

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 97
5573809

BETWEEN JAMES HARDY t/a DATCOM
 LIMITED
 Applicant

A N D VISIONSTREAM PTY LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Eska Hartdegen, Counsel for Applicant
 John Rooney, Counsel for Respondent

Investigation Meeting: 23 and 24 March 2016 at Auckland

Submissions Received: 24 March 2016 from the Applicant
 24 March 2016 from the Respondent

Oral Determination: 24 March 2016

Written record issued: 31 March 2016

ORAL DETERMINATION OF THE AUTHORITY

Summary of Determination

- A. There was no contract or intention to create one between James Hardy and Visionstream Pty Limited (Visionstream).**
- B. There was a contract entered into between Datcom Limited and Visionstream.**
- C. Accordingly, the Authority has no jurisdiction to investigate Mr Hardy's employment related claims against Visionstream.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Hardy, you as the applicant are seeking a declaration from me that from September 2009 while initially your company, Datcom Limited (Datcom), contracted to the respondent, Visionstream Pty Limited (Visionstream), you say you were subsequently employed by Visionstream.

[2] For most of the time between 2009 and 2016, you say you were employed by Visionstream and as an employee, you say you have a personal grievance, an unjustified disadvantage, which you say I can investigate and if I agree can award compensation.

[3] You also say that Visionstream owes you money and because you are an employee I can make an award of arrears to you.

[4] Visionstream on the other hand says it has never had a contract of any sort, employment or otherwise, with you personally and never intended to have a contract with you personally. It says it contracted with Datcom, a company of which you are a director and shareholder, and that that situation never changed during the course of your company, Datcom's engagement with Visionstream in September 2009 until now.

The issues

[5] I consider that there are two issues for me to consider. The first relates to the contractual relationship which you say you had with Visionstream. Secondly, if there was such a contractual relationship between you and Visionstream, was it one of employment?

Investigation Meeting

[6] Over the course of the last day and a half, I have heard evidence from you and from Visionstream's witnesses, Mr Kevin Smith, Executive Manager, Mr Gordon Whyte, Regional Manager, and Mr Kevin Warne, Contractor Manager.

[7] Under s.174 of the Employment Relations Act 2000 (the Act), I am not going to set out all the evidence I have heard. Rather, I will be stating my findings and relevant facts and legal issues.

Issue 1 : Was there a contractual relationship between you and Visionstream?**Employment by Transfield Services New Zealand Limited**

[8] You were employed by Transfield Services New Zealand Limited providing telecommunication services to Chorus, a telecommunications infrastructure company, and that was formerly a branch of Telecom.

[9] Your employment with Transfield Services ended on 27 September 2009.

Visionstream awarded contract with Chorus

[10] On 1 October 2009, Visionstream took over responsibility for the provision of Chorus' field services in the Auckland and Northland regions. Visionstream provides telecommunication services across Australia and New Zealand and they include fibre and copper network distribution, operations and maintenance services.

[11] On 1 October 2009, Visionstream took over responsibility for the contract with Chorus in the Auckland and Northland regions. Up until that time, Chorus had used two suppliers, Downer and Transfield, the latter you had previously been employed by. Both Transfield and Downer had contractors and also employees to service the Chorus network.

[12] Mr Warne, Visionstream's Contractor Manager, explained the general day-to-day operations of Visionstream. He explained that a service provider such as Vodafone will be advised by one of its residential or business customers of an issue. The issue could, for example, be a network fault. That issue is then passed on to Chorus which allocates the job to Visionstream pursuant to its contract with Visionstream. Visionstream then allocates the job via its electronic despatching systems to a technician.

Visionstream seeks owner/operators in NZ

[13] The business model that Visionstream introduced in 2009 was that technicians were to have limited liability companies which entered into commercial arrangements with Visionstream to provide the services required to service the Chorus network.

[14] You were initially unhappy about the prospect of being a contractor or in a contract owner/operator type scenario, having been an employee for Transfield. You

did, however, go along to some of the roadshows which Visionstream conducted when it first won the contract to service Chorus' network and you provided the Authority with some slides which you say were provided to you at that time.

