

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 123/08
5125269

BETWEEN

MARCO ROMAGNOLI
Applicant

AND

JAMES ADAIR HANNA
Respondent

Member of Authority: Philip Cheyne

Representatives: Simon Gaines, Counsel for Applicant
Mr Hanna in person

Investigation Meeting: 8 August 2008 at Blenheim

Further information: 15 August 2008 from the Applicant
15 August 2008 and 19 August 2008 from the Respondent

Determination: 21 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] James Adair Hanna is the sole trustee and beneficiary of a private trust called Eastwest Pacific Trust. That trust apparently owns an architecture business in Blenheim called Design Internationale. Marco Romagnoli is a young Swiss-qualified architect but he is not qualified in New Zealand to practice as an architect. Mr Hanna engaged Mr Romagnoli as a draughtsman and Mr Romagnoli worked in that role with Design Internationale for some time before terminating the relationship. By lodging a statement of problem Mr Romagnoli seeks to recover arrears of wages that he says are owed under a signed employment agreement. Mr Hanna however says that the relationship was always a contract for services and the signed employment agreement was never intended to be operative.

[2] Mr Hanna also raises some issues by way of counter-claim.

[3] To resolve the problem I will review the evidence about the formation of the relationship and apply the law to identify its real nature. I will then deal with the counter-claim issues. First I should say something about the investigation process.

Investigation

[4] At the investigation meeting Mr Hanna objected to it continuing because he was not legally represented. He suggested that an Authority support officer had caused him to think that the meeting was solely for procedural arrangements. My inquiry of the Authority support officer does not support Mr Hanna's contention that he was misled. In any event, documents served on Mr Hanna made the process perfectly clear.

[5] Statements of problem and reply were lodged on 26 May 2008 and 5 June 2008 respectively. This resulted in a referral to mediation but the matter was not resolved. Counsel for Mr Romagnoli wrote to the Authority asking for an investigation meeting date to be set. The Authority served that letter on Mr Hanna and attempted but was unable to arrange a phone conference. At my direction a date was set for an investigation meeting and the notice of meeting was served on Mr Hanna on 30 July 2008. As a result the matter ended up with an investigation meeting more quickly than is normally the case at present. That arose from a communication from counsel that was shared with Mr Hanna coinciding with a date coming free because an unrelated matter was resolved and withdrawn.

[6] Mr Hanna could have sought legal advice anytime after late May 2008 but elected not to. There is nothing ambiguous about the notice of meeting so Mr Hanna had a week to engage counsel to appear. It was too late at the beginning of the investigation meeting to use a wish to appoint counsel as an excuse for not proceeding.

[7] Mr Hanna told me that he did not have access to a number of business records which were apparently lost as a result of a break-in. However he said that his accountant could supply relevant information. I therefore gave both parties the opportunity to provide any further information by no later than Friday 15 August 2008, a timeframe both agreed to. I have received some material from counsel for Mr Romagnoli directed at quantification issues. There is also correspondence from K & J

Consultants 2007 Limited in response to Mr Hanna's request to his accountant and some further correspondence from Mr Hanna.

[8] As will be explained, K & J Consultants 2007 Limited were also Mr Romagnoli's accountants. Because of that they have taken the position that his consent is needed before they can provide substantive responses to most of the issues raised by Mr Hanna. However, I am not convinced that they can help further so I will proceed to determine the matter.

Formation of the relationship

[9] Mr Romagnoli is an Italian national who visited New Zealand. He met Mr Hanna who offered him work with Design Internationale. There is a signed written agreement dated 21 April 2005 headed *Labour Contract*. It purports to create an independent contractor relationship between Mr Romagnoli and Design Internationale Ltd. There is no registered company called Design Internationale Ltd and Mr Hanna told me that this was simply a mistake. It must be his mistake because he drafted the *Labour Contract*.

[10] Having received the offer of work, Mr Romagnoli applied for a work permit but the application was rejected because the job offer as an independent contractor was regarded as self employment and fell outside Immigration Service policy. The rejection was conveyed by letter dated 16 May 2005. That caused some discussion between Mr Romagnoli and Mr Hanna. As a result Mr Romagnoli and Eastwest Pacific Trust concluded a new agreement which was signed on 19 May 2005. It is this agreement that Mr Romagnoli now seeks to enforce against Mr Hanna as trustee. Based on this agreement Mr Romagnoli was granted a work permit on 13 June 2005.

Real nature of the relationship

[11] Mr Hanna does not dispute that the 19 May 2005 agreement creates a legal relationship of employer and employee. He simply says that there was a wholly oral arrangement between him and Mr Romagnoli at the time that the 19 May 2005 agreement would never govern their relationship which would remain a contract for services as purportedly established by the 21 April 2005 contract.

[12] I will put to one side for the moment both signed documents.

[13] The only indications of self employment relate to tax. During the engagement Mr Romagnoli received GST from Design Internationale and complied with the usual GST obligations. There are invoices between Mr Romagnoli and Design Internationale that Mr Hanna generated. Design Internationale did not deduct PAYE and Mr Romagnoli filed tax returns and paid ACC levies directly. All this was arranged for Mr Romagnoli by Mr Hanna through the accountants used by Eastwest Pacific Trust, K & J Consultants Limited. Curiously there is a letter dated 10 June 2005 from K & J Consultants Limited to the Immigration Service in support of Mr Romagnoli's work permit application saying *The Trust is desirous of employing Mr Romagnoli as an Architect and can offer him full time employment on a permanent basis undertaking such work.* Despite that, Mr Romagnoli's tax affairs were dealt with as if he was self-employed.

