

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Paul Carruthers  
**AND** Milano International (NZ) Limited  
**REPRESENTATIVES** Michael O'Brien, counsel for Paul Carruthers  
Tony Kurta, advocate for Milano International  
(NZ) Limited  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 17 April 2007  
**DATE OF DETERMINATION** 15 May 2007

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Paul Carruthers says his former employer, Milano International (NZ) Limited ("Milano International"), dismissed him unjustifiably.

[2] Milano International says the parties were not in an employment relationship. If that is correct, then the Employment Relations Authority has no jurisdiction to enquire further into Mr Carruthers' concerns.

[3] This determination addresses whether the parties were in an employment relationship, or a relationship of principal and contractor.

**The parties' relationship**

[4] Mr Carruthers has extensive experience in the motor vehicle industry, having worked primarily in sales positions. He is the sole director and shareholder of Auto Networks Limited ("ANL"), a company he caused to be registered in July 2002 with the intention of trading as a motor vehicle wholesaler.

[5] Some motor vehicle trades were completed through ANL, but not enough to generate an adequate income for the company or Mr Carruthers. For that reason Mr Carruthers entered into an 18-month engagement with another motor vehicle trader, before being approached by Milano International. I use the word 'engagement' in respect of the other motor vehicle trader without making any finding about whether that relationship was an employment relationship. I do, however, note that income from the engagement was treated as income of ANL's, and accounted for accordingly. Not only that, Mr Carruthers continued occasional (albeit it minor) trading activity of his own through ANL during the course of that and subsequent engagements.

[6] Milano International imports and sells cars. In April 2004 Mr Carruthers entered into an engagement with it, which he says was an employment relationship, to assist with the development of an on-line vehicle auction system. The arrangement continued until December 2004, when Mr Carruthers resigned and returned to the other motor vehicle trader. ANL invoiced, received and accounted for the remuneration from both of those further engagements.

[7] In September 2005 the new general manager of Milano International, Ian Ashley, approached Mr Carruthers with a view to securing Mr Carruthers' return to Milano International.

[8] Mr Ashley did not give evidence. Sumnesh Kumar, a director of Milano International, gave evidence on the company's behalf. Although he travels to New Zealand regularly, he lives in Japan. Inevitably there were limits to his direct knowledge of the detail of the arrangements Messrs Ashley and Carruthers entered into, as well as of the way in which the parties' relationship operated in practice. There was little he could add other than to indicate an awareness that Mr Carruthers' work was being invoiced by and paid to Mr Carruthers' company and that GST was payable. He accepted that arrangement.

[9] According to Mr Carruthers, the overall outcome of discussions with Messrs Ashley and Kumar was an oral agreement that Mr Carruthers would manage Milano International's wholesale vehicle team and sales support staff. At the same time Mr Carruthers said in oral evidence that Mr Ashley indicated the emphasis was to be on transforming the on-line wholesale auction system into an attendance-style auction for dealers only. Mr Carruthers was to set that up, and

take over its running. He also said Mr Ashley told him the arrangement would last for as long as the wholesale and auction system ran.

[10] Payment was to be by way of a retainer of \$500 per week, plus a commission of \$100 for every vehicle sold by the wholesale division. The retainer was subsequently increased to \$1,000 per week. When giving evidence Mr Carruthers used the word 'salary' to describe the retainer, but I do not accept that was the description agreed by the parties at the time. Mr Carruthers used the word because he is saying he was an employee, so therefore the payment was a 'salary' as he sees it.

[11] Mr Carruthers was also to have full use of a company vehicle and cell phone, as well as the use of company office equipment on company premises. Hours of work were 8.30 am to 5.30 pm Monday to Friday, and Saturday from 9.30 am to 2 or 3 pm.

[12] It was common ground that payment would be on invoice and GST would be payable. ANL subsequently submitted invoices, and again received and accounted for all payments. Beyond the conversation about invoicing and GST, the discussions did not directly address whether the relationship was to be one of principal and contractor or employer and employee. Indeed there was nothing to suggest anyone turned his mind expressly to that point.

