



# Employment Court of New Zealand

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## Tse v Cieffe (NZ) Limited WC4/09 [2009] NZEmpC 23; [2009] ERNZ 20; (2009) 6 NZELR 454 (6 April 2009)

Last Updated: 16 April 2009

### IN THE EMPLOYMENT COURT

WELLINGTONWC 4/09WRC 32/08

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN RAEWYN TSE  
Plaintiff

AND CIEFFE (NZ) LTD  
Defendant

Hearing: 19 and 20 February 2009

Appearances: M J McGoldrick, Counsel for the Plaintiff  
Sean O'Sullivan and Monica Singleton, Counsel for the Defendant

Judgment: 6 April 2009

### JUDGMENT OF JUDGE C M SHAW

[1] The sole issue in this case is the employment status of the plaintiff, Raewyn Tse. She has applied for a declaration that the real nature of the relationship between her and Cieffe (NZ) Ltd ("Cieffe") was one of employment.

[2] The matter came to the Court as a de novo challenge by the plaintiff against a determination of the Employment Relations Authority which concluded that Ms Tse was a contractor.

[3] Counsel advised that the Court has heard more evidence and has been referred to more documentation than that presented to the Authority.

#### The law

[4] Counsel were agreed on the principles to be applied when determining the real nature of a relationship as required by s6(2) of the [Employment Relations Act 2000](#). The Court must consider all relevant matters to establish the intention of the parties and apply the tests of control and integration as well as the fundamental test of whether the person performing the services is doing so on their own account.<sup>[1]</sup>

[5] It is also the case that it is possible for a relationship to evolve from one status to another.<sup>[2]</sup>

[6] While each counsel cited previous cases all of those depend on their individual facts. They variously focus on the intention of the parties, the nature of the work, construction of the written agreements or a combination of any of these matters. For this reason previous case law is only useful in reiterating the relevant principles.

#### The facts

[7] Ms Tse has tertiary qualifications. Before being engaged by Cieffe she had worked in a government ministry performing data entry and database administration tasks and providing administrative support. She worked for Cieffe between July 2005 and March 2008.

[8] In 2004 Ms Tse and her then partner set up a company called Assorted Hijinx Limited ("Hijinx") to run an

events planning and management business. She was in charge of business planning and her partner ran the bank account, company registration and GST registration. She attended a WINZ Be Your Own Boss course and received among other payments an enterprise grant to pay establishment costs. The Be Your Own Boss course included information on GST and a general overview of information needed to start a business.

[9] Cieffe manufactures and sells CCTV security systems including servers, cameras and recording equipment. The New Zealand operation was founded by Dennis Sajdl and in 2005 employed four people. At that time Mr Sajdl was the director; his sister, Iva, was the technical document co-ordinator; Ryan Duguid was the manager; and Joe Deveraux was a technician.

[10] The company had two separate systems of remuneration: one for its employees and one for its contractors. The employees' payments, holidays and PAYE payments to IRD were recorded in a payroll system. Payments to the contractors were recorded on another part of the general ledger.

[11] In 2006 Cieffe employed two more technicians and a contractor was engaged to develop a computer tracking system for stock and other matters. In 2006 Mrs Zlata Sajdl became an information analyst. A receptionist was employed in January 2008.

## The contract

[12] In July 2005 after Iva Sajdl, an old and close friend of Ms Tse, approached her with a work opportunity, Ms Tse met with Mr Duguid and her to discuss this. An oral agreement was reached about the way the relationship would operate. Her principal work was on the company's internal system. She was to scan all of the company's existing archived documentation so it could be electronically filed and searched. She also had some reception duties and general office administration duties to do.

[13] Payment was negotiated at an hourly rate. The job was part time for 20 hours a week. They expressly agreed that she would invoice Cieffe as a contractor rather than be paid as an employee.

