Determination Number: AA 46/06
File Number: AEA 654/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Haydn Thomas Bowbyes (Applicant)
AND	Vango Limited (Respondent)
REPRESENTATIVES	Haydn Bowbyes In person Debra Law, Counsel for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	14 December 2005
DATE OF DETERMINATION	21 February 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant has filed to recover wages and other remuneration he alleges the respondent owes him.

The respondent denies the claim and submits that the applicant was never an employee of Vango Ltd.

This determination deals with the threshold question as to whether or not the applicant was an employee of the respondent company.

Background

Vango Ltd imports second hand business vehicles. These vehicles are sold to business clients who want vehicles with tailor-made signage. In essence they operate as mobile billboards for the businesses buying the vehicles.

In August 2004 Mr Bowbyes met the principal shareholder and director of the company Vango Ltd, Mr Paul Archibald. The two men entered into a business relationship the nature of which is in dispute.

The relationship ended in June 2005 and the parties are deeply divided on the matter of the nature of the relationship between them and the question as to whether or not monies are owed by the company to Mr Bowbyes as an employee.

Position of the Applicant

Mr Bowbyes submits that his relationship with Paul Archibald and Vango commenced in August 2004 after he met Mr Archibald at his car yard and presented the Vango concept to him.

Mr Bowbyes submits he put together the business model and a van import, design and sign writing model. It is Mr Bowbyes position in return he was offered a 7% shareholding in the business to rise to 50% when the business was operational. He also submits that Mr Archibald engaged him in the position of Marketing Manager.

Mr Archibald submits he worked very hard for Vango for up to 40 hours per week. However, he was never remunerated as promised despite continuing to work as the Vango Marketing and Design Director on "*a myriad of payment offers verbally offered to me by Paul Archibald and accepted in good faith by me on each instance*".

In his evidence Mr Bowbyes described a multiplicity of arrangements he said were offered by Mr Archibald (including offers of an improved shareholding in the company), which he submits he accepted on various dates between August 2004 and May 2005. The "*agreement*" he now seeks to enforce is an agreement he submits was reached in January 2005 that he be remunerated at the rate of $1500 per week ($36,000) and an agreement (allegedly reached in November) to pay him $1000 for each van design completed for Vango ($40,000).

Mr Bowbyes acknowledges he has received the 7% shareholding in the company that was originally promised. He has also been paid $500 each for two (or three) van designs done by him.

Mr Bowbyes denies having been offered an additional 43% company shareholding for the sum of $70,000.

Position of the Respondent

Mr Archibald denies that it was Mr Bowbyes who came up with the concept for Vango. He said he came up with the concept in July 2004.

Mr Archibald (Company Director) submitted that Mr Bowbyes was never an employee of the company. He was given a small shareholding in Vango Ltd in return for marketing assistance when the company was first set up. He was also contracted to provide designs for vans at an agreed rate of $500 each. Mr Archibald submits that Mr Bowbyes had his own business interests, and his trading names included *Proadz* and *Really Creative* and he invoiced Vango Ltd for his design services under the name of *Really Creative.*

It was also Mr Archibald's evidence that Mr Bowbyes could have taken a greater share in the company for consideration and that in fact he was offered an additional 43% shareholding for $70,000 early in 2005. He declined to take an increased shareholding and shortly thereafter a Ms Robin Wilding took a financial interest in the company. Her interest in the company has since concluded.

Mr Archibald's evidence was supported by that of Ms Wilding.

Legal Tests

With the passage of the Employment Relations Act 2000 the tests for determining what constitutes a contract of service changed (s.6 refers). Judge Shaw considered the recent case law[1] and stated: *"The principles established by these cases may be summarised as follows:*

- *The Court must determine the real nature of the relationship.*
- *The intention of the parties is still relevant but no longer decisive.*
- *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
- *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.*
- *The fundamental test examines whether a person performing the services is doing so on their own account.*
- *Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question."*

More recently the Supreme Court considered the same case and stated at paragraphs 31 & 32.

> *"The real question, it seems to us, is whether the Judge correctly directed herself in accordance with s 6."*
>
> *And:*
>
> *"We are unable to find in her judgment anything concerning s 6 which does not appear faithfully to reflect the words of the section. That section defines an employee as a person of any age employed by an employer to do any work for hire or reward under a contract of service - a definition which reflects the common law. Particular relationships with which this case is not concerned are expressly included and excluded. The section then requires the Court or the Authority, in deciding whether a person is employed under a contract of service, to determine "the real nature of the relationship between them". In doing so the Court or Authority is directed that it must consider "all relevant matters", including any matters that indicate the intention of the persons. But it is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*
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> *"All relevant matters" certainly include 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 the 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*

[1] *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 and *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114.

has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or 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 light of the control, integration and fundamental tests. Hence the importance, stressed in TNT, of analysing the contractual rights and obligations. In the passage of her reasons ……Judge Shaw accurately states what the Court must do and lists the matters which are relevant. She completes her list with reference to industry practice, making the unexceptionable general comment that it is "far from determinative of the primary question".

Discussion and Findings

Credibility

Mr Bowbyes' evidence - both his oral evidence and supporting documentation - was internally inconsistent and in fact contradicts the claim he makes. His evidence (taken overall) supports the respondent's position. Overall, therefore, it is the evidence of the respondent's witnesses that I prefer.

Findings

In deciding this matter I am called upon to determine the real nature of the relationship. To do that I must consider all relevant matters including the intention of the parties including:

- The written and oral terms of the contract between the parties which will not be determinative of the matter but will provide an indication of the common intention of the parties.

- Any divergence from or supplementation of those terms and conditions which is apparent from the way the relationship worked in practice.

- How the relationship operated in practice.

What was the intention of the parties?

There was no written agreement between the parties. However from January 2005 both Mr Bowbyes and Ms Wilding for the company prepared a number of documents that purported to describe their relationship none of which (with the exception of Mr Bowbyes resignation as director of the company on 23 February) were signed.

I note that Mr Bowbyes now seeks to enforce an alleged agreement between the parties (said to be effective from 3 January 2005) that he would be paid $1500 per week. He also seeks to enforce an agreement he says was reached in November 2004 that he would receive $1000 for each van design completed by him.

However, on 17 January 2005 (two weeks after Mr Bowbyes alleges agreement was reached to employ him as Marketing Manager at a salary of $1500 pw) Mr Bowbyes emailed Mr Archibald asking for a 'catch-up'. In that email he wrote (relevant parts of the email summarised):

"I have worked with you on the VANGO project for over four months now ***with no expectations of remuneration. ……***

In return you have offered me:
7% of the company
A future holding of 50% of the company
A revised future holding of 33%
A share of the profit from the Tonerman sale
A design remuneration offer to begin in November
A revised design remuneration offer of $1000 per van to begin in December
An 'on the payroll starting now' at $1500 a week offer made two weeks ago
A revised design remuneration offer of $500 per van actually sold to begin last Friday

I have no doubt that you had the best intention when making these offers and I am well aware of the externalities that have taxed the planned progress.

I also do not expect to hold any of theses offers including the last as final and complete or binding for that matter until something is put to me in writing from VANGO.

What I am going to do however is lay down my ground rules for out continued business relationship from my perspective.

Design

As discussed in the Friday meeting I am happy to do the pure design work for any VANGO van at $500 per van sold. However, I expect that if I am taking the time to design van graphics, the deal is already signed. I will not be designing vans as a teaser for purchase. This is a waste of my time and that is a commodity that I do not have spare. ***My earning capacity will serve me better concentrating on other business interests.***

Interaction/Consultancy

Any interaction outside of the 'pure van design work' from this moment forward either internally or externally will cost VANGO $100 p/hour plus GST. You asked me the other day to consider what my time is worth. From a marketing perspective ***this is what I charge for my consultancy*** *and is half of the going market rate……". (Mr Bowbyes goes on to list what he sees as billable tasks).*

Mr Archibald replied to Mr Bowbyes' email of 17 January saying *" Could you meet me at home 11am tomorrow to discuss your valid points"*. (Emphasis mine).

This email shows that as of 17 January 2005

- Mr Bowbyes was working as a minority shareholder in the business with no expectation of remuneration.

- He was hoping to reach agreement with Mr Archibald on an improved package for the work he was undertaking for Vango.

- He did not consider any of the *offers* made to that date as final and binding until the parties agreed in writing.

- He had other business interests.

- He accepted he would be paid $500 (per van) for the design work undertaken by him. (In his oral evidence Mr Bowbyes agreed the design work he had been doing and was prepared to do was done as an independent contractor).

- He was proposing that he be paid $100 p/hour plus GST for ongoing consultancy/marketing work. He gave oral evidence elaborating on this proposal. He said that at this stage he was also proposing to do the interaction/consultancy work as an independent contractor because by 17 January 2005 he *"had given up on being an employee"*.

I find, on the evidence, that the intention of the parties was that they would go into business together as partners with Mr Bowbyes taking a minority 7% shareholding in return for developing the business and marketing plan for Vango Ltd. Mr Bowbyes was also contracted (on oral terms) on a contract for services to provide designs for vans sold.

How Did the Relationship Work in Practice?

Mr Bowbyes had no set hours for work and worked out of his own home (or premises). He undertook design and marketing work for Vango primarily in the evenings and during the day worked in his own business *Proadz* - a design brokerage business. He did meet with Vango clients as part of its sales team to close the sales on vans[2]. Mr Bowbyes invoiced the company for design work for vans through the trading arm of Proadz – *Really Creative*.

Considering the facts of this case and measuring those facts against the principles of the *control*, *integration* and *fundamental* tests I find these parties were in a relationship in the nature of a partnership and Mr Bowbyes was engaged on the design work under an oral contract for services.

I also find on the evidence that Mr Bowbyes provided other marketing/consulting services for the company and the evidence shows that between January and June the parties did have discussions relating to the terms of their relationship. Documents were prepared and presented (in the main by Mr Bowbyes) but no arrangement superseded the original oral terms i.e. that Mr Bowbyes would take a 7% shareholding in the company and that he be contracted as an independent contractor to do the design work at the rate of $500 for each van sold. That this is the case in clear from another email from Mr Bowbyes to Mr Archibald dated 16 June 2005. Here Mr Bowbyes resent his 17 January email to Mr Archibald (described above p 4 & 5). The subject heading for this email states *"FYI from January …in case you forgot"*.

It is possible that Mr Bowbyes arrived at a very poor deal with Mr Archibald for the work he put into the business. It may be that an enhanced package would have been arrived at in time. However, the terms of an enhanced arrangement were not agreed prior to the relationship commencing and were not subsequently agreed prior to the relationship coming to an acrimonious end.

What is clear, however, is that no relationship in the nature of a contract of service existed between these parties.

Determination

Mr Bowbyes was not an employee of Vango limited and I cannot assist him further.

[2] The design of vans was an integral part of the deal and central to closure of a sale.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott
Member of Employment Relations Authority