

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2013] NZERA Auckland 182  
5430608**

BETWEEN                      IGOR ARAKELIAN  
   Applicant  
  
AND                                DVK GROUP LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Dave Vinnicombe, Advocate for Applicant  
   Evgeny Orlov, Advocate for Respondent  
  
Investigation Meeting:        28 March 2014 at Auckland  
  
Submissions received:        28 March 2014 from Applicant and from Respondent  
  
Determination:                16 May 2014

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

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**Employment Relationship Problem**

[1] This determination addresses the preliminary issue of whether or not the Applicant, Mr Igor Arakelian, was an employee of the Respondent, DVK Group Limited (DVK), or an independent contractor during the period in which he carried out work for DVK.

[2] Mr Arakelian claims he was unjustifiably dismissed by DVK. Only an employee can bring an unjustifiable dismissal personal grievance claim in accordance with s 103 of the Employment Relations Act 2000 (the Act). Mr Arakelian claims that he was an employee when he carried out work for DVK during the period which commenced on or about April 2011 and ceased on either 6 or 10 June 2013.

[3] DVK denies that Mr Arakelian was an employee and claims that he was an independent contractor during the period when he carried out work for DVK.

## **Issues**

[4] The preliminary issue for determination before the Authority is whether or not Mr Arakelian was an employee or an independent contractor during the period he carried out work for DVK.

## **Background Facts**

[5] Mr Arakelian said that during 1994 he formed two companies to provide roofing services: DVK, and DVK Roofing Services Limited, DVK being the operational company and holding all the issued share capital of DVK Roofing Services Limited. He claimed that he worked in both companies and held the positions of sole shareholder, director and employee. However Companies House records show that both companies were incorporated on 9 November 2009, and Mr Vinnicombe on behalf of Mr Arakelian confirmed that prior to incorporation Mr Arakelian had formed a trust which held all the shares of DVK, thereafter the trust transferred the shareholding to Mr Arakelian.

[6] Mr Valeriy Gumbatov, Director of DVK, said he first encountered Mr Arakelian in 2010 following his arrival in New Zealand, and had been offered and accepted employment with DVK.

[7] During early 2011 Mr Gumbatov said Mr Arakelian had approached him and asked for his assistance with DVK's cash flow, in particular he had requested a loan of \$150,000.00. In response Mr Gumbatov said he had agreed to provide a personal loan to Mr Arakelian of \$100,000.00.

[8] Mr Arakelian failed to repay the loan, and Mr Gumbatov said that during discussions about the loan repayment he (Mr Arakelian) had asked him if he would be interested in acquiring a shareholding in DVK. As a result, an Agreement for the Sale and Purchase of Share (the Share Agreement) had subsequently been entered into by Mr Gumbatov and Mr Arakelian on 7 April 2011 in accordance with which Mr Gumbatov acquired a 50% shareholding in DVK which was registered at Companies House on 11 April 2011.

[9] As 100% of the shareholding in DVK Roofing Services Limited was held by DVK, DVK Roofing Services Limited was initially a subsidiary of DVK. However following the date of completion of the Share Agreement on 11 April 2011, the shareholding in DVK

Roofing Services Limited became 50% owned by Mr Gumbatov and 50% owned by DVK, and on 6 March 2013 Mr Arakelian acquired the 50% shareholding owned by DVK. The annual return for DVK Roofing Services Limited filed on 25 March 2014 showed the shareholding to be unchanged at 50% each held by Mr Arakelian and Mr Gumbatov.

[10] Mr Arakelian said that after the Share Agreement had been completed on 7 April 2011, Mr Gumbatov became a director of DVK on 8 April 2011 and DVK Roofing Services Limited on 11 April 2011 and he (Mr Arakelian) ceased to be a director of DVK on 10 June 2011 and DVK Roofing Services Limited on 13 June 2011. However he had remained a shareholder on both DVK and DVK Roofing Services Limited and claimed to be an employee of DVK.

[11] For the sake of clarity I note that Companies House records show that the annual returns, both filed on 25 March 2014 by Williamson & Co Chartered Accountants, show:

**DVK GROUP LIMITED:**

Sole Director: Valeriy GUMBATOV

Shareholders: 500 shares Valeriy GUMBATOV

500 shares Igor ARAKELIAN

**DVK ROOFING SERVICES LIMITED**

Sole Director: Valeriy GUMBATOV

Shareholders: 500 shares Valeriy GUMBATOV

500 shares: Igor ARAKELIAN

*DVK Operation*

[12] DVK employees carried out work for DVK Roofing Services Limited, a roofing and waterproofing company laying down waterproofing membranes, and applying sealants and shingles for commercial and residential properties in Auckland.

[13] All DVK employees had individual employment agreements with DVK and were paid directly by DVK whilst DVK Roofing Services Limited engaged and paid independent contractors.

*Payment Terms*

[14] Mr Gumbatov said Mr Arakelian was never an employee of DVK; and that he was paid for his subcontracting services through DVK and/or DVK Roofing Services Limited. However there was no evidence provided to the Authority by DVK of any invoices submitted by Mr Arakelian, whether GST rated or otherwise, in respect of any subcontracting work he carried out for either DVK or on behalf of DVK Roofing Services Limited.

[15] Mr Gumbatov provided in evidence DVK's IRD Employer monthly schedules for the period from October 2012 until January 2014. Mr Arakelian's name is not included in the list of employees set out on the DVK IRD Employer monthly schedules.

[16] Further, and consistent with DVK's view that Mr Arakelian was not an employee, there had been no PAYE deductions made on his behalf as indicated by the IRD Employer monthly schedules. Although Mr Arakelian claimed that he had paid PAYE, he was unable to provide any evidence that this had ever been the case.

[17] There is however evidence that Mr Arakelian transferred and withdrew monies on a regular basis from both DVK and DVK Roofing Services Limited bank accounts. Mr Arakelian said it had been agreed with Mr Gumbatov that he was to be paid in that way, and further that he had understood that PAYE was to be paid on his behalf by DVK

*Terms of employment*

[18] Mr Arakelian said that the verbally agreed terms of his employment with DVK included a monthly salary of \$10,000.00 (to be transferred from the DVK accounts direct to his personal bank account), a car and a company credit card for petrol purchases provided in the name of DVK and paid for by DVK, and a mobile telephone supplied and paid for by DVK, though DVK denies this claim.

[19] Mr Arakelian had DVK business cards which identified him as 'Manager', and when the business cards were depleted, DVK would order and pay for replacement cards.

[20] Mr Arakelian said he visited customers on behalf of DVK as instructed to by Mr Gumbatov. He worked in the same management capacity as Mr Serguei Formine, another manager of DVK, and he had been the person to visit customers and obtain work for DVK Roofing Services Limited as his command of the English language was better than that of Mr Gumbatov or Mr Formine. Mr Arakelian said he would copy all emails and customer quotations to customers to Mr Gumbatov to whom he reported daily.

[21] Mr Arakelian said he had not taken any annual leave during the period which commenced on or about April 2011 and ceased on either 6 or 10 June 2013, although he had not worked on statutory holidays, nor had he taken any sick leave.

[22] Mr Arakelian said that initially he had received a salary, however during the early part of 2013 his salary had not been paid by DVK at the direction of Mr Gumbatov, and he had been instructed by Mr Gumbatov to receive payments directly from a debtor of DVK identified as 'Edward', which he had done during the period from February to May 2013.

However there had remained a shortfall in the amount he should have received as salary for the period.

[23] On 6 June 2013 the disconnection of the DVK mobile telephone used by him had taken place and it had been transferred to the use of Mr Gumbatov's son on 6 June 2013.

[24] Mr Arakelian said that on 10 June 2013 he had raised this issue with Mr Gumbatov who had advised that he should take the DVK owned vehicle plus the sum of \$50,000.00 for the balance of his shares under a threat of personal assault if he did not agree.

[25] Mr Gumbatov said that he and Mr Arakelian each owned 50% of the shares in DVK after the Share Agreement, and that Mr Arakelian was a business partner who carried out sub-contract duties for DVK and DVK Roofing Services Limited, and was not an employee of DVK.

[26] Mr Gumbatov said that since his association with DVK, there had been no agreement to an employment relationship being formed, and to his knowledge Mr Arakelian had never received a salary from DVK. However as joint shareholder, Mr Arakelian had control and access of DVK bank accounts and he transferred money from the DVK accounts to his personal bank account, as and when he wished to do so, between the period from April 2011 to March 2013.

[27] Mr Gumbatov agreed that as the partner with the greater experience, Mr Arakelian would be the one to visit the customers and that he (Mr Arakelian) decided which customers he would visit. He denied that he had told Mr Arakelian which customers to visit stating that he did not have the knowledge or experience to do so.

[28] His responsibility had been for administration, and in this capacity he had ensured all DVK employees had individual employment agreements.

[29] Mr Gumbatov said that he and Mr Arakelian would talk each day, updating each other on what had transpired during the day and would usually have lunch together.

[30] However during mid-2013 Mr Arakelian had ceased coming into the office and he had been unaware of what, if any, work Mr Arakelian was at that time undertaking on behalf of DVK.

[31] Mr Gumbatov said that on a few occasions Mr Arakelian had advised him that he was sick and unable to carry out any work for DVK, but he had never provided, or been expected to provide, medical certificates, nor had he requested payment for those absences.

[32] Mr Arakelian had also been absent due to holiday commitments, but he had not sought, or been expected to seek, permission to take the leave.

[33] Mr Gumbatov said that during 2012 he had become concerned that Mr Arakelian had been taking such large amounts of monies from DVK bank accounts that it was affecting its financial viability and he had raised this issue with him. However this had resulted in Mr Arakelian withdrawing even more money.

[34] Mr Gumbatov said that in his capacity as the sole director of DVK, effectively the Board of the company pursuant to s 127 of the Companies Act (1993) (the Board), he had therefore withdrawn Mr Arakelian's access to the DVK bank accounts, resulting in Mr Arakelian being able to view the DVK bank accounts, but not make financial transfers from them.

[35] It was following this action that Mr Gumbatov said he had been contacted by the customer 'Edward' who requested warranties in respect of roofing work for which he had already paid direct to Mr Arakelian. Mr Gumbatov said he had been concerned as Mr Arakelian had not informed him that he had been receiving these monies, and the amounts paid by 'Edward' had not been entered into DVK's accounting systems.

[36] Mr Gumbatov said that during mid-2013 he had been advised that Mr Arakelian intended leaving New Zealand and as Mr Arakelian was not working or attending the DVK offices, he had asked Mr Arakelian to transfer the DVK mobile telephone to his son who worked for DVK so it could be used for DVK business. As Mr Arakelian did not agree to this, he had taken steps on 6 June 2013 to transfer the DVK mobile telephone used by Mr Arakelian to his son.

[37] Mr Gumbatov denied that he had dismissed Mr Arakelian, but stated that the relationship with DVK had ceased due to Mr Arakelian not carrying out any further work on its behalf after June 2013.

### **Determination**

[38] Mr Arakelian claims that he was an employee whilst carrying out work for DVK. There was no offer letter, or employment agreement provided to him by DVK, and he did not receive any pay slips because all payments taken by him between April 2011 and June 2013 were a result of direct transfer from DVK accounts, authorised by him, to his personal bank account..