## Invoices

[14] Ms Tse initially decided to invoice Cieffe through her company Hijinx. At that time she was working with her partner to establish it. Ms Sajdl supplied her with an invoice template for this purpose. In July 2005 she sent Mr Sajdl an e-mail with Hijinx company details in which she stated, "*My title (for these purposes): Consultant*". The first few invoices sent by Ms Tse were headed: "*Assorted Hijinx Ltd, PO Box 2567, Wellington.*" The descriptive section of the invoice stated "*consultancy services of Raewyn Tse*". Payments were to be made to Assorted Hijinx Ltd and its bank account number was provided. GST was added to the invoice. The company processed these payments through its contractors' payment system. The monthly payments varied according to the hours she invoiced for.

[15] In January 2006, realising that Hijinx was not going to be a viable business, Ms Tse made the decision to invoice Cieffe in her own name. Invoices from that date contained her name and address and referred to her personal bank account. The description on the invoice remained the same: "*consultancy services of Raewyn Tse*".

[16] On 3 February 2006 she sent Mr Sajdl an e-mail with her invoice stating "*You may notice that I am now billing you as an individual contractor & payments are to be made to my personal account rather than my hijinx business account – I hope that's ok?*" The first of these invoices deducted withholding tax but in the second this was corrected and a GST component was added.

[17] It was at about that time that she accessed two information booklets published by the IRD titled "*Self-employed or an employee? IR336 How to Work Out Your Tax Status*" and a guide for business and non-profit organisations. From May 2006, having discovered that she was not required to be registered for GST as she did not earn over the threshold, she stopped adding GST to her invoices. She continued to render invoices until her relationship with Cieffe ended.

[18] Ms Tse told the Court that she relied on the advice of her partner, friends and the IRD in making decisions about charging for GST.

## Nature of the work

[19] Since its establishment Cieffe's business grew rapidly and by 2005 it needed urgent work done on its management system. Ms Tse was engaged to work on establishing and implementing internal systems for document management and clearing the backlog of documents but also did other jobs.

[20] Ms Sajdl prepared two job descriptions which listed the duties she expected of Ms Tse. It is common ground that all but one of the listed tasks were performed by Ms Tse. As her desk was at the reception area she did some reception work. She also shared a variety of other office tasks such as tidying, cleaning and general duties with other employees. This was a very small workplace comprising many friends or relatives and it was part of the culture of the company that all people working in the office would share these administrative and other duties. Ms Tse worked regular hours Monday to Friday between 9.00am and 1.00pm. This was her choice. She was not instructed to attend at any specific time.

[21] From time to time Ms Tse would advise the company that she would not be present. The e-mails which she sent in August 2005 and March 2006 for example are not applications for leave but advice to Cieffe that she would

not be in on particular days and when she expected to return.

[22] In mid 2006 Cieffe engaged an independent contractor to develop a product tracking system. This new system gave rise to a need for someone to ensure the system was configured and operational and that it complied with the business procedures that had been put in place largely by Ms Tse. There was also a need to test the tracking system to identify any software bugs.

[23] By then the main work she had been engaged originally for was near completion and Ms Tse was asked to provide these further services as they were seen as an extension of the implementation of processes she had previously worked on. This then became her principal occupation although she continued to perform the other general administrative tasks. Her hours increased to 40 hours a week. She continued to work regular hours with some overtime and invoiced Cieffe for those hours. Ms Tse maintained she was closely supervised and her work was mostly regulated, particularly by Ms Sajdl. She was also provided with branded clothing at work and a credit card which she only used on a work related visit to Australia.

[24] In December 2006 Mrs Zlata Sajdl was instructed by Cieffe to inspect its records and registers to ensure that they complied with statutory requirements and to see that all relevant company business documents were complete. As part of this exercise, on 26 February 2007 she provided Ms Tse with a written consultancy agreement.

