

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Anne Watt (Applicant)  
**AND** Eric James & Associates (Respondent)  
**REPRESENTATIVES** Angela Morgan-Roberts for Applicant  
Scott Fairclough for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**SUBMISSIONS RECEIVED** 10 November 2005,  
25 November 2005  
14 February 2006  
**DATE OF DETERMINATION** 17 February 2006

DETERMINATION OF THE AUTHORITY

**Employment relationship problem**

[1] The applicant (Ms Watt) filed her statement of problem in the Authority on 19 September 2005 in which she sought a declaration from the Authority that she was an employee and not an independent contractor and then sought leave to raise a personal grievance out of time.

[2] The respondent, Eric James & Associates (Eric James) filed a statement in reply on 6 October 2005 contending that Ms Watt was an independent contractor and therefore there was no relationship problem within the meaning of the Employment Relations Act 2000 and, in the alternative, opposed Ms Watt's application to raise a personal grievance out of time.

[3] I convened a telephone conference with counsel on 12 October 2005 at which the status of Ms Watt was the primary focus. I indicated to the parties' counsel in that telephone conference that I needed to be satisfied that an employment relationship existed before putting the respondent to the cost of defending an application in this jurisdiction.

[4] It was agreed that I interview the applicant accompanied by her counsel but without the respondent or the respondent's counsel present.

[5] There was a further telephone conference between the Authority and counsel on 17 October 2005 at which I proposed that I issue a Minute describing the interview that I conducted with Ms Watt and identifying the important factual issues raised by her in that interview.

[6] That Minute dated 20 October 2005 was issued in accordance with the Authority's earlier intimation and in it I traversed the nature of the interview in the following terms:

- [8] *Mrs Watt described to me the commencement of her relationship with Eric James and Associates, indicating that the relationship commenced on 14 February 2005 with a week long training session in Christchurch. Mrs Watt and one other recent recruit to the respondent travelled from Invercargill together to Christchurch for this purpose. She said they stayed in a motel and were trained about a group of the products that they would be selling.*
- [9] *Mrs Watt said that there were eight new recruits involved in this training session and that each was treated similarly by the respondent. She said that the status of the eight was brushed over very lightly. She said little or no time was devoted to the issue and when she returned to Invercargill at the end of the week, she felt very unsure about her status.*
- [10] *Mrs Watt told me that during the week in Christchurch commencing on 14 February, each of the new recruits was given a copy of the contract, a copy of which is produced in this proceeding. Mrs Watt said that each of them was told by the respondent to take the contract back to the motel, look at it overnight and then bring it back in the morning so that it could be signed.*
- [11] *Mrs Watt said that she felt very out of her depth being in an unfamiliar town and not being sure how to get legal advice or other support.*
- [12] *She described to me how she felt rather diffident about signing this document without having it checked but she indicates that the respondent told the new recruits that this document was it.*
- [13] *By way of illustration, one of the eight new recruits apparently raised an issue or two and conversation between this individual and the respondent's managing director apparently became quite heated. Mrs Watt took this exchange to mean that there was no prospect of alteration to the terms proposed and that delay in execution would not be tolerated.*
- [14] *Mrs Watt told me in answer to one of my questions that she had never worked in the insurance industry before and had no idea what the usage of the industry was in terms of the status of parties who earned a living in it.*
- [15] *Mrs Watt said that whatever her status, during the training week which began her relationship with Eric James and Associates, it was drummed into us that we worked for Eric James, the reputation of Eric James was important, the way we dressed, the way we kept our cars, what we said when we walked through the door of a prospect's home, the whole image thing was critical to the success of Eric James's business.*
- [16] *At the end of this training week, Mrs Watt told me that she and her Invercargill colleague returned to their city and commenced work. She does not remember giving much thought to questions of her legal status for the first few weeks of her engagement and indeed she told me that she worked for a month before even considering what steps she ought to take in respect to her status.*
- [17] *Mrs Watt said that she spoke to her territory manager at this point who told her to register for GST and so she took that step.*
- [18] *The impetus for thinking about the nature of the relationship again was, it seems, principally that Mrs Watt had made a sale and accordingly was due commission.*