[39] In deciding whether Mr Arakelian was employed by DVK as an employee, I apply s.6 of the Act which provides:

*“s.6 Meaning of employee:*

*1. In deciding ... whether a person is employed by another person under a contract of service, the ... Authority-... must determine the real nature of the relationship between them.*

*(3) For the purposes of subsection (2)... or the Authority-*

*(a) must consider any relevant matters, including any matters that indicate the intention of the parties*

*(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[40] In *Bryson v Three Foot Six Limited (No2)*<sup>1</sup> the Supreme Court stated the following:

*“‘All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.*

*Pre-7 April 2011*

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<sup>1</sup> [2005] 1 ERNZ 372

[41] During the period from 1994 until 9 November 2009 DVK was not an incorporated company.

[42] During the period from 9 November 2009, the date of incorporation of DVK, until the Share Agreement on 7 April 2011, Mr Arakelian was the sole shareholder and director of DVK.

[43] Whilst I accept that Mr Arakelian was fully integrated into the operation of DVK, and in control of it by virtue of his status as sole shareholder and director, I find that there were no other directors or shareholders able to act in an independent way to control his behaviour or actions. DVK effectively had no control over Mr Arakelian.

[44] It was Mr Arakelian's decision to enter into an agreement to sell 50% of his shareholding in DVK to Mr Gumbatov in 2011, a decision he was fully entitled to make given his status as sole shareholder and director.

[45] Also I note that from 1994 Mr Arakelian started and was involved with the DVK business operations until its incorporation as a limited company in 2009 at which time he became the sole director and sole shareholder. Mr Arakelian did not provide any evidence that he had at any time entered into an employment agreement with DVK or on how he was remunerated for the services he supplied. He was fully integrated into the business and in control of it. On that basis I find that Mr Arakelian was in business on his own account and not an employee prior to the Share Agreement on 7 April 2011.

*January – June 2011*

[46] Mr Gumbatov commenced employment with DVK in 2010. At this date he became an employee working under the control and direction of Mr Arakelian. However during April 2011 I find that there was a fundamental change in the nature of that relationship.

[47] Following the signing of the Share Agreement on 7 April 2011, although Mr Gumbatov remained an employee as evidenced by his inclusion on the IRD Employer Monthly schedules, he and Mr Arakelian became equal joint shareholders of DVK. In that capacity neither had a controlling influence.

[48] Mr Gumbatov was appointed a director of DVK with effect from 8 April 2011 and, following the cessation of Mr Arakelian's appointment as a director of DVK on 10 June 2011, he became the sole director of DVK and effectively the DVK Board.

[49] Whilst Mr Arakelian claims that his status as an employee continued following the Share Agreement, I have already found he had not been an employee prior to 7 April 2011.

[50] There are no written terms and conditions of employment on which to establish the contractual nature of Mr Arakelian's relationship. In *Cunningham v TNT Express Worldwide (NZ) Ltd*<sup>2</sup> the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship. This broad approach in *Cunningham* was held by Chief Judge Goddard in *Muollo v Rotaru*<sup>3</sup> to apply to orally agreed terms, in that the relevant intention could be inferred from words or conduct at the time the contract was formed or subsequently varied.

[51] However in this instance I find that whilst Mr Arakelian contended that an employment relationship was intended post-April 2011, Mr Gumbatov's evidence, as the sole director of DVK, was that no employment agreement had been intended or entered into by DVK and Mr Arakelian.

[52] Accordingly I now turn to the way in which the relationship operated in practice by having regard to the features of control and integration, and to the fundamental test of whether Mr Arakelian was working on his own account.

#### *Control and Integration*

[53] The change in share ownership of DVK in April 2011 did not result in either Mr Arakelian or Mr Gumbatov having a controlling interest. However I find that Mr Gumbatov assumed operational control of DVK by virtue of his status as the sole director and effectively the Board of DVK.

[54] Mr Arakelian said that evidence of his employee status was that he visited customers of DVK, and prepared quotations subject to the control of Mr Gumbatov in the capacity of a manager, using business cards with the logo of DVK Group and which designated him as Manager.

[55] Mr Gumbatov agreed that Mr Arakelian had carried out visits to customers; however that this was in his capacity as a subcontractor. Mr Gumbatov denied that he had exercised control over which customers Mr Arakelian visited, and stated that Mr Arakelian made those decisions based on his greater knowledge and experience of the roofing sector.

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<sup>2</sup> [1993] 1 ERNZ 695

<sup>3</sup> [1995] 2 ERNZ 414 (WEC64/95)

[56] I find that following the Share Agreement on 7 April 2011 Mr Arakelian remained integral to the business of DVK, visiting customers and raising invoices and quotations on its behalf.

[57] I consider it likely that Mr Arakelian's use of a DVK motor vehicle, credit card and mobile telephone continued with the sole Director's tacit approval until June 2013 – a period of 2 years - as they had done prior to the change in share ownership, and although unusual in a sub-contractor relationship, I find of themselves, they are not determinative of an employment relationship.

[58] They were in effect a continuance of Mr Arakelian's status pre-the Share Agreement, which I have found not to be as an employee. Similarly Mr Arakelian being provided with business cards which identified him as a Manager of DVK I find to be significant but not determinative.

[59] There is evidence that Mr Gumbatov exercised control over Mr Arakelian initially agreeing to the method of withdrawing monies from DVK and later by preventing him from transferring monies from DVK bank accounts to his personal bank accounts and transferring the DVK mobile telephone used by Mr Arakelian to his (Mr Gumbatov's) son, however I do not find these actions to be determinative of the issue.

#### *Payments to Mr Arakelian*

[60] Mr Arakelian said that he had been paid a monthly salary by DVK, however his name is not included on the DVK IRD Employer Monthly Schedules, and Mr Gumbatov said DVK had not calculated, deducted or paid PAYE on behalf of Mr Arakelian.

[61] Despite Mr Arakelian stating the he had received a monthly salary of \$10,000.00, at the Investigation Meeting he had agreed that this was not the true situation and he had in fact been remunerated for his services by the transferring of monies from DVK bank accounts to his personal bank accounts at his own authorisation, but with the tacit approval of Mr Gumbatov, and that he had used the DVK credit card for personal expenses, both situations which I consider to have prevailed prior to Mr Gumbatov acquiring a 50% shareholding and assuming the sole directorship.

[62] I note that the sums transferred were not regular in nature, varying in both the amounts transferred and the frequency of transfer.

[63] Mr Arakelian said that following the Share Agreement he had transferred the monies with Mr Gumbatov's prior approval. Mr Gumbatov said he had not authorised the transfers to Mr Arakelian's personal account, although either he or Mr Arakelian were able to transfer monies from the DVK bank accounts. However I note that during the period April 2011 until

March 2013 Mr Gumbatov did not raise any objections to the withdrawal of monies by Mr Arakelian.

[64] I consider that this 'payment of monies' situation, which prevailed prior to 7 April 2011, was allowed to continue with the tacit agreement of Mr Gumbatov as the sole Director of DVK after 7 April 2011 and does not thereby establish of itself that there was an employment agreement in place between Mr Arakelian and DVK.

[65] I find the surrounding events and the method of payments to Mr Arakelian to be very unusual and consider that apart from unlawful withdrawals, which has not been suggested in this case, there are other possible reasons to consider:

- i. *Salary*: There is no evidence of an employment agreement written or otherwise, and no evidence of salary payments or PAYE being made by DVK;
- ii. *Payment of Dividend to a shareholder*: There is no evidence of any dividend made to any shareholder;
- iii. *Distribution to a Shareholder*: subject to caveats, s52 of the Companies Act 1993 allows a Board to authorise a distribution by the company at any time, and of any amount, and to any shareholder it thinks fit.
- iv. *Payment to a subcontract*: there is no evidence of any services contract of invoices being presented by Mr Arakelian to DVK;
- v. *Drawings by a shareholder*: Williamson & Co, accountants to DVK, confirmed in a letter dated 19 December 2013 that during 2011, 2012, and 2013 there was no income allocated or paid to Mr Arakelian other than: "... *drawings taken out as a director and shareholder*".

