

[3] CGL says that it intended this contractual relationship to continue while it suited both parties, and for the relationship to change to one of employment once the development phase was completed. It says the parties did not ever progress to the employment relationship stage for a variety of reasons.

[4] The parties agreed in the course of a telephone conference that the Authority should determine Mr Stocker's status as a preliminary issue. The Authority agreed it would make this determination after receiving evidence by way of affidavits, and considering any submissions made by the parties.

Issue

[5] The preliminary issue for the Authority to determine is whether Mr Stocker had a contract for service relationship with CGL or whether he was in a contract of service (i.e. employment) relationship. The answer to that question will determine whether Mr Stocker can progress his personal grievance for unjustifiable dismissal. If Mr Stocker was not in an employment relationship, the Authority has no jurisdiction to consider further the matter of the termination of his relationship with CGL.

The Law

[6] Section 6 of the Employment Relations Act 2000 defines *employee* and provides, at section 6(2), that:

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.

[7] In order to determine the real nature of the relationship the court or 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 their relationship¹.

[8] The leading case in determining the real nature of the relationship is that of the Supreme Court judgment in *Bryson v Three Foot Six Ltd (No 2)*². At page 386 of that

¹ Section 6(3) Employment Relations Act 2000

² [2005] ERNZ, 372

judgment the court held that *all relevant matters* included the written and oral terms of the contract between the parties and the way it operated in practice. It required the court or Authority to *have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test)*.

Evidence and discussion

[9] There was no written employment agreement or contract for services. In the absence of documentation, Mr Stocker points to a number of factors supporting his contention to have been an employee. These include the deductions made for PAYE from his fortnightly pay as well as deductions for a student loan and ACC. He was paid an agreed hourly rate for his work. Mr Stocker provided examples of payslips he received from CGL. These refer to him as an employee and record accrued annual leave. He says he was also compensated for working on public holidays.

[10] CGL provided Mr Stocker with office space and administrative support, full use of a company car, a fuel card, full use of a cellphone, a uniform, a computer and camera. All details of his working conditions and responsibilities were verbal, agreed in discussion with the then company director.

[11] He did not have set hours of work but was able to determine his own schedule and patterns of work. Mr Stocker had several discussions with senior CGL executives about his role in the company to define the nature of both his current and future responsibilities. He says this was because it was a newly established and developing business model. Mr Stocker says he *was part of the company ethos, played a role in its early success and was respected as a valuable team member*.

[12] When Greg Philpott, Chief Executive Officer of CGL, informed Mr Stocker that he no longer had a job, Mr Stocker asked that the decision be provided to him in writing. The letter he received from Mr Philpott was headed *Cessation of engagement*, and referred to the company's precarious financial position and pressing need to *make rapid and radical changes in order to survive*. Part of that had entailed reviewing the company's *people resources*.

[13] The letter noted that there was *some confusion as to the status of our engagement as it appears to sit somewhere between a contractor and a permanent*

part-timer. Despite that confusion, Mr Philpott advised Mr Stocker that his final pay had been prepared *including 8% to cover holiday provision*. He also offered Mr Stocker *on-going independent engagement as a weekend sales consultant*, making it clear that this *would not be construed as any form of permanent employment*.

[14] CGL says Mr Stocker was the only person involved in the early days of the company who did not have an employment agreement. This was due to his being a contractor. It says all genuine employees were engaged on individual employment agreements from day one. The company says an email exchange between it and Mr Stocker before the relationship began supports its view that their mutual intention was for a contracting relationship. Part of that email trail includes the following information from Mr Stocker:

As with any work I do from home I charge \$44.50 per hour, (half the going rate).

[15] Rex Howard was General Manager of CGL at the time Mr Stocker joined the company. His evidence is that he approached Mr Stocker in August 2011 to ask if he would be interested in being involved in the setup of the company. The agreement they reached was for an hourly rate to be paid to Mr Stocker for computer and associated development work, with a different hourly rate being paid for helping get the Car Giant website and related car photography completed.

[16] Mr Howard says that the company's intention was for Mr Stocker ultimately to become an employee who would be responsible for the maintenance of the company's website as well as being the internet sales person. That would be a salaried role with a commission component. Mr Stocker would, at that point, work a 5 day week on a roster basis with other members of the wider sales team.

[17] The company says the relationship did not progress to that point because it became apparent after approximately 4 to 5 months that Mr Stocker *could not commit to a structured working week* due to a combination of personal issues he was undergoing. CGL decided to continue the initial contracting relationship on an *as and when* required basis.

[18] From late January 2012, following the departure from the company of a contractor who had been undertaking photography work for it, CGL says the only function Mr Stocker performed for it was car photography. He chose his hours to suit

himself. Mr Howard says the company attempted to get Mr Stocker into a more structured relationship involving the photography of the cars for the website combined with a commissioned sales role, but that failed. The reason was Mr Stocker's inability or unwillingness to meet the requirements of related to a rostered day as part of the team. His work attendance became more erratic and when the company telephoned his home the response would often be that he was at work. As he was not undertaking work for CGL at those times, the company made the assumption he was undertaking contractual work elsewhere.

[19] Vikki Bushby, who worked for CGL as its Administration Manager, gave evidence of the 2 different hourly rates applicable to different areas of the work Mr Stocker undertook for the company. She said Mr Stocker provided a fortnightly timesheet detailing the different work he had undertaken and specifying the applicable hourly rate for the work.

[20] Ms Bushby referred to a conversation she had had with Mr Stocker around Christmas 2011 regarding Christmas holidays. He had instructed her to pay him for the hours he noted on his timesheets, at his normal hourly pay rate, regardless of what day he worked. This included public holidays. Mr Stocker says he accepted that he was paid well for the work he did and did not need to be compensated for work on weekends or all statutory holidays. He says Ms Bushby was unaware of his employment arrangements with the company, and simply processed his time sheets and pay.

[21] Ms Bushby gave evidence of Mr Stocker's erratic attendance and unreliability with regard to turning up to work at times he had said he would be there. The company says this became more pronounced as the relationship continued.

Intention of the parties

[22] The evidence suggests the parties had a common vision of the work Mr Stocker would undertake, both initially and following completion of CGL's start-up phase. It is not clear that they shared a common intention of the nature of their relationship, particularly at its outset.

[23] I accept that Mr Stocker genuinely believed himself to have been an employee from the start of his relationship with CGL. While he knew his role would evolve, he did not envisage any change to his employment status. Mr Howard thought the initial

relationship would be a contract for service relationship, and that it would change to an employment relationship as Mr Stocker's role evolved.

[24] An email from Mr Howard to Mr Stocker in late August 2011, when they were negotiating terms, refers to the role Mr Howard wanted Mr Stocker to fill : that of internet sales and car presentation on the web. The company was in start-up phase at the time, and people were undertaking many tasks that would not form part of their ordinary duties once it was up and running. Mr Howard noted that:

Apart from cementing you into the role as mentioned, I would like to get you on board sooner to help us build the infrastructure both in terms of your own role, but also in a more general manner.

[25] Mr Howard's email went on to delineate some of the more general areas in which he wanted Mr Stocker's input, including website liaison and completion, phone system set up, and social media sites. He asked Mr Stocker to think about what he was offering and noted that the company could put him on the payroll immediately. He sought Mr Stocker's thoughts on how the company should pay him, asking:

hourly rate prior to the 'real role' starting?

[26] Mr Stocker's response was that he had a clear vision of what needed to be done *both as a) initial set-up and b) the transition to the final role*, noting that it was timely to concentrate on the initial set-up at that point. In response to the question about how the company should pay him, Mr Stocker cited his hourly rate.

[27] I infer from the email correspondence that it was likely that the basis of Mr Stocker's remuneration would change once the establishment phase of the company was complete and he was fully performing the role Mr Howard intended for him. However, that did not affect the intention of the parties at the outset of the relationship which I find was that Mr Stocker would be an employee of CGL.

Control

[28] CGL says that Mr Stocker controlled how and when the activity he was involved in was done. He determined his own schedule and patterns of work. This, in the company's view, points to a contracting relationship rather than one of employment.

[29] Mr Stocker says the company did not ever question his work patterns and that CGL's Chief Executive Officer frequently worked late at night with him, following a similar schedule of work to establish the basis of the company's business model. The company was aware of his difficult family circumstances at the time which impacted on the hours he worked, and was happy to accommodate his undertaking work when he could. No issue had ever been taken with him over his timekeeping.

[30] The evidence is inconclusive on the issue of control. It seems that the work was controlled by CGL, but with significant flexibility over the hours in which it was performed. In this instance the level of control is not determinative of the type of relationship entered into by the parties.

Integration

[31] Mr Stocker maintains the work he performed for CGL was germane to the company's core business and was to be the point of difference in the way it sold cars. His duties included the setting up, launching and maintaining of the internet-based advertising of the company's vehicles.

[32] CGL disagrees and says Mr Stocker's work was an accessory to the business, rather than being germane to it. The company used a number of contractors in the set up phase of the business for activities that were not central to the core business of selling cars.

[33] The company points to Mr Stocker's hours of work, which it says were mostly outside the public opening hours of the business, to support its contention that his work was not integrated into the business.

[34] I disagree and find that the work Mr Stocker performed was central to the work the company was performing at the time it was establishing itself. The role was intended to change over time from one with more generalised duties to one that was focussed predominantly on internet sales and car presentation on the web. That change was anticipated at the outset of the relationship. I also find that CGL's provision to Mr Stocker of a company vehicle, phone, office, uniform and other equipment supports the finding that he was an integral member of the organisation.

Fundamental test

[35] The question from this test is whether Mr Stocker was in business on his own account. CGL say he was. The company assumed, seemingly on the basis of difficulties it had in contacting Mr Stocker by telephone sometimes, that he was undertaking work for other clients. Mr Stocker provided evidence from Inland Revenue that his only earnings between September 2011 and May 2012 were from CGL.

[36] The fact that Mr Stocker was paid through the company payroll system with CGL deducting PAYE, ACC and student loan repayments supports a finding that there is no evidence of him being in business on his own account.

Determination

[37] After considering the intention of the parties, and the application of the usual tests, I find that Mr Stocker was employed by Car Giant Limited.

Costs

[38] Costs are reserved.

Trish MacKinnon
Member of the Employment Relations Authority.