

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 128/08
5095470

BETWEEN STEPHEN READING
Applicant

AND CIVIL ENGINEERING
SOLUTIONS LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: John Peebles for Applicant
Rose Alchin for Respondent

Investigation Meeting: 30 January 2008 at Hamilton

Submissions Received: No submissions from Applicant
18 February 2008 from Respondent

Determination: 3 April 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Reading claims he was employed by Civil Engineering Solutions Ltd ("CESL") and says he was never paid for his time worked throughout his employment and claims arrears of wages and outstanding holiday pay. He also claims he was unjustifiably dismissed.

[2] CESL denies Mr Reading was an employee. Rather CESL says Mr Reading was in fact a partner in the business whereby it was agreed that he and Mr Whitton, a Director and shareholder, would work in the business for no remuneration, but would take a profit share each once the company began to show a profit.

[3] There are three issues to be determined, the final two issues will only require determination if I find in favour of the applicant on the first issue:

- What was the real nature of the relationship between the parties?
- What sums were owing to the applicant upon termination of the agreement?

- Was the applicant unjustifiably dismissed?

What was the real nature of the relationship between the parties?

[4] The nature of employment relationships is governed by section 6 of the Employment Relations Act 2000. The issue for the Authority is whether the evidence establishes the existence of a contract of or for services, when it is viewed in its totality (see *Smith v Practical Plastics Ltd*, [1998] 1 ERNZ 323).

[5] The tests applicable to establishing the real nature of the relationship include consideration of:

- Analysis of the terms and conditions which the parties have agreed to;
- The intention of the parties – although this is not decisive;
- Analysis of the historical control, integration tests and the fundamental test (which examines whether a person is performing the services on their own account); and
- Industry practice.

(*Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114; *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585; *Bryson v Three Foot Six* [2003] 1 ERNZ 581 (EC) and *Bryson v Three Foot Six* [2005] 3 NZLR 729 (SC)).

[6] Mr Reading worked for a company called Dryland Developments Ltd at the same time as Mr Whitton worked there. Dryland Developments Ltd went into receivership. Mr Whitton and Mr Reading started discussing what they could do as they were both facing the prospect of unemployment. Mr Reading invited Mr Whitton to his place for a barbecue to continue the discussions.

[7] During the barbecue the two men discussed starting up Civil Engineering Solutions Limited (“CESL”). With the mix of skills the two men would bring to the business they felt they had a fair chance of making the business successful.

[8] When it came to discussions about setting up the company, Mr Reading made it clear from the start that he did not want to be a director. Mr Reading and Mr Whitton decided that Mr Reading’s life partner, Ms Wanda Dudek, would become a director with Mr Whitton instead of Mr Reading.

[9] Mr Reading says he didn’t want to become a Director because of outstanding issues with the Inland Revenue Department (“IRD”). Mr Reading says IRD claimed he owed \$22,000 in back child support payments and they wanted to know what his earnings would be for the ensuing 12 month period.

[10] Mr Reading says he told IRD that he had just started with a new company which was being set up between Mr Whitton and Ms Dudek. Mr Reading says IRD gave him three months grace due to him not earning any income. At

the time Mr Reading had just left Dryland Developments Ltd after it had gone into receivership.

[11] Mr Reading also told me that one of the reasons he didn't want to be a director was that if he was a director, he would not be able to provide IRD with an estimated income figure.

[12] This evidence contradicts Mr Reading's further evidence that the arrangement he had with Mr Whitton in February 2007, was that he would be paid on the basis of \$20.00 per hour for 50 hours each week thereby receiving \$1,000 per week.

[13] If Mr Reading and Mr Whitton did have such an agreement about the payment of wages to Mr Reading, then Mr Reading was in a very good position to advise IRD that his income was likely to be \$52,000 per annum.

[14] Mr Whitton told me, and I have no reason to doubt his evidence, that he had only met Ms Dudek one other time before the barbeque but he had no problem, if Mr Reading wasn't able to be a Director, to allow Ms Dudek to be named as a Director even though the true partnership was with Mr Reading.

[15] Neither Mr Reading nor Ms Dudek made any capital investment into the company. The company started from a positive position of already having secured clients for which the company would undertake work. Mr Whitton had purchased a vehicle which was registered in the company's name.

[16] From the outset Ms Dudek took on the administration function which involved paying wages and doing the banking for which Ms Dudek was paid wages. The decision to pay Ms Dudek wages for her contribution to the banking and payroll was made by both Mr Reading and Mr Whitton.

[17] Ms Dudek confirmed Mr Reading and Mr Whitton were both working in the business on equal terms and that neither was paid wages. This evidence is supports the evidence of Mr Whitton, who told me that he and Mr Reading agreed as partners, to jointly forgo any remuneration until the business was on a more positive financial footing.

[18] It was common ground at the investigation meeting that Mr Reading and Mr Whitton were equally responsible for obtaining future work.

[19] Mr Norman Higgins, the owner of Higgins Panel and Paint, says Mr Reading introduced himself as Steve Whitton's business partner. A fact later confirmed by Mr Whitton.