[15] Some of the slides include on page 2 that the purpose of the meetings was to *"...present Visionstream's overall approach and discuss the opportunity, introduce how the owner/operator model works, give you detailed information to assist you making an informed decision."*

[16] Another slide is headed up:

"Our vision for your business:"

- *We commit to treating you fairly*
- *Opportunity knocks*
- *Control is in your hands. You are now the boss*
- *More control of your work/life balance*
- *Talk to us about what this means to you*

[17] And then another slide:

"In support of your business success":

- *Access to business and tax advisers, mentors, coaches*
- *Owner/operators paid weekly for first three months then fortnightly*
- *Initial \$3,000 set up grant, unused portion paid as cash after three months*
- *36 month interest free loans for tools and equipment*

[18] And then there was another slide which related to various concerns that Visionstream anticipated owner/operators might have:

"What if I get sick" and the response is:

Model based on 45 weeks (40 hour week) per annum, make up jobs available, financial relief on Visionstream leasing obligations for extended illness.

Another question:

"I have skills, I'm too old to change, I just want to stay as an employee". The response:

Just talk to us, referral opportunities exist, our preferred operating model is owner/operator.

Datcom Limited

[19] You accept that on 3 September 2009, you did incorporate a company called Datcom Limited and on the same date, as director of Datcom, signed a contract between Datcom and Visionstream.

Datcom Limited enters into a contract with Visionstream

[20] You do not dispute that Datcom entered into the commercial contract with Visionstream to provide telecommunications services. What you say is that the arrangement changed soon after you signed the contract on behalf of Datcom and you became an employee of Visionstream. You say that from early 2010, you and Visionstream were in an employment relationship despite the commercial contract between Datcom and Visionstream. You accepted that your company, Datcom, had a commercial contract with Visionstream and that Datcom is still in existence and was not established as a sham company.

Was there a contractual relationship between Mr Hardy and Visionstream?

[21] It is my view that the overwhelming evidence is that there was a commercial contract between Datcom and Visionstream and this commercial contract never altered. You signed on behalf of Datcom a comprehensive written contract and the commercial contract between Datcom and Visionstream is clearly that and nothing stated in it convinces me that it is intended or the manner in which it operates is intended for you to be an employee. The way in which you entered into the contract and the way in which it has operated ever since is between Datcom and Visionstream.

[22] There was discussion in submissions made by both counsel about the Employment Court's decision in *McDonald v Ontrack Infrastructure Ltd*¹. In that case, there was a clear express contractual arrangement between Allied Workforce Ltd and Ontrack Infrastructure Ltd. Mr McDonald claimed the contract between the two companies was operating in a way that he was actually an employee of Ontrack.

¹ [2010] NZEmpC 132

[23] At para.[36] of the Full Court of the Employment Court decision, it says:

The onus is on Mr McDonald to establish the existence of a contract of service between himself and Ontrack. We agree with Mr Chemis that such a contract must satisfy the common law requirements of offer, acceptance, contractual intention, consideration and certainty. That is consistent with the English and Australian authorities cited.

[24] The onus therefore is on you to establish the existence of an employment relationship between yourself and Visionstream and as the Employment Court said in the *McDonald* case that I have just referred to, that contract “*must satisfy the common law requirements of offer, acceptance, contractual intention, consideration and certainty*”.

[25] From the evidence that I have heard, I do not believe you have discharged this onus. If I am wrong in that conclusion and there is a contractual relationship between yourself and Visionstream, what I will go on to do now is to consider whether or not that was an employment relationship.

Was there an employment relationship between Mr Hardy and Visionstream?

Section 6 of the Employment Relations Act 2000

[26] The first port of call when looking at an employment relationship to see whether it is an employment relationship is s.6 of the Act and both counsel have referred to s.6 of the Act.

[27] Turning to the requirement to look at the real nature of the relationship, under the section, the Authority must determine the real nature of the relationship between them, must consider all relevant matters including any matters that indicate the intention of the persons, and is not to treat as a determining matter any statement by the persons that describes the nature of their relationship. So in other words, the fact that a contract might express itself in one way is not determinative of the real nature of the relationship. It is one of the relevant factors.

[28] The contract is very clearly a commercial contract between the two companies and it is accepted by you that that was the basis on which Datcom entered into it. The evidence from Visionstream is that its owner/operators have companies and they

contract their services to Visionstream. None of the owner/operators are employees and neither are you. That is what the contract expressly says.

[29] Any inquiry into this type of question as to the type of employment relationship or otherwise is an intensely factual question. I refer to *Singh v Eric James & Associates Ltd*², and both counsel have referred me also to the Supreme Court decision in *Bryson v. Three Foot Six Ltd*³. In *Bryson*, the facts are different from the case that I have in front of me today. In this case, there is a commercial relationship between two companies, one of which you are both the director and shareholder. In *Bryson*, the document that recorded the terms of agreement looked more like an employment agreement and Mr Bryson did not operate in business on his own account. They were a couple of the factors which were taken into account when considering the relationship between the parties.

[30] The *Bryson* case goes on to consider some other tests which the Authority and the Court look at when considering the real nature of the relationship and these have been summarised in *Poulter v Antipodean Growers Ltd*⁴. I will not go through each of those tests. They are well known.

Common law tests applied to establish the existence or otherwise of an employment relationship.

Intention

[31] The first one that I have mentioned is intention and in my view the contract is clearly a commercial contract and is not and was never intended to be an employment contract.

[32] Turning to that matter, there is a case on that, *May v Armouguard Security Ltd*⁵ in which the Chief of the Authority at the time, Member Dumbleton, stated:

As a matter of principle where a contract is in writing the words used are to be taken as the expression of the parties' actual intention which although for the purposes of s 6 of the Act is not decisive, is a relevant matter when considering the totality of the relationship between the parties.

² [2010] NZEmpC 1

³ [2005] NZSC 34

⁴ [2010] NZEmpC 77

⁵ [2011] NZERA Auckland 208

[33] I look now at some of the other tests, including whether or not you were in business on your own account.

Fundamental Test

[34] Datcom was set up as a limited liability company in order to perform services for Visionstream. You set the company up with the assistance of your chartered accountant, Michael Prasad Group Limited, and the financial information that you provided to me includes the annual reports.

[35] The reports disclose that expenses including home office expenses, ACC levies, accountancy fees and other items which would normally not be company expenses were included in the financial reports and that the company owns assets such as the Nissan Yanette motor vehicle, together with office equipment including a laptop and a computer, and that you have and do receive a shareholder's salary.

[36] The financial information shows that from the date of incorporation Datcom has issued invoices to Visionstream. This one here is for the Acer Notebook. There have been minutes starting from 2 September 2009 being the date of incorporation and subsequently, which you have signed and passed resolutions in respect of Datcom.

[37] There is also the fact that Datcom loaned money from Visionstream, presumably to purchase the items that are now disclosed in the financial reports, and that was to enable it to start and continue with its business.

Integration Test

[38] Another test is the integration test. Your counsel referred to items such as the logo on the van which you drive and the uniform as being indicators that you were an employee of Visionstream. Obviously this is a factor for the Authority to consider. However, I do accept counsel for Visionstream's submission that the signage not only on the uniform but on the call-out car all refer to Chorus and would indicate to a passerby that the person wearing the uniform or handing out the card was actually a Chorus employee.

[39] Other issues which are relevant and relate to what I say is indicative of an independent contract is that you operated your business through Datcom from home.

You had a vehicle. You did not have an office at Visionstream and Visionstream did not provide you with the tools of your trade.

Control Test

[40] The other test which the Courts and the Authority consider is the control test and much was made of the flexibility which you say you were promised when you first engaged with Visionstream. You say that you have to take on assigned jobs and you have to complete them and that this has compromised your flexibility. I agree that this might seem to be an element of control. However, it is my view that it is not an element of control which makes the relationship an employment relationship. Rather, it is part of a commercial relationship whereby Datcom has agreed certain outcomes so that Visionstream can satisfy its obligations to its client, Chorus.

[41] Even so, from the evidence, there is a degree of flexibility and availability as was seen from some of the texts and emails that you sent. One was to Chris Bartlett about your unavailability and there were other email messages which show that it was not a matter of you having to report to work every day or to produce a medical certificate if you were not able to report to work.

[42] Similarly, Kevin Warne gave evidence about the fact that if a number of owner/operators did not perform or refused to perform tasks assigned, that would cause the company a problem but that is a business risk which Visionstream has accepted as part of its business model and therefore it is accepted that it cannot compel performance or assignment and completion by contractors.

Overall Impression

[43] Overall, my impression is that the relationship between yourself and Visionstream, if there is a contractual relationship, is that it is not an employment relationship. It is one of a contract for services.

[44] Accordingly I do not have jurisdiction to deal with your employment related claims.

Costs

[45] The parties are encouraged to agree on costs. However, if there cannot be agreement as to costs, Visionstream has 14 days from the date of this determination to

file a memorandum as to costs and you have 14 days in which to file a memorandum as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority