IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 68/08
5101911

	BETWEEN	TERRY SAGE Applicant
	AND	N.Z. UNDERWATER ASSN Inc. Respondent

Member of Authority:	James Wilson
Representatives:	Tony Savage for the applicant Jenni-Maree Trotman for the respondent
Investigation Meeting:	Determined on the papers
Submissions received:	16 November 2007 from the applicant 27 November 2007 from the respondent
Determination:	29 February 2008

DETERMINATION OF THE AUTHORITY

The preliminary issue to be determined

[1] In October 2007 the applicant, Mr Terry Sage, filed a statement of problem with the Authority alleging that he had been constructively dismissed by the respondent, the New Zealand Underwater Association (NZUA), and seeking *outstanding monies owing,* unpaid annual holiday pay and compensation for being unjustifiably, constructively dismissed,. In a statement in reply NZUA said that Mr Sage was not an employee of NZUA and that the Authority therefore had no jurisdiction to investigate his problem.

[2] During a telephone conference with the party's representatives it was agreed that I should determine whether or not Mr Sage was an employee of NZUA as a

preliminary matter. During that conference it was also agreed that the parties would file submissions in respect to this preliminary matter and that I would determine the issue on the papers. Regrettably it has taken somewhat longer than I had anticipated to issue my determination in this matter and I apologise to the parties for this delay and any inconvenience this may have caused.

Background

[3] In July 2004 the parties executed a document which was entitled *Individual Employment Agreement.* This document was an agreement between NZUA as *the employer* and Terry Sage as *the employee.* This document appears to be based on a standard individual employment agreement (IEA) template. It includes the usual employment agreement headings including term, hours of work, salary, holidays, provisions relating to termination of employment including redundancy pay, a restraint of trade clause and a procedure for dealing with personal grievances and disputes. However there are a number of sections which are worded somewhat differently than would normally be expected in an IEA including:

3. Hours of work.
3.1 The hours of work shall be flexible but average 20 hours per week or as required to complete tasks within the necessary timeframe.

4. Salary.
4.1 The employee shall be paid an hourly contract rate of $45.00 per hour plus GST.
4.2 the salary shall be paid on remittance of an invoice at the end of each month.

6. Annual holidays.
6.1 No provision for annual holidays are included as the employee is employed as a contractor.

7. Public holidays.
7.1 No provision for public holidays are included as the employee is employed as a contractor.

8. Parental leave.
8.1 No provisions for parental leave are included as the employee is employed as a contractor.

Curiously in the light of these clauses the "contract" provides that:
The employee shall be entitled to five days special/sick leave in accordance with section 30A of the Holidays Act 1991.

[4] Throughout his period of service with NZUA Mr Sage was the sole shareholder and director of a company called Dive Tours New Zealand Limited (subsequently Business Coaching New Zealand Limited). Documents supplied to the Authority indicated that this company, Dive Tours New Zealand, submitted an invoice for Mr Sage's time to NZUA. The NZUA annual statements of financial performance for the years ending February 2005, February 2006 and February 2007 list payments apparently made to Mr Sage as *contractor* (2005 and 2006) and *management fees* in 2007. These same financial statements include separate provision for payment of salaries and wages, presumably to other staff of the Association.

The respective submissions

Mr Sage's arguments

[5] For Mr Sage, Mr Savage points to the individual employment agreement and the nature of the position. He says that Mr Sage was in substance supplying his labour and skills to the position and that the degree of responsibility in that position means that NZUA required the contract to be consistent with one of employment.. Mr Sage says that at no time was this contract suspended or varied. He points to correspondence from NZUA in June 2007 in which is the president of the NZUA appears to acknowledge that Mr Sage was an employee.

[6] Mr Savage says NZUA controlled the hours Mr Sage was to work, Mr Sage could not personally make a profit or loss and the NZUA supplied some of the equipment (cell phone laptop and company car) he used in carrying out his duties.

[7] Mr Savage says that while Mr Sage paid GST on his salary this, of itself is not determinative of Mr Sage's employment status. He says that the fact that payments were made to Dive Tours Ltd was a matter of convenience for Mr Sage and that correspondence from NZUA was always to Mr Sage, not to his company. He says that payments were made to Dive Tours Ltd from 1 July 2004 but the only communication between Dive Tours Ltd and NZUA was by way of the monthly invoice. It accepts that Mr Sage provided services to other parties but points out that his employment was for 20 hours per week only.

NZUA's arguments

[8] For NZUA, Ms Trotman also points to the individual employment agreement, in particular references to a *contract rate* and the statements that *the employee is employed as a contractor* in various clauses. NZUA say that the contract was drafted by Mr Sage that, if necessary, evidence is available to confirm that the parties intentions were that Mr Sage was to be engaged as a contractor and not as an employee. Ms Trotman says that Mr Sage was performing the services to NZUA through his company, Dive Tours New Zealand Limited, that he invoiced NZUA on a monthly basis for these services through his company and that he continued to operate this company throughout the period of his services with NZUA She says that the financial records NZUA where prepared in conjunction with Mr Sage (as business mentor) and indicate that payments were to Mr Sage as a contractor.

[9] Ms Trotman says that Mr Sage's hours of work were flexible and that while the agreement was that the hours would be approximately 20 per week, Mr Sage himself determined what hours he worked, and when they were worked, dependent on his availability. NZUA paid Mr Sage on receipt of an invoice for hours worked each month. This amount was not a fixed sum but would vary from month to month. Mr Sage's work was guided by his advice as business mentor and he worked predominately from the offices of Dive Tours Ltd which were located in Whangarei.

[10] Contrary to Mr Sage's submissions NZUA say that Mr Sage's mobile phone was not provided by them but by Dive Tours Ltd, NZUA cannot recall ever providing a laptop to Mr Sage and his Internet usage was paid by Dive Tours New Zealand Limited. Mr Sage used his own vehicle to travel to and from NZUA offices, he was not provided with an NZUA vehicle and appears to have claimed vehicle expenses through Dive Tours New Zealand Limited. Ms Trotman says that, through his company Dive Tours New Zealand Limited, Mr Sage provided services to other entities.

The Law

[11] Section 6 of the Employment Relations Act (the Act) defines an **employee** as:

> *6 Meaning of employee*
> *(1) In this Act, unless the context otherwise requires, **employee** --*
> *(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
> *(b) …*
> *(c) …*
>
> *(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
>
> *(3) For the purposes of subsection (2), the Court or 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 the relationship.*

Since this legislation was enacted there have been a series of cases which have clarified the courts' interpretation of this section. Notably in *Bryson v Three Foot Six* [2003] 1 ERNZ 581, the judge summarised the following principles as established by earlier cases:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contract or statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be and is ascertained by analysing the tests that have been historically applied such as control, integration, and the "fundamental" test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[12] In *McGreal v Television New Zealand Limited*, (AC3/07 Auckland Employment Court, 5 February 2007) , Judge Perkins observed that *this is not a case where the matter is finely balanced or requires careful analysis of the facts in the context of the legal principles.* After analysing Mr McGreal's case in terms of the control test the integration test and the fundamental (or economic reality) test the judge commented:

> *Several of the authorities referred to the situation where, for the purposes of attaining the benefits of being self-employed such as the substantial tax advantages and independence, plaintiffs are initially happy to be classified as independent contractors. However, they then try to claim the opposite upon termination of engagement to obtain the remedies available for an alleged unjustifiable dismissal: Massey v Crown Life Insurance Co [1978] 2 All ER 576, TNT Worldwide Express (NZ) Ltd v Cunningham [1993] 3 NZLR 681, Hollis v Vabu Pty Ltd [2001] HCA 44. In such cases the courts have expressed reluctance to exceed to anything other than the economic reality.*

Discussion

[13] The main argument to suggest that Mr Sage was an employee of NZUA is the so-called *employment agreement*. However this document is contradictory and in fact seems to have been based on a template drafted originally as an Employment Contract (in terms of the Employment Contracts Act), amended to reflect the Employment Relations Act, and then further amended to encompass those aspects of Mr Sage's engagement more indicative of those of a contractor. Given these contradictions it is hard to place any real weight on the wording of the document as signed. Whatever the intention of the parties when this document was originally signed in July 2004, by February 2005 the NZUA accounts were showing payments to Mr Sage as a contractor.

[14] I do not accept Mr Sage's contention that his hours of work were *controlled* by NZUA or that he was an integral part of the NZUA business. It is clear that, while his hours were intended to average 20 hours a week, the actual hours worked were dependent upon his personal availability. I have no doubt that he was able to adjust his hours to accommodate the requirements of his Company. His place of work also appears to have been flexible -- at times at the NZUA office and at other times from the office of Dive Tours New Zealand Limited in Whangarei.

[15] The *fundamental test* asks the question *was (Mr Sage) in business on his own account*? On balance the answer to this question must be *yes*. It would certainly have been possible for Mr Sage to have been an employee of the NZUA for a period of 20 hours a week and to conduct an entirely separate business on his own behalf. He, presumably with NZUA’s tacit approval, chose not to work in this way. He used the vehicle of his own business to provide his services as a business manager and to charge NZUA for those services by the submission of an invoice. This arrangement included a provision for GST which would of course not be payable had this been an employment relationship. This arrangement allowed Mr Sage to develop his other business interests using the same vehicle (Dive Tours New Zealand) and, I have no doubt obtaining the tax and other benefits flowing from it.

[16] Mr Sage is in business on his own account. He is the sole shareholder and Director of a limited liability company. By the vehicle of that company he "sold" his services to NZUA. He was not an employee of NZUA.

Determination

[17] **Mr Sage was not an employee of the New Zealand Underwater Association and the Authority has no jurisdiction to investigate or determine the dispute between them.**

Costs

[18] Costs are reserved meantime. The parties are urged to resolve this issue between themselves in the first instance. If they are unable to do so NZUA may file and serve submissions in respect costs within 28 days of the date of this determination. Mr Sage will then have 14 days in which to file and serve a response.

James Wilson
Member of the Employment Relations Authority