

the parties had entered into. Zeald then pursued Mr Greenstein for amounts it claims he owes under the terms of the Agreement.

[3] Zeald believes Mr Greenstein was an independent contractor so in accordance with the terms of the Agreement it commenced recovery action against him in the District Court. At some point during those proceedings (subsequent to filing his information capsule) Mr Greenstein challenged the District Court's jurisdiction to hear Zeald's claim on the grounds he was an employee.

[4] Mr Greenstein claims that although he agreed to be an independent contractor at the outset of the engagement about six weeks into it he decided Zeald was treating him as an employee. On that basis he now claims he is an employee and that the parties were in an employment relationship.

[5] I note that Mr Greenstein did not do anything about his belief that his employment status had changed from that agreed at the outset of the relationship. He keep his views about that alleged change in status to himself until well after Zeald had filed District Court proceedings against him to recover the Initial Booster Payments from him.

[6] The District Court proceedings are currently on hold whilst the jurisdiction issue is resolved. Zeald has applied for a declaration from the Authority as to the status of the parties' relationship so it is clear which jurisdiction must determine the proceedings between them.

[7] Zeald engages both employees and contractors. It has made a business decision to engage all of its Sales Consultants as independent contractors. There appear to be sound business reasons for it doing so. Entirely separate processes, rights, obligations and documentation apply to Zeald's employees versus its independent contractors. This distinction is deliberate and it is something Zeald carefully monitors to ensure its contractors are not treated the same as its employees.

Issues

[8] The only issue to be determined is whether or not Mr Greenstein was an employee in accordance with the definition of "*employee*" set out in s.6 of the Employment Relations Act 2000 (the Act).

[9] The leading case is the Supreme Court decision of *Bryson v. Three Foot Six Ltd*¹ which acknowledged that *all relevant matters* includes written and oral terms of the contract entered into between the parties together with any divergences from or supplementation to those terms apparent from the manner in which the relationship operates in practice.

[10] The Supreme Court also observed that how the relationship operates in practice is crucial to determining its real nature and that the Authority is still to have regard to the features of the control, integration and fundamental tests which apply at common law.

[11] Section 6 defines the meaning of “*employee*”. Section 6(2) of the Act requires the Authority to determine “*the real nature of the relationship*” between the parties. This requires the Authority to “*consider all relevant matters, including any matters that indicate the intention of the parties*”². The Authority is not to treat as determinative any statement by the parties describing the nature of their relationship³.

[12] The inquiry into the status of a particular relationship is an intensely factual one. Once the material facts have been established the Authority must stand back and make its determination based on the overall factual matrix of the circumstances as they existed during the relationship, not as a party may with the benefit of hindsight have wished them to be.

Relevant documentation

[13] The parties agree that all of their pre-engagement discussions were around an independent contracting relationship. At no point was an employment relationship ever even raised.

[14] These pre-engagement discussions are supported by the Agreement entered into by the parties on 10 April 2013. Mr Greenstein acknowledges that he was not pressured to sign the agreement and that he was provided with time to seek advice on it before agreeing to the offer Zeald had made.

[15] In clause 3.3 of the Agreement Mr Greenstein acknowledges that “*he is an independent contractor and shall conduct the business as an independent proprietor*”

¹ [2005] 3 NZLR 721

² Section 6(3) of the Act

³ Section 6(3)(b) of the Act

in his own name". The remainder of the clause specifically provides that he is not, among other exclusions, an employee.

[16] Frequent reference is made throughout the Agreement to Mr Greenstein running his own "*business*" and to having sufficient funds to pursue his business. Zeald expressly does not provide any warranties about the success or otherwise of Mr Greenstein's business.

[17] The Agreement also makes provision for Mr Greenstein to contract with it via a limited liability company should he wish to do so providing that the obligations of that entity were personally guaranteed by him.

[18] Mr Greenstein was required to purchase his own equipment and meet his own expenses. Mr Greenstein was to be paid solely on a commission and bonus basis. The Agreement refers to the relevant commissions based on the Sales Consultant's Commission Policy and the Commission and Hunters Bonus Policy (where applicable) for future internal sales to clients he had introduced to Zeald. The Agreement specified that there was no guarantee that Mr Greenstein would earn a minimum amount.

[19] The Agreement required Mr Greenstein to purchase his own equipment in order to carry out the services. This included a modern laptop computer, a modern smart phone and a motor vehicle not more than 8 years old that was to be kept in a clean and tidy condition consistent with a professional business image.

[20] Zeald agreed to provide Mr Greenstein with "*Initial Booster Payments*" in order to assist him with cashflow in the early stages of the relationship. However, there was an obligation under the Agreement to repay those initial boost payments if he did not meet certain sales targets. That is what the proceedings that Zeald has brought before the District Court relate to.

[21] Under the Agreement Zeald licences the use of its intellectual property to Mr Greenstein so that he can perform the required services. A licence would not be required if he was an employee because there would be an implied licence to use Zeald's intellectual property as a matter of course because if he was an employee he would in effect be Zeald's servant.

[22] I find that there are no aspects of the Agreement which contain the hallmarks of an employment relationship. For example:

- (a) There was no requirement for Mr Greenstein to work particular days or fixed or set hours or even a minimum number of hours per day or per week.
- (b) There was no requirement for him to provide the services from a particular geographical location. In particular he was not required to work from Zeald's premises in order to ensure supervision. Access to Zeald's premises was at his own discretion.
- (c) Mr Greenstein was not guaranteed a regular wage or salary payment. All payments to be made to him were linked solely to the success of his own endeavours.
- (d) Mr Greenstein was not entitled to holiday pay or any other benefits provided by the Holidays Act.
- (e) Mr Greenstein had the discretion to decide when he was and was not available to perform services and any time that he made himself not available was done so at his own expense.
- (f) There was no requirement on him to seek permission or approval from Zeald in advance of deciding not to be available for work on a particular day or over particular time periods.
- (g) There was no problem resolution clause which is mandatory for all employment agreements. Instead clause 21 of the Agreement sets out an alternative dispute resolution procedure which is very different from those provided by the Act.

[23] Mr Greenstein acknowledges that he was given an opportunity to take legal advice before signing the Agreement, and that he signed it without pressure or duress.

[24] I find that the Agreement entered into by the parties was a very comprehensive and detailed commercial Agreement that runs to some 36 pages. I do not consider there can be any doubt from reading it that the parties mutually intended to enter into a commercial independent contracting relationship.

[25] Mr Greenstein also sent an email to Zeald prior to signing the Agreement which states:

Let's start off as a sole trader, although I will eventually create a company as soon as my residency is complete which should be in May.

[26] I consider this relevant documentation strongly supports the existence of an independent contractor relationship.

Intention of the parties

[27] This is a case in which both parties carefully turned their minds to the status of their relationship before entering into that relationship. Both parties were aware that they were signing an Agreement which provides for an independent contractor relationship. Mr Greenstein did not raise any concerns about the status of his relationship until after Zeald had filed District Court proceedings to recover the amounts it claim he owes under the terms of the Agreement.

[28] The Agreement specifically requires Mr Greenstein to acknowledge that he understood the Agreement and that the real nature of the relationship created is an independent contractor arrangement, not some other arrangement such as an employment relationship.

[29] The parties agree that their mutual intention was to enter into an independent contractor arrangement. That intention is clearly reflected in the relevant documentation.

[30] I refer to the Employment Court's comments in *Chief of Defence Force v. Ross-Taylor*⁴ in which it emphasised:

"It is a very serious matter for the Authority or the Court to find, notwithstanding the clear intention of highly capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually entered into, that, after those arrangements have been terminated, the real nature of their relationship was completely different."

⁴ [2010] NZEmpC 22

[31] I consider that these factors indicate the parties were not in an employment relationship.

Tax and associated issues

[32] Under clause 10.10 of the Agreement Mr Greenstein acknowledges that he is fully responsible for complying with all applicable tax laws and other statutory obligations. It also provides for Zeald to deduct withholding taxes if it is legally required to do so.

[33] Consistent with that arrangement, Mr Greenstein completed an IR330 tax code declaration which records his tax code as WT (withholding tax) with the associated schedular payment activity being recorded by him on that form as “*commissions to sales people*”.

[34] The invoicing arrangements were complicated given the commission and bonus structure in place. Clause 10.9 of the agreement provides for Zeald to create tax invoices on Mr Greenstein’s behalf to cover the difficulties associated in calculating commission.

[35] The complexity of the commission structure was partly due to Mr Greenstein having a very wide discretion to provide discounts to a customer or to agree to a time payment with a customer. In which case, in accordance with the terms of the Agreement, his commission or bonus would be paid after the customer had made each required payment to Zeald, not at the time the sale initially occurred.

[36] Zeald’s payment arrangement to Mr Greenstein was that at the same time the customer was billed the invoice for the services it had purchased then Zeald would automatically generate an invoice in Mr Greenstein’s name to cover the associated commission on the sale to save him the difficulties in calculating different bonus percentages based on what the customer had actually already paid. Zeald then paid Mr Greenstein commission (and where applicable bonuses) based on the commission invoices it generated for him.

[37] I consider that these arrangements suggest that the parties were in an independent contractor arrangement.

Operation of the relationship in practice

[38] Mr Greenstein was required to meet his own tax and ACC levy liabilities. I consider he had flexibility to decide where and when he wanted to work. Zeald would provide him with leads it had generated via its telemarketers which the telemarketers would book into his diary. Mr Greenstein had free rein to identify which periods in his diary were available for Zeald's telemarketers to book appointments into.

[39] Mr Greenstein had the sole discretion to identify to Zeald what geographical areas he would and would not accept appointments in and he could change his mind about that at any time by simply advising Zeald that his preferences had changed.

[40] I consider that the way the relationship operated in practice is indicative of an independent contractor arrangement. The payment and taxation arrangements and flexibility of Mr Greenstein's working hours, to engage staff to support him and determine which locations he would and would not work within are all indicative of an independent contracting arrangement.

Control test

[41] I do not accept Mr Greenstein's submissions that he was subject to a high level of control. There was no control over the hours that he worked, either via the Agreement or in practice. Mr Greenstein determined his own hours of work. He also determined which days he would be available. He did not have to seek permission or prior approval or any periods he decided he was not available to work. His availability or otherwise was entirely up to him.

[42] Shortly after the engagement commenced, Mr Greenstein provided Zeald with an outline of his availability in terms of days, hours and the geographical location within which he was available. He was free to amend this outline of availability at any time, and he did so at least once during the engagement.

[43] I find that Mr Greenstein was under no particular obligation to accept any of the lead generation appointments that Zeald provided him with. Whilst he did so because he wanted to increase his own income, it was open to him to decide that he did not want to meet with a lead that Zeald had sourced for him. He did not have to give Zeald any reason for not wanting to follow a lead it had sourced, he simply had to tell Zeald to reallocate it to another Sales Consultant.

[44] At various times during the engagement Mr Greenstein did advise Zeald that he would not be available to attend appointments in particular places or at particular times. There was no issue with him making those decisions himself to suit his own preferences.

[45] The times and locations for the follow-up appointments generated as a result of the leads that Zeald provided to Mr Greenstein were determined initially by the prospective customer but could be rescheduled or adjourned by him in discussion with the customer. Mr Greenstein was also free to decide to pass the appointment over to another sales consultant should he have wished to do so. No permission was required from Zeald in respect of any changes Mr Greenstein wanted to make to the lead generation appointments it had arranged for him.

[46] Mr Greenstein was required to attend a Monday morning sales meeting in order to manage workflows internally, allocate internal resources and to operate as a motivational and information sharing opportunity for the Sales Consultants. However, he was also able to attend via skype, and on occasion he did so. He also failed to attend some of the meetings despite there being a contractual obligation on him to do so. Mr Greenstein was never censured for not attending these sales meetings.

[47] I do not accept Mr Greenstein's evidence that Zeald exerted control over his method of selling. Zeald provided Mr Greenstein with training in terms of the product/services it offered. It also trained Mr Greenstein on its processes so that he could understand them in order to maximise his sales to customers.

[48] I find that Mr Greenstein was not directed or required to follow a specific sales process. Zeald merely shared information with him that, in its experience, had consistently worked the most effectively and what selling techniques and processes its top Sales Consultants had adopted to achieve their on-going success.

[49] It was open to Mr Greenstein to follow this advice, reject it or only partially adopt it as he saw fit. How he dealt with the training that was provided was entirely up to him. He had been engaged as a sales expert and was expected to use his own experience and expertise to achieve success. There was no limitation put on that.

[50] I do not consider the fact that Zeald provided Mr Greenstein with training on its products and advice on how he could maximise sales of its particular products

means that Zeald was exercising the sort of control over him that is indicative of an employment relationship because Mr Greenstein was entirely free to adapt or ignore that information at his own discretion.

[51] Nor do I accept Mr Greenstein's evidence that because he was required to update Zeald's CRM tool that is an example of Zeald exercising control over him. I consider this is just a matter of internal customer management so that it was clear which customers had been approached, when and by whom and what their needs were.

[52] I consider the CRM tool was just one of the reporting processes put in place to ensure that Zeald's business ran effectively and the requirement on Mr Greenstein to update that tool with his activities does not in itself create an employment relationship between the parties.

[53] I find that the parties did not deviate from the obligations in the Agreement in terms of the control exercised over Mr Greenstein during the engagement. I find that Zeald did not control him to the extent necessary to alter the nature of the relationship that the parties intended at the outset of their engagement.

Integration test

[54] Mr Greenstein was provided with a Zeald business card and his profile was listed on its website. Zeald said it did this to ensure consistency of its brand to its prospective and actual customers and it refers to its obligation in clauses 4.4 and 4.5 of the Agreement to provide marketing material, assistance and promotional material to Mr Greenstein.

[55] I find that apart from the initial set up business cards and some preliminary marketing material, Mr Greenstein was expected to purchase this information from Zeald and I consider that arrangement is consistent with an independent contractor relationship.

[56] I consider that whilst the branded marketing material could potentially suggest that Mr Greenstein was been integrated into Zeald's business, I do not consider that he was in fact integrated into Zeald's business. It was clear that Mr Greenstein was operating his own business which involved selling Zeald products and services.

Fundamental test

[57] The Agreement makes it clear that Mr Greenstein was in business on his own account and he took the risks associated with his business failing (see clause 2.1(d)).

[58] Mr Greenstein's commission structure was linked directly to his own sales. If Mr Greenstein failed to close sales then he did not get paid. The more sales he closed the more he would be paid. There was also the opportunity for him to earn bonuses and even a passive income from the sales he generated because he received payment for any future sales Zeald's internal team made to a client he introduced despite him having no involvement in any such sales.

[59] I find that Mr Greenstein took the risks and benefits associated with self-employment insofar as he was able to benefit or profit from his own endeavours. He also took the risk in that there was no guarantee of regular payments outside of the initial booster payments which were provided to help him establish his business in the initial stages of the relationship.

[60] I find that the aim of the initial booster payments was to assist with initial cashflow difficulties given the commission structure was related to payments actually made by customers, not just to the date on which the sale was entered into.

[61] I consider the following further factors indicate that Mr Greenstein was in business on his own account:

- (a) He was required to purchase or provide his own equipment to do the work required;
- (b) He was required to pay for his own expenses and he did not claim these back from Zeald. Such expenses are tax deductible for him irrespective of whether he was GST registered;
- (c) Had Mr Greenstein been registered for GST then the Agreement anticipated the payment of GST in addition to commission;
- (d) Zeald deducted scheduler payments and not PAYE in accordance with his self-declared WT tax code;

- (e) Zeald made no deductions for ACC, and the Agreement laid responsibility for those obligations on Mr Greenstein;
- (f) Mr Greenstein was not enrolled in a KiwiSaver scheme;
- (g) Mr Greenstein had the ability to contract with Zeald through a limited liability company;
- (h) Mr Greenstein was required under clause 22 of the Agreement to indemnify Zeald in respect of any liability consequential to his breaches of the Agreement;
- (i) Mr Greenstein was free to provide services to other organisations during the term of the Agreement provided he had Zeald's prior consent. Consent was needed to ensure that any other business he became associated with did not compete with Zeald and did not create a conflict of interest or potential confidentiality issues for Zeald's existing customers because Zeald retains highly commercially sensitive information about its clients' sales and marketing strategies;
- (j) Mr Greenstein obtained a second independent contracting engagement with Matrix Applied Computing in early August 2013 without Zeald's knowledge or consent which indicates he did not consider himself to be an employee at that time.

[62] I consider that these factors are all indicative of an independent contractor arrangement. I find that Mr Greenstein took the risk of his business failing and was in business on his own account.

Industry practice

[63] I do not have sufficient evidence to form a conclusion about this and so I give it no weight.

Outcome

[64] I find that each of the common law tests do not undermine the intentions of the parties as evidenced by the freely negotiated contractual arrangements. I consider that each of the common law tests supports the mutual intention which was recorded in the

Agreement which provides that Mr Greenstein would be an independent contractor and not an employee. This was also the basis on which he was offered and accepted work with Zeald.

[65] Mr Greenstein had the ability to profit from his endeavours by increasing the number of sales he generated. He could also increase his income without doing any actual work himself because he was paid for subsequent sales that Zeald's internal sales team later made to clients he had introduced.

[66] Standing back and looking at the overall situation I am satisfied that the parties were not in an employment relationship. Mr Greenstein could structure his work as he saw fit. He had considerable freedom and flexibility not only in terms of the days or hours worked but also in terms of where he would undertake work and when and where he would be prepared to see prospective clients.

[67] I find that Mr Greenstein does not fall within the definition of an employee in s.6 of the Act. Accordingly, the Authority does not have jurisdiction to investigate any of the issues that have arisen between the parties. I find that the parties were always in an independent contractor relationship as per the terms of the Agreement they entered into in April 2013.

Costs

[68] Zeald as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to resolve costs by agreement. If that is not possible, then Zeald has seven days within which to file its costs submissions. Mr Greenstein has seven days within which to respond with Zeald having a further three working days within which to reply.

[69] This timetable will be strictly enforced and any departure from it requires the prior leave of the authority.

Rachel Larmer
Member of the Employment Relations Authority