

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 99  
5376159

BETWEEN

GOPAL KALICHETI  
Applicant

AND

ARMOURGUARD SECURITY  
LIMITED  
Respondent

Member of Authority: Trish MacKinnon

Representatives: Geoff Davenport, Counsel for the Applicant  
Andrew Schirnack, Counsel for the Respondent

Investigation Meeting: 16 April 2013

Submissions Received: On the day

Determination: 6 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Kalicheti claims he was summarily and unjustifiably dismissed by Armourguard Security Limited (Armourguard) on 19 August 2011. He says a fair and reasonable employer could not have taken the decision to so dismiss him in all the circumstances of the case.

[2] He acknowledges he had signed a contract for services with Armourguard in January 2009 through his company, Target Securities Limited (Target). Mr Kalicheti is the sole director and shareholder of Target. He says, however, that the relationship turned out in reality to be one of employment.

[3] Armourguard denies that Mr Kalicheti was its employee at any relevant time. It says its relationship with Mr Kalicheti, through Target, was, at all times, a contracting relationship. It says it exercised its right under the January 2009 contract

for services between the parties to terminate its contract with Target. Armourguard says the Employment Relations Act 2000 has no application to the termination of the contract.

[4] This determination relates solely to the preliminary issue of whether Mr Kalicheti's relationship with Armourguard was an employment relationship or a contract for services relationship.

### **The law and its application to the relationship**

[5] Section 6 of the Employment Relations Act 2000 concerns the meaning of "employee" and provides, at s.6(2), that:

*In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must decide the real nature of the relationship between them.*

[6] In order to determine the real nature of the relationship, the Court or Authority<sup>1</sup>:

- (a) *Must consider all relevant matters, including any matters that indicate the intention of the persons; and*
- (b) *Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[7] The leading case in determining the real nature of the relationship is that of the Supreme Court judgment in *Bryson v. Three Foot Six Ltd (No 2)*<sup>2</sup>. In that case, the Court held (at para 32) that "all relevant matters" included the written and oral terms of the contract between the parties as well as the way it operated in practice. The written intention of the parties was relevant, but not decisive, in determining the real nature of the relationship.

[8] To determine the real nature of the relationship the Court or Authority was required 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)".

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<sup>1</sup> Section 6(3) Employment Relations Act 2000  
<sup>2</sup> [2005] NZSC 34

[9] **The Contract**

[10] The contract signed by the parties on 26 January 2009 is described on its cover sheet as a *Service Vehicle Security Contract*, the parties being Armourguard Security Limited ("Company") and Target Securities Limited ("Contractor"). I shall refer to it as the Contract. Some of the provisions of the Contract are noted below.

[11] The *Introduction* notes the agreement of the parties to the "Contractor" undertaking, "as an independent contractor, armoured vehicle, security and courier services for and behalf of (*sic*) the Company on the terms and conditions set out below".

[12] In the *Definitions and Interpretation* section of the Contract, "Contractor" is defined as "the entity or person stated in item 2 of the Schedule 1 to be the contractor and includes, where the context requires, any other person who performs the obligations of the Contractor pursuant to this agreement, whether as an employee or otherwise of the Contractor". Item 2, Schedule 1 refers to the Contractor as "Target Securities Limited". "Employee" is defined as "any person employed by the Contractor in any capacity in relation to the Services".

[13] The *Contractor Requirements* section of the Contract sets out the acknowledgement and agreement of the parties as to the importance of having "suitably trained persons to undertake armoured vehicle, security and courier services for and on behalf of the Company under the terms of this agreement".

[14] It states the agreement between the parties that their rights and obligations under the Contract, with some stated exceptions, are conditional upon the satisfaction of specified conditions relating to credit checks, Police Certificates of Approval, and signed undertakings by Target and any employees.

[15] The Contract requires the contractor to hold, and keep current, at the contractor's expense a security guard's licence, pursuant to the Private Investigators and Security Guards Act 1974. It is also required to have a goods service licence under the Transport Services Licensing Act 1989, and to be registered for GST.

[16] A section of the Contract is devoted to the *Status of Contractor* which makes explicit that the relationship is an "independent contractor relationship". It contains the acknowledgement of the parties that the agreement will "not operate as, or

constitute, an offer or contract of employment either during its Term or at expiry for whatever reason".

[17] The term of the Contract is twelve months (subject to the contractor meeting licence and other requirements) at the expiry of which time, or at any time thereafter, either party could terminate it on 3 months' written notice. The notice period applies unless the Contract is "otherwise terminated in accordance with the terms of (the) agreement".

[18] The Contract contains very specific requirements relating to uniforms to be worn by the contractor and employees, and to vehicle fit out and livery. There are also strict health and safety and conduct requirements.

[19] It contains provisions for payment to Target, and is explicit that payment of wages and salary to crew persons and relief drivers is the responsibility of Target, as well as any "costs, expenses, taxes and government levies (including ACC levies) relating to any Employee".

[20] The indemnity clauses provide that Target is to indemnify Armourguard for losses of cash or valuables relating to the failure of Target employees as well as for any other losses or breaches. It is to maintain insurance cover to the satisfaction of Armourguard. It is also responsible for training of its (Target's) employees.

[21] The Partnership clause provides for joint and several liability in the event that the Contractor operates as a partnership. An Arbitration clause provides that any dispute between the parties is to be referred to a single arbitrator, agreed between the parties. Under the Strikes and Lock-outs clause Target is obliged to continue to perform the services under the Contract regardless of any "strike, lock-out, dispute, disturbance or other industrial action".

### **How the relationship between the parties worked in practice**

#### *(a) Mr Kalicheti's perspective*

[22] Mr Kalicheti gave evidence on his own behalf. He said that he signed the *Security Vehicle Service Contract* with Armourguard on the basis of assurances from Armourguard that the relationship would be one of a contractor.

[23] He said things turned out quite differently and, in reality, Armourguard exerted a significant degree of control over him. As examples, he said that:

- Armourguard had taken out insurance cover that the Contract required Target to do;
- Armourguard completely controlled the process of his employing relief drivers and specified the induction topics and documents for them as well as all health and safety documentation. Additionally, Armourguard carried out the security checks into Target employees;
- Armourguard did rosters for the runs he, and the relief drivers, did;
- Although he paid the relief drivers, it was from the monies paid to him by Armourguard for the hours worked, as recorded by Armourguard;
- Armourguard controlled the type of vehicle Target could purchase and utilise, and dictated the colour, signage, vehicle type, year and dealer of the vehicle Target could use;
- Armourguard dictated the equipment to be installed in the vehicles and had stringent and specific requirements for vehicle inspections, panel beating, locks and daily and monthly vehicle check sheets for each vehicle;
- Armourguard dictated uniform, routes, policies and procedures and constantly monitored all movements, stops, and location of his vehicles using GPS;
- Armourguard had forced him to sell his ownership share in a BP garage.

[24] These, together with other stringent requirements of Armourguard, led Mr Kalicheti to believe the true nature of his relationship with Armourguard was one of employment rather than a contract for services.

[25] He says Armourguard had complete control of his operations and of the relationship. He says the work he did through his company, Target, was completely integrated into Armourguard's business. While Armourguard claimed to have negotiated fees for services with him, he says that in reality there was no negotiation and he had to accept what Armourguard proposed.

*(b) Armourguard's perspective*

[26] Matthew Lange and Brian Pickering gave evidence for Armourguard. Mr Lange was employed as the company's Wellington Cash Manager between January

2008 and January 2013. Mr Pickering, who has been employed by Armourguard for 16 years, has been its National Cash Operations Manager since 2003.

[27] Mr Lange explained that he was responsible for the day to day management of cash transport, and the comings and goings of contractors, their employees and relief drivers, at the Armourguard Wellington depot. His role entailed managing the Contract between Target and Armourguard.

[28] He said Armourguard had first engaged Mr Kalicheti, through Target, as a Patrols Contractor between 2007 and 2009 undertaking night patrols of customers' businesses. Later, in January 2009, it engaged Mr Kalicheti, again through Target, to perform different services. This is the contract for services that Mr Kalicheti now claims to have been, in reality, an employment relationship.

[29] Under the Contract Mr Kalicheti and his employees were responsible for performing cash in transit services in the Northern Hutt areas between 6.00 a.m. and 7.00 p.m. Monday to Friday and Sunday.

[30] Mr Lange said he negotiated the rates of payment with Mr Kalicheti. The price range for job rates was set using the Armourguard costing module. This "factors-in averaged amounts for likely contractor expenses associated with the run (for example, vehicle costs, vehicle running costs, maintenance, RT equipment, employee wages) and any applicable deductions made by Armourguard".

[31] Amongst the evidence referred to by Mr Lange were emails between himself and Mr Kalicheti over revised costings. He said the fees paid to Target were all gross payments, with no deductions for tax. Target was responsible for all its own, and its employees' taxes.

[32] Mr Lange said that approximately fourteen months into the relationship between Target and Armourguard, Mr Kalicheti was assigned a second run (the Airport run) which involved picking up, and delivering, cash from flights arriving in, and departing from, Wellington airport. This entailed Mr Kalicheti employing more crew and acquiring a second vehicle.

[33] To the best of Mr Lange's knowledge Mr Kalicheti had never claimed to be an employee during his relationship with Armourguard. He had only claimed the

existence of an employment relationship after Armourguard terminated Target's contract for services in August 2011.

[34] Throughout the relationship both Armourguard and Target consistently referred to Mr Kalicheti as being a contractor or a self-employed contractor.

[35] Mr Pickering drew an analogy between the way in which Armourguard operated its business and structured its relationships with contractors with the courier industry in New Zealand. He said the contractors engaged by Armourguard to perform cash transport services either owned or leased the armoured vehicle they used to perform services for Armourguard. The contractors employed their own crews of relief drivers to perform the services under the contract.

[36] Contractors gained advantages from being GST registered by the ability it gave them to claim back for vehicle and other business expenses. Mr Pickering said that the nature of the industry meant that Armourguard would always have to exert some level of control over its contractors' work. This was because the transport and security services industries were highly regulated, as well the need for ensuring the safety and security of the property and people involved in the work, including the general public.

[37] Contractors had to take part in regular security training, and comply with Armourguard's standard operating procedures. They and their crews were required to be in uniform and use vehicles that clearly identified them with the company. These were important issues because of the nature of the industry in which they were engaged.

[38] Mr Pickering pointed to specific factors that in his view underlined the contract for services nature of the relationship. These included:

- The Contract, specifying the nature of the relationship;
- The Contractor held a security guard's licence which it maintained at its own expense during the Contract;
- The Contractor held a goods services licence which it maintained at its own expense during the Contract;
- The Contractor was registered for GST and charged Armourguard GST for its services;

- Target could and did provide suitably trained persons to perform the services under the Contract, subject to Police and other checks
- Target maintained a vehicle for providing the services at its own expense;
- Target was required to ensure its employees complied with the provisions of the Contract and indemnified Armourguard in the event of failure of any of its employees to comply with the terms of the Contract;
- Target was responsible for ensuring its employees undertook cash in transit and armed robbery training and for providing records of that training to Armourguard on request.
- Target was paid on a per job basis;
- Target was required to provide insurance;

### **The intention of the parties**

[39] It is clear from the evidence of both Mr Kalicheti and Armourguard that their mutual intention when they entered into the written Contract in January 2009 was for their relationship to be a contract for service relationship. That was the type of relationship they had enjoyed since 2007. Mr Kalicheti had not queried that relationship while engaged as a Patrol Contractor and said that he signed the 2009 Contract on the basis that he would be "permitted to operate as a contractor".

[40] The January 2009 Contract is unambiguous as to the nature of the relationship between the parties. It was to be an independent contractor relationship. Mr Kalicheti was to employ or engage staff on his own account. He, his team, and the vehicle he was required to provide under the terms of the Contract, were required to be available to perform the specified services 7 days a week, and 52 weeks of each year during such hours and at such times as the company required.

[41] While not determinative of the "real nature of the relationship", the intention of the parties at the outset was clearly to have a contract for services relationship. This is a relevant factor in any consideration of the totality of the relationship between the parties.

### **Control**

[42] Mr Kalicheti asserts that Armourguard exercised a high degree of control over the work he undertook. He says if it was a genuine contracting relationship, not only would the benefits of undertaking the work vest in him, but so would the risk. He, as

the person providing the services, would have to arrange the appropriate insurance, undertake appropriate processes and security checks.

[43] Mr Kalicheti says that Armourguard undertook these matters and many others, some of which I have listed in the section dealing with his perspective of his working relationship with Armourguard.

[44] Armourguard points to the ability of Target to determine whether Mr Kalicheti or his relief drivers were providing the services under the Contract. It refers to the matters listed as factors pointing to a contract for services relationship in the section above dealing with Armourguard's view of the working relationship with Target as indicative that the control test favoured Armourguard. It refers to evidence of Mr Kalicheti having been involved in staff induction, and security clearances.

[45] The company also refers to a recent determination of the Chief of the Authority in *May v Armourguard Security Limited*<sup>3</sup> on a similar matter in which the relationship was found to be a contract for services relationship. That case has many parallels with that of Mr Kalicheti. Mr May entered into a *Service Vehicle Service Contract* with Armourguard, initially in August 2003, with later contracts following in 2005 and 2009.

