Determination Number: AA 459/05
File Number: AEA 828/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Aaron Calman (Applicant)
AND	The London Shed Company Limited (Respondent)
REPRESENTATIVES	Miranda Harvey, Counsel for Applicant Jane Latimer, Counsel for Respondent
MEMBER OF AUTHORITY	Dzintra King
INVESTIGATION MEETING	17 October 2005
DATE OF DETERMINATION	1 December 2005

DETERMINATION OF THE AUTHORITY

The matter to be determined is whether the applicant, Mr. Aaron Calman, was an employee. The respondent, The London Shed Limited, says he was a contractor.

Mr. Calman provided DJ services. Originally, in February 2002, he contracted to do so with The London Shed Limited, which operated a bar called the London Shed, on a casual basis, usually being one night a week. His company, Aaron Calman Entertainment Limited, invoiced The London Shed Limited for his services. During that period Mr. Calman also worked at other venues.

Around November 2003 Mr. Adrian Liebrecht, a director of The London Shed Limited, agreed that Mr. Calman would extend his hours at the bar. Mr. Calman would work for 25 hours per week as the bar's DJ and promotions manager for the sum of $50,000 plus GST. Mr. Calman provided invoices and was paid weekly on Fridays. He was usually present at the London Shed on Thursday, Friday and Saturday nights. They entered into a verbal contract whereby Mr. Calman through his company would provide services. This was agreed to be a contracting relationship.

Mr. Calman said that the change in his employment status came about when Ms Longstaff, who was the general manager of the London Shed, walked out. He agreed to become duty manager on Monday nights for a fee of $15 per hour plus GST. Mr. Calman said the duty manager's job was to look after the staff for the night and manage the tills. Mr. Calman said that Mr. Liebrecht suggested he become the interim general manager until such time as a suitable replacement for Ms Longstaff was found. Mr. Calman said Ms Longstaff had been an employee and he had taken over exactly the same duties that she had performed. He said the role was full time and entailed managing the London Shed on a day to day basis including managing the staff, implementing systems and procedures, organizing staff rosters, encouraging good staff morale and having responsibility for maintenance, repairs and security. Mr. Calman said he was the full time general manager and the resident DJ on Saturday and Monday nights (another DJ had taken on the Saturday nights). He

believed he and Mr. Liebrecht had an employment relationship, although the grounds for this belief were not made clear.

Mr. Liebrecht said he was a director of the company and also the general manager of the London Shed. He managed the stock, staff, contractors and finances and carried out sales and marketing. He was also responsible for employing staff and engaging contractors. The Ms Longstaff who left the London Shed had been employed as a bar manager who was responsible for the bar rosters and the bar staff reported to her. She reported to him and he maintained control over the general operation and management of the bar.

Mr. Liebrecht said that when Ms Longstaff left Mr. Calman approached him and asked if he could contract his services as duty manager for Monday nights for $15 plus GST per hour as he wanted to gain experience. As Monday nights were not busy he would also have time to work on promotions and events. Mr. Liebrecht agreed to this and Mr. Calman invoiced for the services he provided. Mr. Liebrecht said he had five duty managers who could run the bar. He paid for the licence for all bar managers who were employees. He denied that Mr. Calman took over Ms Longstaff's position; she was not the general manager, but the bar manager. Mr. Calman was merely the duty manager on Monday and Saturday nights and the promotions and events organiser and he DJed on Thursday and Friday nights. He invoiced for organising promotions and events and duty managing on Saturday nights at the rate of $50,000 per annum plus GST and for duty managing on Monday nights at $15 plus GST.

In summary, Mr. Liebrecht said that the arrangements between the respondent and Mr. Calman were with Mr. Calman's company and were as follows:

- February 2002, verbal contract for DK services.
- December 2003 verbal agreement for organising promotions and events.
- February 2004, verbal agreement for duty managing on Monday and Saturday nights.

The London Shed provided employment agreements for its employees. Mr. Calman had never asked for one or for any alteration to the agreements he had with the London Shed. He had never indicated, prior to the events that led to the termination of the relationship with the London Shed, that he believed he was working as the general manager and had never tried to negotiate terms and conditions for that position.

In August 2004 Mr. Liebrecht wrote a letter for Mr. Calman. Mr. Calman was trying to get a mortgage and as he was self-employed he was having some difficulties. He asked Mr. Liebrecht to write a letter saying he was an employee earning $50,000 per annum. The reference to Mr. Calman's being an employee was for the sole purpose of his obtaining a mortgage. He said that although the letter was written in August 2004, six months after Mr. Calman claimed to have been appointed as interim general manager, there was no reference in the letter to that status, and Mr. Calman had never asked for such a reference to be included. It was foolish for Mr Liebrecht to agree to write a letter that misrepresented the facts.

Mr. Calman did not have an office at the bar nor did he have a work computer. When he was not providing services as a DJ or duty manager there was no requirement for him to be at the bar. He could come and go as he pleased and undertake whatever work he wanted with organisations other than the London Shed.

Mr. Calman did not ask for annual leave at any stage not did he claim outstanding leave when the relationship terminated. He told me he had not claimed for annual leave because he was a contractor. He paid his own ACC.

The law

The Authority is to determine 'the real nature of the relationship' by considering 'all relevant matters' (s 6(3) (a)) including applying tests such as the control, integration, and the fundamental test.

Section 6(3) provides that, in determining the real nature of the relationships, the Authority must consider all relevant matters (including the intention of the parties), but is not to treat the "label" as determinative. In Koia v Carlyon Holdings Ltd [2001] ERNZ 585 the Court stated that while intention was still relevant it was no longer decisive and intention was only one of the relevant matters that the Court had to consider. Other matters might include control of working or evidence of carrying on business on one's own account and other factors. It is the reality of the relationship rather than its nominal nature that must be determined.

Before I consider the matter in more detail, I need to indicate that the evidence did not convince me that Mr. Calman ever took up the position of general manager either on an interim or permanent basis. He did not try to negotiate a salary for this position or any terms and conditions. When I examine the nature of the relationship I will be considering the work that Mr. Calman actually carried out.

Intention

There was no written agreement and no attempt was made to vary what both Mr. Calman and Mr. Liebrecht understood to be the contracting nature of the existing employment. The variation for the duty manager services was on the basis that Mr. Calman provided an invoice.

Control

Apart from needing to be on the premises at particular times to carry put the DJ and promotions and Monday night bar manager duties Mr. Calman was free to come and go as he pleased. He could carry out promotions and events work on the Monday night if there was time available.

Integration

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This test considers whether the work performed by the alleged employee is done as an integral part of the business and whether he or she has effectively become "part and parcel of the organisation": Bank voor Handel en Scheepvast NV v Slatford [1952] 2 All ER 956. In Stevenson, Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 10, Lord Denning said of the integration test:

> *Under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for service, his work although done for the business, is not integrated into it but is only accessory to it.*

The focus of the test is the "economic reality" of the relationship, and the extent to which the employee is, for all respects, an integral part of the organisation for which he or she works. Factors to be considered in determining whether an alleged employee is "an integral part of the organisation" include:

(a) Is the person carrying out a role that is part and parcel of the organisation?
(b) How is the person paid?
(c) Does the person have an office and use the other party's equipment and tools?

Apart from the bar manager duties Mr. Calman's duties could not be said to be an integral part of the business. The events and the promotions work was ancillary. He was not responsible for hiring and firing staff not did he have disciplinary powers. He had a significant degree of autonomy. He had his own company, provided invoices, paid his own tax, deducted expenses and paid his own ACC levies. He did not have an office at the premises of the London Shed.

Fundamental Test

In Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374 (PC), the Privy Council endorsed (at p 382) a passage from the judgment of Cooke J in Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173; [1968] 3 All ER 732, which posed a fundamental test for distinguishing between an employee and an independent contractor. The test, which has now been adopted by a full Bench of the Court of Appeal in Cunningham v TNT Express Worldwide (NZ) Ltd [1993] 1 ERNZ 695; [1993] 2 NZLR 681 (CA), is whether it can be said that the person who has engaged himself to perform the services is performing them as a person in business on his own account. Considering matters overall, Mr. Calman was providing the relevant services on his own account.

Decision

Mr. Calman was a contractor, not an employee.

Costs

Costs were reserved. If the parties are unable to resolve the matter of costs the respondent should file a memorandum within 40 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum

Dzintra King
Member of Employment Relations Authority