[20] With regard to his knowledge of the workings of the business, initially Mr Reading told me he had no real knowledge of the banking facilities or access to the cheque books. He said if he needed anything he had to ring Ms Dudek who would raise a cheque for him. That evidence was then contradicted when Mr Reading accepted there were butts in the cheque book which were in his handwriting. He told me at that point that he had only completed the butts and did not write out any cheques. Eventually however, and after questioning during the investigation meeting, Mr Reading conceded that he had indeed written some cheques out.

[21] One of the cheques written out in Mr Reading's handwriting was made out to the value of \$2,000. The cheque was made out to cash. There is no record of who cashed the cheque, or for what purpose it was written. I understand this is currently under investigation by the Respondent.

[22] With regard to the agreement to forgo payment, Mr Reading and Mr Whitton both told me they agreed from the outset that any outlay incurred by either of them would be reimbursed from company profits. In line with that agreement Mr Reading received reimbursement for expenses he had paid out. On occasions Mr Reading and Mr Whitton would use their own money to pay for day to day expenses. Mr Reading acknowledged at the investigation meeting that waged staff did not do this and they were not expected to.

[23] The distribution of incoming work was done by both Mr Reading and Mr Whitton together and employees would go to either man to seek instructions on work to be undertaken. I am satisfied employees reported to both Mr Reading and Mr Whitton equally. Likewise, Mr Reading and Mr Whitton would discuss and agree about the engagement of any new employee.

[24] All staff employed by CESL were required to complete time sheets. Mr Reading and Mr Whitton were not required to account for their time. Indeed, consistent with him being more than an employee in the business, Mr Reading was free to come and go as he wished.

[25] Co-incidentally, one week before Mr Reading ended the relationship with Mr Whitton, Mr Whitton had approached him seeking an injection of capital funds so that the business could pay bills which were due for payment. Mr Reading told Mr Whitton that he was not a Director and had no cash and therefore could not contribute.

[26] Mr Whitton says Mr Reading became abusive in that meeting and enquired about how the partnership would be affected. Mr Whitton suggested

they review the share ratio and modify it according to the value contributed by each partner. Mr Whitton had previously contributed \$45,000.

[27] No further discussions took place as Mr Whitton was unable to make any contact with Ms Dudek or Mr Reading. Eventually Mr Whitton paid Ms Dudek for her shareholding and is now the only director and shareholder of the business.

Conclusions

[28] While Ms Dudek is named as a director and shareholder of the company, I am satisfied the true situation was that Ms Dudek's involvement was in name only. Ms Dudek was not involved in any of the important company decisions (indeed Ms Dudek's own evidence was that she was unhappy that Mr Reading and Mr Whitton did not involve her in important discussions).

[29] I am satisfied that at the commencement of CESL both Mr Reading and Mr Whitton were intending for their relationship to be as equal partners within the business, with equal decision making responsibilities, albeit for Mr Reading's convenience, Ms Dudek was named as a Director and shareholder.

[30] Mr Reading did not contribute any capital to the company. Mr Reading was clear in his oral evidence that he was responsible for getting out and establishing new business. He was expecting to share in the profits of the business. In this way Mr Reading saw himself as profiting from his input.

[31] Neither Mr Reading nor Mr Whitton received payment for the time they put into growing the business, unlike Ms Dudek who received wages for the hours she spent working for the company. Ms Dudek gave evidence as to the arrangement between Mr Whitton and Mr Reading with regards to Mr Reading salary. However, I have treated Ms Dudek's evidence with caution. Initially she was unable to tell me how she knew about the arrangement, but later could recall with clarity that Mr Reading had told her. Ms Dudek, had control of the payroll. If she truly believed at any time during Mr Reading's association with CESL that Mr Reading was an employee, it was open for her to include him in the payroll. She did not do this.

[32] I am satisfied that it was agreed both Mr Reading and Mr Whitton would forego any payment for their efforts until such time as the company was on a more positive financial footing. I am also satisfied that the positive financial footing has yet to be achieved. The evidence shows that Mr Whitton continues to work for no reward in the business.

[33] Mr Reading was not subject to any of the normal controls of being an employee. He was not required to complete time sheets, he was free to come and go as he wished, and he held himself to be the "boss". The evidence on these points strongly suggests Mr Reading was something other than an employee.

[34] Further, I have accepted Mr Higgin's evidence that Mr Reading had held himself out to be a business partner of Mr Whitton. Mr Higgins had nothing to gain from giving his evidence which was uncontested.

[35] Standing back and considering the evidence objectively, I am satisfied that in practice, the parties conducted themselves as if Mr Reading and Mr Whitton were an equal partners in the business and that that was the intention of the parties at the inception. This conclusion is supported by the evidence which shows Mr Reading had considerable discretion to make decisions affecting the work of employees. He also had significant autonomy in undertaking his duties, and Mr Reading took no sick leave or holiday pay. That situation prevailed throughout Mr Reading's relationship with CESL.

[36] I find that the relationship, both at its inception and at its termination, was one of a contract for service and not a contract of service. In other words Mr Reading was not an employee. I therefore have no jurisdiction to determine the other matters before me.

[37] Costs

[38] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority