

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 462  
5517343

BETWEEN                      ALAN CHELLP  
Applicant

A N D                              STRETCH CEILINGS NEW  
ZEALAND LIMITED  
Respondent

Member of Authority:      James Crichton

Representatives:            Applicant in person  
Igo Mikitas, Advocate for the Respondent

Investigation Meeting:     10 November 2014 at Auckland

Date of Determination:    12 November 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Chellp) alleges that he was employed by the respondent (Stretch Ceilings) and that he is owed wages for a particular job in Samoa. Stretch Ceilings denies that Mr Chellp was ever employed by it, maintains that he was always a contractor, and therefore protests the jurisdiction of the Authority to deal with the matter.

[2]     Stretch Ceilings also advises that it has a claim against Mr Chellp filed in the Disputes Tribunal at Auckland which is now set down for hearing on 9 December 2014.

[3]     I convened a telephone conference with the parties as a consequence of which it was agreed that the Authority would hold a brief investigation meeting at which the sole issue for determination was whether Mr Chellp was an employee of Stretch Ceilings or not. I suggested that it would be useful to have the Authority determine its view on that issue prior to the Disputes Tribunal hearing.

[4] At the investigation meeting, Mr Chellp and Mr Mikitas were present and gave their evidence on oath.

[5] While Mr Chellp maintained that he was employed by Stretch Ceilings, the latter was equally adamant that Mr Chellp was not employed by Stretch Ceilings for the job in question and had never been employed by Stretch Ceilings because he was always a contractor. Moreover, Stretch Ceilings' evidence was that it does not employ anyone and it was at a loss to understand why it would employ Mr Chellp when no one else was employed.

[6] The Authority was not provided with any employment agreement in writing; Mr Chellp maintained that he was offered employment but there is no documentary evidence of that whatever and Mr Mikitas was very clear that that claim was simply mischievous.

[7] It is also apparent that Mr Chellp provided Stretch Ceilings with invoices, not just for the current role but also apparently for previous engagements, and examples of those invoices were provided to me.

[8] Mr Chellp's explanation for the invoice relating to the Samoan job (the one in contention here) was that he was unable to get any payment from Stretch Ceilings and accordingly sent it an invoice.

[9] Mr Mikitas disputes that contention and maintains that any failure by Stretch Ceilings to pay is a function of its claim against Mr Chellp which is to be heard in the Disputes Tribunal on 9 December 2014. In effect, that claim is in the nature of a counterclaim against whatever Mr Chellp may be owed by Stretch Ceilings.

[10] Although Mr Chellp maintained that he had not been registered for GST until after the Samoan job had concluded, and he provided documentary evidence of his GST registration, a proper construction of that Inland Revenue Department form is that he was effectively registered for GST on and from 1 June 2014, that being the registration date on the form, and on that basis, he was registered for GST for the totality of the Samoan job.

[11] Even if he were not registered for GST prior to that, the explanation for his being a contractor rather than an employee to Stretch Ceilings before that date, for

earlier work, is either that he was in error in failing to register for GST or that he was registered for GST in another name, for instance one with limited liability.

[12] Mr Mikitas urged on me the proposition that earlier engagements of Mr Chellp by Stretch Ceilings were sometimes in the name of a limited liability company which Mr Chellp previously controlled but which has since ceased trading.

[13] Mr Mikitas provided an example of an invoice from such a company and Mr Chellp's response when sighting it at the investigation meeting was to indicate that that legal entity had ceased to trade but that does not deal with the force of the point made by Mr Mikitas which is that at the relevant time, Mr Chellp was plainly not working as an employee but through an incorporation.

[14] Another example provided by Mr Mikitas from last year was a quotation from Mr Chellp for two different prices, each of which were expressed as being a dollar amount plus GST or a lower cash sum (presumably exclusive of GST).

[15] Mr Mikitas also gave evidence that Stretch Ceilings has work all around New Zealand (and clearly overseas as well) and it has groups of contractors who service its requirements in all of the local markets it regularly works in and that Mr Chellp is just one of those contractors for the Auckland region. Mr Mikitas said that not even he was employed by Stretch Ceilings although he worked from time to time as an installer of suspended ceilings and when he did that he, like everybody else, was a contractor.

### **Determination**

[16] I am satisfied on the evidence I heard that Mr Chellp was not an employee of Stretch Ceilings for the period that he claims, being in effect the extent of Stretch Ceilings' Samoan job. It is apparent that the parties are in dispute over money owed by the one to the other and the appropriate forum for that dispute to be ventilated and disposed of appropriately is the Disputes Tribunal.

[17] I conclude that Mr Chellp is not employed by Stretch Ceilings because there was simply no evidence before the Authority, save for Mr Chellp's oral assertions, that this was an employment relationship. Of most importance in my reaching the conclusion that I have is the fact that Stretch Ceilings gave evidence to me that it did not employ anybody, either in Auckland or in any of the other markets in which it

operates and that Mr Chellp was no differently placed from any other contractor who regularly worked for it.

[18] Moreover, all of the evidence before the Authority supports Stretch Ceilings' claim that Mr Chellp was a contractor; there were examples of tax invoices both currently and for earlier jobs, evidence that Mr Chellp had previously contracted through a limited liability company, evidence that Mr Chellp had always contracted to Stretch Ceilings previously rather than been employed by it and had never protested in the past, evidence of quotations from Mr Chellp expressed on an either plus GST basis or a much cheaper cash price and evidence that Mr Chellp was registered for GST in his own name, for the totality of the Samoan job.

[19] I am satisfied then that the real nature of this relationship was in truth a contractual relationship rather than a relationship of employment and on that footing, the evident dispute between these parties is outside the Employment Relations Authority's remit and cannot be taken any further in this jurisdiction.

### **Costs**

[20] Stretch Ceilings claims costs but appeared in the Authority with Mr Mikitas as advocate. As I indicated to Mr Mikitas at the investigation meeting, the Authority's practice is not to award costs to a successful party unless they are actually represented by a lawyer or advocate at hearing, even although Mr Mikitas maintained that he had taken legal advice prior to attending the investigation meeting.

[21] On that basis of the Authority's usual practice then, costs are to lie where they fall, that is to say each party will bear whatever legal costs they have incurred prior to the attendance at the Authority's investigation meeting.

James Crichton  
Member of the Employment Relations Authority