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Jaques v Annandale Logistics Limited [2011] NZERA 161; [2011] NZERA Auckland 117 (29 March 2011)

New Zealand Employment Relations Authority

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Jaques v Annandale Logistics Limited [2011] NZERA 161 (29 March 2011); [2011] NZERA Auckland 117

Last Updated: 3 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 117 5323627

BETWEEN DAVID JAQUES

Applicant

AND ANNANDALE LOGISTICS

LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

Eleanor Robinson

Applicant in Person

Alan Vane, Counsel for Respondent

8 March 2011 at Taupo

8 March 2011 from Applicant 10 March 2011 from Respondent

Determination:

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] The Applicant, Mr David Jaques, claims that he was unjustifiably dismissed by the Respondent, Annandale Logistics Limited ("Annandale").

[2] Annandale denies it unjustifiably dismissed Mr Jaques on the basis that Mr Jaques was not an employee but an independent contractor during the period he was working for Annandale.

Issues

[3] The preliminary issue for determination before the Authority is whether Mr Jaques was an employee or an independent contractor during the period he was working for Annandale.

Background Facts

[4] Annandale is a logistics company which transports stock throughout New Zealand. Annandale has 5 trucks in operation and employs approximately 20 employees.

[5] On 29 June 2010 Annandale placed an advertisement in the Taupo Times for drivers required to fill two permanent full-time vacancies. Mr Jaques responded to the advertisement and was interviewed on 1 July 2010 by Mr Leigh Goodman, Annandale Director and Shareholder, and by Mr Mike Peters, Annandale Logistics Manager.

[6] Mr Goodman said that during the interview the requirements of the position and the terms and conditions of employment were explained to Mr Jaques. At the conclusion of the interview Mr Jaques had stated that to both Mr Goodman and Mr Peters that he wanted to pay his own tax direct to the IRD.

[7] Mr Goodman said that he had not been clear what Mr Jaques had meant, and he had asked Mr Jaques for clarification as he had been concerned that Annandale complied with its PAYE obligations to the IRD.

[8] Mr Jaques clarified for Mr Goodman that what he wanted was for Annandale to make him a gross payment of the base wage rate plus GST, with an additional percentage payment in respect of the statutory entitlements for holiday and sick leave. Mr Jaques said that he had told Mr Goodman that in all other respects he wished to be treated as an employee, although Mr Goodman did not recall this statement.

[9] Mr Goodman said that following the interview he continued to be concerned that Annandale fulfilled its responsibilities towards the IRD as he had not previously encountered the situation in which an employee could pay their own tax. Mr Goodman said that a day or so later he had a further discussion on the subject with Mr Jaques. Mr Jaques said he had no recollection of this subsequent discussion, but Mr Peters confirmed that there had been a telephone call between Mr Goodman and Mr Jaques following the interview, although he had not been privy to what had been discussed.

[10] Mr Goodman's evidence was that during that telephone call, Mr Jaques had told him that: *"he wanted to put income through his company and have his company provide labour services to Annandale Logistics so that he was able to pay his own tax and offset his earnings against the other income streams in his business."* Mr Jaques denied that this further discussion took

place.

[11] Mr Jaques commenced working at Annandale on 12 July 2010. An invoice dated 18 July 2010 was submitted by DDJ Trading Limited ("DDJ") and was annotated *"To provide Contract labour Dave Jaques."* The invoice itemised:

- a. the hours worked at a rate of \$18.50 per hour;
- b. a 12.00% calculation in respect of *"Holiday/STAT"*;
- c. an accommodation amount;
- d. a Social Club contribution; and
- e. GST

[12] Mr Goodman said that DDJ provided fortnightly invoices all in the same format, other than the item in respect of the Staff Social Club contributions which did not appear on the invoice for 15 August 2010 or on any of the invoices produced thereafter. I note that all invoices quoted a GST number, indicating the DDJ was registered for GST.

[13] On 14 July 2010 Mr Jaques emailed Mr Goodman. The email was headed 'Dave's Employment Terms' and contained a rationale for Mr Jaques being paid a higher hourly rate than the current hourly rate. Mr Goodman said that, following receipt of this email, he and Mr Jaques had a discussion. Mr Jaques said that during this discussion Mr Goodman had told him that Annandale could not afford to increase the hourly rate at that time, but that Mr Goodman agreed to share any additional profit with him.

[14] Mr Goodman denies that he mentioned anything about profit sharing with Mr Jaques on the basis that firstly Annandale at that time had little, if no, profit, and secondly that Annandale had two other shareholders who would have to be involved in such discussions. I find Mr Goodman's evidence on this point the more credible.

[15] During August 2010 there was an incident in which there was damage to the truck Mr Jaques was driving. This was not an isolated incident as Mr Goodman stated that performance issues had begun to occur from approximately 4 August 2010. Annandale considered that cumulatively these incidents constituted a breach of contract by DDJ and justified the termination of the contract with DDJ.

[16] On 8 October 2010 Mr Peters wrote to DDJ outlining the grounds of complaint Annandale had with Mr Jaques, and notifying DDJ that Annandale was giving: *"...notice that your company's services will not be required after the end of work on Friday 8th of October"*.

Determination

[17] Mr Jaques gave evidence to the effect that he was an employee when working for Annandale and was therefore able to bring a personal grievance under [s 103](#) (1)(b) of the [Employment Relations Act 2000](#) ("the [Act](#)").

[18] In deciding whether Mr Jaques was employed by Annandale 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-fa) must consider Annandale 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

[19] 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 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

[20] Mr Jaques was not provided with an employment agreement. Mr Goodman explained that it was the practice of Annandale to issue employees with an employment agreement, but that he had not provided Mr Jaques with an employment agreement as he believed Mr Jaques to be an independent contractor whose services were being provided by DDJ.

[21] On 10 September 2010 Mr Jaques emailed Mr Goodman requesting an employment agreement. There was a discussion between Mr Jaques and Mr Goodman which Mr Jaques recorded without Mr Goodman's knowledge. The tape was played at the Investigation Meeting. On the tape Mr Jaques is heard querying being provided with a contract and Mr Goodman said that he was struggling to devise a contract to cover the situation with Mr Jaques as it was *"...not like an individual employment agreement."*, and *"It's hard for me to give you an individual contract when you are an independent contractor"*

[22] Towards the end of this conversation Mr Jaques advised Mr Goodman to use the individual employment agreement as a basis for the contract, advised which clauses should be omitted, and suggested that the resulting contract be called a *'contract for services'*.

[23] Mr Goodman explained that Annandale had previously engaged contracted driving staff from two companies, RPM Relief Limited and Kellex Contracting Limited. Annandale did not have a contract in place with either of these businesses but had received GST invoices from both, and payment for the drivers' services had been made upon receipt. Payment in respect of the holiday and sick pay entitlements were included in the hourly rate, whereas these were itemised separately in the DDJ invoices. However in all other respects the invoicing process had been the same for all three companies.

[24] Mr Goodman had not supplied these drivers with employment agreements as they were employed by RPM Relief Limited and Kellex Contracting Limited respectively and their services supplied to Annandale on an independent contractor basis . Mr Goodman said he had not provided Mr Jaques with an employment agreement because he did not believe Mr Jaques was an employee but an independent contractor whose employer was DDJ.

[25] There are no written terms and conditions of employment on which to establish the contractual nature of the relationship. In *Cunningham v TNT Express Worldwide (NZ) Ltd*^[2] the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship. This broad approach in *Cunningham* was held by Chief Judge Goddard in *Muollo v Rotaru*^[3] to apply to orally agreed terms, in that the relevant intention could be inferred from words or conduct at the time the contract was formed or subsequently varied.

[26] However in this instance I find that whilst Mr Jaques contended that an employment relationship was intended at the time the contract was formed, and although Mr Goodman intended at the outset of the interview process to engage Mr Jaques as an employee, the evidence is that Mr Goodman understood from the terms proposed by Mr Jaques that an independent

contractor relationship had been formed.

[27] While in this situation it is difficult to precisely gauge the relevant intention, the fact that Mr Jaques had stated quite clearly that he wanted to pay his own tax and to charge GST to Annandale would indicate that the relationship being proposed by Mr Jaques was to be outside of the normal employer-employee arrangements. Additionally, GST does not apply to services provided by an employee to his or her employer.

[28] Moreover the fact that the notice to terminate the services provided by Mr Jaques to Annandale was sent to DDJ, I find to be indicative of the fact that Annandale had not intended the relationship between itself and Mr Jaques to be that of employer-employee.

[29] 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 Mr Jaques was working on his own account.

Control and Integration

[30] Mr Jaques stated that he was under the control of Annandale when working, being told where to deliver to and when. Mr Peters explained that as Logistics Manager, it was his role to organise the daily driving rosters and that in the Annandale operation the drivers, whether employee drivers or contract drivers, would be organised in a similar manner. This is the industry practice in a logistics business.

[31] In *Singh v Eric James & Associates Limited*^[4] Chief Judge Colgan observed:^[5] "*Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor*". I do not find that the control and direction of how the driving services were to be performed, whilst a consideration, to be determinative of the relationship between Annandale and Mr Jaques in circumstances in which all drivers working for Annandale, irrespective of employment status, are similarly instructed where to deliver to, at what time, and when, in accordance with the industry practice.

[32] Mr Jaques said that he was paid for periods of time when he was not driving, which he stated indicated he was an employee rather than a contractor. Mr Peters explained that it was Annandale's practice for drivers to supervise the loading of their trucks, which meant they were not driving at that time. Moreover DDJ invoiced Annandale for the services of Mr Jaques on an hourly basis without providing specific detail on the services provided.

[33] Further, Annandale also endeavoured to ensure that the drivers could 'back-load' whenever possible, and this might entail their waiting at a location for another load to arrive. Mr Peters explained that this practice was more economical for Annandale than having the drivers return to the depot with an empty truck. Equally a driver might experience non-driving time at the depot when waiting for an order to arrive. Annandale drivers, whether employees or contractors, would consequently be paid for non-driving time.

[34] I do not find payment for non-driving time to be determinative of an employment situation in these circumstances.

[35] Mr Jaques pointed to the fact that he had a uniform whilst working for Annandale. Mr Goodman said that Mr Jaques had asked for a uniform at the interview. Annandale had a number of tee-shirts available for the drivers, which were optional attire. Mr Jaques was offered these tee-shirts, but as he did not like the quality, Mr Jaques bought his own shirts and had them embroidered with his name and that of Annandale. Mr Jaques asked Mr Goodman to reimburse him the cost of the embroidery. Mr Goodman said that Mr Jaques had presented him with a *fait accompli* in this respect and felt that he had been "conned" by Mr Jaques

[36] I do not find that the payment for embroidery on tee-shirts which Mr Jaques provided at his own expense, and had embroidered on his own initiative, whilst of some relevance, to be determinative of an employment relationship.

[37] Mr Jaques pointed to his having joined the Annandale Staff Social Club as evidence of an employment relationship. Mr Jaques paid subscriptions for a month, and then ceased the contributions as he said he had been disappointed at the lack of activity.

[38] Mr Goodman said he had been unaware that Mr Jaques had joined the Annandale Staff Social Club and there had been no suggestion that he join on the part of Annandale, nor did Annandale facilitate the process.

[39] The Staff Social Club subscription was itemised as a deduction on the DDJ invoices and Mr Goodman could have queried this with Mr Jaques as being inappropriate for someone who was not an employee, however of itself I do not find it determinative of an employment relationship.

[40] Whilst I do find evidence that Mr Jaques was subject to the control of Annandale in the provision of services, and that his position was integral to the operation of Annandale, I find that this has to be balanced against considerations of contractual intention between the parties and examination of the question of whether Mr Jaques was in business on his own account, the fundamental test.

The Fundamental Test

[41] Mr Jaques said that his relationship with DDJ was as an employee and a director and trustee shareholder. Mr Jaques said he was paid a salary by DDJ in respect of the work he performed for Annandale, and that DDJ also paid PAYE on his behalf during the period he was working at Annandale.

[42] Mr Jaques said he was directed by DDJ to drive a truck for Annandale.

Taxation Position

[43] Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*^[6] that: "*Taxation arrangements, both generally and in particular are a relevant consideration.*" DDJ issued invoices to Annandale for the services of Mr Jaques. These invoices were headed 'TAX INVOICE', included GST and additional items annotated as 'Holiday/STAT' and were identified as being for the provision of Mr Jaques services.

[44] Mr Jaques explained that prior to driving for Annandale, he had been employed by a company called Navigation Operations Limited, which later changed its name to DDJ, and which provided services described as '*Labour Dave Jaques*' to Tauhara Haulage. Navigation

Operations Limited provided GST invoices to Stu Purvis t/a Tauhara Haulage, annotated as being '*Toprovide: Contract labour Dave Jaques*'

[45] Mr Jaques said that he had not appreciated that the manner in which he had been paid by Tauhara Haulage and Annandale were not appropriate for an employee until he had left the employment of Annandale and commenced working for a company called Strait Linehaul Limited.

[46] I do not accept that Mr Jaques only became aware at that stage that his belief that he was a *bona fide* employee was not correct. Mr Jaques had formed DDJ and the companies which predated it and evolved into it. Mr Jaques stated that DDJ employed him and remitted PAYE to the IRD on his behalf. DDJ issued GST invoices for the provision of Mr Jaques services. Mr Jaques explained to the Authority that he had wanted to pay his own tax because he "*could pay less if I paid my own*".

[47] I find that there is sufficient evidence to indicate that Mr Jaques was in business on his own account.

Employee status

[48] I find that Mr Jaques wanted to be regarded as an employee by the companies to which DDJ provided his services for motives which were less than honourable. An email sent by Mr Jaques to Mary Morrison, an employee of Stu Purvis, during the time he was driving for Tauhara Haulage and dated 16 July 2010, indicated Mr Jaques motivations. Mr Jaques wrote:

Mary,

You and I had the conversation about RWT. While you have a GST invoice then I am just paid as independent contractor.

Arguing I was an employee is a legal one (based on the Cunningham case with TNT couriers) and will only come up if I need to file a personal grievance against Stu.

[49] I find that Mr Jaques was, by his own admission, adequately informed of the difference between an employee and an independent contractor. At the outset of the arrangement with Annandale I find that Mr Jacques's prime motivation for the contractual relationship he proposed was financial, driven by taxation considerations. However after August 2010, when Annandale had made it clear to Mr Jaques that there were concerns with his performance, Mr Jaques attempted to bolster the contention that he was an employee for similar reasons as those indicated in the earlier email he had sent to Ms Morrison.

[50] Mr Jaques attended an interview for a permanent full-time employee position with Annandale. Annandale was prepared to employ Mr Jaques on such a basis. It was Mr Jaques who insisted on a different relationship in order that he could take tax advantages by invoicing for his services through DDJ, the company of which he was an employee. Having insisted on such an arrangement and DDJ raising invoices for his services, Mr Jaques could not at a later stage argue against the implications of that relationship and attempt to brand it as a different relationship for his own purposes.

[51] Mr Jaques must accept the consequences that flow from his motivation and decision. I determine that Mr Jaques was an independent contractor whilst working for Annandale.

Costs

[52] 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

[1] [2005] NZSC 34; [2005] 1 ERNZ 372

[2] [1993] 1 ERNZ 695

[3] [1995] NZEmpC 277; [1995] 2 ERNZ 414 (WEC64/95)

[4] [2010] NZEMPC 1

[5] Ibid at para [7]

[6] [2010] NZEMPC 1