

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 179
5537258

BETWEEN

JON DAVISON
Applicant

A N D

TALLEY'S GROUP LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Paul Wallace, Representative for the Applicant
Graeme Malone, Counsel for the Respondent

Investigation Meeting: 5 June 2015 at Auckland

Submissions Received: 5 June 2015 from both the Applicant and the Respondent

Date of Determination: 22 June 2015

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY MATTER**

- A. There was no contract or intention to create one between Mr Jon Davison and Talley's Group Limited (Talley's).**
- B. Even if there was a contractual relationship between Mr Davison and Talley's, the underlying and true nature of the relationship was that of an independent contract, not an employment agreement.**
- C. Accordingly, the Authority has no jurisdiction to investigate Mr Davison's employment related claims against Talley's.**
- D. Costs are reserved.**

Employment relationship problem

[1] The applicant, Mr Jon Davison, claims he was employed in the role of General Manager, Potato Products by Talley's Group Limited (Talley's) from 18 June 2012 until 19 December 2014.

[2] Talley's denies Mr Davison's claim and says it never employed him. Rather, it engaged his company, Jay D Consulting Limited (Jay D) as an independent contractor to provide marketing services to it from 18 June 2012 until 19 December 2014.

Issues

[3] The issues for determination by the Authority are:

- (a) Was there a contractual relationship between Mr Davison and Talley's?
- (b) If there was a contractual relationship between Mr Davison and Talley's, was the relationship one of employment?

Issue One:

Was there a contractual relationship between Mr Davison and Talley's?

[4] Mr Davison says the intention of the parties was that he was to be employed and that he was employed by Talley's despite the existence of a contract for the provision of services between his company, Jay D, and Talley's.

[5] Mr Davison says the nature of the contract entered into between Jay D and Talley's required him personally to provide services to Talley's and the manner in which the contract operated made him an employee of Talley's.

[6] The Court in *McDonald v. Ontrack Infrastructure Ltd*¹ considered triangular or tripartite employment relationships. In that case Mr McDonald was employed pursuant to a casual individual employment agreement by Allied Workforce Limited (Allied). Allied is a labour hire company which provides individuals to clients to cover temporary work needs. One of Allied's clients with whom it had a contract was Ontrack Infrastructure Limited (Ontrack).

¹ *McDonald v. Ontrack Infrastructure Ltd* [2010] NZEmpC 132

[7] Mr McDonald was assigned by Allied to work for Ontrack. Upon termination of the assignment Mr McDonald claimed Ontrack had unjustifiably dismissed him. Mr McDonald claimed that following his placement by Allied with Ontrack, he became an employee of Ontrack and therefore upon termination was able to bring a personal grievance claim against it under the Employment Relations Act 2000 (the Act).

[8] The Employment Court stated at para [36] of *McDonald*:

... it is open potentially for someone such as Mr McDonald to argue that he was employed by an entity at the third point of the triangle, that is by a person who was not originally his employer but with whom his employer had a commercial relationship which included the exclusive provision of the employee's services to that third party. It will be for Mr McDonald to establish that legal position on the particular facts of his case if he is to maintain his claims against the first defendant [Ontrack].

The onus is on Mr Davison to establish the existence of a contract of service between himself and Talley's "... such a contract must satisfy the common law requirements of offer, acceptance, contractual intention, consideration and certainty"².

Investigation meeting

[9] As permitted under s.174 of the Act, this determination has not set out all the evidence received. The determination states findings and relevant facts and legal issues in relation to the preliminary matter and makes conclusions in order to efficiently dispose of the matter.

[10] The investigation of this preliminary matter took a full day in the Authority. Closing submissions were provided by both parties at the conclusion of the investigation meeting.

[11] For the Authority's investigation, the applicant, Mr Jon Davison, provided a written statement. Mr Andrew Talijancich (aka Talley) on behalf of the respondent also provided a written statement.

[12] Each witness confirmed by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information, and did so.

² *McDonald v. Ontrack Infrastructure Ltd* [2010] NZEmpC 132 at para.[36]

Relevant facts

[13] Mr Davison has a BSc (Microbiology) and significant experience in the food industry both internationally and within New Zealand.

[14] Prior to commencing at Talley's in 2012, Mr Davison had almost thirty years' work experience including in general management and CEO positions for a number of New Zealand manufacturing businesses. These businesses included Easiyo Products Limited, Goodman Fielder Limited, Country Fare Bakeries Limited, and Mr Chips Holdings Limited (Mr Chips).

[15] Mr Davison's most recent period of employment, prior to commencing at Talley's, was as Chief Executive Officer of Mr Chips, a position he held for approximately 14 years. In December 2011, Mr Davison was appointed Director of Potatoes New Zealand, which reflected, in his words, his "*significant leadership and experience in the industry*".

