27] The question here for the Authority, is whether Mr de Witte was a person in business on his own account.

[28] It was undisputed that Mr de Witte provided GST invoices to AGR for payment. It was also common ground that Mr de Witte rented his own office from AGR which he used to operate his business of Anvil Jewellery Limited. Mr de Witte had a separate and distinct telephone line into his office which could not be accessed through the AGR telephone network.

[29] Mr de Witte told me at the investigation meeting that he was paid \$50,000 commission up front because he was taking all the risk and he wanted to cover that. He told me he could make the designs but that if AGR did not sell any of the products it produced, he would receive no commission. The evidence shows Mr de Witte never got involved in marketing or selling any of the products he designed for AGR, but relied on AGR to sell the product. Ms Goldsworthy told me there were designs which could not be sold.

[30] Mr de Witte also told me that he agreed to accept the commission payments over the three years instead of accepting any payment for the business. The evidence shows that in addition to the \$50,000 commission payable each year for three years, Mr de Witte sold the chain making business assets and goodwill for the total sum of \$1.00.

[31] Mr de Witte designed and had business cards printed at his own expense. Mr de Witte's business card describes him as being a Jewellery Manufacturing Consultant.

[32] Mr de Witte sent an email to AGR's Australian manager Mr Brian Bath in May 2005 in which he set out an explanation he had previously made to a potential supplier regarding his

relationship with AGR. In the email to Mr Bath Mr de Witte advises he told the supplier he was a consultant to AGR and was someone who ...consults and works for numerous other manufacturers and retailers throughout the industry. Mr de Witte provided a copy of the email correspondence he had received from the supplier and told Mr Bath ...As you can see they have wrongly recorded AGR Mathey as my company name.

[33] I find the facts outlined above to be indicative of Mr de Witte being an independent contractor.

Industry practice

[34] AGR Matthey is in the jewellery manufacturing business. It employs its own manufacturing staff. It was common ground that within the jewellery manufacturing business it was common to employ staff rather than independent contractors.

Conclusion

[35] In light of the facts measured against the established principles I find that the real relationship is that of contract for service.

[36] Mr de Witte was not an employee and therefore I have no jurisdiction to assist with his problem any further.

Vicki Campbell
Member of Employment Relations Authority