

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Jamin Patching (applicant)
<b>AND</b>	KSM Installations (NZ) Limited (respondent)
<b>REPRESENTATIVES</b>	the applicant represented himself No appearance by or for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 10 February 2006
<b>DATE OF DETERMINATION</b>	13 February 2006

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. Mr Patching asks the Authority to determine his employment status, i.e. whether he is an independent contractor or an employee – statement of problem received on 31 October 2005.

2. In a statement in reply received on 15 November the Company says there was no employment relationship between the parties, there never had been, that it sub-contracted to Mr Patching's company and that that relationship was now at an end.
3. During a telephone conference call on 29 November attended by the applicant and counsel for the Company, Mr Costa Varuhas, and subsequently set out in a written Record of Preliminary Conference and Directions dated the same day, the parties were directed to undertake mediation: it did not settle this employment relationship problem.
4. During the conference, and as reflected in the Record, the parties were advised that,

*5. c. In the event that this problem is not resolved at mediation the Authority will proceed to investigate the matter on Friday 10 February 2006, from 10.00 a.m. Separate advice of the venue and confirmation of the date and time will be provided.*

5. Consistent with standard Authority process, and shortly after the telephone conference, a Notice of Investigation Meeting confirming the time, date and venue of the investigation was sent out to the parties via the addresses for service provided by them, along with the Record. This is usually done by both documents going out in the same envelope. Mr Varuhas recently advised the Authority that the Notice was not included with the Record. He also says he understood the reference at 5. c. in the Record to refer only to a "tentative" investigation date (email of 3.27 p.m., 8 February).
6. By way of fax and letter dated 27 January 2006 the parties were advised that attempts to arrange another telephone conference (so as to facilitate the presentation of written statements and other evidence, etc) had been unsuccessful. The parties were also reminded that an investigation had been scheduled for 10 February. The parties were directed to file any written statements and documents by, for the applicant 2 February, and, for the Company, 8 February: no material was received.

7. By email dated 7 February, Mr Varuhas advised:

*1.I note that the applicant has not filed any further documents and/or statements in this matter.*

*2.I confirm I will be appearing at the High Court at Wellington on 10 February 2006. Accordingly I request that the proposed investigation meeting also scheduled for 10 February 2006 be adjourned.*

8. The applicant opposed the request. The Authority sought more detail from Mr Varuhas in support of his client's request. A reply was received later on the same day.

9. By way of an email also sent out on 8 February I declined the Company's request. In reaching my decision I relied on:

- a. The content of the telephone conference of 29 November 2005, and
- b. the Record of Preliminary Conference and Directions, and
- c. the Notice of Investigation, and
- d. the reminder of 27 January 2006, and
- e. the late nature of Mr Varuhas' application for an adjournment.

10. It was explained to Mr Varuhas that the only ground for adjourning the investigation would be if he could establish that his High Court fixture was very recent, an unmovable commitment and that alternate representation was not reasonably available to his client.

11. Numerous email exchanges then ensued between Mr Varuhas and the Authority. Various matters emerged including the following: Mr Varuhas was "appearing at the High Court" (above) so as to move his nephew's admission to the bar. The admission was set down for midday but various commitments related to it precluded his appearing at the Authority between 10.00 a.m. and after 3.00 p.m. He had been

advised of the “*details*” of his High Court appearance at midday on 26 January 2006 (email of 4.57 p.m., 8 February). He could attend the investigation from 3.15 p.m. One of the Company directors was “*seriously unwell*” and a medical certificate would be provided “*once it is to hand*” (email of 4.14 p.m. 9 February). The other director had not planned to attend and was “*unable to do so at short notice due to his own work commitments*” (email of 2.00 p.m., 9 February): no details were provided.

12. Mr Varuhas did not accept the Authority’s proposal to accommodate his requirement by way of an adjournment from 11.30 until 1.05 p.m.
13. By email received at 10.16 a.m. 10 February, and in response to the Authority’s earlier reiteration that the investigation would be proceeding, Mr Varuhas advised that the respondent would not be participating in the investigation on that day. Mr Patching did attend, having travelled down from Auckland on his motorcycle (and not, apparently, as previously advised, by way of “*non-refundable travel plans*” – refer to the email of 8 February from Jamin & Angela Patching).

### **Decision to Proceed with Investigation**

14. I was satisfied it was appropriate for the Authority to proceed to hear Mr Patching’s application for the following reasons.
15. I find that the Company was properly informed of the investigation set down for 10 February because of the effect of the telephone conference on 29 November 2005 and the clarity of the Record of Preliminary Conference and Directions received – as he accepts – by Mr Varuhas, in November 2005: there is nothing tentative about the words, “*the Authority **will proceed** to investigate the matter on Friday 10 February 2006, from 10.00 a.m.*” (emphasis added –above). As a legal practitioner, it is reasonable to expect Mr Varuhas to have noted those words and to have protected his client’s interests by acting on them promptly and – if in doubt as to their meaning, or the venue, etc – to seek speedy clarification from the Authority.
16. I was also satisfied that it was reasonable to expect the attendance of Mr Varuhas in the hours offered to him, notwithstanding the undoubted importance to him of

moving his nephew's admission to the bar: that is not a matter that requires most of the working day.