- [19] *She said that she got paid her commission directly to her bank account before any invoice to support that payment was actually raised by her.*
- [20] *Indeed, she indicated that it was a month after her first commission cheque was received that she raised an invoice in respect to it and by then she had received a second commission payment, again without an invoice having been raised by her.*
- [21] *She had no idea how to prepare the requisite tax invoice and sought assistance from Eric James and Associates who sent her a template which she completed appropriately and sent back.*
- [22] *Mrs Watt said that she felt as if she was under the control and direction of Eric James and Associates, partly because of the emphasis placed on the respondent's reputation and matters of that kind in the initial training session and partly because of the provisions in the contract.*
- [23] *In the latter regard, Mrs Watt felt that the exclusivity clause (clause 6) meant that she had no control over what she actually did and effectively had to commit full time to Eric James and Associates. She felt this provision was backed up in her mind by the non-competition clause (clause 18).*
- [24] *Again, by way of example she referred to her Invercargill colleague who had been a professional photographer prior to joining the respondent and who apparently was told by the respondent to wind his business down.*
- [25] *Mrs Watt also referred to the fact that she had to ask for time off as evidence for the view that the respondent controlled her work. This was the case even when she was in the hospital with deep vein thrombosis when she says that she effectively had to explain why she was not working.*

## **Process**

[7] The Authority Minute of 20 October last concludes with a brief discussion of the way in which the matter is to be progressed. I directed that counsel was to furnish the Authority with submissions on the factual matrix as disclosed by my interview with Ms Watt, and the relevant law applied to that factual matrix.

[8] I then indicated to counsel that I would like them to indicate in their submissions what kind of process they sought in the Authority concluding its deliberations on the matter and in particular whether counsel wished to be heard.

## **The submissions**

[9] Both parties' first submissions proceed essentially on a factual basis and invite the Authority to make decisions on the facts without reference to any consideration of the legal principles.

[10] Both counsel seemed to contemplate a determination from the Authority dealing only with Ms Watt's status.

[11] In the event the Authority decides that Ms Watt is in truth an employee, then the next question for determination will be whether she may raise her grievance out of time and of necessity, that must be the subject of further submissions from counsel or further agreement from the parties as to a process for determining that issue.

[12] To ensure that there was an understanding about the extent of the subject matter to be considered in this determination, I called a further telephone conference with counsel and this proceeded on 19 January 2006.

[13] At that telephone conference, the parties were given a further opportunity to file submissions and the respondent did so.

[14] This Determination deals only with the issue of Ms Watt's status.

### **The contract or agreement**

[15] There is a contract or agreement between Ms Watt and Eric James dated 14 February 2005. It has as its cover a front page which refers to the document attached as an individual employment agreement.

[16] It is nothing of the kind. It is in fact, as I made clear in my Minute, a contract between a principal and its agent.

[17] Quite clearly, the front page has been attached to the contract in error and there is no doubt by the provisions in the document that it contemplates and describes a contractual rather than an employment relationship.

[18] The only question is whether the true nature of the relationship between these parties is in truth adequately subsumed within the terms of this contract or indeed is actually an employment relationship.

### **The real nature of the relationship**

[19] As I have already recited, by agreement with the parties' counsel, I interviewed the applicant without the respondent or the respondent's counsel present. I have quoted in their totality at para. [6] above the relevant portions of my Minute to the parties of 20 October 2005.

[20] The parties' first submissions filed through their respective counsel each comment on that factual matrix and I desire now to highlight what I consider to be important points of difference between the parties' respective positions.

[21] First, I note that, in her discussion with me, Ms Watt did not refer to two interviews that she had with Eric James' chief executive, which is referred to in the submissions from Eric James. Not surprisingly, Eric James contends that at those two interviews, Ms Watt was told in the clearest terms what the nature of the relationship was to be. Plainly, Ms Watt has no recollection of either of those discussions (given that she did not mention them to the Authority when questioned) or the subject matter traversed in those discussions.

[22] Again there is a difference in respect to the contract itself where Ms Watt says that the contract was given to her at the training week in Christchurch in February 2005, whereas Eric James says that a template of that contract was actually provided in what they refer to as *a starter pack* prior to the training week.

[23] In response to that contention, Ms Watt says through her counsel, that she had been told by a Mr Chong that the contract in the starter pack was not necessarily the contract that she would be offered. That specific allegation is responded to by Eric James, in its second submission and denied. Further, Ms Watt's contention seems inconsistent with Eric James' own clearly stated position and Ms Watt's own recollection and evidence, that the contract offer was not negotiable and would not be varied from in any circumstances by Eric James.

[24] There is dispute between the parties about whether Ms Watt was told at the training week that she *worked* for Eric James or whether she *represented* Eric James. Ms Watt's recollection was that she was told that she was working for Eric James, whereas Eric James say that they would have used the phrase *representing Eric James*.

