

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mark Graeme Berghan (Applicant)

AND Canterbury International Institute (Auckland) Limited
(Respondent)

REPRESENTATIVES Kristina Anderson for Applicant
No appearance for Respondent

MEMBER OF AUTHORITY Ken Raureti

INVESTIGATION MEETING 15 November 2006

DATE OF DETERMINATION 20 December 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem.

[1] Mr Berghan has filed an employment relationship problem with the Authority in which he claims he was employed the respondent company (CIIA) as its Principal. He says that he was unjustifiably dismissed, and that he has been subjected to unjustified disadvantage during his employment.

[2] Mr Kumar, a director of the respondent company says that Mr Berghan was hired as an independent contractor and not an employee.

[3] During a conference call with the parties, it was agreed that the Authority would in the first instance determine the preliminary matter of independent contractor versus employee status.

No appearance for the respondent.

[4] This preliminary matter was set down to be investigated in August 2006. Mr Kumar resides in Australia. He had originally intended to appear at the meeting in person. The day before the meeting date, Mr Kumar advised that Authority that he was sick, and therefore unable to attend the meeting. As a result, the matter was rescheduled for 15 November 2006.

[5] On 18 September 2006 Mr Kumar advised the Authority that he intended to seek legal advice. One month later, 18 October 2006 Mr Kumar wrote to the Authority and advised he had sought legal advice which confirmed for him that Mr Berghan was an independent contractor. He said based on that advice he will not be attending the meeting scheduled for 15 November 2006.

[6] The next day, (19 October 2006) the Authority responded to him indicating that if he chose not to attend the investigation meeting, it would be useful if he would provide a copy of his legal advice so that it may be considered in the whole scheme of things. It was pointed out to him that on the one hand he has legal advice that Mr Berghan is an independent contractor and on the other hand, Mr Berghan's legal advice is that he is an employee. Mr Kumar was urged to attend, and he was advised that if he did not attend, the matter would be determined on the information available to the Authority. That afternoon, Mr Kumar replied by email that

he is comfortable with the Authority making a determination on the documents he had provided to date, and he iterated he did not intend attending.

[7] On the morning the investigation meeting was scheduled (15 November), Mr Kumar sent two emails to the Authority, one was a reference to an article Mr Berghan wrote in the New Zealand Herald, and the other was a reference to a website of one of Mr Berghan's companies of which Mr Berghan is a director. As a result of the eleventh hour email correspondence received from Mr Kumar, the Authority contacted him to ascertain his intentions. He was quite clear that he would not be attending the meeting.

[8] The respondent has been afforded reasonable opportunities to properly put its matters and information before the Authority for its consideration. Mr Kumar has put various written statements and references forward and has clearly indicated he will not be attending the meeting. In light of the foregoing, I have exercised the power to proceed with the matter pursuant to clause 12, Schedule 2 of the Employment Relations Act 2000.

Background.

[9] Canterbury International Institute (Auckland) Limited is a registered Private Training Establishment which teaches two diploma courses, one in marketing, and the other in IT. CIIA was set up in 2003. Between the initial setting up of the CIIA campus in 2003, and Mr Berghan's alleged dismissal in January 2006, he has had three separate work engagements with CIIA.

[10] Mr Berghan is a Director of three companies, A2Z Group Limited, A2Z Translate Limited and ANM Marketing. The first engagement he had with CIIA was during the early stages of setting up the campus in May-June of 2003. Mr Berghan through A2Z Group Limited undertook a project management contract engaged as an independent contractor to manage the whole physical fit-out and set up of the campus.

[11] The second engagement of Mr Berghan was in late 2004. This engagement was also as an independent contractor through A2Z Group Limited. CIIA was experiencing problems with NZQA accreditation issues. Mr Berghan was contracted to develop an action plan to assist CIIA address NZQA quality management systems and processes. Mr Berghan says that there is no dispute about those engagements; they were clearly on an independent contractor basis.

[12] The third and last engagement was Mr Berghan taking on the role of Principal of CIIA. This engagement began in April 2005.

Terms of their agreement.

[13] Before Mr Berghan took on the full time Principal role, he and Mr Kumar had various communications surrounding the negotiation of the terms of their agreement. In an email of 22 March 2005 from Mr Berghan to Mr Kumar, (Mr Kumar's response to each of Mr Berghan's points is in capitals) Mr Berghan says:

Hi Nick, OK, lets talk turkey. A2Z has grown to the point now where I am in the process of putting in place systems that will allow my staff to take over 90% of the operational side, leaving me with basically the high-level client liaison. I like working with you and (forgive the presumption) think we operate on something like the same wavelength (not giving up anything on the considerable charisma though!).

