

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 509  
5350552

BETWEEN                      GERALD JOSEPH MAROLDA  
   Applicant  
  
AND                                VIRTUAL INFRASTRUCTURE  
   PROFESSIONALS NZ LIMITED  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Blair Edwards, Counsel for Applicant  
   Lance Warren, Advocate for Respondent  
  
Investigation Meeting:        17 November 2011 at Auckland  
  
Determination:                30 November 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Marolda) alleges that he was unjustifiably dismissed from his employment by the respondent (VIP) on 1 June 2011. VIP resists that contention on the footing that Mr Marolda was, at his own request, an independent contractor at the time that the relationship came to an end and so there cannot be any recourse to personal grievance or the Employment Relations Authority.

[2]     The Authority directed that the matter proceed first to a preliminary investigation meeting wherein the question of whether or not the Authority had jurisdiction to hear the wider issue was addressed.

[3]     This determination is concerned exclusively with that preliminary jurisdictional issue.

[4] Mr Marolda was employed by VIP on and from 16 May 2011 and was at that time employed by VIP with the relationship being documented by conventional documentation such as an employment agreement, a position description, a letter of offer and various other items evidencing a standard employment relationship.

[5] At the same time that Mr Marolda was employed, VIP also recruited two other persons on broadly similar terms and conditions of employment. Importantly, for our purposes, VIP's evidence before the Authority was that these other two individuals were employees and not contractors and that VIP's intention had always been to recruit its staff as employees rather than as contractors.

[6] It follows from the foregoing brief summary of the factual position that, at the point at which Mr Marolda was commencing his relationship with VIP, it is common ground that that relationship was one of employment. Both parties attest to that and the documentary evidence before the Authority unequivocally supports the same conclusion. In addition, VIP's evidence (which the Authority accepts) was that two other individuals were recruited at the same time as Mr Marolda and they also were recruited as employees. It follows that the Authority has no difficulty in concluding that at the point at which the relationship between Mr Marolda and VIP began, the real nature of the relationship (using that expression as a term of art) was an employment relationship.

[7] However, there was a meeting between the parties on 23 May 2011 at which Mr Marolda maintains that VIP asked him to accept payment on a temporary basis as if he were a contractor. Mr Marolda's evidence is that the request was made because his account details "*had not been loaded onto VIP's accounting system*". It followed, apparently, that it was easier for VIP to pay against Mr Marolda's invoice rather than to pay him as if he were salaried. This arrangement was allegedly advanced as a temporary expedient only and was apparently to be replaced by a reversion to a normal salary basis for subsequent months.

[8] The implication which the Authority derives from Mr Marolda's evidence on this matter is that VIP, for whatever reason, sought to have him temporarily a contractor such that it could dispose of Mr Marolda from the organisation without the threat of personal grievance. Mr Marolda's evidence was that the proposed temporary arrangement was sold to him on the footing that this temporary set up would be easier

for VIP but Mr Marolda told me that he considered that the real reason it was advanced was because VIP had cashflow problems.

[9] VIP's evidence about the meeting of 25 May could not have been more different. Both the company representatives who were present at that meeting gave evidence to the Authority. Those representatives were Mr Warren himself and Mr Brent Nathan. The essence of their evidence was that the genesis for the proposed contractor arrangement came from a request of Mr Marolda's and was certainly not something that they desired or sought. They told me in their evidence that they had accepted Mr Marolda's request to be of assistance to him because he had advanced the proposition that he needed to put some money through a company of which he was the principal shareholder.

[10] Messrs Warren and Nathan point out that it was completely inconsistent with the previous history of the relationship that they would suddenly decide that they needed to have Mr Marolda as a contractor, given that a matter of days before, they had gone to a great deal of trouble to inaugurate Mr Marolda (and his two colleagues) into an employment relationship with VIP which had been thoroughly and properly documented. Both of the VIP witnesses emphasised to the Authority that they understood that the employment relationship conveyed protections on employees, that they thought those protections were important and that, in thinking about their business plan, it had never been in their contemplation that they would have contractors in the role that Mr Marolda was to perform. Further, they pointed out that it made no sense that they would have Mr Marolda as a contractor but his two colleagues remained in employment.

[11] VIP refuted Mr Marolda's implication that it wanted to get rid of him and used this as a device to do so economically; VIP pointed out that it had, at that time, the highest regard for Mr Marolda and saw him as adding significant value to its business. Furthermore, Mr Marolda's contention that there were cashflow problems which was why VIP had requested this curious change, were rejected by Mr Nathan and Mr Warren. Mr Nathan pointed out that the cashflow implications of paying a contractor were exactly the same as the cashflow implications of paying an employee if the amount in question was the same (as Mr Marolda alleged was the case here).

[12] The only thing that both parties agreed about in respect of the 23 May meeting was that the relationship between Mr Marolda and VIP did not materially change

between that date and the date the relationship came to an end. In other words, the relationship between the parties, whatever it was as a matter of law, was not materially affected by the discussions on 23 May.

### **Determination**

[13] I am not persuaded that Mr Marolda has satisfied the Authority that the initiative for the change in the relationship came from VIP. I prefer the evidence of VIP's witnesses to the effect that the initiative for the sudden change was more likely than not to have come from Mr Marolda himself.

[14] I reach this conclusion because of the inherent unlikelihood of an employer going to a great deal of trouble to document an employment relationship with an incoming senior manager and then, within the space of a week, propose that there be a change to an independent contractor relationship, apparently because of cashflow problems. First, it seems inconceivable that an employer would set up the relationship on the basis of employment and then a week later suggest a temporary change, and second, and in any event, the suggestion that this was done for cashflow reasons is itself absurd. As Mr Nathan correctly observed in his evidence, the cashflow implications of paying on an invoice are exactly the same as the payment of a like amount by way of salary. The evidence is that whatever the nature of the payment, it was due and owing at the same date and so there was no possible benefit, in a practical sense, to VIP of suggesting a change in the nature of the payment regime.

[15] What is more, the implication that VIP sought to change the nature of the relationship so as to get rid of Mr Marolda quickly and without undue cost, also seems fanciful; Mr Marolda had not been with VIP long enough for VIP to decide it had made a mistake and indeed all of the evidence suggests that VIP believed that Mr Marolda could add significant value to its business.

[16] I conclude that it was more likely than not that it was Mr Marolda who suggested the change to one of independent contractor and that he did that for his own reasons, perhaps, as VIP's witnesses suggested, because he was still obtaining other income from other projects including offshore projects. If, as the Authority has concluded, it was Mr Marolda who proposed that the relationship change from one of employment to that of a contractor, it cannot be right that he can then resile from that

position and seek the protection of the employment jurisdiction when it was his initiative in the first place that created the change.

[17] If the Authority is satisfied (as it is) that the initiative for the change from employment to contractual came from Mr Marolda, then it is not fair and just to allow him to, as it were, switch back to get the protections of employment law when he has deliberately sought to depart from them.

[18] Accordingly, the Authority's conclusion is that Mr Marolda initiated the change in the nature of the relationship when the parties met on 23 May 2011 and that, having freely agreed between them that the relationship was no more and no less than a relationship between a principal and its contractor, that was the relationship at the point at which the relationship came to an end.

[19] Had the Authority concluded that the initiative for the change had, as Mr Marolda alleged, come from VIP, then of course the Authority's conclusion would have been different because it would be difficult to make the judgment that in seeking to have the protections of employment law removed (even temporarily) it was fair and just for the "employer" to then take advantage of the change and end the relationship.

[20] To the contrary, the Authority's conclusion is that because the initiative for the change came from Mr Marolda, he must be held to have made a conscious decision that he wished to be a contractor rather than an employee and that being his choice, he cannot now look to the Authority to remedy what he considers to be an employment relationship problem.

[21] For the avoidance of doubt then, the Authority concludes that the real nature of the relationship, at the time it came to an end was not one of employment. Fundamentally, I am satisfied that Mr Marolda chose to perform the services on his own account. While he was integrated into the business in one sense, the evidence the Authority heard suggested he had other business interests. With the very short nature of the relationship, it is difficult to assess the amount of control exerted over Mr Marolda but it did seem that his personal talents were likely to have him operating very much as a free agent.

**Costs**

[22] Costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority