

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 278
5418930

BETWEEN PAUL CHATTELL
 Applicant

A N D HOT WELLNESS LIMITED t/a
 GO 360
 Respondent

Member of Authority: K J Anderson

Representatives: M Copeland, Counsel for the Applicant
 B Bennett, Advocate for the Respondent

Investigation Meeting: 15 May 2014 at Rotorua

Submissions Received: 11 June 2014 from the Applicant
 8 May 2014 from the Respondent

Date of Determination: 1 July 2014

DETERMINATION OF THE AUTHORITY

Introduction – A preliminary issue

[1] The applicant, Mr Paul Chattell, claims that he was unjustifiably dismissed on 31 January 2013. But the respondent, Hot Wellness Limited (HWL), says that Mr Chattell was not an employee at the time of his departure from the business on 31 January 2013; rather, he was an independent contractor under a contract for services. Therefore, a preliminary issue arises for determination: Was Mr Chattell an employee at the material time?

[2] If the Authority determines that Mr Chattell was an employee then he is entitled to have his claim of unjustifiable dismissal investigated further. Conversely, if it is found that Mr Chattell was not an employee then the Authority does not have jurisdiction and the matter cannot proceed any further with the Authority.

Background

[3] Hot Wellness Ltd t/a GO 360 (the business), is a provider of fitness and gym services in Rotorua. Mr Chattell was engaged as a personal trainer. It is established that Mr Chattell used to own the business, trading under another name, but apparently, due to financial pressures, he sold to HWL. The sale included the membership database and all of the gym equipment and other assets.

[4] Relevant to the determination of the preliminary matter, it is established that a condition of the sale to HWL was that Mr Chattell and his wife would be employed by HWL, effective from the settlement date: 7 February 2011.

[5] Consistent with the sale and purchase agreement for the business, an employment agreement was agreed to and signed by the parties on 7 February 2011.

The change in status from employee to contractor

[6] The managing director of HWL is Ms Belinda Bennett. Along with Ms Eve Johnson, Ms Bennett owns the business.

[7] Sometime in November 2011, HWL proposed that a number of employees, including Mr Chattell, should become independent contractors rather than remaining employees of the business. The evidence of Mr Chattell is that he was “open” to changing from being an employee to a contractor, subject to having an opportunity to consider the proposed contractor agreement.

[8] The evidence is that people had plenty of time to consider the proposed change as HWL envisaged that the change to being contractors rather than employees, would not occur until the beginning of the next financial year; 1 April 2012.

[9] Along with the other employees involved, Mr Chattell received a draft contract for consideration. Under the heading “BACKGROUND” is the following:

- B. The Contractor is engaged as an independent Contractor. Nothing in this agreement is intended to create an employer/employee relationship. At all times, the Contractor shall be independent of Go 360.

[10] It is established that Mr Chattell entered some changes (handwritten) onto the draft contract and returned it to Ms Bennett for her consideration. The changes were quite minor. Firstly, at subclause A, the draft agreement informed that:

GO 360 wishes to hire a room to the Contractor to undertake the services set out below and the Contractor agrees to provide such services.

Mr Chattell required that the word “room” be replaced with “gym facilities”.

[11] A further change was required at clause 1.1 of the agreement whereby it proposed that the agreement “...may be terminated at any time by one party giving 30 days’ written notice to the other”. Mr Chattell requested that the notice period be reduced to 14 days.

[12] At clause 2.11 of the proposed agreement: The Contractor will:

Provide a weekly detailed invoice to: belinda@go360.co.nz with copying to authorised personnel as directed, for services purchased by GO 360 (i.e. instructor fees). Unless otherwise agreed, all invoices should be submitted no later than Wednesday 4pm. Submission of an invoice later than this may result in the delay of payment to the contractor. Pay periods for claiming are Monday to Sunday of the previous week.

[13] Rather than have the email address whereby invoices were sent to Belinda Bennett, Mr Chattell required the invoices should be provided to “ADMIN”; presumably meaning that his invoices would be provided to the administration facility of HWL.

[14] Mr Chattell required a further change at clause 5.3 of the proposed agreement. This change relates to access to the GO 360 facilities, with the use of a swipe card, during and outside normal working hours.

[15] Finally, at Appendix A of the proposed agreement, there is a provision for the amount of rent that the contractor pays GO 360 for the use of the gym and facilities. The weekly fee/rent proposed was \$150. It was proposed that Mr Chattell would provide 10 hours of services to GO 360 at an hourly rate of \$15 in lieu of paying rent. Mr Chattell required that this should be reduced to five hours of services being provided for up to 20 clients, i.e. \$75 per week, and 10 hours of services would be provided for more than 20 clients each week, i.e. \$150. It appears that this change was also proposed by another personal trainer, Ms Vicki Bass, and possibly initiated by

her. Ms Bass was also an employee at the time and she successfully changed from that status to one of being a contractor, without any apparent issues; following the access of appropriate independent advice.

[16] It was always intended that the change from being an employee to a contractor would take effect from 1 April 2012, but for some reason that has not been really explained, it seems that concluding the new agreements did not get properly addressed until late April or perhaps early May 2012. The evidence of Ms Bennett is that she agreed to the changes proposed by Mr Chattell (and Ms Bass) and had a final version of the contractor agreement typed and ready for signing shortly after. Ms Bennett says that when the changes were made she gave the final version to Mr Chattell (and respectively Ms Bass) for his perusal and signing. Mr Chattell denies that he received this final version of the agreement. The Authority has viewed the agreement signed by Ms Bass and Ms Bennett on 8 June 2012, and Ms Bass has given some evidence about her involvement. While it is disputed whether Mr Chattell received the amended agreement with the changes he had requested, I conclude that it is probable that he did take receipt of the amended agreement, albeit it is established that he never signed or returned it.

[17] The evidence of Ms Bennett is that she never had any concerns in regard to Mr Chattell not returning the contractor agreement as the changeover from being employees to contractors for Mr Chattell and Ms Bass was effective from 1 April 2012. And from her perspective, everything was working well and she had no reason to doubt that Mr Chattell was happy with the new arrangements; until the circumstances that arose on 31 January 2013, whereby the relationship was terminated and Mr Chattell subsequently chose to raise a personal grievance. Ms Bennett's evidence is that until the above date, she had a good working relationship with Mr Chattell and he was someone whom she admired in regard to his personal training skills. Ms Bennett added that she is most disappointed that matters have now come to these proceedings now before the Authority. It is also established that for Mr Chattell, the change from being an employee to a contractor was, to some extent, an extension of the arrangement he had with HWL, as he already had a number of private clients whom, he trained in his own time, whilst being an employee during normal working hours.

Analysis and conclusions

[18] Mr Chattell largely relies on the fact that he did not sign the contractor agreement, to support his position that he remained an employee throughout his relationship with HWL. On the other hand, Ms Bennett says that while it may have been remiss that she never followed up with Mr Chattell to ensure he signed and returned the agreement, with the changes he had requested, she had no doubt that Mr Chattell became a contractor as of 1 April 2012. This is particularly evidenced by the fact that he was paid out all accrued holiday pay (as an employee) in recognition of the change of status from employee to contractor. The receipt of accrued holiday pay is acknowledged by Mr Chattell and it appears that it was paid over a period of several weeks.

[19] Section 6 of the Employment Relations Act 2000 (the Act) provides that when deciding whether a person is employed under a contract of service, the Authority must determine the real nature of the relationship between the parties in dispute. In arriving at this determination, the Authority must consider any relevant matters, including any matters that indicate the intention of the parties. But the Authority is not to treat as a determining matter any statement by the parties that describes the nature of the relationship; in other words, just because a party says that he was an employee, or alternatively, the other party says that the person was a contractor, that cannot be the sole matter that determines the relationship.

[20] The leading authority on such matters is *Bryson v. Three Foot Six Ltd (No 2)*¹. In reference to “all relevant matters” as set out in s.6 of the Act, the Supreme Court held that 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**. [Emphasis added by the Authority]

[21] The Supreme Court also stated that:

It is important that the Court or the Authority should consider the way in which the parties have **actually behaved** in implementing their

¹ [2005] ERNZ 372

contract. **How their relationship operates in practice** is crucial to a determination of its real nature. [Emphasis added]

[22] In examining all of the evidence I conclude that while Mr Chattell was in an employment relationship with HWL until 31 March 2012, and notwithstanding that he never signed and returned the contractor agreement, he became an independent contractor effective from 1 April 2012.

[23] There are several factors, or relevant matters, that bring me to this conclusion. Firstly, Mr Chattell received the holiday pay that he had accrued as an employee up to 31 March 2012 and by taking receipt of these monies, this was an indication that he had accepted the change in his status of relationship from employee to contractor.

[24] Secondly, Mr Chattell, at all times until his departure on 31 January 2013, by his actions, portrayed that he had become an independent contractor. This is evidenced by the fact that he sought various changes to the proposed contractor agreement, these were accepted by HWL, and all that remained was for Mr Chattell to sign and return the contract that contained the changes that he had requested. Mr Chattell has not given a satisfactory explanation regarding why he did not sign and return the contractor agreement, however he conducted himself in such a manner that it could be reasonably implied that the agreement had been completed.

