IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 203/10
5303364

	BETWEEN	MICHAEL SCOTT OLIVER Applicant
	AND	KEITH BROWN T/A AUTOWEB SOLUTIONS Respondent

Member of Authority:	G J Wood
Representatives:	Michael Oliver on his own behalf Keith Brown on his own behalf
Investigation Meeting:	4 November 2010 at Palmerston North
Submissions Received:	4 November 2010
Determination:	20 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Michael Oliver, claims that the respondent, Mr Keith Brown, owes him $1,070 net for work done developing web solutions for Mr Brown's trading entity, autoweb solutions. Mr Brown denies that Mr Oliver was ever employed by him as an employee.

Factual discussion

[2] During the relevant period Mr Oliver was a tertiary student in Palmerston North. Over the Christmas holiday break of 2009-2010 Mr Oliver was looking for work and read an advertisement on the Student Job Search website that stated:

> ***Web Developer – Palmerston North – Permanent***
>
> *This employer is seeking a back end web developer with a high degree of skill and experience in developing in a PHP/MY SQL*

> *environment. You will be developing small CMS's from scratch, as well as working with systems such a wordpress, magento and silverstripe. You will be enthusiastic and reliable, as well as being able to work independently, and track your time/tasks. This is a home based role so you must have your own computer, broadband and applications. You must be local to Palmerston North and Wellington and have great communications skills as you will be dealing with people over the phone. If interested, you will provide an up-to-date CV, as well as examples of code written for recent projects (attached in a zip preferably). The hours will initially be 15-20 pw and the pay rate between $15-$30 ph. An agreement will be made as to how this work will look ie hours and pay as could be on contract basis.*

[3] The job was said to be starting on 18 January 2010, and work would remain ongoing. Mr Oliver applied for the job on 5 January. Mr Brown responded on 6 January, stating amongst other things:

> *What I am looking at is an initial project to build a data base to display Motor Vehicles and other Automotive Applications such as Trucks, Boats, Motor Cycles etc.*
> …
>
> *If you believe you have the skills to meet these requirements I would be very keen to advance discussions, I would prefer that you work from home on your own PC and Software and we would meet twice a week with the occasional meeting in Levin.*
>
> *We would have a number of options with payment either by hourly rate, contract etc. If we can achieve the desired outcomes, then I would envisage that there would be sufficient work and opportunities to maintain a long term relationship …*

[4] The parties met later that day and discussed the terms of the job. It was Mr Oliver's evidence that Mr Brown told him that no written contract was required, but that he would employ him and pay an hourly rate or $20 per hour. Mr Brown's evidence was that he did not offer Mr Oliver employment, but rather a contract at the rate of $20 per hour. This was because of his experience of using young people, in that while they were cheap they often turned out not suitable and therefore could only be employed later, once their suitability had been assessed. Other than the reference to potential payment on a contract basis, none of these factors were raised in the job advertisement or interview. I need not decide this conflict in evidence, because it is the real nature of the relationship, rather than the parties' labelling of it, that will be determinative.

[5] Despite the apparent preference of Mr Oliver to be paid in cash, Mr Brown insisted that all payments go through his books, although it appears that no taxation

was deducted by Mr Brown, which is consistent with his claim that this was not an employment relationship. I accept that no discussions were had about who was responsible for the payment of tax, both parties believing it to be the responsibility of the other.

[6] Mr Brown did not have total control over how Student Job Search might advertise a vacancy. He also did not have technical knowledge to do web development work, and therefore was not able to supervise the work of students such as Mr Oliver. Rather he would only find out if there were problems when the web solutions were put before clients.

[7] Mr Oliver worked for about six weeks, averaging 5-6 hours per day. He was paid the same rate of pay for all hours worked, and he worked at times of the day to suit himself. Mr Oliver did not have any other work duties at the time. He would speak to Mr Brown about how work was going 2-3 times a week by email or phone, when additional instructions would be given about what was required. Mr Oliver would send in a timesheet as required by Mr Brown each week, which was used as the basis for paying Mr Oliver. Mr Oliver provided all the tools for the job - in particular a computer and the necessary broadband and email connections.

[8] Mr Oliver worked one step removed from clients and had no opportunity to profit from his relationship with Mr Brown, other than by payment fixed for his hourly labour. Neither party expected the work to be delegated by Mr Oliver to any other people, but to be performed personally by him.

[9] Mr Brown later lost the contract that Mr Oliver was working on and as Mr Brown claimed to have no money to pay him, he did not pay him for the last 53.5 hours of his work, totalling $1070. After not being paid Mr Oliver declined to do any more work until he was paid and Mr Brown continued to fail to pay him.

[10] After not getting paid and having being put off for several months, Mr Oliver shut down a website that he claimed was the property of another person who did website work for Mr Brown. Mr Brown claims it was his own property. One of the reasons Mr Brown claims that he has not since paid Mr Oliver is because of his inability to access what he sees as his property. Mr Brown now agrees that, in hindsight, it was wrong to take down the website and that it could be returned to Mr Brown at any time.

[11] Mr Oliver then filed in the Authority. At a case management conference held on 25 August 2010 the issue of mediation was discussed and the benefits of the process explained to Mr Brown. He had until the following Monday to let the Authority know whether he would go to mediation voluntarily, and if not, to provide his reasons why. In the absence of a formal response from Mr Brown the parties were directed to mediation by 3 October 2010, with an investigation meeting set down for 3 November as well. Mr Brown did not attend mediation. He did not believe he had to attend because in his view Mr Oliver was never an employee of his. At the investigation meeting he apologised if that belief was wrong, which it is.

[12] The matter has not resolved and it therefore falls to Authority to make a determination.

The Law

[13] A factual analysis based on the relevant provisions of the Act and the judgment of the Supreme Court in *Bryson v. Three Foot Six Ltd (No.2)* [2005] ERNZ 372 is required. Section 6, set out below, requires the Authority to consider and determine the real nature of the relationship between Messrs Oliver and Brown.

[14] Section 6 states:

> ***6. Meaning of Employee***
>
> *1. In this Act, unless the context otherwise requires,* ***employee*** *-*
>
> *(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
> *(b) includes –*
> *(i) a home worker; or*
> *(ii) a person intending to work; but*
> *(iii) excludes a volunteer who –*
> *(i) does not expect to be rewarded for work to be performed as a volunteer; and*
> *(ii) receives no reward for work performed as a volunteer.*
>
> *2. In deciding for the purposes of sub-section 1(a)(ii) 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.*

> *3. For the purposes of sub-section (2) the Court or Authority –*
>
> *(a) must consider all relevant matters, including any matters that indicate the intentions of the parties; and*
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship …*

[15] The principles to be applied in determining cases like this were identified by the Employment Court in *Tsoupakis v. Fendalton Construction Ltd* (unreported Colgan CJ, WC16/09 18 June 2009) as follows:

> - *Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law;*
> - *The Authority or the Court, in determining whether a person is employed under a contact of service, is to determine 'the real nature of the relationship between them: s.6(2);*
> - *The Authority or the Court must consider 'all relevant matters', including any matters that indicate the intention of the persons; s.6(3)(a);*
> - *The Authority or the Court is not to treat as a determining matter any statement by the parties that describes the nature of their relationship; s.6(3)(b);*
> - *'All relevant matters' including the written and oral terms of the contract between the parties, which will usually contain indications of the common intention concerning the status of their relationship;*
> - *'All relevant matters' will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice;*
> - *'All relevant matters' include features of control and integration and whether the person has been effectively working on his or her own account (the fundamental test);*
> - *Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental test;*
> - *Industry practice, while not determinative of the question, is nevertheless a relevant factor;*

- *Common intention as to the nature of the relationship, if ascertainable, is a relevant factor;*

- *Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.*

Determination

[16] Any relationship such as this can be construed to be either an employment relationship or another form of contract, but the Authority must determine the real nature of the relationship, taking into account all relevant factors.

[17] Here I accept that there was no common intention as to what form of contract would apply. It was clearly Mr Oliver's intention that he work as an employee, but equally it was Mr Brown's intention that Mr Oliver not be an employee. Had Mr Brown provided a written contract then the issue of the parties' intention would have been determined by those written terms.

[18] Taxation arrangements do not assist in this case because they appear to be non existent. Similarly, there is no evidence of any industry practice that would assist the parties either way.

[19] Mr Oliver relies on the fact that the job was advertised through Student Job Search, but in my view jobs through Student Job Search could just as easily provide contract work as employment. For instance, much temporary work offered by Student Job Search would not ordinarily be considered employment.

[20] What is very important in this case however, is the way that Mr Brown approached the offer of work. The job was described as permanent. Mr Brown indicated in evidence that he used work such as that done by Mr Oliver to test the suitability of people for employment. Suitability for employment can most properly be assessed in a work setting akin to employment. If the work was being done with a view to considering employment then the work itself could most likely be described as employment. This is important in assessing what is known as the control test, as while Mr Brown could not control the quality of Mr Oliver's work directly (because he was not an expert in the field), he could do so indirectly through client assessment of it. Furthermore, Mr Oliver had to account for his hours of work hour by hour, even though he had reasonable flexibility as to when he did it, provided he did so promptly.

[21] I therefore conclude that the degree of control by Mr Brown over Mr Oliver was more consistent with Mr Oliver's status being that of an employee rather than as an independent contractor.

[22] I also accept that the integration test favours a finding of Mr Oliver being an employee rather than an independent contractor. While Mr Oliver provided his own business tools and worked off site, he was an integral part of autoweb solutions, as one would expect of an employee. For instance, he was paid an hourly rate rather than a pre-arranged fee per job and was on occasion asked to work on different tasks.

[23] An assessment using the fundamental test also favours a finding of employment over contracting. Mr Oliver could not be said to be in business on his own account. He had no opportunity to make profit from the work he did and had no propriety interest in that work. In this respect I note that despite Mr Oliver's frustrations at not being paid for the work he helped create for autoweb solutions, the work he did remains the property of Mr Brown. Mr Brown claims it is his property as well, even though he has failed to pay for the work that Mr Oliver did in developing it, which also favours a finding of employment.

[24] Thus though the parties had different intentions as to whether or not Mr Oliver was ever an employee of Mr Brown, I conclude, for all the reasons given above, and after utilising the standard tests, that the real nature of the relationship was one of employer and employee. It follows that Mr Brown must now pay Mr Oliver the sums owing, plus the $70 filing fee.

[25] I therefore order the respondent, Keith Brown, to pay to the applicant, Michael Oliver, the sum of $1,070.00 net, plus $70 in expenses.

G J Wood
Member of the Employment Relations Authority