[25] The agreement runs to about eight pages. Ms Tse is referred to throughout as the consultant. The agreement also makes the following points:

- The consultant has specialised knowledge and experience which Cieffe requires in connection with the work.
- It provided for the work to be performed under the general supervision and direction of the Cieffe representative.
- The consultant shall not be construed as an employee of Cieffe.

[26] At about this time she was given a business card with Cieffe's logo. It described her as "*Office Manager*".

[27] Throughout this time there had been considerable dissension between company directors.

[28] One director was threatening to terminate the employment of the company's staff. Because of the uncertainty Ms Tse did not sign the consultancy agreement when she was originally given it in February but did so after some prompting by Mr Sajdl who was concerned about those working for Cieffe keeping their positions. Having made corrections to some details in it, she signed the agreement in April 2007.

[29] Because of changes in her work Ms Tse approached Mr Sajdl to talk about her work. They met in January 2008 and he agreed to raise her hourly rate retrospectively from 1 January 2008.

[30] From late 2007 Ms Tse had been assisting Ms Sajdl with client relationships and at that time new business cards were printed for her describing her as "*Client Relationship Assistant Manager*".

[31] In February 2008 Mrs Sajdl became concerned that in her invoices Ms Tse was claiming more hours than she had worked. When she inspected earlier invoices Mrs Sajdl found that Ms Tse had claimed for payment for some public holidays and had stopped charging for GST even though her remuneration was now over the threshold.

[32] Having raised that matter with Ms Tse there followed a series of e-mail correspondences which led to the termination of Ms Tse's contract in March 2008.

## **Other relevant matters**

[33] Several times throughout the period that Ms Tse worked at Cieffe she mentioned her employment status as a contractor.

[34] In November 2007 the issue of holiday pay arose at a staff meeting. In a follow-up e-mail to Mrs Sajdl she said, "*I wasn't aware that Alternate Holiday's existed and as am not an employee knew it didn't apply to me anyway...*".

[35] In applications for a bank loan dated 2007 and for a tenancy agreement in January 2006 Ms Tse described herself as self-employed.

[36] In an e-mail sent to a lawyer friend Ms Tse asked about her obligations as a contractor. She said "*The rest of the kids (mikey etc) are employees but I am on a contractors contract so I believe diff rules apply.*"

[37] In February 2008 she wrote to Ms Sajdl who had queried her hours of work and claims for holiday pay saying she didn't actually know all the rules or regulations around being a contractor and that she did not know she did not get paid for holidays.

## **Discussion**

[38] Mr O'Sullivan for the defendant submitted that the intention of the parties to enter into an independent contract or arrangement is demonstrated by their initial oral agreement and by their subsequent behaviour.

[39] For the plaintiff, Mr McGoldrick submitted that there was no clear intention by either party when they entered their relationship and neither the subsequent written agreement nor any other labels accorded to the relationship are determinative. It is the case for the plaintiff that the type of work and subsequent behaviour of each party indicates that the real nature of the relationship was that of employer/employee. He further submitted that even if the initial engagement of Ms Tse had begun as a contract for services, the way the relationship worked in practice

was such that by its conclusion it was an employment relationship.

[40] I find that at the commencement of the relationship both parties deliberately entered into an independent contracting arrangement which was evidenced by the oral agreement reached and the method of invoicing and payment. Other documentary evidence of Ms Tse's understanding of her employment status includes her e-mails to Mr Sajdl, her self-description on official forms and, at least up to the beginning of 2008, her references to herself as a contractor as opposed to an employee.

[41] She also signed the written consultancy agreement in April 2007. While that occurred at a time of some stress in the company which was having an adverse effect on the staff including Ms Tse there was no evidence that Ms Tse entered into that agreement other than by her own free will and with a full understanding of its implications. She carefully read it and made changes to the document before she signed it.

[42] While it is the law that a statement by the parties about the nature of their relationship is not determinative<sup>[3]</sup>, in this case I find that the statement in the consultancy agreement confirms the nature of the relationship which had existed from the outset: a contract for services.

