

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 436
5341766**

BETWEEN LARS LUNDBOM
 Applicant

AND AVISIT SOLUTIONS LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Gretchen Stone, Counsel for Respondent

Investigation Meeting: 6 September 2011 at Auckland

Submissions received: 12 & 23 September 2011 from Applicant
 13 September 2011 from Respondent

Determination: 6 October 2011

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] This determination addresses the preliminary issue of whether the Applicant, Mr Lars Lundbom, was an employee of the Respondent, Avisit Solutions Limited (“Avisit”), or an independent contractor, during the period he carried out project work for Avisit.

[2] Specifically Mr Lundbom claims that an employment relationship was established either in 2005 or 2006 when remuneration on a commission basis for the employment relationship was agreed. Mr Lundbom claims that this agreement was subsequently breached by Mr Visser.

[3] Avisit denies that Mr Lundbom was an employee and claims that Mr Lundbom was an independent contractor whilst carrying out project work for Avisit.

Issues

[4] The issues for determination are:

- Whether Mr Lundbom was employed by Avisit in either 2005 or 2006 on a commission-only basis.
- Whether Mr Lundbom was an employee of Avisit or an independent contractor when he carried out project work for Avisit during the period from September 2005 until March 2011.

Background Facts

[5] Mr Arjen Visser, shareholder, CEO, and Technical Director of Avisit, explained that he had set up Avisit in July 2000 in New Zealand as a vehicle for his business of Information Technology (“IT”) contracting work in the Netherlands. Mr Visser said that during this period he began to design Dbvisit software, a disaster recovery, standby, and replication database solution for Oracle databases worldwide.

[6] Mr Visser said that during the period from 2005 up until March 2011, Avisit had worked with a total of 12 contractors, of whom Mr Lundbom was the first. At the date of the Investigation Meeting, 8 of these contractors were still providing services to Avisit. Mr Visser explained that the IT industry is very specialised, which is the reason for the high usage of contractors who have certain skill sets in a particular area. Mr Visser stated that in February 2011 Avisit employed its first permanent employee following the Company’s achievement of good sales figures and cash flow reserves.

[7] During early 2005, Mr Visser had met Mr Lundbom as a result of a friendship between Mr Lundbom’s wife, Ms Rita Riccola, and Mr Visser’s sister. At this time both Mr Visser and Mr Lundbom were living in New Zealand, and Mr Lundbom had full-time permanent employment with a printing company, remunerated at an hourly rate equivalent of \$18.00 per hour.

[8] In May 2005 Mr Visser said he had had initial discussions with Mr Lundbom with a view to Mr Lundbom assisting Avisit with graphic design work and marketing services. However it was not until September 2005 that Mr Lars carried out work for Avisit. The work concerned a project called NZOUG, which was the identifying name used in connection with an Oracle conference held in Auckland, and for which Mr Lundbom was to provide to Avisit marketing and graphic design services.

[9] Mr Lundbom stated that it had been agreed with Mr Visser that he (Mr Lundbom) was to receive 30% commission resulting from direct sales achieved at the NZOUG Auckland

Oracle seminar. The commission payments were to extend for a period of one year following the seminar.

[10] Mr Visser explained that the commission-based payment was one option he had discussed with Mr Lundbom as a means of remunerating him for his services. However as no sales had been made following the seminar, Mr Visser said he had emailed Mr Lundbom suggesting that they met to discuss how to compensate Mr Lundbom for his work on the project.

[11] Mr Visser said that as a result of that discussion it was agreed that Mr Lundbom would invoice Avisit for his time on an hourly basis, and that Mr Lundbom proposed an hourly rate of \$60.00. Mr Lundbom agreed that it had been he who had set the hourly rate. Mr Visser said that although he had thought the hourly rate was high, he had nevertheless agreed to it.

[12] Mr Visser said, and Mr Lundbom agreed, that Mr Lundbom was to be responsible for his own tax arrangements.

[13] An invoice was sent to Avisit on 24 November 2005 from a company called Logomotion, which Mr Lundbom explained had been a company he had set up in the Netherlands. The invoice, which was in relation to graphic design work for Dbvisit and the NZOUG Marketing Campaign, was for 40 hours work at an hourly rate of \$60.00 per hour. The invoice contained no amount in respect of GST.

[14] In May 2006 Mr Lundbom invoiced Avisit for graphic design work at an hourly rate of \$60.00. On this occasion the invoice was sent from a company called Fresh Ideas.

[15] In October 2006 Mr Visser said he discussed with Mr Lundbom the possibility of payment for the services he (Mr Lundbom) had provided in connection with the Google Adwords marketing campaign on the basis of a 30% commission on sales made through Google Adwords. Mr Visser said there was no agreement on the commission proposal.

[16] Mr Visser said that on 24 October 2006 Mr Lundbom had sent him an online marketing proposal. Mr Visser explained that part of the proposal had been implemented, but other parts had not been implemented as that required prospective customers to provide their registration details in order to download the software. Mr Visser said he had seen this as a barrier which could prevent potential customers downloading and trialling the software.

[17] Mr Visser said that he had gone to see Mr Lundbom at his home to explain that it was not going to be possible to accurately record the sales achieved through Google Adwords, and consequently a commission on sales would not be practicable. Ms Riccola, who could not recall whether the incident took place in 2005 or 2006, described Mr Visser walking into their home and announcing that the agreement regarding commission payments had changed and that Mr Lundbom should invoice Avisit for his services.

[18] Mr Visser, explaining that he and Mr Lundbom had been friends, recalled that he had been a little nervous as he had suggested the commission payment idea and wanted to be sure that Mr Lundbom understood the reasons why he considered the commission payment idea to not be practicable; however he was adamant that he had been polite, and that Mr Lundbom had agreed to continue to invoice Avisit at the rate of \$60.00 per hour.

[19] During the following years until March 2011, Mr Lundbom provided services to Avisit, invoicing for these at an hourly rate of \$60.00. From the invoices produced in evidence the work appeared to be sporadic in nature:

- In 2007 there were 3 invoices from a company called Fresh Ideas with a total invoice value of \$3,105.00;
- In 2008 there were 4 invoices from a company called Bombom Design, with a total invoice value of \$3,335.00;
- In 2009 there were 9 invoices, all from Bombom Design, with a total invoice value of \$7,235.00;
- In 2010 there were 3 invoices, all from Bombom Design, with a total invoice value of \$3,620.00; and
- In 2011 there was one invoice from Bombom Design for \$420.00

[20] During the period from September 2005 until March 2011, Mr Lundbom said that he had three areas of employment in addition to the work he carried out for Avisit: his full-time employment with the printing company, some work he carried out for his wife's on-line website selling health products, and some work for a client in Sweden.

[21] During the term of the relationship between the parties Ms Plaatsman, Mr Visser's defacto partner, shareholder and Director of Avisit, said that she and Mr Visser agreed to lend Mr Lundbom and Ms Riccola the sum of \$5,000.00 to assist them in a house purchase, and

the sum of \$3,500.00 as an advance payment on two invoices. Mr Visser said, and Mr Lundbom agreed, that the loan requests had been instigated by Mr Lundbom.

[22] In February 2011 Avisit sought concept designs from three designers, of whom Mr Lundbom was one. Mr Mike Donovan, Support and Developer with Avisit, emailed Mr Lundbom on 2 February 2011 in connection with the proposal. In the email Mr Donovan stated:

I'm not sure if Arjen has mentioned it to you, but would you be interested/be available to be involved in discussions around the design of our new site?

What we are intending to do is this:

- 1. Distribute a project brief doc to 3 designers*
- 2. Commission them to spend around 4 hours coming up with designs for our new site ...*
- 3. After reviewing these initial concepts we would select one designer from the three to work with to develop the new site concept proper.*

How does this sound to you? Would you be interested?

[23] Mr Lundbom responded by email confirming that he did want to be involved, and submitted a design. However this was not the design which was eventually chosen by Avisit.

[24] Mr Lundbom subsequently contacted the Department of Labour for advice and had lodged a Statement of Problem with the Employment Relations Authority in April 2011.

Determination

Was Mr Lundbom employed by Avisit in either 2005 or 2006 on a commission-only basis?

[25] There has been some lack of clarity between the parties on whether the proposal that Mr Lundbom be paid a commission resulted from the dealings between the parties in either 2005 or in 2006.

[26] Although an employee's remuneration usually contains an element of payment by salary, a person who is remunerated purely by way of a commission payment can also be in an employment relationship.

[27] I note that neither in 2005 nor in 2006 was there a written or oral employment agreement confirming any terms which had been agreed between the parties. Whilst

the parties are agreed that a commission proposal was discussed in both 2005 and 2006, it appears that subsequent discussions on both occasions resulted in this proposal being withdrawn.

[28] I find no evidence to substantiate that an employment relationship based on a commission only remuneration basis was confirmed and agreed between the parties. I find that the withdrawal of the commission basis proposal was accepted by Mr Lundbom as evidenced by his agreement to invoice Avisit on the basis of an hourly payment for the time he spent on each piece of work.

[29] Having found no basis for establishing an employment relationship on a commission payment basis, I turn to examining the real nature of the relationship between the parties.

Was Mr Lundbom an employee of Avisit or an independent contractor when he carried out work for Avisit during the period from September 2005 until March 2011?

[30] In deciding whether Mr Lundbom was an employee of AVISIT, 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-

(a) must consider all 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

[31] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

¹ [2005] 1 ERNZ 372

“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

[32] In this case 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.

[33] In 2005 it was agreed between Mr Lundbom and Mr Visser that Mr Lundbom would invoice Avisit for the work which he carried out on behalf of Avisit. Mr Visser said, and Mr Lundbom agreed, that it was Mr Lundbom who set the hourly rate at \$60.00, a rate which Mr Visser thought to be high, but which he had accepted.

[34] Mr Visser said, and Mr Lundbom agreed, that Mr Lundbom would be responsible for his own taxes. Avisit did not deduct PAYE from the amounts invoiced by, and paid to, Mr Lundbom. During the majority of the time of his association with Avisit, Mr Lundbom was employed on a full-time basis with a printing company. Mr Lundbom agreed that PAYE was deducted from his salary by the printing company, and that he understood that an employer was required to deduct PAYE from an employee’s remuneration.

² [1993] 1 ERNZ 695

³ [1995] 2 ERNZ 414 (WEC64/95)

[35] The first invoice sent by Mr Lundbom dated 24 November 2005 did not include an amount for GST. The invoice was in the name of Logomotion, a company which Mr Lundbom said he had established whilst he was still in Sweden. Mr Visser said he had not queried the non-inclusion of GST on the invoices submitted by Mr Lundbom as he believed Mr Lundbom to have been earning below the rate at which he would need to be registered for GST.

[36] Mr Lundbom continued to supply invoices based on time expended at an hourly rate of \$60.00 during 2006, 2007, 2008, 2009, 2010 and 2011. The invoices were submitted in the trading names of Logomotion in 2005, Fresh Ideas in 2006-2008, and thereafter in the name of Bombom Designs, all companies set up by Mr Lundbom as vehicles for the provision of his services.

[37] In addition to his full-time employment with the printing company and the work he carried out for Avisit, Mr Lundbom had also carried out work for Ms Riccola's on-line business and had continued to do some work for a client in Sweden during some part of the period from 2005 to 2011.

[38] I consider that Mr Lundbom was aware of the difference between an employee and an independent contractor in light of the evidence presented and his own business practises and experience.

[39] Significantly when questioned during the course of the Investigation Meeting, Mr Lundbom stated that he believed that, during the period he carried out project work for Avisit, he was an independent contractor who had an expectation of profit share as a result of his contribution during the early part of Avisit's development.

[40] 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 Lundbom was working on his own account.

Control and Integration

[41] During the period 2005 to 2011 the invoices indicate that Mr Lundbom worked on a sporadic basis, equating to 295 hours over the period, an average of 59 hours per year.

[42] Mr Lundbom agreed that he had no expectation of on-going project work from Avisit, although there was a small amount of regular work consisting of measuring rates of web-site ‘hits’.

[43] Mr Lundbom confirmed that he had carried out the work at his own premises, in his own time and using his own equipment.

[44] Mr Lundbom would be issued with requests from Avisit for any work to be undertaken. From the documents supplied in evidence, the work to be carried out appeared to be of a graphic design and marketing project nature.

[45] Both the nature of the work carried out by Mr Lundbom, and the method of working, do not appear to be integral to the business of Avisit.

[46] 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*”. It was established in evidence that Avisit had a high use of contractors, which I find to be characteristic of the IT industry, given its highly specialised nature. Whilst not determinative of the matter, I do find such industry practise to be a highly relevant factor.

[47] I do not find evidence that Mr Lundbom was subject to the control of Avisit in the provision of services, or that his position was integral to the operation at Avisit.

The Fundamental Test

[48] Avisit did not calculate, deduct or pay PAYE on behalf of Mr Lundbom for any services provided by him to Avisit. Mr Lundbom submitted invoices in respect of his hours worked and was paid accordingly. Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*⁶ that: “*Taxation arrangements, both generally and in particular are a relevant consideration.*”

[49] Mr Lundbom was aware that as an employee, PAYE was payable, yet during the period of his association with Avisit, Mr Lundbom did not request an employment agreement, or that Avisit pay PAYE on his behalf. On the contrary Mr Lundbom had represented himself as being responsible for his own taxation arrangements. Although Mr Lundbom did not submit invoices to Avisit which included a GST component, I do not find that this is

⁴ [2010] NZEMPC 1

⁵ Ibid at para [7]

⁶ [2010] NZEMPC 1

determinative of the fact that Mr Lundbom was an employee as Mr Lundbom's income from such work might not have reached the level at which he was required to register for GST.

[50] Mr Lundbom was able to carry out the project work for Avisit at times of his choosing, in order that he could accommodate it outside his full-time employment commitments.

[51] Mr Lundbom operated a business on his own account, with trading names known variously as Logomotion, Fresh Ideas and Bombom Design, with clients in addition to Avisit.

[52] It was Mr Lundbom who determined the hourly rate at which his services would be provided. I do not accept that the fact that this rate did not increase within the 5 year period he carried out project work for Avisit to be indicative of an employment relationship in which Mr Lundbom was too intimidated by Mr Visser to ask for an increase, since Mr Lundbom had twice approached Mr Visser for a personal loan during that period, which had been granted; and further Mr Lundbom had confirmed that the hourly rate charged to his other clients had also not increased over this period.

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

[54] I determine that Mr Lundbom was an independent contractor during the period of his providing services to Avisit, and I am unable to assist Mr Lundbom further.

Costs

[55] 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

