

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 276
5464664

BETWEEN ANDY O’SULLIVAN
Applicant

AND STARGATE OPERATIONS
LIMITED (In Liquidation)
Respondent

Member of Authority: Vicki Campbell

Representatives: James Turner for Applicant
No appearance for Respondent

Investigation Meeting: 20 May 2015

Submissions Received: 20 and 22 May 2015

Determination: 10 September 2015

DETERMINATION OF THE AUTHORITY

- A. Stargate Operations Limited’s (in Liq) counter-claims against Mr O’Sullivan are dismissed**

- B. Mr O’Sullivan was an employee of Stargate Operations Limited (in Liq) from December 2009 until 28 February 2014.**

- C. Mr O’Sullivan was not unjustifiably dismissed.**

- D. Stargate Operations Limited (in Liq) breached a term of the employment agreement and its statutory obligations to act in good faith.**

- E. Stagate Operations Limited (in Liq) is ordered to pay to Mr**

O'Sullivan within 28 days of the date of this determination the sum of \$15,000 gross for an unpaid finders' fee.

F. Stargate Operations Limited (in Liq) is ordered to pay to Mr O'Sullivan sum of \$72,000 within 28 days of the date of this determination for unpaid holiday pay.

G. Mr O'Sullivan is to be paid interest on the amounts payable for outstanding wages and holiday pay at the rate of 5% per annum to be calculated from 28 February 2014 until the date of this determination.

Liquidation

[1] On 15 May 2015 Stargate Operations Limited (Stargate) appointed liquidators. On 19 May 2015 Mr Derek Ah Sam provided the Authority with the written consent of the liquidators to continue in its investigation and determination of the claims raised by Mr O'Sullivan.

[2] Mr Ah Sam brought the Authority's attention to Schedule 7 of the Companies Act 1993 which sets a maximum claim as a preferential creditor as \$20,340 with any balance ranking as an unsecured creditor in the liquidation.

Employment relationship problem

[3] Mr Andy O'Sullivan claims he was unjustifiably dismissed, is owed arrears of wages including holiday pay, and that Stargate has breached the employment agreement between it and Mr O'Sullivan as well as its statutory obligations of good faith.

[4] In its statement in reply Stargate accepted money is owed to Mr O'Sullivan for a finders' fee and holiday pay but denied all other claims. Stargate counter-claimed against Mr O'Sullivan for the use of a fuel card and reimbursement of an amount charged to Stargate for a health insurance policy for Mr O'Sullivan. These items of expenditure were incurred after the relationship terminated.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr

O'Sullivan and Stargate but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

No appearance for Respondent

[6] The Authority was advised on 19 May 2015 that there would be no appearances at the investigation meeting for the respondent. On the day of the investigation meeting the Authority Officer contacted the Liquidator to confirm that no witnesses would be in attendance to provide evidence for Stargate. The Authority was advised that Stargate would not be represented and neither would any witnesses appear to give evidence. Consequently, there was no appearance for Stargate at the investigation meeting.

[7] Prior to going into liquidation and prior to the investigation meeting Stargate's witnesses lodged and served written statements of evidence which have been considered by the Authority. Where the evidence between the parties is in conflict I have preferred the evidence of Mr O'Sullivan as he attended the investigation meeting and was available to answer questions to assist the Authority in its investigation.

[8] There was no good reason why Stargate's witnesses could not have attended the investigation meeting and I proceeded to investigate the matter pursuant to clause 12 of the second schedule of the Act.

Counter-claim

[9] At the commencement of the investigation meeting Mr Turner made an oral application to have the counter-claim dismissed as a result of Stargate not attending the investigation meeting. As it was a counter-claim Stargate was in effect, the applicant party to the counter-claim.

[10] The Authority's standard notice of investigation meeting, including the notice of investigation meeting issued in relation to this matter, has appended to it a series of notes, the first of which is in the following terms:

If the applicant does not attend the investigation meeting, the matter may be dismissed and costs may be awarded against the applicant.

[11] The Authority received copies of documents purporting to be affidavits from Stargate's witnesses. The documents were not correctly sworn and at best can be

considered a brief of the evidence to be sworn and confirmed by the witnesses at the investigation meeting.

[12] Due to Stargates absence from the Authority's investigation meeting, I have not had the benefit of getting sworn evidence from any of Stargate's witnesses nor have I been able to question them about the counter-claim.

[13] In the absence of evidence to support its claims the counter-claims are dismissed.

Background

[14] Stargate is a manufacturer and seller of registered psychoactive products commonly known as "party pills" or "legal highs". As a result of legislative changes in 2014 operations in Stargate's business has ceased. Mr Matthew Bowden is the sole director and a majority shareholder of Stargate.

[15] Mr O'Sullivan says he was engaged by Stargate from December 2009 until he was dismissed in March 2014 and that the nature of his relationship was as an employee. Stargate denies Mr O'Sullivan was an employee for the entire period and says he was at times an independent contractor and at other times an employee.

[16] From the time of his engagement with Stargate Mr O'Sullivan carried out sales work on behalf of Stargate. During the period he was engaged by Stargate the duties Mr O'Sullivan undertook changed from strictly sales to overseeing the production and manufacture of Stargate's products.

Issues

[17] The issues for determination are:

- a) Was Mr O'Sullivan an employee or independent contractor;
- b) If Mr O'Sullivan was an employee at the time the employment relationship ended, was he unjustifiably dismissed;
- c) If Mr O'Sullivan was unjustifiably dismissed, what if any, remedies should be awarded;

- d) Did Stargate breach the employment agreement between the parties;
- e) Did Stargate breach its statutory duties of good faith;
- f) What, if any, wages or other benefits are owed to Mr O’Sullivan;
- g) What, if any, annual holiday entitlements are owed to Mr O’Sullivan.

Was Mr O’Sullivan an employee or independent contractor;

[18] Mr O’Sullivan says he was an employee of Stargate from his initial employment in December 2009 until 28 February 2014.

[19] Stargate denies Mr O’Sullivan was an employee at all times during that period and says Mr O’Sullivan’s relationship changed and that at times he was an independent contractor, while at other times he was an employee. Those period were:

Contractor – December 2009 to 27 November 2011

Employee – 28 November 2011 to 31 May 2012

Contractor – 1 June 2012 to 31 March 2013

Employee – 1 April 2013 to 28 February 2014

[20] The date of 28 November 2011 is inconsistent with a letter signed by Mr Bowden on 28 November 2011 which records that Mr O’Sullivan’s employment commenced on 21 November 2011.

[21] Whether Mr O’Sullivan was an employee or a contractor is determined under Section 6(1) of the Employment Relations Act (“the Act”) which states:

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 determine the real nature of the relationship between them.

[22] Section 6(3) states:

For the purposes of subsection (2), the court of the Authority-

- (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 the relationship.

[23] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd.*¹

[24] The Employment Court in *Poulter v Antipodean Growers Limited*² summarised the applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analyzing the tests that have been historically applied such as control, integration, and the “fundamental” test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[25] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice then to apply the three tests known as the control, integration and fundamental or economic reality test.

[26] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.³

[27] The periods in dispute are the two periods December 2009 to 27 November 2011 and 1 June 2012 to 31 March 2013.

Intention of the parties

[28] There was no written documentation demonstrating the intention of the parties at the time the arrangement for work was entered into. There is no dispute that Mr

¹ [2005] ERNZ 372.

² [2010] NZEmpC 77 at [20].

³ Ibid at [21].

O'Sullivan was offered and accepted work on the basis that he would be paid commission only.

[29] In his written statement Mr Bowden says that when he interviewed Mr O'Sullivan he advised Mr O'Sullivan that there would be no base salary for the position but rather the pay was based 100% on commission from all sales of Stargate product. Mr Bowden acknowledges there was no discussion about how Mr O'Sullivan's commission based income would be treated for tax purposes.

[30] Mr O'Sullivan provided Stargate with a document called an "invoice" headed up with "MyShot Trust Fund". I accept this was not a "Trust" but was a name used by Mr O'Sullivan for the purpose of tracking his commission payments. The documents set out Mr O'Sullivan's calculations of the commission payments owed to him by Stargate.

[31] The amounts stated in the documents presented by Mr O'Sullivan were paid by Stargate in full with no deductions, albeit it proved difficult for Mr O'Sullivan to reconcile the payments with the amounts claimed as the payments to Mr O'Sullivan were irregular and consisted of part payments of the documented amounts claimed.

[32] Apart from the commission payments the invoices included reimbursement of expenses for items Mr O'Sullivan purchased on behalf of the company. Mr Bowden neither questioned the commissions claimed nor the claims for reimbursement of expenses. Stargate paid what was claimed. There is no dispute that tax was never deducted prior to payment of the invoices produced by Mr O'Sullivan.

[33] There is no agreement as to the intention of the parties at the time the relationship was entered into and how the payment of services was to be treated.

The control test

[34] This test examines the extent to which the activities of Mr O'Sullivan were controlled by Stargate.

[35] Mr O'Sullivan was provided with all the tools required of him to perform his role. Stargate provided him with an office, a computer including software, telephone equipment and business cards. Mr Bowden provided Mr O'Sullivan with a database

of overseas prospects and required Mr O'Sullivan to work through the list as part of his sales duties.

[36] Mr O'Sullivan's evidence is that he worked regularly on 4 days every week from 11am to 7pm. In Mr Bowden's written statement he denies Mr O'Sullivan worked the hours claimed and says Mr O'Sullivan was free to work whatever hours he wished. That statement from Mr Bowden is contrary to a statement he made in a sworn affidavit dated 4 October 2012 where he states that Mr O'Sullivan worked Monday to Friday from 11am – 7pm. The 4 October 2012 affidavit was presented to the District Court in unrelated proceedings.

[37] The control test does not assist greatly in deciding whether or not Mr O'Sullivan was an employee or a contractor. Mr O'Sullivan undertook his work with little or no supervision, which may be indicative of a contracting relationship but also equally is indicative of an employment relationship. The provision to Mr O'Sullivan of the tools required for him to undertake his work and the regularity of his hours of work is strongly indicative of an employment relationship.

Integration test

[38] This test examines the extent to which Mr O'Sullivan was integrated into Stargate's business. That is whether the work undertaken by Mr O'Sullivan was integral to the business and whether Mr O'Sullivan had become part and parcel of the business.

[39] Mr O'Sullivan's evidence was that from the time he first started working in his sales role in 2009 his focus was on growing the business. Mr O'Sullivan increased the number of retail and wholesale customers and overseas companies purchasing Stargate products. During his tenure he also had a role in overseeing the production and manufacturing of Stargates Products.

[40] Documents signed by Mr Bowden confirm Mr O'Sullivan was employed as the General Manager for Stargate. The role of General Manager would, in my assessment be an integral role for the company.

[41] I consider the work performed by Mr O'Sullivan was an integral part of Stargate's business because it could not have grown the business to the extent that it

did without his work. The work could have been undertaken by either an employee or a contractor and so is not strongly determinative of Mr O'Sullivan's status one way or the other.

Fundamental test

[42] This test examines the extent to which Mr O'Sullivan took on financial risk himself in providing his services to Stargate including whether he was in business for himself.

[43] While Mr O'Sullivan produced and submitted a document which purported to be an invoice, I am satisfied this document was used to identify the commissions and reimbursements of expenses owed to Mr O'Sullivan. There was no GST added to the amounts claimed as commission payments and Mr O'Sullivan was not registered for GST.

[44] Mr O'Sullivan worked with one client to develop a specific product to meet the client's expectations. He did this through the resources of Stargate and Stargate sold the product and received the income from the sales.

[45] Mr O'Sullivan did not work for any other companies between 2009 and February 2014. He worked solely and in a full time capacity for Stargate.

[46] Mr O'Sullivan did not have his own accountant until late 2011 when issues as to whether he was an employee or a contractor arose. At that time Mr Bowden wanted all those working for him to sign employment agreements. At the same time concerns about the tax treatment of Mr O'Sullivan's commission payments arose and he sought independent advice.

[47] Mr O'Sullivan received two employment agreements from Mr Bowden. The first in 2011 and the second in 2012. When Mr O'Sullivan received the 2012 employment agreement he made proposed changes to the agreement and returned it to Mr Bowden.