WE WILL ACCOMADATE YOUR COMMITMENT TO A2Z

If I was to take consider a full time role at CII, I would like:

1. A 3 year plan of where u see me in three years and what my income is, i.e. Will I be retiring to the beach in 2008 or 2009?

RETIRING ON THE BEACH IS A POSSIBILITY – THE FOUNDATION IS IN PLACE – WHAT YOU BUILD ON IT WILL BE UP TO YOU.

2. Options as to whether I am to be a PAYE employee or to contract via one of my companies.

YOUR CHOICE. (Authority notes that Mr Berghan disputes that "YOUR CHOICE" was Mr Kumar's response, he says the response was "I WOULD PREFER TO KEEP THE SAME COMPANY CONTRACT")

3. An acknowledgement that I cannot just walk away from my existing business, and that I will have to use some normal business hours to deal with emails, phone calls, meetings etc. over 90% of my clients are northern hemisphere, so I tend to work evenings with them, but I do have some local clients.....There is going to have be some good faith here.

ACKNOWLEDGED. GOOD FAITH BOTH WAYS.

4. Lotsa holidays! (now that made you jump eh?)

I WILL CONVERT YOU INTO AN INDIAN – NO HOLIDAYS

If I did take on a full time job, I would want considered:

1. The freedom to hire who I thought best for the various roles.....within the constraints of established procedure and budget.

OK.

2. A structured budget and strategic plan to work with; the crucial budget point will be staff salaries/wages; they are relatively high here compared to Australia (hell, the bus drivers just turned down 8%!))

OK – IN CONSULTATION WITH GAJINDER OR I.

[14] Items 3 – 6 detail various conditions and authorities around access to academic staff in Australia, an ability to restructure management/administrative roles/responsibilities, reporting systems in Auckland, an agreement that the Directors would fully support any disciplinary action he took on students, and a budget allocation for improving the look and feel of the school. Mr Kumar's responses were consenting with riders of keeping the directors in the loop, and in consultation with Gajinder or himself.

[15] Item #7 of Mr Berghan's email refers to a *healthy local marketing budget allocation (full disclosure: I will be proposing one of my own company's services here)* Mr Berghan indicated that Whitireia Polytechnic had recruited over 500 students with over half of those sourced from local market. Mr Kumar gave it the "OK – AS LONG AS IT IS PERFORMANCE BASED."

[16] In items 8 & 9 Mr Berghan sought full disclosure of the current school situation, employment contracts, lease, financials, projections etc, and in #9 wanted to have clear established reporting requirements from him to the Directors and authorities. Again Mr Kumar's response was "OK".

[17] Mr Kumar indicated to Mr Berghan at the end of the email, *BOTTOM LINE. I WANT CIIA TO OPERATE RELATIVELY AUTONOMOUSLY FROM SYDNEY. WE HAVE A COMPREHENSIVE INFRASTRUCTURE TO RECRUIT STUDENTS INTO AUST AND NZ FROM THE SUB-CONTINENT.....*

FINANCIAL – LONGER TERM. IF YOU REALLY WANT THE "BEACH" OPTION I AM WILLING TO NEGOTIATE A DEAL WITH YOU ON THE FOLLOWING LINES: INTERIM AGREEMENT TILL JULY – MINIMISE FINANCIAL BURDEN ON CIIA LONG TERM AGREEMENT.

STAGE 1 – BASE SALARY/CONSULTANCY FEES (\$60k TO \$70k PER YEAR) PLUS A SMALL PERCENTAGE OF OPERATING PROFIT.

STAGE 2 – WHEN WE (INVESTORS) HAVE RECOVERED THE CAPITAL INVESTMENT – THE ABOVE PLUS A HIGHER PERCENTAGE OF PROFIT.

[18] The next day, Mr Berghan replied to Mr Kumar by email and said, *Ok, let's do this thing. I would like to see P&L and Balance Sheets first,.....I would like contract to be between my company A2Z Group and CII as a management contract. Proposed contract value, % of operating profit, reviews at 6 months and 12 months, etc. etc. Contract to be performance based rather than time based?*

Conditions of contract.

[19] The outcome of the negotiations was that Mr Berghan drew up a contract for them. It is headed **Contract for provision of management services between** *Canterbury International Institute Auckland 156 Vincent Street Auckland referred to in the contract as the "client, And A2Z Group Limited 97 Rose Road Grey Lynn Auckland referred to in the contract as the "provider".*

[20] The contract goes on to list the Provider responsibilities as being *to manage the campus in all respects, specifically to maintain and supervise all academic processes, to maintain and expand all local marketing processes, and to maintain compliance with all relevant New Zealand legislative bodies.* The Client responsibilities were *to provide administrative and financial support to enable the provider to effectively perform their tasks, specifically to provide a strategic plan for the Institute, to provide an annual budget, to provide financial support to ensure the provider is able to implement the budget and to provide offshore marketing services.*

[21] The clause of the contract headed **Consideration** says:

For the period 24/03/05 – 23/6/05

Annual fee of NZD\$65,000.00 plus GST, (monthly NZD\$5416.67 plus GST) to be paid monthlyby direct credit to a bank account nominated by the provider.

From 24/06/05

Annual fee of NZD\$70,000.00 plus GST (monthly NZD\$5833.33 plus GST) to be paid monthly...

[22] The next clause is headed **Incremental increase as reflection of performance.** The clause reflects that *in recognition that an increase in student body leads to an increase in the management role, and that the increasing student body reflects the effective management.....ergo a measure of performance, the following incremental increase is to apply.* The clause then lists in table form a simple incremental increase to the annual fee of NZ\$5,000.00 plus GST for every increase in the student body of 10 students. The table showed the number of students, the increase applied and the new annual fee.

[23] The signatories to the contract were Mark Berghan for A2Z Group, and Mr Kumar on behalf of CIIA. It was dated 31/03/05.

Summary of Mr Berghan's evidence.

[24] He says there was a significant change in his duties and role when he went from part time contracting to full time employed work in relation to C11A. Previously he had no direct supervision of students or staff, was not required to be on site dedicated hours, and had only been designated an action plan to address NZQA and quality management system (QMS) issues. With the new role, he was required to manage the students and staff, be on site designated hours, and handle the actual day to day running of the campus. He says he was no longer free to determine how and when the work was done. He says in his role as Principal he was an integral part of CIIA, he took direction from CIIA's directors.

[25] He says when he commenced his role he was asked by Nick Kumar to "clean up the school", as there were multiple NZQA audit issues that had not been resolved by previous management. The primary goal was a successful NZQA audit in April 2005 (two weeks after I formally started). This was achieved when CIIA went from a 6 month to a 12 month NZQA cycle. It was his understanding that he was to work as a manager of the school in all operational respects, and to plan and develop marketing and on-going growth of the school, however, he says many operational and all strategic decisions had to be approved by the directors.

[26] In terms of when he did the work, he says he was required to be present during general office hours on campus, Monday to Friday; he also took work home when needed. He said a lot of email correspondence and systems design/admin functions were attended to and done from his home. Most of the time on campus was used in academic/operational matters (student issues, staff issues etc). Mr Berghan said if he was a contractor, he would have stuck to his hours as per the contract, but he considered himself as an employee and therefore you work till the job is done, not to the hours employed.

[27] In terms of how he would receive his work, much of the administration/NZQA audit type work and the general operational work for the Principal is pre-determined by the NZQA rules and procedures and the school QMS. He says with anything of substance he was required to seek approval from the directors; he would discuss an idea or concept, develop a plan and submit it to them for approval.

[28] He says it is clear that CIIA was offering him employment rather than work as a contractor. He says the directors required that he continued to be paid through his company. He says that he never in reality thought of himself as anything but an employee. He also says that it would be unheard of in the education industry for a Principal to be anything but an employee.

CIIA's statement.

[29] CIIA's evidence has been received by way of very brief emails from Mr Kumar. His emails are bullet point statements with minimal explanation. A summary of the key information from Mr Kumar is he says that Mr Berghan was providing management services to CIIA as a contractor. He says that during the period in question, Mr Berghan was also conducting and running the affairs of his other companies, and he particularly points out advertising work done by ANM Marketing and paid for by CIIA as another indication that Mr Berghan was an independent contractor carrying on his businesses as well as performing the management services contract.

[30] CIIA refers to the 22 March email and says that Mr Berghan chose to work as a contractor rather than an employee, and it was he, Mr Berghan who drew up the contract. Mr Kumar says that A2Z Group Limited invoiced CIIA on a monthly basis for management services. The invoices are tax invoices, and the company is GST registered.

[31] Mr Kumar says that Mr Berghan's evidence is rather contrived, he is trying to have it both ways, he has utilised the tax benefits for providing management services as an independent contractor and is now trying to utilise the statutory protection afforded to employees.

Legal framework.

[32] The starting point is Section 6 of the Employment Relations Act 2000.

6 Meaning of employee

- (1) *In this Act, unless the context otherwise requires, **employee-***
- (a) *means any person of any age employed by and employer to any work for hire or reward under a contract of service; and*
 - (b) *includes-*
 - (i) *a homemaker; or*
 - (ii) *a person intending to work; but*
 - (c) *excludes a volunteer who-*
 - (i) *does not expect to be rewarded for work to be performed as a volunteer; and*
 - (ii) *receives no reward for work performed as a volunteer.*
- (2) ***In deciding for the purpose of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.***
- (3) *For the purposes of subsection (2), the Court or the Authority –*
- (a) *must consider all relevant matters, including any matters that indicate the intention of the persons; and*
 - (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[33] As can be seen from the provisions of s.6 (2) and (3) of the Act, the focus is on determining the real nature of the relationship between the parties. In determining the real nature of the relationship, the Authority is required to consider all relevant matters including any matter that indicates the intention of the parties. While the intention of the parties is relevant it is not decisive of the matter. Other factors important to determining the status of the parties include those factors - arising from the evidence - as to how the arrangement between the parties worked in practice, and applying the well known tests such as control, integration and the fundamental test.

Discussion.

[34] Due to the non attendance of Mr Kumar, there was no ability for the Authority to seek expansion or clarification on the points that he put before the Authority. In respect of the 22 March email and the contract, there was only one point of difference between the parties, which not surprisingly is the aspect in item #2 of the email re Mr Berghan's question as to whether he was *to be a PAYE employee or a contractor*. Mr Berghan says, which I noted above that Mr Kumar did not respond "YOUR CHOICE" but replied "I WOULD PREFER TO KEEP THE SAME COMPANY CONTRACT".

[35] I was not convinced by Mr Berghan's evidence on that matter, I think it is more likely that Mr Kumar did respond "YOUR CHOICE". In my view it is consistent with the other short bullet point style, abbreviated responses he made to each of the other questions asked by Mr Berghan, and also of the manner in which his communications to the Authority have been couched. While I was not convinced by Mr Berghan in this aspect of his evidence, even if what he said is right, Mr Berghan replied to Mr Kumar the following day and said **"Ok lets do this thing.I would like contract to be between my company A2Z Group and CIIA as a management contract."**

[36] Mr Berghan then maintained the momentum of *"lets do this thing"* and drafted up a contract for the provision of management services. Mr Berghan is a businessman, he has three companies, he drew up the contract from a relatively equal bargaining position and they signed his contract. While the contractual statements asserting the nature of the relationship are not decisive, the particular contract drafted and signed by Mr Berghan is specifically that of a contract for services.

[37] Mr Berghan was quite open and upfront with his other business interests, he declared it in the first paragraph of the 22 March email in respect of A2Z, in paragraph #3 he sought an *acknowledgement he cannot just walk away from his existing business and he would have to use some normal business hours to deal with emails, phone call etc*, and his *"full disclosure"* in item #8 of the email of his proposal to use his marketing company to do the local marketing of CIIA. In my view, Mr Berghan's thinkings were clear, astute, and demonstrate a sharp business thinking mind of always having an eye for, and seizing opportunities. He saw an opportunity for one of his other companies, and he showed his intentions to take advantage of the opportunity, and he fully indicated that he would be working on his other business interests in the course of his engagement with CIIA.

[38] I accept that there were boundaries, parameters and authorities that Mr Berghan had to work within. He did not have an open cheque book or unlimited scope to do what he liked. He was required to confirm and consult with the directors on various matters; however they were operational matters that one could reasonably be expected to be consulted on. See Mr Berghan's evidence in para # [25], *it was his understanding that he was to work as a manager of the school in all operational respects*. In para # [27], Mr Berghan said that "with anything of substance" he was required to seek approval. In my view, such authorities are consistent with sound business practice and in this matter do not translate to *control* as in the Directors of CIIA intervening, regulating and controlling Mr Berghan's every day work. Mr Berghan had autonomy (within limits) to manage the campus and its operations on behalf of CIIA. I would describe the *control* exercised by the directors as prudent management of its Principal against the backdrop of protecting its business interests.

[39] Mr Berghan has said that it would be unheard of in the education industry for a Principal to be anything other than an employee. I tend to agree with him in the context of Principals employed in the Education Sector at Intermediate schools, Secondary Schools, High Schools, Colleges and other primary and secondary schools. However, the environment that prevails within the context of training provided by private training establishments is quite different, and it is not unheard of to have such campuses run by a senior management structure, or a director of the private training establishment company. The industry practice in this case is unlike the Education Sector described above and does not assist Mr Berghan's assertion.

Determination.

[40] Mr Berghan was a person in business on his own account, and had opportunities, and did benefit from that. He was engaged as an independent contractor to provide management services by way of his company A2Z Group Limited. The manner in which the work was carried out was consistent with the agreement the parties entered into. It has often been stated, anything that can be done by an employee under a contract of service can also be done by an independent contractor under a contract for services. This in my view is one such situation.

[42] The real nature of the relationship between Mr Berghan and CIIA was not one of employment, Mr Berghan was not an employee as defined in s.6 of the Employment Relations Act 2000, therefore the Authority has no jurisdiction to investigate Mr Berghan's substantive claim.

Ken Raureti
Member of Employment Relations Authority