[43] Mr McGoldrick submitted that as the agreement does not address taxation obligations or describe who is responsible for tax payments, does not contain a description of the services or work or particular job required by Cieffe, the intention of the parties entering into this agreement was at cross purposes. I do not accept that submission. In the context of the way in which the relationship between the parties was entered into and its subsequent implementation, including the invoices, I find that there was no cross purpose of intention on the signing of that consultancy agreement. Ms Tse knew she was a contractor rather than an employee and often described herself as such.

[44] Mr McGoldrick further submitted that a number of factors point to Ms Tse being under control of Cieffe in a manner which is inconsistent with her being a contractor. He referred to the tasks which she performed which were not sufficiently specialised.

[45] I find that Ms Tse was specifically engaged to do work for which she had had some prior experience and which Cieffe wished to take advantage of. It is clear however that she also undertook other tasks which were non-specific and not of the sort which would generally be undertaken by a self-employed contractor. However at that time Cieffe was run as a family business where all persons including some managers and self-employed persons contributed to the daily routine tasks in a spirit of co-operation. The fact that Ms Tse contributed in this way to the common duties did not detract from the principal work that she was engaged to do and is not sufficient to transform her status to one of employee. This is particularly so in view of the other evidence which supports her contracting status.

[46] The minimum number of hours which she worked was agreed between her and Cieffe but I find it was entirely up to her as to when she undertook this work and she worked a variety of hours each month. During her period of engagement Ms Tse was supervised by Ms Sajdl who monitored her work and issued instructions to her about the work she was to perform. Again this level of supervision was not such as to rob Ms Tse of her independent status.

[47] In some respects the evidence points to a degree of integration of Ms Tse into the business. These are the business cards and the Cieffe branded clothing. She used Cieffe equipment and had access to the building. Calling her an office manager or client relationship assistant manager certainly presents an image of her to the outside observer as somebody who was part of the management team rather than running a separate business on their own. Such integration would not normally be expected of a consultant. Again, however, I find that, notwithstanding this outward appearance, by agreement the parties continued to have a business relationship which was clear and unequivocally not one of employment.

[48] This business relationship was most evident in the supply of invoices by Ms Tse to Cieffe. Mr McGoldrick submitted that Cieffe required Ms Tse to provide invoices without formally documenting the reason for that requirement, and the use of a corporate identity, Hijinx, was a matter of simple convenience to accommodate the request the provision of invoices.

[49] I do not accept this interpretation. Ms Tse is an intelligent woman who, although she relied on advice from her partner and other friends, had had some training in the requirements to set up a business. She called herself a contractor from the beginning of her engagement and consistently throughout that time. This consistent position only came to an end when it was apparent that her relationship with Cieffe was disintegrating.

## Conclusion

[50] This is a case where the intention of both parties was made very clear at the outset of the relationship, was acknowledged by Ms Tse throughout her time with Cieffe as being that of a contractor and was confirmed when she signed the consultancy agreement in 2007. While there were some elements in the conduct of her employment which, viewed in isolation, would not support a finding that she was self-employed, taken in the round I find that the real nature of the relationship between Ms Tse and Cieffe was, as intended, a contract for services. I agree with the Authority's determination in this regard and accordingly neither the Authority nor the Court has jurisdiction to hear a personal grievance brought by Ms Tse.

## Costs

[51] Counsel are encouraged to reach agreement on the question of costs. If that cannot be done counsel for the defendant is to file a memorandum of costs within 14 days of this judgment. The plaintiff will have 7 days to respond. If costs cannot be resolved before my impending retirement from the Employment Court any other Judge of the Court may decide that issue.

**C M SHAW**

**JUDGE**

Judgment signed at 3.00pm on 6 April 2009

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[1] *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34; [2005] ERNZ 372 (SCNZ)

[2] *Koia v Carlyon Holdings Ltd* [2001] NZEmpC 130; [2001] ERNZ 585

[3] Section 6(3)(b) of the ERA

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