17. In the absence of any detailed explanation, I was also satisfied that it was reasonable to expect the attendance of at least one of the respondent's directors to be present at the investigation and a copy of a relevant medical certificate in advance of the investigation.
18. Mr Varuhas' late advice of his High Court commitment, coming as it did over a week after the Authority's reminder of 27 January, was unacceptable: it unnecessarily complicated alternate arrangements that may have proved acceptable to both parties.
19. For those reasons, and the fact that the applicant had given up his own employment and had travelled down from Auckland, I was satisfied it was appropriate to proceed with the investigation: s. 173 and Clause 12 of Schedule 2 of the Act applied.
20. In the event of an election seeking a hearing *de novo*, and in respect of the matters summarised above, the Court may be assisted by a report into good faith: s. 181 of the Act.

## **Findings**

21. From the evidence set out in the statements of problem and in reply and that presented by Mr Patching under affirmation at the investigation, I am satisfied that the following findings are properly arrived at.
22. By way of sub-contracts, the respondent Company undertakes interior fit-outs and other for major construction companies such as Fletchers, Mainzeal, etc.
23. Following a discussion with the Company's two directors, Alana and Jamie Hargraves, Mr Patching says he started working for the Company, for a second time, from 2 May 2005 until 30 September 2005, as "*a hammer-hand*" (oral evidence), undertaking fit-outs and other building work. Mr Patching is not a qualified carpenter. There is no written agreement between the parties recording

the nature of Mr Patching's employment relationship with the Company, either as an independent contractor or as an employee.

24. Mr Patching agrees that, he says, at the suggestion of one of the Company's directors, Mr Jamie Hargraves, he invoiced the Company for all work done by him using his own Company – Patch & Co. Ltd – to do so (see the invoices attached to the statement in reply). He says he set up this company so as to facilitate the earlier operation of a lawn mowing and rubbish removal franchise ("Patch & Co t/a VIP Services"). Mr Patching says that, following his discussion with Mr Hargraves, and consistent with the Company's requirement, he gave up all of his own contracting work except to do some lawn mowing on "one or 2" (oral evidence) Saturday afternoons, after he had finished his work that day for the Company.

25. The applicant says he worked regular hours for the Company, that those doing similar work to himself were all contract of service employees and that the respondent provided him with nearly all of the tools and safety equipment required to undertake the work he performed for it.

26. Mr Patching is aggrieved by the termination of his work for the Company, but that is a separate employment relationship problem which – in light of my finding in this determination – the parties will need to revisit with further mediation.

27. Because of his dissatisfaction with the manner in which his working relationship with the Company was terminated, Mr Patching says he sought advice via the Department of Labour's Infoline. He downloaded a fact sheet entitled, "*who is an employee and who is not?*" After assessing the criteria set out in the fact sheet, Mr Patching was satisfied he was, in reality, an employee.

## **Parties' Positions**

### **Applicant's Position**

28. The applicant's position is effectively set out above.

### **Respondent's Position**

29. The Company's position is summarised in its statement in reply. It relies on the applicant being a director and shareholder of his own company and the claim that the respondent sub-contracted work to Mr Patching's company, to support its claim that their relationship was not that of employee/employer. The Company produced no other written records or other argument to support its position.

### **Discussion and Findings**

30. It is a fact that payment by the Company to Mr Patching for his services was undertaken via invoices issued by the latter's company. Is that sufficient evidence of an independent contractor relationship? Or are there other grounds for finding in favour of the Company's position. For the following reasons I am satisfied the respondent cannot succeed.

31. It is clear from communications issued by the Company and attached to the statement of problem (dated 28 May and 15 & 30 September 2005) that while the Company described its staff as contractors, and referred to them continuing their own business work, in reality it required of Mr Patching that:

- a. He adhere to set work hours of 7a.m. to 4.30 p.m. Monday to Friday and Saturdays on an "*as required ... unless otherwise agreed by the contractor and (the Company)*" (15 September 2005, above – also refer to the letter of 30 September) basis;
- b. He represent the Company "*both in attitude and workmanship*" (30 September, above);
- c. It had clear expectations of Mr Patching and regarded him as "*a full-time contractor – not a part time worker who comes and goes as he pleases*" (30 September, above); and
- d. He was purportedly dismissed for being "*unreliable*" (30 September, above), i.e. deficient time keeping

32. From the facts, i.e. the statements of problem and reply, the Company's correspondence and the applicant's evidence, I am satisfied that the former clearly held to itself the power to control the hours worked by the applicant, to hire and fire Mr Patching, that it would profit or lose from the enterprise, supplied all of the materials for the work including the equipment needed and that the applicant – like the Company's other employees – was bound to the Company and was not expected to take his skills elsewhere. I am also satisfied the respondent made use of Mr Patching's company so as to obtain administrative benefit, rather than because of a genuine agreement reached by the parties whereby Mr Patching would subcontract to the Company.

33. I am therefore satisfied that the real nature of the relationship was that Mr Patching was an employee: s. 6 (2) of the Act and *Bryson v Three Foot Six Limited* [2003] 1 ERNZ 581, as upheld by the Supreme Court ([2005] 3 NZLR 721) applied. An issue to be determined in any subsequent proceedings but which does not interfere with this finding is, who was the employer? Was it the Company and/or the Hargraves?

### **Determination**

34. I find that the applicant, Mr Jamin Patching, was an employee of the respondent, KSM Installations (NZ) Limited. It follows that the applicant is able, should he wish to do so, to commence another employment relationship problem.

### **Costs**

35. Mr Patching seeks to recover the cost of his application. That request is granted. The Company is directed to pay costs to Mr Patching of \$70.00 (seventy dollars).

**Denis Asher**

**Member of Employment Relations Authority**

