IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 73
5369187

	BETWEEN	DANIELLE OLIVIER Applicant
	AND	CLOUDBERRY BUSINESS SOLUTIONS LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Applicant in person Andrew Collyer, advocate for Respondent
Investigation Meeting:	29 March 2012
Determination:	24 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Danielle Olivier has applied to the Authority to recover wages and other money due to her for work performed for the respondent Mr Andrew Collyer.

[2] At the investigation meeting it was established that the contracting parties had been Ms Olivier and Cloudberry Business Solutions Ltd (Cloudberry), a company of which Mr Collyer is a director and principal shareholder.

[3] Ms Olivier claims that she had an employment relationship with Cloudberry from which, when it ended in January 2012, she was owed money for work performed over several weeks in and after December 2011. She claims to recover $4,460.15, a total she invoiced to Mr Collyer with details of hours worked and expenses in relation to work she had carried out for his company's clients.

[4] She also claims payment for "loss of work" of four weeks at approximately $900 per week, for the period after termination of her employment. This was clarified at the investigation meeting to be a claim for four weeks at 40 hours per week, at $20 per hour, or $3,200 in total. As well Ms Olivier claims to recover expenses, in particular the filing fee of $71.56 for her application to the Authority.

[5] In its formal response Cloudberry has opposed the claim on the grounds that the Authority does not have jurisdiction to determine it, because the parties were not in an employment relationship. Cloudberry contends that Ms Olivier was a self-employed independent contractor, not an employee.

Nature of the work relationship

[6] To determine this preliminary issue the evidence given by Ms Olivier and Mr Collyer must be considered against the relevant principles of law. In particular, s 6 of the Employment Relations Act 2000 provides that for the purposes of deciding whether a person is employed by another under a contract of service, the Authority must determine the real nature of the relationship between the persons. In doing so 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 their relationship.*

[7] The leading case on s 6 of the Act is *Bryson v. Three Foot Six Limited* [2003] NZLR 721. From the judgment of the Supreme Court in that case and earlier decisions approved of by the Court, the principles to be applied may be summarised as follows:

(1) The Authority must determine the real nature of the relationship;

(2) The intention of the parties is still relevant but no longer decisive;

(3) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship;

(4) The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the fundamental test;

(5) The fundamental test examines whether a person performing the services is doing so on their own account;

(6) Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[8] The summary above was given recently by the Employment Court in *Poulter v. Antipodean Growers Limited* [2010] NZEmpC 77, 17 June 2010, at para [20]. The Court also concluded that ultimately the approach necessarily to be taken under s 6(2) of the Act is for the Authority to gain an overall impression of the underlying and true nature of the relationship between the parties.

[9] At material times Mr Collyer was a business adviser or consultant for Cloudberry. In June 2011 he posted in the Student Job Search site an advertisement for a position described as Personal Assistant - Permanent. The description included the following:

> *You will be required to support the owner of several companies specialising in –*
>
> *Business Advisory Services to SME's* [Small and Medium Enterprises]….

[10] The advertisement sought a person with "Office Clerical" experience at a rate of $17.50 per hour pay. The appointee would be required to "generally learn the skills required to keep on top of all administrative tasks" during a work period of 15 hours per week. The "work" was advertised as "Ongoing" and starting in July 2011.

[11] Ms Olivier, who was then completing degrees in arts and commerce contacted Mr Collyer about the advertised position and was sent by him a copy of an Individual Employment Agreement. The parties to it were expressed to be Cloudberry Business Solutions Ltd, the "Employer," and Ms Olivier, the "Employee". The agreement was for the position of "Personal Assistant" and contained many of the provisions usually found in a written agreement where there is a contract of service between parties.

[12] One particular provision referred to the nature of the position as "Casual 'as required' employment relationship," but it is difficult to reconcile that provision with some others in the agreement. For example, one clause provides for "a minimum number of hours of work guaranteed and a minimum number of two hours for any one period of work." Another clause guaranteed 10 hours work per week;

> *The parties agree that because the Employee is being employed on an as required basis, the Employee has no fixed hours of work. However the Employer agrees to offer to the Employee at least ten hours (10*

> *hours) per week. The Employee shall take all reasonable steps to be available when required.*

[13] There was also provision for a "trial period" able to be terminated by the employer providing 14 days notice within the trial period. The general termination provision required the employer to give 14 days notice in writing to the employee, who was required to give the same period if leaving. A 90 day probation period in the draft agreement strongly suggests that the employment was 'ongoing' and not 'casual' or "as required." There had been no reference to casual employment in the Student Job Search advertisement.

