

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 153/09  
5132884

BETWEEN                      JAYSEE PILLAY  
   Applicant  
  
AND                                RADIUS SECURITY  
   LIMITED  
   Respondent

Member of Authority:        Marija Urlich  
  
Representatives:              Truc Tran, for Applicant  
   Mark Beech and Shima Grice, for Respondent  
  
Investigation Meeting:        2 December 2008  
  
Further information and        4, 5, 10 December 2008, 22 January, 4, 16 and 17  
submissions received:        February 2009  
  
Determination:                14 May 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]        Mr Pillay worked as an accountant for Radius Security for about one year, from February 2007 until March 2008. Mr Pillay says he was unjustifiably dismissed.

[2]        Radius Security denies Mr Pillay was unjustifiably dismissed because, it says, Mr Pillay was an independent contractor and not an employee.

**The issues**

[3]        This determination deals solely with the preliminary issue whether Mr Pillay was an employee or independent contractor. If this issue is resolved in Mr Pillay's favour then the Authority will investigate the substantive claim. If not the Authority does not have jurisdiction to consider the matter further.

## **The real nature of the relationship - employee or independent contractor?**

[4] Section 6 of the Employment Relations Act 2000 provides the meaning of employee and requires the Authority to determine the real nature of the relationship between the parties<sup>1</sup>. The Authority must consider whether the evidence establishes the existence of a contract of or for services having viewed the evidence in its totality<sup>2</sup>.

[5] The tests applicable to a consideration of the real nature of the relationship include<sup>3</sup>:

- Analysis of the terms and conditions agreed by the parties;
- The intention of the parties (though not decisive); and
- Analysis of the historical control, integration and fundamental tests

[6] In applying these tests to the parties' factual matrix I am required to consider all relevant matters, including anything which may indicate the intention of the parties, though any statement by the parties describing the relationship is not determinative. The operation of the relationship in practise is to be assessed.

### **(i) the terms and conditions agreed by the parties**

[7] Mr Pillay's association with Radius Security commenced in early 2007. He was engaged by a recruitment agency for six months to provide accounting services to Radius. He was paid by the recruitment agency which invoiced Radius for work performed by Mr Pillay.

[8] In about June Mr Pillay and Radius agreed that he would provide accounting services directly to the business. In his oral evidence to the Authority Mr Pillay said he discussed this change with the then chief financial office who asked him whether he wished to invoice Radius or deduct 8% holiday pay. Mr Pillay replied he would invoice Radius directly. He continued to operate from the position description he had received from the recruiting agency.

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<sup>1</sup> Section 6(2) Employment Relations Act 2000

<sup>2</sup> *Smith v Practical Plastics Ltd* [1998] 1 ERNZ 323

<sup>3</sup> *Bryson v Three Foot Six Ltd* [2005] 3 ERNZ 729 (SC)

[9] Mr Pillay says he became an employee of Radius at this time. He was part of the business; his duties and performance were closely monitored and assessed by the chief financial officer.

[10] In October the business was reorganised and some staff were made redundant. The chief financial officer left the business in December. Mr Pillay's duties changed as a consequence and he initiated renegotiation of his remuneration. Mr Pillay reached agreement with Mike Moran, the newly appointed acting general manager. The terms of that agreement were that Mr Moran would draft a written agreement for the parties, the term of the agreement would be 6 months and Mr Pillay's daily rate would be \$480 plus GST.

[11] On 24 December Mr Pillay was offered a written agreement titled *Contract of Engagement for Professional Accounting Services*. The parties executed this document three days later, the terms of which governed their relationship until its end in March 2008.

**(ii) the intention of the parties**

[12] For the first five months of Mr Pillay's engagement with Radius he was an independent contractor. For the next phase of his engagement (June – December 2007) the intention of the parties was also that he was an independent contractor. From then until March the parties operated under a written agreement which described Mr Pillay was a *contractor*.

[13] I find the intention of the parties was that Mr Pillay was to be an independent contractor.

**(iii) control test**

[14] This involves *an assessment of the manner in which the person providing the work exercises and assumes supervision and control over the person performing it*.

*The greater the level of control the more likely the Court will be prepared to find that a contract for services exists<sup>4</sup>.*

[15] The written agreement entered by the parties specified the place of work and the responsibilities and duties of the role were set out in a position description attached to that document. Radius provided all tools, equipment and materials necessary for Mr Pillay to perform those duties. Mr Pillay reported to Mr Moran and was accountable to him for the effective discharge of his duties. Radius provided the work Mr Pillay performed. I find Radius exercised a high level of control over Mr Pillay.

**(iv) integration test**

[16] With this test the Authority must consider whether Mr Pillay was employed as part of the business and whether his work was an integral part of that business; this can be contrasted with a contract for services where the work is accessory to the operation of the business rather than integral.

[17] I find Mr Pillay's work was fully integrated into Radius'. His position description provided that he had supervising and functional relationships with staff. He reported on a daily basis to Mr Moran who had oversight of his performance. He performed his work at Radius' premises and, on a day-to-day basis, was treated no differently from employees.

**(v) fundamental test**

[18] The fundamental test asks the question – is this person in business of their own account?

[19] Mr Pillay was registered for GST and that registration was noted on the invoices he tendered to Radius for payment. On Mr Pillay's evidence he elected to be treated in this manner in June 2007 and renegotiated the terms of his continued engagement on the same basis later that year.

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<sup>4</sup> Clark v Northland Hunt Inc, AC 66/06, 27 November 2006, Perkins J

[20] Mr Pillay is an accountant of some year's experience. I am satisfied, given the evidence of his work experience and professional expertise, that he understood the difference between a contract for services and of services. He elected to remain a contractor in June 2007 because, as he told the Authority, he considered that status would provide greater protection in the uncertain times ahead. Mr Pillay then confirmed his election in entering a written agreement later that year.

[21] Mr Pillay's professional expertise is an element of this employment relationship problem which requires particular weight to be given it and, I find, outweighs my findings regarding control and integration. I conclude that he was a person in business of his own account during his engagement with Radius and that the real nature of the relationship was that of an independent contractor.

### **Costs**

[22] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then leave is granted to request a timetable be set for the filing of such within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority