

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Annie Sullivan (Applicant)
AND Eagle Print Limited (Respondent)
REPRESENTATIVES Brian Spong, Advocate for Applicant
Robert Hucker, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 14 September 2004
FURTHER INFORMATION AND SUBMISSIONS RECEIVED 29 October 2004, 1 March, 6 May, 1, 24 and 27 June 2005
DATE OF DETERMINATION 4 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination deals only with the preliminary issue of whether Ms Sullivan was an employee or independent contractor for Eagle Print Limited (“Eagle Print”).

Background

[2] In October 2002 Ms Sullivan, trading under the name Jatcom, entered a heads of agreement with Litho Tech Limited Imaging Limited (“Lithotech”) to provide print brokering services. There is no dispute between the parties that Ms Sullivan’s relationship with Jatcom was one of an independent contractor.

[3] At about this time Lithotech bought another print business called Eagle Print. Eagle Print remained a separate company to Lithotech though they shared directors and shareholders. After purchase it became apparent Eagle Print needed some administrative support to operate its accounting software package. Ms Sullivan provided this service from February 2003. The terms of engagement were not put in writing. Eagle Print says the heads of agreement entered with Lithotech carried over to Eagle Print. There was no evidence this was expressly agreed between the parties.

[4] After about a month of providing administrative support to Eagle Print it was agreed Ms Sullivan would move from the Lithotech offices, where she had a work station set up, to the Eagle Print offices. She took all her files and Eagle Print provided all the equipment necessary to set up a work station. No new heads of agreement was entered between Eagle Print and Ms Sullivan. Ms Sullivan invoiced her remaining Lithotech work from the Eagle Print offices.

[5] In March 2003 Ms Sullivan, under the name Jatcom, issued the first invoice to Eagle Print for work performed over the preceding month. The invoice is for 11 hours of consultancy services provided for the period 24 – 28 February at the rate of \$30 per hour plus GST.

[6] Ms Sullivan became registered for GST in August 2002 and continued to be so through her engagement with Lithotech and Eagle Print. While engaged by Lithotech and Eagle Print Ms Sullivan's accountant, on her behalf, filed monthly GST returns and annual tax returns in relation to this income and paid her ACC levy. GST schedules provided to the Authority show Ms Sullivan claimed GST back on expenses during this period. She says these expenses relate to her rental property, the income from which is declared in the same tax return. The working papers, which would show what the expenses relate to, have not been provided and the tax schedule, to which the list of expenses claimed are attached, declares Ms Sullivan's occupation as print broker.

[7] In April 2003 Ms Sullivan meet with the directors of Eagle Print. She says they agreed she would receive a base salary of \$30,000 per annum plus 5% commission on any print work she brought in. Wayne Lawrence, a director of Eagle Print was present at this meeting. He says Jatcom was offered a monthly base of 80 hours per month at \$30 per hour plus GST to provide administration services and that the remainder of the time was available to Jatcom to continue servicing its client base. Ms Sullivan's invoices from this period have been provided to the Authority and reflect exactly the terms advised by Mr Lawrence in his evidence. I find it is more likely than not that these were the terms agreed upon by Ms Sullivan and Eagle Print in April 2003.

[8] At about this time Mr Lawrence gave Ms Sullivan a document entitled "Eagle Print Limited Contract Description" which sets out a list of duties and responsibilities for a position title of "Estimator and Account Manager" reporting to the Managing Director. They discussed this document and Ms Sullivan agreed the list of duties and responsibilities was acceptable to her. Mr Lawrence said the document was produced as part of the due diligence process for the purchase of Eagle Print and was provided to Ms Sullivan as an outline of what was expected from Jatcom. The document was not signed by the parties.

[9] In addition to the administration support duties Ms Sullivan continued to provide print brokering services for existing clients of Eagle Print (described as a "home client") and new clients she brought to Eagle Print. Mr Lawrence says in relation to the print brokering work Ms Sullivan was not required to give personal service.