[25] Not much turns on the nomenclature except of course that Ms Watt alleges that by the use of the word *work*, Eric James is implying an employment relationship and presumably conversely, Eric James, by referring to the word *represent* rather than the word *work*, are seeking to distance themselves from the suggestion that there was in fact an employment relationship.

[26] Finally, I wish to comment on the difference in the explanation for the timeline in which Ms Watt was paid her commissions and had to furnish documentation in support to Eric James. Ms Watt told me that, after the training week, she worked for a month before registering for GST and that she only registered for GST when she was told to do that by her territory manager.

[27] Further, when it came to forwarding a GST invoice to Eric James for the commissions that she was due, she was forwarded a template by Eric James on how to complete the invoice.

[28] Her evidence also was that she was actually paid by direct credit into her bank account before she furnished her first invoice and that the first payment arrived just after she had completed her registration for GST.

[29] Eric James says that the reasons for this particular timeline is effectively a function of the nature of the industry where the insurance products were being sold, particularly medical insurance, frequently had a significant lead time before being accepted by the insurer and so the kind of time delay that Ms Watt talks about is actually of no consequence.

[30] I have considered the helpful submissions of the parties' counsel and carefully reviewed the notes of my interview with Ms Watt which I recorded in detail in my Minute. I note that in the submissions from Ms Watt's counsel, the remark is made that the record I made of my interview with Ms Watt which I included in my Minute is accepted by Ms Watt as an accurate reflection of the interview.

[31] Having reviewed all of that material, I am not persuaded that the real nature of the relationship between the parties is anything other than the relationship between a principal and its contractor. I think that Eric James did everything that it reasonably could have to alert Ms Watt to that fact, both prior to entering into the relationship and subsequently.

[32] I accept the statements made by counsel for Eric James that the initial interviews would have set out the nature of the relationship and, with the exception of the erroneous front page, there is no question that the documentary basis for the relationship is contractual rather than employment in nature.

[33] While no doubt the nature of the induction that Ms Watt had its problems, it is nonetheless clear to me that nothing in what happened at the February training week or subsequently, definitively speaks of an employment relationship rather than a contractual one. I accept that the commencement of the contractual relationship from Ms Watt's evidence seems to have been a bit confused and protracted and perhaps not as well organised by Eric James as it might have been, but that of itself does not prove that the relationship is in the nature of an employment one.

[34] Essentially, I accept that Ms Watt was told this was a contractual relationship although she herself was unclear about her status, I have decided that the contractual document is undoubtedly a contract for services rather than a contract of service and I accept Ms Watt's own evidence that during the course of the relationship, she was paid for her work against invoices generated by her, she having been registered for GST for the purpose.

[35] I note Ms Watt's point that she felt that she was effectively being directed not to perform other work and would always be available to Eric James, but I consider that that point has been well met by Eric James' counsel in their submissions when they say that Eric James needs to be aware of the availability of its contractors to follow up the leads that Eric James' telephone marketers have been able to identify. Were a contractor not available at particular times to accept these leads, the leads might evaporate and Eric James would prefer to know if its contractors were not available at particular times so that leads could be put to somebody who was available.

[36] Finally, the question of industry practice is relevant. Ms Watt told me that she had not worked in the insurance industry before and that is absolutely accurate. However, Eric James makes the point that Ms Watt had actually applied for a position in the insurance industry and been interviewed by the present chief executive of Eric James and, while not successful, the role that she had been interested in was remunerated on a similar contractual basis. I note that Ms Watt says that she did not understand it was not an employment role and I accept her evidence on that point, but I still think she would have been on notice that there was something a bit different about the nature of this industry than perhaps what she had been used to.

[37] Having said all that, I want to make clear that the Authority does not consider that Ms Watt has been mischievous in bringing this claim. She has had some difficult personal circumstances which may well have impacted on her concentration and her inability to recollect some matters relevant to the central issue in this claim ought not to reflect negatively on her.

### **Determination**

[38] I am not persuaded that the evidence advanced by Ms Watt sustains her first claim that she is an employee of Eric James and accordingly that claim fails. Given that she has not satisfied the Authority that she is indeed an employee, the Authority need not consider a process for dealing with her second claim for leave to raise a personal grievance out of time. It follows that Ms Watt's claim fails in its entirety.

### **Costs**

[39] Costs are reserved, but the Authority expresses the view that given the unusual nature of the claim and the relatively more economical way in which the matter was dealt with by the Authority, with the parties' consent, that costs should lie where they fall.