

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 82/09
5140434

BETWEEN

RAVI JOGIA
Applicant

AND

SEFTON CONSTRUCTION
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: R Jogia, in person
N Carter, counsel for Respondent

Investigation Meeting: 29 January 2009

Additional information provided: 9 February 2009

Submissions received: 29 January and 6 March 2009
3 March 2009 from respondent

Determination: 20 March 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ravi Jogia says he was unjustifiably dismissed by his former employer, Sefton Construction Limited (“SCL”).

[2] SCL says the parties were not in an employment relationship, rather a relationship of principal and contractor. This determination addresses whether the parties were in an employment relationship.

The entry into the relationship

[3] In November 2007 SCL advertised a vacant position of quantity surveyor/estimator. Mr Jogia was qualified for the position and forwarded his resume to Chris Dixon, a director of the company.

[4] Some three interviews followed. It was common ground that the intention was that the successful applicant be engaged as an employee, and the recruitment process commenced on that basis.

[5] However, matters took a different turn during negotiations over the rate of pay in one of the later interviews. In particular the salary Mr Jogia sought was higher than SCL wished to pay. The parties settled on a figure of \$95,000. Mr Jogia told me he asked Mr Dixon if it would make any difference if he used a 'GST mode'. Mr Dixon told me his response was that did not believe that it would, and said so. Accordingly the parties agreed payment would be on a 'GST basis', and payable monthly on invoice.

[6] There was a conflict in the evidence about how much further the discussion went. In particular Mr Jogia denied that there was reference to SCL not being liable for payments of Mr Jogia's tax, and that he responded it was better for him to put the payments through his separate business as there were tax advantages for him. He did, however, admit that he was aware of the deductions available to him if he offered his services through his own business. It is at least clear that relevant aspects of the discussion centred on the amount of the payment Mr Jogia would receive, at least some aspects of its tax treatment, and aspects of the way in which payment would be claimed and forwarded. Equally clearly, there was no express discussion or agreement that the relationship would be one of principal and contractor.

[7] The relationship began on or about 3 December 2007. On 3 December 2007 both parties signed a written employment agreement.

[8] The agreement read in every respect as an employment agreement, and made no reference to a relationship of principal and contractor. It provided for a salary of \$95,000 per annum, as well as for certain allowances and reimbursements. Payments were to be made by direct credit to an account in the employee's name, and there was provision for the parties to agree to payment on other terms in the event that the monthly payments could not be made. The agreement contained typical provisions for annual leave and sick leave, a detailed redundancy provision, provisions for the resolution of disputes and personal grievances, a provision requiring that any variation

be in writing and signed by both parties, and a provision stating that the written agreement contained the 'whole and entire' agreement between the parties.

[9] The agreement also contained a schedule specific to Mr Jogia. It provided that he would be paid a salary of \$95,000 per annum (inclusive of holiday pay), specified hours of work of Monday – Friday 7.30 am – 5.00 pm, and included a holiday entitlement of four weeks, with at least two to be taken during the normal Christmas – New Year break.

[10] Mr Jogia's position was intended to cover the requirements of two major construction projects. According to the position description accompanying the employment agreement, he had responsibilities: in aspects of the financial management of the projects; to ensure suitable and cost effective subcontractors were engaged; to assist in managing the administration of the projects; in client liaison; and in ensuring compliance with health and safety requirements.

The relationship in practice

[11] With the exception of the first month, Mr Jogia invoiced SCL on a monthly basis through his company Vrindha International Limited ("VIL"). The first invoice was in his own name. All of the invoices were GST invoices and had GST added to the 'fee' or 'contract sum' for the month in question.

[12] Mr Jogia had previously been in business as a video store operator. That business traded through VIL. It employed staff and engaged contractors and suppliers. The business closed in September 2007. Subsequently VIL's only source of income was the provision of Mr Jogia's services to SCL.

[13] Mr Jogia was also the director and shareholder of another company, Luxembourg Limited ("LIL"). He said in his CV that the company was a quantity surveying, project management and general construction company, and that he had pursued operating it 'to the fullest extent'. He said in evidence that the company did not trade and his accountant said its year end accounts would show only expenses. However an allegation that, while in the employ of SCL Mr Jogia had handed an LIL business card to a client of SCL's, came to Mr Dixon's attention. He said he did not

follow the matter up in a disciplinary context because he believed Mr Jogia was a contractor.