[10] Mr Lawrence gave unchallenged evidence that the use of print brokers was a usual industry practise.

[11] Ms Sullivan used her own car and cell-phone in carrying out work for Eagle Print. She said if she brought in work for a home client and had had to use her car or cell-phone she would charge Eagle Print a 5% commission on that work to cover those expenses she had incurred.

[12] Ms Sullivan continued to invoice the agreed monthly amount even if she did not attend Eagle Print on a public holiday or was away sick. These absences were not detailed on the invoice. The parties did not discuss payment for sick leave, annual leave or public holidays.

[13] Ms Sullivan initiated several discussions with Eagle Print regarding concerns her accountant had raised with her about the possible tax implications of invoicing only one client. Ms Sullivan said her accountant had told her she could be viewed as an employee if she only invoiced one company. Mr Lawrence said he recalled Ms Sullivan raising this as an issue at the beginning of the relationship with Lithotech and again with Eagle Print. Ms Sullivan said Eagle Print suggested she split Jatcom's invoicing between Lithotech and Eagle Print to overcome this difficulty but she told

them, on the advice of her accountant, this would not work because the two companies shared directors.

[14] From mid-June to mid-July 2003 Martin White, Eagle Print's managing director, was absent on annual leave. Ms Sullivan agreed to increase her duties while he was away and an increase in the base amount to be invoiced was negotiated and agreed. In fulfilment of these expanded duties Ms Sullivan was asked to start at 8.30am and remain until 6pm to lock up the premises. She had keys and was given the security code to the building. Ms Sullivan attended a management meeting every morning with the production manager and a director, Ed Gibson, who had stepped in to cover during Mr White's absence. Ms Sullivan said during this period she was only performing work for Eagle Print because she was too busy in that role to develop other print broking clients. Mr Lawrence said Ms Sullivan was never required to work exclusively for Eagle Print.

[15] Over the period of Mr White's absence, Mr Gibson conducted a review of Eagle Print. As a result he came to Ms Sullivan with a suggestion that she become an employee. Ms Sullivan said she was chuffed with the proposal, readily agreed to it and expected Mr Gibson to come back to her with an offer. When no offer was forthcoming she approached him again and he said he was working on it.

[16] Mr Gibson said Ms Sullivan reacted positively to the suggestion but said that she would have to discuss it with her accountant. Mr Gibson said he spoke with Ms Sullivan about a week later, that she had not yet spoken to her accountant and he took it no further. The parties agreed no terms and conditions were discussed or remuneration.

[17] Eagle Print ended its relationship with Ms Sullivan in September 2003.

Determination

[18] Section 6(3) of the Employment Relations Act 2000 provides that the Authority must determine the real nature of the relationship between the parties and in so doing must consider all relevant matters including the intention of the parties.

[19] The parties did not have a written agreement. I do not accept the heads of agreement entered with Lithotech and Ms Sullivan trading as Jatcom transferred to the relationship with Eagle Print. Lithotech was a separate legal entity and there is no evidence that the parties agreed the document would transfer to the relationship with Eagle Print. In the absence of any written record of the parties' intention I must look at how Ms Sullivan's engagement operated in practise, any relevant documents and evidence of arrangements for payment and taxation.

[20] The tests to determine a status question such as this are well established¹:

- (i) to what degree was Ms Sullivan's performance of administrative and print brokering services controlled by Eagle Print and integrated into their business ("the integration and control tests"); and
- (ii) was Mrs Sullivan performing duties of administrative support and print brokering as a person in business on her own account ("the fundamental test").

[21] Ms Sullivan says she was an employee from the outset of her relationship with Eagle Print. She says she was fully integrated into the business; her work place was at Eagle Print, and from June she was required to attend work during business hours (8.30am to 6pm), and attend

¹ *Three Foot Six Limited v Bryson*, 12 November 2004, CA 246/03

management meetings every morning where her duties were directed. She said she was working full time at Eagle Print and as she was invoicing one company she was effectively an employee.

[22] Eagle Print says Ms Sullivan was an independent contractor. It says a heads of agreement was entered with Ms Sullivan trading as Jatcom and Lithotech and that relationship transferred to Eagle Print. The invoicing system used by Ms Sullivan continued with Eagle Print; Ms Sullivan invoiced Eagle Print under the name Jatcom for the agreed base sum plus GST and a commission system was agreed between the parties for work she brought in. Ms Sullivan's services were contracted for 80 hours per month and she was free to pursue other business interests with the remaining time. This changed in June when Ms Sullivan agreed to temporarily cover Mr White while he was on leave and an increase in the base sum to be invoiced was negotiated. Eagle Print says during this period it put a proposal to Ms Sullivan to become an employee and she did not respond.

[23] Ms Sullivan first raised concerns regarding her status in relation to the possible tax implications while engaged with Lithotech and again during her engagement with Eagle Print. There was no evidence Ms Sullivan ever proposed to Lithotech or Eagle Print that she was an employee or should be an employee; Ms Sullivan did not make any such proposal during negotiation of terms at the outset of the relationship with Eagle Print or during negotiation of terms during Mr White's absence. Ms Sullivan first asserted she was an employee after her relationship with Eagle Print ended.

[24] I accept Mr Gibson's evidence that he approached Ms Sullivan in June/July 2003 and offered her employment, that her response was positive and that she needed to take advice from her accountant. This response is consistent with Ms Sullivan's evidence that she had taken advice from her accountant before responding to the split invoice proposal. Ms Sullivan's mind was turned to this issue and it was prudent that she should take further advice to enable her to weigh up the benefits of changing her status to that of employee. The parties did not conclude an employment agreement. Ms Sullivan took no steps to enforce the alleged employment agreement. She did not stop issuing invoices to Eagle Print.

[25] Ms Sullivan's tax arrangements are those usually associated with someone who is self-employed. While tax status is not determinative of employment status² Ms Sullivan's active participation in the tax regime indicates an intention on her part to be treated as an independent contractor.

[26] I accept Ms Sullivan became more integrated into Eagle Print during Mr White's absence. This was a temporary arrangement and its terms were negotiated and agreed between the parties. Ms Sullivan's level of monthly invoicing increased as a consequence. I note that during this negotiation the parties did not seek to address the issue of annual or sick leave or overtime payments, as might be expected in a contract of service. I accept during this period the level of control over how Ms Sullivan carried out her duties increased; she was required to go to morning meetings, attend office hours and close the premises. Such control is consistent with that of an employee as it is with the temporary role Ms Sullivan was taking on. This level of control did not extend to Ms Sullivan's print broking work, which continued as before.

[27] Having weighed all the factors I make the following findings:

- (i) From February 2003 Ms Sullivan, trading under the name Jatcom, contracted to Eagle Print to provide accounting software support services and print brokering services;

² *Bryson*, above

- (ii) In April 2003 Ms Sullivan and Eagle Print agreed what print brokering and administrative support Jatcom would provide and an increase in the monthly base invoicing rate was negotiated;
- (iii) In June 2003 Ms Sullivan agreed to increase her duties while the managing director was on leave and an increased invoicing base rate was negotiated; and
- (iv) the employment discussions between the parties were not concluded and no employment agreement was entered.

[28] The integration and control tests weigh in Ms Sullivan's favour in relation to the period where her duties increased during Mr White's absence, however this was not a permanent arrangement and standing back from this period and looking at the relationship as a whole I am satisfied Ms Sullivan was in business in her own account throughout her engagement with Eagle Print. Ms Sullivan's personal grievance application to the Authority is unable to proceed.

[29] In determining this employment relationship problem I have been greatly assisted by the helpful submissions provided by the representatives.

Costs

[30] The issue of costs is reserved. I invited the parties to attempt to resolve this issue themselves. If they are unable to do so they should apply to the Authority to determine such.

Marija Urlich
Member of Employment Relations Authority