[14] In every other respect the relationship was that of employer and employee. Mr Hanna supervised Mr Romagnoli's work. The work was done for Design Internationale's clients. Mr Romagnoli was paid a percentage of the sum invoiced to and paid by Design Internationale's clients in respect of his work. Mr Romagnoli introduced several prospective clients to Design Internationale rather than working for them himself. Principally, work was performed at Design Internationale's business premises using its equipment and resources. Overall, Mr Romagnoli was working in and for Design Internationale's business and was not operating his own business. In the absence of a written agreement Mr Romagnoli would clearly be classified as an employee.

[15] The 19 May 2005 agreement says *Each party acknowledges that this agreement contains the whole and entire agreement between the parties as to the subject matter of this agreement.* It also stipulates that variations must be in writing and signed by both parties to be effective or binding. The agreement also says that it shall commence *upon employee obtaining a Work/Visa Permit from the NZ Govt.* That is a reference to the rejection of a work permit based on the 21 April 2005 *Labour Contract* due to the Immigration Service policy allowing work permits only for employment. By its terms and in context the 19 May 2005 agreement superseded the 21 April 2005 *Labour Contract*.

[16] Mr Hanna whether as trustee or in his personal capacity is bound by his signature to the terms of the 19 May 2005 agreement. The terms of this agreement

and the relationship in practice mean that the legal relationship between Mr Hanna and Mr Romagnoli was that of employer and employee.

[17] Even if there was some basis for looking beyond the terms of the written employment agreement I do not accept Mr Hanna's evidence of an oral arrangement not to be bound by the written employment agreement. He did not impress as a reliable witness.

[18] Finally, if it was necessary to do so I would find that the 21 April 2005 *Labour Contract* purporting to create a contract for services was inconsistent with the real nature of the relationship which was always that of employer and employee. As explained above, Mr Romagnoli never operated a business on his own account. He always worked for Mr Hanna.

Counter-claims

[19] There are four separate claims totalling \$48,600.00 based on losses said to have been caused by Mr Romagnoli's failure to perform his work properly. It is not necessary to detail the separate claims. If I assume that Mr Romagnoli was at fault as claimed, any losses are not recoverable against him. His work was always supervised and signed off by Mr Hanna because he could not practice as an architect in New Zealand.

[20] There is also a counter-claim for \$8,800.00 being the cost of food and accommodation provided to Mr Romagnoli during the early part of the employment. As counsel for Mr Romagnoli observed, Mr Hanna and his wife gifted food and accommodation at the time and there was never expectation of any later accounting or charge.

[21] None of Mr Hanna's counter-claims have any merit.

Arrears

[22] The start date for calculating arrears of salary at the rate of \$50,000.00 per annum is 13 June 2005. Mr Romagnoli through his solicitor resigned on 2 November 2007.

[23] Mr Romagnoli was absent from New Zealand as follows: 18 December 2005 – 18 January 2006; 20 July 2006 – 1 August 2006; 3 October 2006 – 14 October 2006;

and 20 August 2007 and 22 October 2007. All these absences were with Mr Hanna's approval. I will treat them as paid leave to the extent of Mr Romagnoli's entitlement to annual holidays.

[24] Mr Romagnoli's work was generally done Monday to Friday. The usual statutory holidays were observed. The employment agreement provided for full-time employment being 40 hours work over five days per week with the salary paid monthly at a rate of \$4,166.67. Employment between 13 June 2005 to 2 November 2007 amounts to 28 complete months plus 18 days in June 2005 and 2 days in November 2007. If he had worked throughout Mr Romagnoli should have been paid \$119,444.54 gross for this period.

[25] Mr Romagnoli was entitled to 7 weeks annual leave (35 working days) and proportionate holiday pay on earnings from 13 June 2007 until 2 November 2007. Mr Romagnoli took leave between 18 December 2005 and 18 January 2006 (20 working days), 20 July 2006 and 1 August 2006 (9 working days), 3 October 2006 and 14 October 2006 (9 working days) and 20 August 2007 and 22 October 2007 (45 working days). That is a total of 83 working days. The October 2006 absence related to bereavement so 3 days must be regarded as bereavement leave. The August 2007 absence was for surgery and Mr Romagnoli was entitled to paid sick leave by that time of 10 days. That leaves a total of 70 days leave taken against an entitlement of 35 days, so Mr Romagnoli must be regarded as having taken 35 days annual leave in advance. His relevant daily pay was \$192.31 so he was paid \$6,730.85 holiday pay in advance. Against that \$1,555.56 must be offset as his entitlement to proportionate holiday pay at termination leaving a balance of \$5,175.29 additional holiday pay. Taking account of leave due and given in advance, Mr Romagnoli should have received \$114,269.25 in salary.

[26] Mr Romagnoli received payments totalling \$52,889.83. That figure includes the GST component of the payments made by Design Internationale to Mr Romagnoli. That leaves a balance owing of \$61,379.42. Mr Romagnoli's claim as detailed during the investigation meeting is for arrears of \$59,610.17. I am satisfied that he is owed at least that amount.

Orders

[27] Mr Hanna is to pay to Mr Romagnoli the sum of \$59,610.17 (gross) pursuant to section 131 of the Employment Relations Act 2000.

[28] There is a claim for interest. I order Mr Hanna to pay interest on \$59,610.17 at the rate of 9% per annum commencing on 2 November 2007 until the arrears are paid in full.

[29] There is a claim for costs. Mr Romagnoli is entitled to costs having been completely successful. The investigation meeting took less than half a day in part due to the well presented case for Mr Romagnoli. An appropriate award of costs on a contribution basis is \$1,500.00 plus \$70.00 for the lodgement fee. I order Mr Hanna to pay costs of \$1570.00.

Philip Cheyne
Member of the Employment Relations Authority