[48] The fundamental test has very strong elements of an employment relationship which includes the requests that Mr O'Sullivan sign a written employment agreement.

Industry practice

[49] There was no evidence about what current industry practice is.

Overall impression

[50] The overall impression from all of the facts in this case of the underlying and true nature of the relationship between Mr O'Sullivan and Stargate is that of an employment relationship.

[51] During the periods Stargate agrees Mr O'Sullivan was an employee, Mr O'Sullivan received regular payments which had been reduced by PAYE prior to payment.

[52] A letter dated 28 November 2011 written for Mr O'Sullivan to assist him in securing mortgage funds states that until 21 November 2011 Mr O'Sullivan was a contractor for 2 years and had recently moved to being an employee. That letter is contradicted by the statements made by Mr Bowden in his sworn affidavit dated 4 October 2012 where he swears Mr O'Sullivan had been an employee of Stargate for three years.

[53] The use of invoices to request payment is indicative of a contracting relationship. However, the documents were not tax invoices and I have accepted Mr O'Sullivan's evidence that he had a discussion with Mr Bowden at the commencement of the relationship that the payment of commissions would be in lieu of a salary. This indicates an intention to enter into an employment relationship.

[54] I find Mr O'Sullivan was an employee of Stargate Operations Limited from December 2009 until the relationship ended in February 2014.

Unjustified dismissal

[55] Mr O'Sullivan says that issues around his tax status and outstanding payments to the Inland Revenue caused significant issues in the workplace and left him with no option but to leave his employment. He also says he entered into an agreement with Stargate to loan it \$500,000 and the non-payment of this loan also contributed to him leaving the company. He further says the employment relationship deteriorated and Stargate dismissed him from his employment on or about 28 February 2014.

[56] Significant issues regarding Mr O'Sullivan's tax status began to surface in 2011 and were still not resolved when the employment relationship ended in February 2014.

[57] Neither Mr O'Sullivan nor Stargate had made tax payments to the Inland Revenue on the commission payments received by Mr O'Sullivan except for the periods December 2011 to March 2012 and April 2012 to December 2012 and then only in the aggregate sum of \$21,540.90.

[58] By April 2013 Stargate accepted Mr O'Sullivan was an employee and the parties agreed that Mr O'Sullivan was owed commission payments in the amount of \$798,037.50.

[59] Mr O'Sullivan and Mr Bowden agreed that of the outstanding commissions Stargate would retain the sum of \$512,000 which represented the PAYE or income tax relating to the sales commissions previously paid to Mr O'Sullivan without deduction and which Stargate should have withheld and paid to the Inland Revenue. The balance of \$286,037.50 would be paid to Mr O'Sullivan and tax would be deducted prior to payment from that amount. Mr O'Sullivan received \$194,943.58 net.

[60] The evidence before the Authority establishes Stargate was to retain the \$512,000 for the sole purpose of remitting that sum to the Inland Revenue on behalf of Mr O'Sullivan as income tax payable.

[61] On 8 October 2013 Mr O'Sullivan resigned from his employment with Stargate. Mr O'Sullivan attributes his resignation to the fact that Mr Chris Buhmann had come on board as the new General Manager. In his resignation email Mr O'Sullivan states (verbatim):

Chris has come on board and doing a good job and taking the company to a better place which is going to mean changes that I disagree with.. doesn't mean they are wrong ..just a different approach. I thought I'd be able to just to bit my tongue and see out the smoking mixes till the end (a plan I have been vocal with everyone about)
Unfortunately I'm too much of a control freak and I can foresee this kind of interference happened again in the future which just causes conflict in the company and stress on my family.

So I think it best if I hand in my notice now so you both can run the company without any interference and I can move on.

This isn't me throwing my toys out of the cot as I have had time to think it over.

Happy to discuss this in person next week when we meet. Have a think about what notice you would like to make the transfer as smooth as possible.

I would like my tax sorted before I leave, SOL has had over 500k of my tax money for over a year now and done nothing with it... which has put my family at a lot of risk over the last year.

[62] After Mr O'Sullivan's employment had ended, and on 16 April 2014 Mr Buhmann wrote to Mr O'Sullivan outlining a conversation the two had had in October 2013 following Mr O'Sullivan's notification of his intention to resign. In that email Mr Buhmann states:

After the email of 8 October we had talked about your plan to resign and I had thought the date was end of the year, then when we spoke about it you told me that it was end of February, and told me that you had made this clear to all staff. I was happy to keep paying your commission on Jan and Feb even though your work load was less and less.

[63] I find it is more likely than not that Mr O'Sullivan no longer wished to be employed by Stargate and resigned in October with a view to finishing in February 2014. He was not dismissed but left his employment at his own volition.

[64] With respect to the loan for \$500,000 that was not part of the employment relationship and the Authority has no jurisdiction with respect to that loan.

Breach of Employment Agreement/Breach of Good faith

[65] Mr O'Sullivan says the agreement to withhold the \$512,000 from his pay in April 2013 became an enforceable a term of his employment. The agreement required Stargate to pay to the Inland Revenue the complete sum of \$512,000 as income tax on behalf of Mr O'Sullivan.

[66] At the time of the investigation meeting the \$512,000 had not been paid to the Inland Revenue and had not been returned to Mr O'Sullivan.

[67] Mr O'Sullivan says the failure to pay the \$512,000 as agreed to the Inland Revenue is both a breach of the employment agreement and a breach of good faith.

[68] The withholding of the \$512,000 from Mr O'Sullivan's pay and the subsequent failure to pay the money, as agreed, to the Inland Revenue is a breach. The conduct of Stargate in withholding the money from April 2013 for a specified purpose and failing to honour that agreement is a breach of its obligations of good

faith. The conduct of Stargate has left Mr O'Sullivan in an extremely difficult position particularly in light of the liquidation of the company.

[69] No remedies have been sought for the breaches of the employment agreement or the breaches of good faith.

Arrears of wages

[70] Mr O'Sullivan claims he is owed \$512,000 being unpaid arrears of wages plus \$60,000 being unpaid notice of four weeks and a "finders fee" of \$15,000 which is also outstanding.

[71] The \$512,000 was held by Stargate and represented Mr O'Sullivan's obligation to pay income tax. The \$512,000 is not payable to Mr O'Sullivan but rather is payable by Stargate to Inland Revenue. The non-payment of the \$512,000 on behalf of Mr O'Sullivan is now between the Inland Revenue and Stargate.

[72] Mr O'Sullivan claims he is owed \$60,000 for unpaid notice of four weeks. Mr O'Sullivan gave notice in October 2013 and worked a period of four months as notice. There is no basis to Mr O'Sullivan's claim for a payment of a further four week's notice.

[73] Stargate has acknowledged it owes Mr O'Sullivan the sum of \$15,000 for a finders' fee. Stagate Operations Limited (in Liq) is ordered to pay to Mr O'Sullivan within 28 days of the date of this determination the sum of \$15,000 gross.

Outstanding holiday pay

[74] Mr O'Sullivan seeks unpaid annual holiday pay of \$72,000. Mr O'Sullivan says he did not take any annual leave entitlements during the period of his employment.

[75] In this case Stargate has failed to provide accurate wage and time records and therefore, in accordance with section 132(1) of the Employment Relations Act 2000 I have accepted as proved Mr O'Sullivan's claim. Stargate has accepted that it owes Mr O'Sullivan holiday pay.

[76] Stargate Operations Limited (in Liq) is ordered to pay to Mr O’Sullivan the sum of \$72,000 within 28 days of the date of this determination for unpaid holiday pay.

Interest

[77] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.⁴

[78] There were no legal grounds for the finders’ fee and outstanding holiday pay to be withheld. The money should have been paid to Mr O’Sullivan who was entitled to the use of it from the date of the termination of his employment.

[79] I consider it reasonable and fair that Mr O’Sullivan is paid interest on the amounts ordered to be paid from the date of termination of his employment with Stargate at 5% per annum until the date of this determination. This order takes into account that the company is no longer operating and is in liquidation.

Costs

[80] Costs are reserved.

Vicki Campbell
Member of the Employment Relations Authority

⁴ Judicature (Prescribed Rate of Interest) Order 2011.