[46] The terms of his contract were very similar to those of Mr Kalicheti's. Mr May appeared not to have questioned the contract for services nature of the relationship until Armourguard exercised a provision of the contract to terminate the relationship. At that point Mr May claimed an employment relationship existed, and challenged the termination of his contract.

[47] Armourguard cited a passage from that case in which the Authority referred to much of the control exercised by Armourguard as "being necessary because of the highly regulated nature of the road transport industry and also the security services industry." The Authority found that the application of the control test did not greatly assist in determining the contractual relationship between the parties.

[48] I agree with that view and for the same reasons do not find the control test determinative in Mr Kalicheti's situation.

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<sup>3</sup> [2011] NZERA Auckland 208

**Integration test**

[49] As to be expected the parties focussed on different factors to support their respective contentions that Mr Kalicheti's (Target's) work was, or was not, completely integrated into Armourguard's operations.

[50] Submissions on behalf of Mr Kalicheti focussed on his ready identification with Armourguard through his uniform, vehicle type and livery. This was described as "the deliberate and fully integrated approach taken by Armourguard".

[51] Other factors cited in support of that integrated approach were the fixing of routes by Armourguard, the types of insurance required, and the hours and days during which the services under the Contract were to be performed.

[52] Submissions for Armourguard focussed more on monetary advantages obtained by Mr Kalicheti, as the Contractor, and on his integration into his own business, Target.

[53] He received a fee for his work, from which no tax was deducted. Those fees were paid to an entity (Target) he controlled. He was responsible for paying his own taxes and could, and did, take advantage of being GST registered to claim back vehicle and business expenses. He purchased, or leased, vehicles at his own cost in order to provide the services under the Contract.

[54] Mr Kalicheti could decide who would complete jobs assigned to Target by Armourguard and was not restrained from undertaking other work provided it did not compete with that company. He had the ability to take on further runs, and vehicles, to increase his income.

[55] Having considered the evidence and submissions, I do not doubt that Mr Kalicheti was integrated into the business of Armourguard to a reasonable degree. Equally, he was fully engaged with his own business, Target Securities Limited. I find the integration test is not helpful in determining the real nature of the relationship between the parties. However, I find the following insight from MacKenna J to have some application to this situation:

*A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence.<sup>4</sup>*

### **Fundamental or economic reality test**

[56] The essential question here is whether Mr Kalicheti engaged himself to perform services for Armourguard as a person in business on his own account. From the evidence, it is clear to me that he did.

[57] He did not provide all the services under the Contract with Armourguard personally, but provided employees to do so. His oral evidence was that he had 40 employees. Payment of invoices for Mr Kalicheti's work for Armourguard, and for that of his employees, were made to his business, Target Securities Limited.

[58] He was responsible for hiring and paying employees, and for payment of their taxes. Although his evidence was that many of his employees were formerly Armourguard employees, Mr Kalicheti acknowledged that he had taken on "walk ins" and "friends of friends".

[59] Throughout his relationship with Armourguard Mr Kalicheti held, through Target, and maintained at the expense of his business, a security guard's licence, and a goods service licence.

[60] Financial statements of Target list various assets of the company, including the vehicle and some equipment Mr Kalicheti used in undertaking agreed services under the Contract with Armourguard. He claimed depreciation on those assets.

[61] Mr Kalicheti had the ability to gain further revenue by taking on additional runs, and some more *ad hoc* work for Armourguard. He was able to negotiate costings with Armourguard, although he clearly found that difficult in practice. I am not convinced from the evidence that was entirely due to Armourguard's obduracy, although no doubt it required a solid case to be mounted in support of any increases.

[62] I find the application of this test leads to the conclusion that Mr Kalicheti's relationship with Armourguard was properly described as a contract for services.

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<sup>4</sup> *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 1 All ER 133, cited by Casey J in *Cunningham v TNT Express Worldwide* [1993] 1 ERNZ 695 at 714

**Conclusion**

[63] Mr Kalicheti willingly entered into a contract for services with Armourguard in January 2009. There is no convincing evidence that situation changed. There were significant financial and tax benefits from that type of relationship for Mr Kalicheti.

[64] The evidence suggests Mr Kalicheti became disenchanted with the contract for services relationship only when his contract was terminated by Armourguard invoking a term that allowed it to do so. His dissatisfaction has led him to reconstruct the relationship to one that could not so easily be terminated.

**Determination**

[65] Mr Kalicheti's relationship with Armourguard was not one of employment and he is unable to pursue a personal grievance, or seek any remedies under the Employment Relations Act.

**Costs**

[66] Costs are reserved.

Trish MacKinnon  
Member of the Employment Relations Authority