IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 529
5466260

	BETWEEN	STUART CAIRNS Applicant
	AND	INTERWORLD PLASTICS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Graeme Minchin, Counsel for the Applicant Ray Parmenter, Counsel for the Respondent
Investigation Meeting:	11 December 2014
Determination:	22 December 2014

DETERMINATION OF THE AUTHORITY

A. At the time of its termination on 28 April 2014, the real nature of the relationship between Stuart Cairns and Interworld Plastics Limited, in his role as either chief executive or chief financial officer, was on the basis of a contract for services and not a contract of service. Consequently the Authority has no jurisdiction to investigate and determine a personal grievance application by Mr Cairns about the termination of that relationship.

B. Costs are reserved.

[1] Stuart Cairns was one of a group of investors who purchased Interworld Plastics Limited (IPL) in April 2013. Through another company he and Philip Hudson bought one third of the shares. Ross Goldsack purchased one third. Peter Thodey (through another company) took interests in the remaining third of the shares.

[2] Mr Cairns had negotiated the purchase of IPL from a liquidator. Mr Hudson had suggested Mr Cairns investigate IPL's potential and, if it were viable, to identify co-investors. Mr Cairns had then contacted Mr Goldsack who also brought Mr Thodey into the planned investment. Mr Hudson, Mr Goldsack and Mr Thodey became directors of IPL and, after some discussion, Mr Cairns took up the role of chief executive officer (CEO).

[3] Mr Cairns was appointed to the CEO role on terms set out in a letter of appointment dated 18 July 2013 and an employment agreement dated 29 July 2013. Both documents were signed by Mr Thodey on behalf of IPL.

[4] In December 2013 the directors decided to appoint Mr Goldsack as executive director and to change the title of Mr Cairns role to chief financial officer (CFO). Mr Cairns disputed whether that change of role from CEO to CFO was properly made or implemented but it was not relevant for the purposes of this determination.

[5] Through Mr Goldsack's resultantly closer involvement in the running of the business, as executive director, he learned in early January 2014 that Mr Cairns provided IPL with a monthly invoice for his salary. The invoices were from a company called Totaranui Management Limited (TML) and the description for the amount sought on each invoice (equivalent to Mr Cairn's monthly salary) read: "*Management fee for [a named month] as per agreement*". TML was a registered company in which Mr Cairns was a shareholder and the sole director.

[6] Two things surprised Mr Goldsack about the TML invoices. Firstly, he understood Mr Cairns had not taken his full salary in recent months because of an agreement he, Mr Cairns and the two other directors had made in September 2013 to ease pressure on IPL's cash flow. They had agreed the three directors would defer interest payments on the shareholder loans they had made to the business and Mr Cairns would take a 'salary holiday' by reducing his salary by 50 per cent until the end of December. However the three monthly TML invoices for the last quarter of 2013 were for amounts equivalent to Mr Cairns' full monthly salary. Secondly, Mr Goldsack had understood Mr Cairns was employed directly by IPL (with his salary subject to PAYE deductions) rather than providing invoices for management fees through TML (with those fees subject to an additional amount for GST).

[7] Mr Goldsack did question Mr Cairns about the payments including GST but he did not seek to change the arrangement Mr Cairns had put in place for payment to TML. In his role as executive director Mr Goldsack approved TML's invoice for January 2014 and subsequent monthly invoices were also paid. The evidence from him and Mr Thodey (with whom he discussed the situation) was that they did not want to risk upsetting Mr Cairns at a time when the business was under financial and commercial pressure.

[8] In April 2014 Mr Goldsack and Mr Cairns fell out over a financing proposal for which Mr Cairns had sought bank approval. Mr Goldsack considered the proposal Mr Cairns had prepared and presented to the bank was contrary to early instructions Mr Goldsack had given not to do so without his prior involvement and sign-off. Mr Cairns said he had used conservative valuations but, in an email to Mr Cairns on 14 April 2014, Mr Goldsack criticised the information Mr Cairns gave the bank as "*over hyped*", "*a load of crock*" and "*far from being an accurate assessment of the business*".

[9] On 28 April 2014 Mr Goldsack arranged to meet Mr Cairns and handed him a letter, addressed to "*Stuart Cairns, Totaranui Management Limited*". The letter advised Mr Cairns that his "*contractual relationship*" with IPL was "*terminated with immediate effect*". It was that action that Mr Cairns sought to challenge as an unjustified dismissal. His application to the Authority, lodged on 23 June 2014, was not resolved in mediation and the Authority proceeded to investigate the preliminary jurisdictional issue.

Issue and investigation

[10] The issue for determination was whether (as indicated by his signed employment agreement and work in the position of CEO) Mr Cairns was an employee of IPL or (as indicated by the monthly invoices from TML he provided) he was really engaged on a contract for services, that is as an independent contractor. If he was found not to be an employee, the Authority would have no jurisdiction to investigate and determine his personal grievance application.

[11] At the Authority's investigation meeting on this issue Mr Cairns, Mr Thodey, Mr Goldsack and IPL's accounts administrator Lorna Lichfield confirmed written

witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives also gave closing submissions on the facts and law. I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result.

Finding on employment status

[12] In deciding whether Mr Cairns was employed by IPL to do work under a contract of service, s 6 of the Act required the Authority to determine "*the real nature of the relationship*" before him and IPL. The Act directs the Authority to consider "*all relevant matters*" in making such an inquiry. This includes any matters that indicate the intention of the parties. Any statement by the persons describing the nature of their relationship is not to be treated as determining its real nature.[1]

[13] The following guidance from the Supreme Court describes the necessary analysis:[2]

> *"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 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 quoted in para [5] above, 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". The only criticism which might*

[1] Section 6(2)and (3) of the Employment Relations Act 2000 (the Act).
[2] *Bryson v Three Foot Six Limited (No 2)* [2005] ERNZ 372 (SC) at [32].

> *fairly be made of the Judge's list is that it does not expressly direct attention to the substantive contractual terms upon which the* TNT *case places emphasis, but it is clear from the following section of the judgment, headed "Conditions of employment", that she was very much alive to the need to begin by looking at the written terms and conditions which had been agreed to by Mr Bryson and Three Foot Six. It was, however, open to her to conclude, as she did, that the crew deal memo did not give any reliable indication of the real nature of the relationship. As the Judge noted, s 6(3)(b) requires that the statement in the crew deal memo that Mr Bryson was an independent contractor is not to be treated as determinative. In that respect s 6 confirms what is to be found in* TNT.

[14] I concluded Mr Cairns was not, at the time of the termination of his relationship as either CEO or CFO of IPL, an employee. After considering the relevant matters, as set out in the remainder of this determination, the decisive factors in reaching that conclusion were the mechanism Mr Cairns set up on taking the CEO role for payment for his services to be made to TML rather than to him as personal remuneration and the acquiescence of IPL's directors to that arrangement once they indisputably became aware of it by January 2014.

(i) Contractual terms and intention

[15] Mr Thodey and Mr Cairns met in late July 2013 to discuss and agree the terms in Mr Cairns' letter of appointment as CEO. They also discussed, and appeared to agree, on terms recorded in a written employment agreement. Objectively observed, the intention of IPL was for Mr Cairns' tenure of the CEO position to be as an employee. While the letter of appointment only referred to the directors confirming his "*appointmen*t" (not employment) as CEO, the accompanying employment agreement had his name on the title page, so that references to the "*employee*" in that agreement were reasonably to be read as referring to him.

[16] Mr Cairns' intention also appeared to be that he was to be an employee CEO. However he said he had made it clear during his discussion with Mr Thodey that he wanted his salary paid through one of his companies, although he did not say which one. He said this was apparent from a change to the draft letter of appointment. Mr Thodey handwrote the name of KC & KC Investments Limited – a company in which Mr Cairns was a shareholder – on the letter for insertion between Mr Cairns' name and a post office box address to which Mr Cairns had his mail sent. I found Mr Cairns' account less likely than Mr Thodey's evidence on that discussion. Mr Thodey said Mr Cairns had not wanted to provide a residential address for use on the letter

and had said the post office box number was that of the company and asked for its name to be inserted. It was not sufficient evidence of an agreed arrangement (at that time) for Mr Cairns' salary to be paid through a company. There was nothing else in the employment agreement or the letter of appointment that indicated any arrangement for payment of Mr Cairns salary to be made through a company or that referred to TML in any way.

[17] In terms of the s 6 test, the employment agreement was evidence of the intentions of the parties but, as a "*statement*" by IPL and Mr Cairns, did not necessarily determine the nature of their relationship.

[18] If my preference for Mr Thodey's evidence was wrong, however, and Mr Cairns had in fact made it clear in July 2013 that payments of his salary should be to a company rather than him personally, his original intention would seem to have been that the relationship was really on the basis of a contract *for* services (by TML to IPL) rather than one of employment. The invoices he provided – from TML for management fees – would support that construction but (to be found to be an employee) he would have to argue they were not accurate 'statements' of the real nature of the relationship.

(ii) Actual behaviour and operation in practice

[19] The evidence from Ms Lichfield and Mr Cairns confirmed that from the beginning of his tenure in the role as IPL's CEO he provided a monthly invoice to her for payment of a "*management fee*" to TML. Ms Lichfield said IPL had previously had what she called "*a lot of contract people in management positions*", including a financial controller and a business development manager, so she did not question the payment arrangement and set up a creditor account for TML in IPL's accounts payable system.

[20] Each TML invoice was expressed to include payment by IPL of an amount for GST rather than any provision for PAYE deductions from Mr Cairns' salary. From July through to December 2013 Mr Cairns had the authority to approve payments of those invoices (in his role as CEO) and he did so.

[21] Mr Cairns said he made those arrangements for payment to TML (which he said was registered for GST) because it enabled him to "*better manage*" his tax although, by the time of the Authority investigation, he was "*not sure*" if he had gained any tax advantage. He accepted that by not having PAYE tax deducted from his salary he was better off because TML also received the GST amount as an additional payment from IPL (that TML had to hold and account for to IRD in due course). Meanwhile TML had the benefit of more cash than Mr Cairns would have done if PAYE was deducted from his salary.

[22] While Mr Goldsack and Mr Thodey were surprised to discover in January 2014 that Mr Cairns was not being paid in the way that they expected, they accepted that arrangement without any attempt to challenge Mr Cairns about it. Three further invoices – for January, February, and March 2014 – were presented by Mr Cairns and paid by IPL with that knowledge. As a result the way that the arrangement operated in practice – through the actual behaviour of both Mr Cairns and IPL – showed that what IPL intended in July 2013 to be a contract *of* services had, with IPL's knowing acceptance or failure to demur, become one of a contract *for* services by (at the latest) January 2014.

(iii) Control, integration and fundamental tests

[23] That conclusion was not displaced by analysis under the three tests developed through case law.

[24] The control test looks at the degree of control or supervision exercised by the employer over the alleged employee's daily work. While Mr Cairns was subject to direction by IPL's board of directors, he had significant control over his work in the position of CEO. In that role the work he performed also met the integration test of being an integral part of the business. He hired and directed the work of managers and other employees, had an IPL business card stating he was its CEO, had a company credit card and was generally held out to the world as the CEO of IPL's business.

[25] However, as submitted by IPL, the elements of control and integration were effectively neutral in the necessary analysis. While Mr Cairns would have appeared

to any outside or objective observer to have been 'running the show', no necessary inference could be taken that he was therefore either an employee or a contractor's nominee providing services to IPL.

[26] The fundamental test – of whether Mr Cairns was, through TML, really in business on his own account – confirmed, on balance, the conclusion that (by January 2014 at the latest) the relationship was based on an agreed contract for services. While Mr Cairns could not, like a tradesperson or other such independent contractor, work for other entities or increase TML's profit by working harder or differently in performing services for IPL, the arrangements he made at his own initiative to render invoices was compelling evidence of being in business on his own account (as director and shareholder of TML).

[27] This was not a situation, of the sort found in some other cases, where the employer required a person working for it to submit paperwork for the payment of salary in the form of an invoice, sometimes on a template provided by the employer. Here Mr Cairns had initiated that arrangement, and as CEO, signed off payment of the invoices. He was a sophisticated and experienced businessman who – as he accepted in answer to questions during the Authority investigation – knew the difference between an employee and someone providing services through a contract for services and understood the tax differences and implications of those arrangements.

[28] His actions were, I found, very much within the scope of cautions given in judicial dicta over the years. In *Telecom South Limited v Post Office Union Inc*, for example, Justice Bisson stated:[3]

> *I think it is necessary to sound a word of warning to those who seek to introduce taxation advantages into the terms of their employment that they may have to abide by the consequence that they be classed as self-employed and not as a worker for the purposes of [the right to use personal grievance procedures]. In* Massey v Crown Life Insurance Co *[1978] 2 All ER 576 Lord Denning MR said at p 581:*
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> > *In the present case there is a perfectly genuine agreement entered into at the instance of Mr Massey on the footing that he is 'self-employed'. He gets the benefit of it by avoiding tax deductions and getting his pension contributions returned. I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as being 'self-employed', he must lie on it. He is not under a contract of service.*

[3] [1992] 1 ERNZ 711 at 725.

[29] Elsewhere in the *Massey* decision of the English Court of Appeal, to which Justice Bisson had referred in *Telecom South*, Lord Justice Lawton made the following observation that was also relevant to Mr Cairns' case:[4]

> *In the administration of justice the union of fairness, common sense and the law is a highly desirable objective. If the law allows a man to claim that he is a self-employed person in order to obtain tax advantages for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then in my judgment the union between fairness, common sense and the law is strained almost to breaking point. The appellant in this case is asking this court to adjudge that he is entitled to make claims with two different voices …*

[30] Mr Cairns had 'made his bed' at the outset by choosing to have TML invoice for management fees. He was not entitled to have those TML invoices 'speak' with the voice of a contracting company to IRD – because that seemed more advantageous to him – and then seek to have another 'voice' as a supposed employee heard in the Authority.

(iv) Industry practice

[31] As a check to my conclusion I also considered industry practice. There was some limited evidence from Ms Lichfield that IPL had previously engaged people in management positions on a contractor rather than employee basis (invoicing for their work) but, in respect of wider industry practice, I considered I could take 'quasi-judicial notice' of the many business arrangements of which an Authority member becomes aware through the many cases lodged annually. While an outside observer may assume that a person working as CEO or CFO of a company is an employee of the company, that is sometimes not the case, particularly where shareholders and directors are working in the business. Working proprietors will sometimes use various senior management, executive or operational titles without themselves having employment agreements with the company that they own (in part or whole, whether directly or beneficially through some other company or trust arrangement). The real nature of the relationship must be discerned from the particular evidence, and not merely an assumption that a position title necessarily denotes employment rather than some other status.

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[4] *Massey v Crown Life Insurance Co* [1977] EWCA Civ 12, [1978] 2 All ER 576 at 581, cited without disagreement by the Employment Court in *Excell Corp Ltd v Carmichael* [2003] 1 ERNZ 473 at [28].

Costs

[32] Costs are reserved. The parties are encouraged to resolve any issue as to costs between themselves. If they are unable to do so and wish the Authority to determine the matter, IPL should lodge and serve a costs memorandum within 28 days of the date of this determination and Mr Cairns would then have 14 days to lodge a reply memorandum. No submissions will be considered outside this timetable unless prior leave has been sought and granted. If the Authority were asked to determine costs, it would likely do so on the basis of its usual daily tariff (in this case being $1750 for a half-day investigation meeting) adjusted, if necessary, upwards or downwards by the application of any principles relevant in the particular circumstances.[5]

Robin Arthur
Member of the Employment Relations Authority

[5] *PBO v Da Cruz* [2005] ERNZ 808, 819-820