

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 297  
5333164

BETWEEN                      EDWARD WHALLEY  
Applicant

AND                              RAYNMAC HOLDINGS  
LIMITED TRADING AS  
CARS AND MORE  
Respondent

Member of Authority:      Vicki Campbell

Representatives:           Applicant in Person  
Richard Shand for Respondent

Investigation Meeting:     On the papers

Submissions Received:     13 May and 31 May 2011 from Applicant  
26 May 2011 from Respondent

Determination:              8 July 2011

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

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**A      The real nature of the relationship between Mr Whalley and Raynmac Holdings Limited trading as Cars and More was a contract for services. The Authority does not have jurisdiction to hear a personal grievance brought by Mr Whalley**

**B      Costs are reserved.**

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[1] Mr Edward Whalley claims he was subject to sexual harassment when working for Raynmac Holdings Limited trading as Cars and More (Cars and More) and then unjustifiably dismissed. Cars and More deny the claims and says the Authority has no jurisdiction to investigate Mr Whalley's claims as he was not an employee but was engaged on an independent contract basis.

[2] This matter was originally set down for an investigation meeting on 12 May 2011. However, during a conference call in early May 2011 the parties consented to the Authority determining the issue of the real nature of the relationship on the papers alone. A timetable was then agreed to allow both parties to make submissions on this preliminary matter. This determination deals only with the preliminary issue as to whether Mr Whalley was an employee or an independent contractor.

### **What was the nature of the employment relationship?**

[3] Section 6 of the Employment Relations Act 2000 prescribes that the Authority must determine the real nature of the relationship. The intention of the parties is still relevant but is no longer decisive. The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the “fundamental” test.

[4] In making the assessment, the Authority is required to consider all relevant matters, including any matters that indicate the intention of the parties. The Authority is prohibited from treating as determining a matter, any statement by the parties that describes the nature of the relationship. The assessment calls for an analysis of the actual operation of the relationship in practice.<sup>1</sup>

#### *Terms and conditions of engagement*

[5] Prior to Mr Whalley undertaking sales work for Cars and More he was already engaged as a self employed person in his position as a real estate agent. Evidence has been produced to the Authority which indicates that Mr Whalley continued to be self employed during his time at Cars and More.

[6] Mr Whalley filed an IR3 with the Inland Revenue Department (IRD) in July 2010 which is the form filed by self employed people. He has also produced documents from the IRD which show that he continued to be responsible for his own tax payments throughout 2010.

[7] I am satisfied from the documents produced to the Authority that Mr Whalley was keen to continue receiving the tax advantages he enjoyed as a self employed

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<sup>1</sup> *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114; and *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585; *Bryson v Three Foot Six* [2003] 1 ERNZ 581 (EC), and *Bryson v Three Foot Six* [2005] 3 NZLR 729 (SC); *Tse v Cieffe (NZ) Limited*, unreported, 6 April 2009, Shaw, J, WC4/09

person and desired to work on a commission only basis as a contractor when he commenced his engagement with Cars and More.

*Intention of the parties*

[8] Before he commenced his engagement at Cars and More Mr Whalley requested that he retain his own personal cell phone number and the phrase “ASK ED”. This was agreed and both the phrase and the number were then printed on business cards Mr Whalley used while engaged by Cars and More.

[9] During his engagement Mr Whalley enquired of Cars and More as to whether he could become an employee. The parties discussed an employment agreement, however, no agreement could be reached.

[10] Mr Whalley has supplied the Authority the invoice book he used to claim his commission payments. Mr Whalley has requested that this book be returned to him following this determination as he requires it for the IRD.

[11] I am satisfied that on the balance of probabilities it is more likely than not that the intention of both Mr Whalley and Cars and More was that Mr Whalley be engaged on a contracting basis and produce invoices for each car sale he made.

*Control and Integration*

[12] Mr Whalley was provided with a cell phone for work purposes, however, as already stated, Mr Whalley insisted that he have his own personal number attached to the cell phone.

[13] Mr Whalley says he had to be at work everyday, however, from the documents produced to the Authority I am satisfied Mr Whalley had significant flexibility as to when and how he undertook his duties. There is no evidence to suggest that Mr Whalley was subject to supervision during his time selling cars and neither is there any evidence to show he was required to report to anyone on a regular basis.

[14] I also find that Mr Whalley had the freedom to maintain, increase or even reduce his income by application of his personal sales ability, his own personal contacts and the number of hours he made himself available to work.<sup>2</sup>

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<sup>2</sup> See *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1.

[15] The documents show that Mr Whalley was able to enter into sales of vehicles with other sales agents working on the car yard and the two would share the commission between them.

*Fundamental*

[16] As already stated Mr Whalley had his own accountant and business expenses were deducted from his income prior to lodging his tax returns with the IRD. I am satisfied Mr Whalley was able to profit from his endeavours and benefited from his own personal tax arrangements in ways employees are unable to.

[17] Mr Whalley says he was required to paint a vehicle and undertake a welding job while engaged at Cars and More. I am satisfied Mr Whalley undertook these tasks in the capacity of independent contractor and supports my conclusions that he could make a profit from his endeavours. Mr Whalley received cash in payment for these two jobs without deduction. There is no invoice recording the details of the jobs so the Authority is left to conclude that the payments in respect of these jobs was akin to an “under the table” payment.

**Determination**

[18] I am satisfied Mr Whalley knew he was a contractor when he commenced his engagement with Cars and More and that is why he insisted on having his own cell phone number and issued invoices for each vehicle sold. Mr Whalley was free to undertake work other than selling cars as indicated by the work he completed in painting a vehicle and the welding work for which he received payment.

[19] There is no evidence on the papers to indicate that Mr Whalley was required to report on a daily or other basis and his work was not supervised in any way. Mr Whalley was able to take advantage of tax benefits not available to employees.

[20] Viewed in the round, I find the real nature of the relationship between Mr Whalley and Cars and More was a contract for services. The Authority therefore, does not have jurisdiction to hear a personal grievance brought by Mr Whalley.

**Costs**

[21] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Cars and More may lodge and serve a memorandum as to costs within

28 days of the date of this determination. Mr Whalley will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Vicki Campbell  
Member of Employment Relations Authority