[66] However during the beginning of 2013 Mr Gumbatov in his capacity as sole Director ceased to allow Mr Arakelian to transfer monies from the DVK accounts to his personal bank account, and transferred the DVK mobile telephone from Mr Arakelian to the use of his son on 6 June 2013.

[67] I find that whilst these are actions that an employer exercising control could take in regards to an employee, they could also relate to the Board ceasing distributions to a shareholder or ceasing payment to a sub-contractor, and therefore I do not find these actions to be determinative of the issue..

*The Fundamental Test*

[68] An employee is paid for his or her service to an employer. The fact that Mr Arakelian was not directly paid a salary but withdrew the monies from the DVK bank account upon his own authority I do not find to be as relevant as the fact that Mr Gumbatov, as sole Director and in effect the Board of DVK, was aware of the situation and allowed it to continue which was possible because the joint shareholders had at that time the ability to transfer funds on their own account.

[69] It was not until he became aware that the amounts of monies Mr Arakelian was transferring for his personal use were placing DVK in a precarious financial position that he took action to prevent Mr Arakelian being able to continue to make such money transfers, although Mr Arakelian still had the ability to view the DVK bank accounts. This was a decision Mr Gumbatov could and did implement by virtue of his position as the sole Director acting as the Board of DVK.

[70] Once he discovered that Mr Gumbatov had blocked his access to operate the DVK bank accounts, Mr Arakelian did not address the issue of non-payment with Mr Gumbatov and ask to be placed on the payroll as I would have expected him to have done had he believed there to have been an employment relationship and agreement that his salary would be made by direct transfer from the DVK bank accounts.

[71] Rather Mr Arakelian said that he had then proceeded to take monies directly from a DVK debtor, namely a customer called 'Edward' for his personal use. These monies had not been processed through the DVK accounting processes as would be the usual procedure or entered in the DVK accounts. Mr Arakelian said that he had acted in this way upon instructions from Mr Gumbatov.

[72] I note there is no reference to these payments being reflected in the personal bank statements submitted in evidence by Mr Arakelian, nor are there submitted in evidence copies of director's minutes authorising the transaction.

[73] Mr Gumbatov denied that he had instructed Mr Arakelian to receive payments directly from 'Edward' and said that he had not been aware of the situation regarding the customer 'Edward' and the payments received directly by Mr Arakelian until 'Edward' had brought the matter to his attention by requesting warranties for the work carried out by DVK and for which he had paid Mr Arakelian.

[74] There is no evidence that once he became aware of the irregular dealings with 'Edward' that Mr Gumbatov took any form of disciplinary action against Mr Arakelian, which I consider to be consistent with his view that Mr Arakelian was not an employee.

[75] Mr Arakelian stated that during the period between February and May 2013 there had been a significant shortfall in his total salary expectation despite the \$23,000 he had received via 'Edward' and \$2,010.00 by using the DVK credit card for personal expenses, however he did not raise this as an issue with Mr Gumbatov until 10 June 2013, following the mobile telephone transfer.

[76] I do not consider that an employee faced with having to receive payment for a contractual salary by means of what was certainly an unorthodox and unrecorded collection of a DVK debt together with the use of a DVK credit card for personal expenses and the associated personal taxation implications, coupled with a significant shortfall in salary expectation, would not have raised his concerns about the situation with his employer until some 5 months later.

[77] Mr Arakelian denied that he had taken any sick leave or holiday entitlement during the period from April 2011 until June 2013. Mr Gumbatov's evidence is in contradiction to this assertion. I observe that Mr Arakelian has made no claim for unpaid accrued annual leave entitlement which would be an entitlement of an employee upon the termination of employment

[78] In considering whether or not Mr Arakelian was in business on his own account, I observe that he is an experienced business man who has owned and operated a number of businesses in New Zealand. Upon or before the transfer of 50% of his shareholding in DVK to Mr Gumbatov and the change in the directorships I consider that it was incumbent upon to him to negotiate the basis of an employment relationship with DVK.

[79] However he did not do so, rather he continued his adopted pre- 2011 practice of withdrawing monies from the DVK bank accounts as and when he required personal cash, and when this avenue of revenue was closed to him, he chose to take monies owed to DVK by a customer for his personal usage.

[80] Although Mr Arakelian said that Mr Gumbatov had given him instructions to follow the course of action in collecting monies due to DVK, there is no supporting documentary evidence before the Authority in support of this assertion.

[81] Given his business acumen, I consider that Mr Arakelian would have been aware, and have wanted to ensure, that the correct accounting processes were followed in respect of such

a payment from a DVK debtor, had this course of action been legitimately authorised by DVK. Further that he would have ensured that the correct paperwork in respect of warranties and guarantees for the work which had been carried out had been provided to the customer, however there is no evidence that he did so.

[82] It would be reasonable to expect an employee of a company undertaking such an unorthodox action as debt collection direct from a customer for personal use not to require documentary evidence that the actions had been authorised, to prevent any future disciplinary action. There is no evidence that Mr Arakelian did so.

[83] It would also be reasonable to expect an employee to have ensured that the employer declared such income to the IRD on the employee's behalf for PAYE purposes. There is no evidence that Mr Arakelian did so.

[84] In this respect I observe that Mr Arakelian was not a naive and inexperienced person in business matters who could not be expected to fully appreciate the implications of such actions for him personally.

[85] Although there is evidence that Mr Gumbatov exercised some control over Mr Arakelian and I have found Mr Arakelian to have been fully integrated into the business of DVK, I find that the following factors indicate that he was in fact in business on his own account:

- he was not an employee of DVK during the period 1994 to November 2009;
- he claimed that he was, by virtue of being an employee, paid a salary of \$10,000.00 per month on which he paid PAYE, however he provided no evidence in support of his PAYE contributions;
- his name was not included on the DVK IRD Employer Monthly Schedules although given his business experience he would have known that this was a requirement in respect of both the employees and employers to account for PAYE;
- he did not work full-time for DVK, made no claim for holiday pay entitlement, and did not claim for paid sick leave;
- he transferred monies by varying amounts and at various times from the DVK bank accounts to his personal bank accounts, not an action usually open to an employee;

- he took monies directly from a DVK debtor which he did not declare for accounting or any other purposes and on which there is no evidence that he declared this for IRD/GST purposes, not an action usually open to an employee;
- In a letter dated 19 December 2013, Williamson & Co, accountants to DVK, as part of an internal audit, confirmed that during 2011, 2012 and 2013 there was no income allocated or paid to Mr Arakelian other than; “ *...drawings taken out as a director and shareholder*”;
- he did not raise any issue with DVK concerning the shortfall in his alleged salary expectations over a 5 month period as would be expected of an employee;
- Mr Gumbatov’s evidence that Mr Arakelian decided which customers to visit and when is credible in light of the fact that Mr Arakelian had the most experience and knowledge of the DVK business ; and
- there is no evidence that Mr Arakelian’s alleged employment was terminated by DVK, rather the indications are that, for whatever reason, he ceased to provide such services as he had been providing to DVK, an action open to an independent contractor but not to an employee

[86] I find that there is sufficient evidence to indicate that Mr Arakelian was in business on his own account.

[87] I determine that Mr Arakelian was an independent contractor during the period of his providing services to DVK.

### **Costs**

[88] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant 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.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