[14] Mr Jogia accepted that he had handed to card to the person concerned, but not that he was soliciting business for LIL. As for whether Mr Jogia was conducting a business through LIL, Mr Jogia said invoices were prepared in respect of work done, but none were paid. He produced by my count 13 such invoices pursuant to a direction that he produce the invoices. On their face they were GST invoices. Most were for sums between \$300 and \$600. Ten were issued in June 2007. All were issued before the association with SCL began.

[15] Otherwise Mr Jogia based his activities at SCL's premises, but made site visits where necessary. He had access to office support services and equipment, the use of a mobile phone, and entitlement to the reimbursement of expenses incurred in the performance of his duties. Except as noted above, he also used an SCL business card. On the other hand he did not have the use of a company vehicle, and there was no evidence that he claimed any reimbursing payments in respect of his own vehicle.

[16] Mr Dixon raised a concern that, when Mr Jogia was off-site ostensibly on SCL business, he was conducting his own business. However there was no evidence supporting the associated allegations and I understand them to have been abandoned.

[17] Finally, there was discussion during the investigation meeting of Mr Jogia's access to leave entitlements. I have considered it in the context of the present issue and it has not affected my overall conclusion. I say no more about it because the substantive matter includes a claim for holiday pay which rests on more than simply determining whether Mr Jogia was an employee or a contractor.

Whether the relationship was one of employment

[18] In determining whether the parties' relationship was one of employment I apply s 6 of the Employment Relations Act 2000, which provides in part:

“6. Meaning of employee

a. ...

- b. 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.
- c. For the purposes of subsection (2) the Court or the Authority –
 - i. must consider all relevant matters, including any matters that indicate the intention of the persons, and
 - ii. is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.”

[19] I also apply the following passage from the judgment of the Supreme Court in **Bryson v Three Foot Six Limited (No 2)**¹:

“ ‘All relevant’ matters certainly include 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 the 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 at common law. It is not until the Court or 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 tests.”

[20] Overall, the combination of the nature of Mr Jogia’s skills and experience, and the industry in which he worked, mean I derive little assistance from the control test. His position was capable of being an employed position, but it was equally capable of being seen as one in which he provided specialist services under contract.

[21] Similarly I derive little assistance from the integration test. It is not, for example, uncommon for a person in a genuine contractual arrangement to provide services to third parties in the name of the principal rather than in the name of the person’s own business, and to take advantage of the principal’s marketing or administrative support services. Such a person might appear to a third party to be a part of the principal’s business although that is not the reality.

¹ [2005] 1 ERNZ 372

[22] This is particularly so when the services are being provided pursuant to a contract between a company of which the person is a director and shareholder, and the principal. When there is such a contract, the services are actually provided and charged for by person's company which in turn pays the person as its employee, and the company accounts for those activities accordingly, the person can expect difficulty in establishing that his or her relationship with the principal was one of employment.

[23] If circumstances of that kind had existed here, I would probably have found the parties' relationship was not one of employment. However I am not persuaded that VIL was the party contracting with SCL. There was no mention of it at all in the written agreement, and I am not persuaded that the parties' discussions about payment extended to identifying VIL as a party to the agreement. There was no basis on which to infer that VIL was the contracting party rather than Mr Jogia himself.

[24] I am also influenced by the fact that SCL planned and intended to engage an employee for the position, going as far as to execute a document expressed to be and consistent in every respect with an employment agreement. I give weight to Mr Davis' expressed view that the parties' discussions concerned the mode of payment and he did not consider the resulting arrangement made 'a difference'. Again, had he recognised that such an arrangement could make a difference, and amended the written agreement to properly reflect any difference, I might have found that the parties intended their relationship to be one of principal and independent contractor.

[25] Therefore I find on the facts that while the arrangement was an attempt to assist Mr Jogia's tax position, it did not go further and was not sufficient to transform what was originally intended to be - and appeared to be - an employment relationship into one of principal and contractor.²

Direction to mediation

[26] Mediation has not been attempted pending a determination of the nature of the parties' relationship. The parties are now directed to attend mediation within 42 days of the date of this determination.

² Refer **Telecom South v Post Office Union** [1992] 1 ERNZ 711

[27] Mr Jogia is further directed to advise the Authority promptly of whether the matter was settled or not settled at mediation. The substantive matter before the Authority is suspended until receipt of that advice or until further direction.

Costs

[28] Costs are reserved pending a determination of the substantive matter, or resolution between the parties.

R A Monaghan

Member of the Employment Relations Authority