[25] Further evidence of a contractor relationship is available in the form of the invoices that Mr Chattell presented to HWL each month. In particular, these invoices reveal that Mr Chattell was applying the arrangement regarding the cost of renting the premises and facilities of GO 360, consistent with the terms of the contractor agreement at Appendix A. Again, this arrangement was as requested by Mr Chattell, when he sought the amendments to the initial proposed agreement.

[26] On the matter of income generated since 1 April 2012, Mr Chattell was requested to provide to the Authority his Inland Revenue Department records from then until 31 January 2013. Unfortunately, Mr Chattell has failed to provide these records and his reasons for this failure are less than convincing.

[27] I also accept the evidence of Ms Bennett (and Ms Bass) that from 1 April 2012 Mr Chattell's involvement on a day-to-day basis changed in that rather than being under the control of HWL as an employee, he had considerable autonomy to organise his day as he wished; albeit there appears to be one particular exception. This is that,

in lieu of paying rent for the use of the GO 360 gym and facilities, and as per the terms of Appendix A to the contractor agreement, Mr Chattell was required to provide (for want of a better term) his labour, for 5 to 10 hours a week, depending on the number of his clients who used the gym. Furthermore, Mr Chattell was able to and did, invoice HWL for other hours that he provided his services to the business, i.e. taking classes.

[28] According to the invoices produced by Mr Chattell to HWL, his client numbers appear to have been less than 20 each week as he is recorded as having offset five hours labour against the amounts that he invoiced HWL. It also seems that there was a “to do list” whereby Mr Chattell could choose the type of work he preferred in regard to the work he carried out to pay the rent.

[29] An issue has been raised by Mr Chattell in regard to whether he would have received any real benefit from becoming a contractor. This particular point has been made by him in the context of why he did not sign the contractor agreement, and therefore, by implication, he remained an employee. Apart from the fact that the actions of Mr Chattell contradict his stance that he remained an employee, I am satisfied by the overall evidence that a particular benefit for Mr Chattell was that he received the full fees paid by clients (\$60) as compared with the \$27.50 that personal trainers employed by HWL received. The evidence of Ms Bennett is that Mr Chattell was also free to solicit clients via mail drops and general promotion of the gym. Mr Chattell was also able to “walk the [gym] floor” and talk to Go 360 clients, whom could become his clients, should they wish to do so.

[30] Mr Chattell says that he was required to be available for work according to a roster. But I prefer the evidence of Ms Bennett. She says that there was a “list” whereby contractors could select the work they wished to do to pay off the rent. Ms Bennett also says that she did not really enforce this practice and Mr Chattell had the flexibility to more or less do what he chose to do. Ms Bennett says that sometimes Mr Chattell “just sat at the computer” and compiled training programmes. Ms Bennett also referred to accommodating Mr Chattell in regard to his commitments to his clients at various times.

[31] Another relevant factor that I have taken into account is that there is evidence of an industry practice whereby personal trainers are engaged as contractors to gyms

throughout the country; indeed it is within the knowledge of the Authority that most, if not all, of the major gym franchises operate in this manner. The evidence of Ms Bennett is that she chose to observe industry practice when she initiated the change from employees to contractors, as this arrangement had benefits for both parties. Ms Bennett says that Mr Chattell was certainly in favour of such an arrangement.

[32] Finally, the evidence substantially points to Mr Chattell accepting that he was a contractor from 1 April 2012 and at no time did he dispute this was the situation. Even when he returned the proposed contractor agreement with the changes that he required, he never raised any concerns about the nature of his relationship with HWL and he continued to provide invoices each month. The matter of the status of his relationship with HWL only became an issue some 10 months later when, because of Mr Chattell's alleged actions, the company terminated the relationship.

Determination

[33] It has to be said that very few employee/contractor disputes have immediately obvious answers and some elements of the arrangements in place between the parties will favour one point of view and others a converse opinion. Nonetheless, on weighing the evidence before the Authority, I conclude that it is more probable than not that as from 1 April 2012, the nature of the relationship between Mr Chattell and HWL was one of a contract for services, or in other words, Mr Chattell was an independent contractor. It follows that because there was not an employment relationship in existence at the time that the services of Mr Chattell were terminated by HWL, the Authority does not have jurisdiction to investigate the alleged personal grievance lodged by him.

Costs

[34] As Hot Wellness Limited was represented by Ms Bennett in her role of managing director of the company, the issue of costs does not require consideration.