

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 104  
5468961

BETWEEN                      CLE  
   Applicant  
  
AND                                XKC LIMITED  
   Respondent

Member of Authority:        M B Loftus  
  
Representatives:              Jamie Steele, Counsel for Applicant  
   Blair Edwards, Counsel for Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions Received:        11 March and 1 April 2015 from Applicant  
   1 April 2015 from Respondent  
  
Determination:                28 October 2015

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**DETERMINATION OF THE AUTHORITY**

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**Suppression Order**

This is a file passed from another member of the Authority. As part of his consideration of the claim he issued an order suppressing various details. This preliminary issue cannot, in my view, be determined without mention of some of those details.

In order to preserve the current orders this decision has been anonymised and I issue a further order preventing the publication of anything which may identify the parties.

**Employment relationship problem**

[1]     The applicant, CLE, claims she was unjustifiably dismissed by the respondent, XKC Limited (XKC), on or about 4 July 2014. She also claims a significant sum in respect to unpaid leave.

[2] XKC says the Authority lacks jurisdiction and cannot consider CLE's claims as she was a contractor and not an employee.

[3] The parties agreed the question of whether CLE was a contractor or employed be determined as a preliminary issue. They also agreed this be done on the papers which include untested affidavit evidence.

### **Background**

[4] What follows is a brief summary of considerably more evidence. It does, however, note the key points.

[5] CLE was engaged by a company known as VTA in June 2009. The agreement entered into at the time states CLE was a contractor providing services to both VTA and its clients. Its content is consistent with that approach with, for example, an ability for CLE to perform work for others but it was also of limited duration – 6 months. CLE was also a shareholder with 24% of VTA's shares.

[6] Two of VTA's clients were a pair of allied companies for which CLE did the accounting work. She says that after about three months MKR (a director of both client companies) approached and asked if she was prepared to become an employee. She says she accepted and terminated her relationship with VTA.

[7] CLE says she was not provided with an employment agreement. Therefore, and on the advice of her previous business partner at VTA (GRS), she simply forwarded her previous weekly invoices to XKC. She adds that from this point she no longer worked for anyone else as she had previously been able to do.

[8] In 2013 the original pair of companies were placed in liquidation though a new company (XKC) was established. It acquired the assets and goodwill of the previous companies. The original principles remained and while she says she was reluctant to do so GRS convinced CLE to both become a director and invest in XKC by purchasing shares. XKC deny CLE was ever a shareholder and claims she put money into the business by way of a loan. Here I conclude the documentary evidence suggests CLE was a shareholder (refer the agreement for sale and purchase of shares) but whichever is correct the evidence of both parties suggests this was always intended to be a temporary arrangement with the money being repaid within a year and CLE's involvement as a principle then ending.

[9] At the time MKR also sent CLE a letter dated 7 May 2013. It advises:

*This is to notify you that we have recently restructured and our new company name is XKC trading as XKC(A).*

*As we continue trading as XKC(A) there will be no change to any day-to-day functionality of the company or your position.*

*Based on the above, you will now be employed by XKC and therefore payslips and all correspondence from the company will be addressed from the above.*

*All terms and conditions from your original Individual Employment Agreement still stand. Please sign the attached and return as understanding and acceptance of the above...*

[10] CLE says she signed and returned the acknowledgement on 20 May 2013. XKC deny CLE returned the document and there is no evidence of a signed version.

[11] Similar advice was sent by the liquidator.

[12] CLE says tensions then arose over the level of drawings MKR and her partner were taking from the business. This led to an agreement they would curb the drawings but this impacted on CLE's relationship with the two. Further pressure arose when MKR and her partner were in a position to buy GRS and CLE's shares. GRS was overseas and CLE wished to await his return. The pressure escalated when XKC restructured and a new accountant arrived. According to CLE this person tried to pressure her into divulging information that would give MKR control of the finances. CLE resisted given there was yet to be settlement of the share transfer.

[13] Once the share transfer was settled CLE was accused of breaching confidentiality. That led to the alleged dismissal which is the subject of CLE's substantive claim though it should be noted XKC's letter is headed *Termination of Contractor Position*.

[14] GRS's affidavit supports CLE's version of events.

[15] XKC's position is that CLE was originally engaged as, and thereafter remained, a contractor. It says the relevant conversations related to a proposition CLE work for XKC rather than through VTA (which took a portion of her charges) in return for additional hours. XKC says CLE accepted the proposal. It claims the fact this was a contract for services explains the lack of an employment agreement.

[16] XKC explains the letter of 13 May by saying this was a pro-forma one sent to all employees and contractors and adds that despite her contrary claim CLE never returned her acceptance. It also says the liquidator's letter was similarly a form letter sent to both employees and contractors (and provides various copies thereof to support this claim).

[17] XKC also notes the following:

- a. CLE forwarded weekly invoices. No PAYE was deducted and CLE remained responsible for all taxes (which her tax returns show were paid via the provisional tax regime);
- b. Payments made to both CLE and GRS were combined together and listed separately from those made to employees in the accounts the two prepared;
- c. Payments to CLE and GRS were made by direct credit and not through the payroll system. CLE counters this by noting that nor did her name appear on the list of creditors prepared for the liquidator;
- d. CLE never completed a leave request or otherwise behaved as an employee (though CLE counters this by saying she only took leave (2 days) once);
- e. CLE worked variable hours and could choose from where she performed her duties. MKR denies this and says she worked a regular forty hour week;
- f. As part of the liquidation process CLE compiled a list of employees and their leave balances. Her name does not appear on the list;
- g. CLE did work for others though the alleged work was as a counter hand in a takeaway business. Her response to this is yes, but as an unpaid volunteer assisting a friend;

### **Determination**

[18] Both parties produced substantial submissions. These are appreciated and have been considered along with the relevant law and attached affidavits. That said,

comment must be made about the parties agreed this preliminary issue be determined on the papers and with untested affidavit evidence. That is extremely difficult in a situation such as this where the parties disagree on almost every pertinent fact, especially with regard to intent. In such circumstances a heavy reliance must be placed on the documentary evidence and the conduct of the parties.

[19] In this case, and with only one exception, the documentary evidence and CLE's conduct appears to support a conclusion she was a contractor. In particular I note CLE forwarded invoices to XKC and did not deduct PAYE from her own payments. She continued with her previous provisional tax arrangements as she had when a contractor. To me this takes on a greater significance when combined with the fact CLE was a financial controller who had (or at least should have had) significant knowledge of these issues and the requirements. She was personally responsible for these transactions yet did not treat herself as if she was an employee.

[20] There is then the list of employees CLE prepared for the liquidator. Surely she would have added herself if she considered herself an employee. I can reach no conclusion from the fact her name did not appear on the list of creditors prepared for the liquidator as there is no evidence she was then owed anything.

[21] To that I add the fact she did not generally act as if an employee in respect to leave and in this regard reject the claim this is because she took no leave. It strains credibility to suggest an employee would feel compelled to work without leave for some five years.

[22] Here I must note CLE places importance on the fact XKC accepts two days *leave* was once taken. If CLE was not an employee there would be no leave. I accept that but in the absence of an ability to test the evidence consider this pales against the weight of factors which suggest CLE remained a contractor.

[23] To that I add CLE's acceptance she continued to report to GRS. There is no argument he was a contractor and independent of XKC. There is also no argument the costs of both CLE and GRS was accounted for as a single item discreet from the cost of employees.

[24] I then consider the fact that while GRS's affidavits are intended to support CLE and he claims he was present when she and XKC discussed their relationship he

never actually goes so far as to say he heard the parties expressly agree she was an employee.

[25] The documentary exception referred to earlier is the letter of 7 May 2013 which expressly states the relationship was that of employment. I accept the evidence this was an error and identical letters were sent to all irrespective of status (employee or contractor) given the appended evidence such a mistake occurred more than once. To that I add the fact that even if this was not an error and did constitute an offer of employment there is no documentary evidence CLE accepted. Indeed evidence tendered by XKC suggests she disregarded the letter and left it unsigned in her desk.

[26] I take the issue of CLE's directorship no further as there is nothing in law to suggest that would preclude her being an employee. A similar answer applies to the alleged shareholding. The only issue here which would have been a further indicator she was not an employee is whether or she took drawings. That would have strongly indicted she as a not an employee but while she didn't, I note the return on the capital she invested was high (approximately 50% per annum) and that may effectively amount to the same thing.

[27] I also note the submission there is no evidence CLE enjoyed the particular benefits of self-employment. There is also no evidence she didn't given a lack of information as to how her taxable income was assessed.

[28] There is then CLS's claim she only worked for XKC. It is clear that is incorrect (though whether her endeavours were paid or not I do not know) but in any event there is no evidence to support a claim she couldn't have done so if she so chose.

[29] To that is added the claim she worked full time hours but whether she did or not is unclear given the absence of any records and the fact her invoices were for a set weekly amount. Again I note CLS was responsible for XKC's finances and allied record keeping. Once again, and if she was an employee, she did nothing to ensure an employer's obligations were met in respect to herself.

[30] As already said, and after considering the evidence and submissions I conclude the evidence points to a finding CLE remained a contractor. I so find and note the consequence thereof is that the Authority does not have jurisdiction to hear CLE's grievance.

[31] Her claim is therefore dismissed.

M B Loftus  
Member of the Employment Relations Authority