[14] The draft employment agreement appears to the Authority to have been intended for a part time permanent worker rather than a true casual employee. In any event it was not executed by Ms Olivier and Cloudberry because Mr Collyer suffered a serious but short illness. When he had recovered a different focus was placed on the work Ms Olivier began then to perform. From mid September 2011 she was engaged as a business and marketing assistant and consultant, at a rate of pay of $20 per hour.

[15] I find that this was work which she had little or no practical experience of but for which she had considerable aptitude and knowledge from her studies. The nature of her role within the Cloudberry business can be described as that of an understudy to Mr Collyer, or an intern, associate or someone who was, as she put it, "shadowing" him in the day to day routine work he performed for business clients of his company or companies. In some respects it was similar to an apprenticeship in business advisory or consultancy work. She told the Authority she was in "training" on the job and that she did not work on her own or independently. Mr Collyer confirmed that there had been nothing Ms Olivier could do without his guidance. He directed her work, he said, which was performed for his clients. I find there was present a strong element of control by Mr Collyer over Ms Olivier with regard to the work she did and how it was to be done.

[16] Ms Olivier was paid according to invoices she submitted in which her hours were recorded against work done for particular Cloudberry customers or clients. She was paid without deduction of tax, although she kept aside a sum to cover payments of whatever tax might be required. I accept that Ms Olivier indicated to Mr Collyer a preference to have responsibility for looking after payment of income tax, but that

alone is a quite weak indication that she was an independent contractor and not an employee. To the extent that she did refer to herself as a self employed contractor, that was no more than a label to reflect her preference to receive her pay in full without tax having been deducted at source.

[17] Mr Collyer summarised the arrangements in such a way as to lend considerable weight to the claim of Ms Olivier that she was an employee. He said;

> *I have done everything I can to give* [Ms Olivier] *the opportunity to grow and develop into the role of 'advisor', which fundamentally involved bearing the cost of her attending meetings with clients, partners and members of my network, seminars, training and workshops, with the hope that she could become someone I could rely upon to run an office in New Zealand whilst I am out of the country.*

[18] Particular problems Mr Collyer said he perceived with Ms Olivier's performance do not detract from the real nature of the relationship which, the Authority is satisfied, was one of employment under a contract of service. Although when the continuation of the employment was under negotiation Ms Olivier proposed becoming a "self employed contractor," I find she did not have that status while contracted to Cloudberry between September 2011 and January 2012. She was in fact quite reliant on Mr Collyer to show her what to do and how to do it, and she is to be regarded as having been integrated into his enterprise and not in any sense in business on her own account. She had no investment in Cloudberry and no ability to increase her earnings through the exercise of skill and effort, except by working longer hours.

[19] While it appears that Mr Collyer had some intention to see Ms Olivier become a self employed independent contractor, Ms Olivier seems to have been less concerned about the nature of the relationship. As a matter of legal principle intention is not determinative and the label the parties put on their relationship is also merely one of many factors to be weighed up in determining the real nature of that relationship.

[20] Accordingly, the overall impression the Authority has of the underlying and true nature of the relationship is that it was one of employment under an employment agreement or contract of service. Also, the regularity or frequency of work indicates that the employment was not 'casual.'

Monies due to Ms Olivier

[21] Mr Collyer has accepted that Ms Olivier is owed some payment for work she did between about 27 December 2011 and 24 January 2012 at an agreed rate of pay of $20 per hour. He disputes the amounts invoiced by her and has been seeking further information from the clients and Ms Olivier before offering any payment on those.

[22] I am satisfied that the amounts invoiced were in accordance with the agreement that Ms Olivier would be paid at the rate of $20 per hour for her time and also some expenses. I find that she is owed the sum of $4,460.15 gross.

[23] I also find that the termination of her employment was at the initiative of Cloudberry following an unresolved disagreement about an increase in pay being sought by Ms Olivier for her work. I do not consider that by stipulating for higher payment she ended the employment. Cloudberry ought to have given her reasonable notice of termination, which I fix at two weeks and therefore order the company to pay a total of $1,000 wages in lieu of notice (for 25 hours per week at $20).

[24] Ms Olivier as an employee was also entitled to proportionate annual holiday pay for her period of employment, but calculation of the amount is not possible as the Authority has not been given the precise amount of total gross earnings during the employment to which 8% can be applied.

[25] As an expense, I order that Cloudberry reimburse to Ms Olivier the Authority filing fee of $71.56.

Determination

[26] The Authority orders Cloudberry Business Solutions Limited to pay to Ms Danielle Olivier the above amounts of $4,460.15 gross arrears of wages, $1,000 gross in lieu of notice and $71.56 in reimbursement of an expense.

A Dumbleton
Member of the Employment Relations Authority