

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 251/09
5140990**

BETWEEN BRETT LEWIS
 Applicant

AND LEWIS TRANSPORT LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Marilyn Rose Lewis & David John Lewis, for the
 Respondent

Investigation Meeting: 7 July 2009

Determination: 29 July 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Brett Lewis ("Mr Lewis") claims arrears of wages and unjustifiable dismissal against his former employer Lewis Transport Limited ("Lewis Transport"). The directors of Lewis Transport are Mr Lewis' parents Mrs Marilyn Rose Lewis and Mr David John Lewis.

[2] The parties were unable to resolve the problem between them by mediation.

The facts

[3] Mr Lewis was employed by Lewis Transport as operations manager for the period from 23 March 2007 to 19 September 2007. The terms of that employment were not recorded in a written individual employment agreement.

[4] Mr Lewis and his former partner one Ms Maree Francis Brooks ("Ms Brooks") formed a limited liability company SDK Solutions Limited and which was

incorporated on 30 October 2007 ("SDK"). Its name is derived from the initials of Mr Lewis' children. Mr Lewis and Ms Brooks intended SDK to trade in warehouse storage.

[5] Unfortunately, the operations of SDK became intermingled with the operations of Lewis Transport.

[6] Mr Lewis continued to perform his duties as operations manager for Lewis Transport but as a contractor through SDK as from October 2007. Lewis Transport permitted this arrangement and in the expectation of invoices being rendered, continued to regularly pay each week to SDK in respect of Mr Lewis' services. Lewis Transport says it has paid the total sum of \$30,271.60 to SDK in respect of Mr Lewis' service.

[7] SDK tendered 13 invoices all at once to Lewis Transport on 2 February 2008 in respect of Mr Lewis' purported management services through SDK.

[8] By letter dated 13 February 2008 the Inland Revenue Department wrote to Lewis Transport as follows:-

I have received information that SDK Solutions Ltd has been supplying the labour of Brett Lewis to your company.

Based on the information that I have received, I would like to advise you that Brett Lewis and other staff member of SDK Solutions Ltd are to be treated as employees of your company and that as of 1 February 2008; no further payments are to be made to SKD Solutions Ltd.

From the above date any further payments to any staff member of SKD Solutions Ltd are to be subject to the deduction of PAYE and any other deductions as required by section NC1 of the Income Tax Act 2004.

[9] Lewis Transport did not comply with the Inland Revenue's directive. It says that Mr Lewis flatly refused to be paid wages so as to avoid or minimise his child support liability. It says that it accepted advice that as long as PAYE was paid by some entity, Inland Revenue would be satisfied. It says it was content to continue paying for Mr Lewis' service through SDK on its assumption that SDK would pay PAYE to the Inland Revenue.

The merits

[10] There are two disputes here. Firstly Mr Lewis claims he is owed wages by Lewis Transport in respect of the period that he purported to contract his management services through SDK. I am satisfied that Mr Lewis continue to remain Lewis Transport's employee even though the parties purported to treat his engagement as contracted through SDK as from October 2007. The change in accounting did nothing to alter Mr Lewis' status as an employee. He remained an employee throughout.

[11] I am satisfied that at his insistence and entirely for his own purposes, Mr Lewis was paid by SDK. Lewis Transport paid SDK for his service. SDK was a company Mr Lewis and his partner Ms Brooks controlled. I find SDK was paid for Mr Lewis' service. I find that Lewis Transport has paid for Mr Lewis' service and I decline to make any order for arrears of wages in Mr Lewis' favour. The tax treatment of such payments is not a matter for this Authority.

[12] As concerns the claim for unjustifiable dismissal, I find that Mr Lewis resigned from his employment and there was no dismissal.

The determination

[13] Mr Lewis is not owed arrears of wages and he was not dismissed. There will be no formal orders.

The costs

[14] As neither party was represented by professional advocate, there will be no order for costs.

Leon Robinson
Member of Employment Relations Authority