[13] I do not accept that the 'payment on invoice' procedure was the result of an instruction to Mr Carruthers from Mr Ashley, or Mr Kumar. Mr Ashley himself was paid 'on invoice', and Milano International's staff comprised a mixture of people who were paid 'on invoice' and people who were employees. Mr Kumar struck me as willing to act on the preferences expressed by the staff, although he believed there was an industry practice to the effect that sales staff were engaged as contractors. I consider it likely there was at least an assumption by Milano International that the engagement was to be on the basis of principal and contractor, and both parties proceeded without discussing the assumption. Further, I accept Mr Kumar's evidence that, during a conversation he had with Mr Carruthers, Mr Carruthers insisted on being paid through ANL. My reservation about that evidence concerns whether the discussion occurred at the time of Mr Carruthers' earlier engagement with Milano International, rather than in or about September 2005. In any event, Mr Carruthers continued to have ANL invoice for

and receive payments for his services as had by then been his practice for some years.

[14] There was no written document setting out the terms of the agreement.

[15] There was considerable discussion in the evidence of the way in which the relationship operated in practice. In general I accept that many of Mr Carruthers' activities as manager of the wholesale division were consistent with what might be expected if the parties were in an employment relationship. This is also true of the way in which Mr Carruthers presented himself to third parties – namely he dealt with them on the basis that he was representing Milano International's interests. However in the circumstances I am about to discuss I do not consider those features exclude the possibility that the real underlying relationship was one of principal and contractor.

[16] A significant feature – not being consistent with the existence of an employment relationship - was that Mr Carruthers derived his income directly from ANL, not Milano. ANL has filed tax returns every year since its registration. It has accounted for income received in respect of the various engagements discussed above (treating the income as company income, not payments received on behalf of Mr Carruthers), deducted business-related expenses (as it was entitled to do) in reasonably significant amounts, offset losses made by Mr Carruthers' own vehicle trading activities against income received from other sources (including Milano International), and made payments to Mr Carruthers which were identified as 'shareholder salary'.

[17] It does not assist Mr Carruthers to disavow any grasp of the implications of this approach on the ground that he is a layperson and does not understand such things, or to purport to blame his accountant or Milano International for failing to draw those implications to his attention. The arrangement of his affairs in such a way provided advantages not available if he were an employee of Milano International, and apparently the arrangement has continued for several years without any challenge from Mr Carruthers.

## **Determination**

[18] Section 6 of the Employment Relations Act 2000 provides in part:

“(2) In deciding ... whether a person is employed by another person under a contract of service, the ... Authority ... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2) the ... Authority –

- (a) must consider all relevant matters, including any matters that indicate the intention of the parties; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.”

[19] My focus is on s 6(3)(a). There was no written or oral statement by the parties describing the nature of their relationship in any event, and for present purposes I regard the phrase ‘all relevant matters’ as incorporating:

“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.”<sup>1</sup>

[20] As already indicated, I accept that aspects of the operation of the parties’ relationship in practice were consistent with the existence of an employment relationship. Milano International also exercised a degree of control over Mr Carruthers’ activities, although the senior and specialised nature of his position meant he had some autonomy in the way he operated. Indeed it is the very attainment of seniority, specialised skills, experience and a network of contacts which prompts people to offer their services through their own businesses in a way that is also consistent with Mr Carruthers’ activities. The offering of services in this way does not absolve the offeror from observing the requirements of and some direction from the principal, or attempting to work effectively within the principal’s organisation.

[21] I have also highlighted a significant feature that was clearly not consistent with the existence of an employment relationship between Mr Carruthers and Milano International, namely the engagement of Mr Carruthers’ services through his own company, ANL.

[22] ANL was not a sham company. It had been trading for some time, even if not on the basis Mr Carruthers had planned, and continued to do so with Milano

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<sup>1</sup> **Bryson v Three Foot Six Limited** (No 2) [2005] 1 ERNZ 372

International. Its existence was not for the purpose, directly or indirectly, of depriving Mr Carruthers of the entitlements of an employee.

[23] Having structured his affairs in that way, Mr Carruthers must now accept the result. Taking the above considerations into account, I conclude that he was in business for himself and was not an employee of Milano International.

[24] Accordingly it is not open to Mr Carruthers to proceed with a personal grievance in the Authority.

### **Costs**

[25] Costs are reserved.

[26] The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they shall have 28 days from the date of this determination in which to file and serve memoranda setting out their positions.

**R A Monaghan**  
**Member of Employment Relations Authority**