Discussions between Mr Davison and Mr Talley.

[16] In mid-May 2012, Mr Davison says he became aware that he was to be made redundant by Mr Chips and so began looking for other employment opportunities. Mr Davison made contact with Mr Andrew Talley, Director of Talley's to see what opportunities there may be for him.

[17] Mr Talley says there was no role for Mr Davison at Talley's but that he was interested in Mr Davison's skills and experience in the food industry. Mr Davison and Mr Talley met in late May 2012 to discuss possible opportunities. Mr Davison left Mr Chips on 1 June 2012.

[18] Following their meeting in May 2012, there was an email exchange between Mr Davison and Mr Talley in early June 2012 about the possibility of Mr Davison joining Talley's. Mr Davison says he understood from the meeting with Mr Talley and from their email correspondence that he was to be employed by Talley's. Mr Davison says he had always been an employee and intended this to continue by securing permanent employment.

[19] Mr Talley says he never turned his mind to an employment relationship with Mr Davison. The discussion at the meeting in May 2012 and the subsequent email exchange, Mr Talley says related to an independent contract with Talley's.

June 2012 email correspondence between Mr Davison and Mr Talley

[20] On 5 June Mr Davison sent an email to Mr Talley as follows:

As a starting point for a further discussion I propose:

- (a) *An annual evergreen contract for business development services.*
 - (b) *An appropriate job title to support business development (eg. General Manager – Food Service?).*
 - (c) *Proposed base package 170K pa plus car allowance plus phone plus expenses.*
 - (d) *Bonus for the first year based on 20K for each 1,000T annualised volume increase.*
- ...

[21] Mr Talley replied on 8 June:

John, think about below and call me

Title: General Manager – Potato Products

Role: Potato sales Australia/Business development ...

Remuneration:

- *Contract of 12,500 plus GST month (NZD150,000pa) plus telephone/computer and travel expenses (flights, meals, accommodation). The position wouldn't provide any car or car allowance for NZ. A 20k bonus if you get new customers totalling 5,000mt in the first 12 months. Start 1 July 2012.*
- *Term evergreen with 3 month notice clause after first 12 months. That would guarantee you a minimum 12 months, but we see this a full time role subject to performance and traction during that first time. I see the role evolving based on what we achieve and what you find during the first 6-12 months.*
- *Role and your time would be exclusive to Talley's. Normal office hours each week to be kept, 4 weeks holiday pa. We would seek a 6 month ROT after any notice period (potato only).*

[22] According to Mr Davison, he intended to be employed by Talley's but during the course of discussions Mr Talley suggested that a better arrangement would be an independent contract relationship whereby Mr Davison would be paid indirectly by

Talley's. Mr Davison was unsure exactly what that meant, but as he wanted the job, accepted this arrangement.

[23] Mr Talley says it was always his intention that the relationship be an independent contract. An independent contract arrangement would allow Talley's the flexibility to review the role which had been created for Mr Davison and would provide both with financial benefits. Mr Talley says it was Mr Davison who requested "*to work through his company for tax reasons including tax losses that he had and expenses he could claim...*". Therefore, a contract for services was drafted between Talley's and Jay D.

[24] Mr Talley referred to aspects of the email correspondence with Mr Davison which he says supported an intention to have an independent contract. Mr Davison pointed to references in the email correspondence which he says favoured his view that there was an employment relationship.

[25] For example, Mr Davison pointed to his request in his email of 5 June 2012 for an "*annual evergreen contract for Business Development services*" as an indication that he intended an employment agreement. Mr Talley understood that reference to be to an independent contract for services. Mr Talley saw his reference in his email of 8 June 2012 to a "*Contract of \$12,500 plus GST month*" as being a clear indication of an independent contract because employees are not paid GST. Mr Davison says the reference by Mr Talley in the same email to "*Normal office hours each week to be kept, 4 weeks holiday ...*" to mean an employment agreement.

[26] Mr Davison refers to the email of 8 June 2012 from Mr Talley as an offer of employment. This view, Mr Davison says, was further cemented when, the following Monday, 11 June "*at Andrew's request I flew to Christchurch and accompanied him the following day on a visit to the production facility in Ashburton to meet the staff on 12 June*".

[27] On 14 June, Mr Davison replied to Mr Talley's email and in his evidence to the Authority said this was an acceptance of the offer of employment. There were a number of other matters referred to by Mr Davison which he pointed to as being evidence that he was employed by Talley's, including the provision of a business card.

[28] Having heard the evidence of both Mr Davison and Mr Talley regarding their discussions in May 2012 and having viewed the subsequent communications between them, it is my view that the parties intended a contract for services not employment. I am supported in this view by the subsequent contract entered into by Talley's and Jay D on 18 June 2012.

Contract between Talley's and Jay D – 18 June 2012

[29] In the critical emails between Mr Davison and Mr Talley, Mr Davison requested draft contracts to be provided to him. For example, in his first email of 5 June to Mr Talley, he said:

Obviously we will need more discussion but if you see this working then I can get a contract under way for you to look at and meanwhile I could visit the plant, meet your team and get a better understanding of quality systems currently in place.

[30] Following Mr Talley's response on 8 June, Mr Davison in his reply of 14 June, said:

If you are okay with the above, please send me a draft contract with a 1st July start date as proposed or do you want me to organise that for you?

[31] It is clear to me that the parties did not consider there to be a binding contractual relationship between them until a contract was provided, agreed to and signed.

[32] In response to Mr Davison's requests for a contract to be drafted, Mr Talley drafted an agreement for services between Talley's and Jay D. This was not an agreement between Mr Davison and Talley's but rather between his company, Jay D, and Talley's. Mr Davison gave evidence that after receiving the agreement for services he read it, amended it and returned it to Mr Talley.

[33] On 18 June, Mr Talley for Talley's and Mr Davison for Jay D signed the agreement for services. A few days after signing it and returning it to Mr Talley, Mr Davison took legal advice. After receiving the legal advice, Mr Davison did not approach Mr Talley to change the agreement and was aware that it was an agreement for services.

[34] When questioned about the termination clause in the agreement for services which stated:

The parties acknowledge that each has the right to terminate this agreement for any reason whatsoever (and without cause or reason) upon giving three months' written notice to the other provided however that, on terminating the agreement no party shall be entitled to any compensation...

Mr Davison said he understood that was not a clause which would be contained in an employment agreement but that he would be able to argue later that the agreement was an employment agreement and that that clause was not enforceable.

[35] Mr Davison was clear to the Authority that he wanted the job at Talley's and was going to sign the agreement despite what it said. Mr Davison is a highly qualified and experienced businessman. Mr Davison was aware, in my view, that the contract he was signing was between his company Jay D and Talley's.

[36] On the evidence, it is my view that there was no contract or intention to create one between Talley's and Mr Davison. There was no contractual relationship between Talley's and Mr Davison. Mr Davison has been unable to satisfy the common law requirements of offer, acceptance, contractual intention, consideration and certainty required. This was clearly set out by the Court as requirements to establish a contractual relationship in *McDonald*³.

[37] The contractual relationship was entered into and existed between Jay D and Talley's. Accordingly, Mr Davison was not an employee of Talley's. The Authority has no jurisdiction to investigate Mr Davison's claims against Talley's.

Issue Two

If there was a contractual relationship between Mr Davison and Talley's, was the relationship one of employment?

[38] Because of the finding that there was no contractual relationship between Mr Davison and Talley's, it is not necessary for the Authority to consider whether the nature of the relationship between the parties was one of employment.

[39] I am satisfied that there was no contractual relationship between Talley's and Mr Davison, the contractual relationship was between Jay D and Talley's. However,

³ Supra, para.[36]

if I am wrong in this view, it is apparent to me that the way in which the contract operated between the parties was that of an independent contract and not that of an employment agreement.

[40] Section 6 of the Act states:

Meaning of employee

- (1) *In this Act, unless the context otherwise requires, employee –*
 - (a) *Means – any person of any age employed by an employer to do any work for hire or reward under a contract of service;*
 - ...
 - (2) *In deciding for the purposes of sub-section (1)(a) whether a person is employed by another person under a contract for service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
 - (3) *For the purposes of sub-section (2), the court or the Authority*
 - (b) *Must consider all relevant matters including any matters that indicate the intention of the persons; and*
 - (c) *Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[41] The leading case on s.6 of the Act is the Supreme Court decision of *Bryson v. Three Foot Six Limited*⁴. Chief Judge Colgan in *Singh v. Eric James & Associates Limited*⁵ states at para.16 that the inquiry in each case involving s.6 of the Act, is *intensely factual* and at para.17 sets out a number of principles derived from the *Bryson* decision.

[42] The Employment Court in *Poulter v. Antipodean Growers Limited*⁶ summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:

- (1) *The Court must determine the real nature of the relationship.*
- (2) *The intention of the parties is still relevant but no longer decisive.*
- (3) *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*

⁴ [2005] 3 NZLR 721

⁵ [2010] NZEmpC 1

⁶ [2010] NZ EmpC 77, 17 June 2010 at para.[20]

- (4) *The real nature of the relationship can be ascertain by analysing the tests that have been historically applied such as control, integration and the 'fundamental' test.*
- (5) *The fundamental test examines whether a person performing the service is doing so on their own account.*
- (6) *Another matter which may assist in the determination of the issue is industry practice although this is far from being determinative of the primary question.*

[43] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s.6 is for the Authority, or the Court, to gain an overall impression of the underlying and true nature of the relationship between the parties.

[44] Mr Davison is an experienced businessman with some 30 years' working in various senior management and CEO positions. Mr Davison has himself negotiated and been responsible for both employment agreements with staff and independent contracts with suppliers. In my view, Mr Davison was aware of the differences between an employment agreement and an independent contract. Mr Davison's company, Jay D, entered into a contract for services with Talley's and in my view Mr Davison was well aware that it was an independent contract. Mr Davison took advice about the agreement but chose not to raise any issues with Mr Talley about it.

[45] Mr Davison was aware that employees do not pay their own tax and ACC levies nor do they pay their own expenses and claim expenses against their tax. Mr Davison, through his company Jay D when contracting to Talley's, did claim for expenses, tax deductions and depreciation.

[46] Mr Davison consulted his accountant about the manner in which various items should be treated in order to obtain the most attractive tax advantages.

Jay D

[47] Mr Davison's evidence was that he incorporated Jay D in 2000:

... primarily as a means of leasing a motor vehicle in relation to [his] previous employment with Mr Chips. I never intended that Jay D Consulting would be used to provide consulting services because all my working life I have been in direct employment.'

[48] Mr Davison produced the end of year accounts for Jay D from 31 March 2001. These accounts demonstrate that not only was depreciation claimed in respect of

motor vehicles owned by Jay D but also in respect of office furniture prior to Mr Davison's relationship with Talley's.

[49] In 2007/2008 Mr Davison was involved in negotiations for the sale of Mr Chips to Simplot Australia Pty Limited. Jay D entered into a service agreement with Mr Chips to provide consulting services in respect of the negotiations. Mr Davison accepted that the agreement entered into was an agreement for services and not an employment agreement.

[50] The annual report for Mr Chips dated 2008 provided by Mr Davison at the Investigation Meeting refers to the service agreement and the incentive payment made to Jay D for services rendered. A considerable incentive was made to Jay D. Mr Davison described the arrangement as an expedient way for him to obtain an incentive. By paying the incentive to Jay D rather than to him personally, he was able to take advantage of a lower tax rate. All these factors are compelling evidence in my view that Mr Davison was well aware of the differences between an employee and an independent contractor.

The Agreement for Services – 18 June 2012

[51] The written agreement between Jay D and Talley's is expressed as an agreement for services, not an employment agreement.

[52] When considering s.6 of the Act in *May v Armourguard Security Limited* Member Dumbleton stated:

*“As a matter of principle, where a contract is in writing the words used are to be taken as the expression of the parties' actual intention which, although for the purposes of s6 of the Act is not decisive, is a relevant matter when considering the totality of the relationship between the parties”*⁷.

[53] There were indicators in the agreement that the relationship was one for services and other indicators that it was more related to an employment agreement. Indicators of an independent contract included the service fee, expenses charged to Talley's and the termination clause which has been referred to. Indicators of an employment agreement included exclusivity to Talley's, reporting, hours of work and performance review.

⁷ *May v Armourguard Security Limited* [2011] NZERA Auckland 208 para.[10]

Financial arrangements

[54] Jay D issued GST invoices to Talley's each month for services provided by it. Jay D also claimed expenses from Talley's each month.

[55] Mr Davison was not provided with a car by Talley's, he chose to lease a car through Jay D to take advantage of tax benefits. Jay D was registered for GST and issued invoices on letterhead to Talley's. Jay D claimed various tax deductions and the tax returns produced showed these included expenses for a home office, motor vehicle, telephone and office equipment and furniture.

[56] Mr Davison was not paid a salary from which PAYE was deducted and no KiwiSaver deductions were made.

[57] Talley's paid Jay D upon receipt of a GST invoice and Jay D in turn remunerated Mr Davison. Jay D was responsible for its own tax and ACC. From the accounts prepared for Jay D, it appears Mr Davison has utilised the services of an accounting organisation called Accounting for Small Businesses, since 2000. Mr Davison obtained accounting advice in relation to his own situation and that of Jay D. Accounting for Small Businesses prepared the yearly accounts and tax returns for Jay D since 2000.

[58] I accept the submission made by Mr Malone on behalf of Talley's that *"...where a party elects to structure his affairs so that services are provided under a contract for services to gain advantages that he perceives in such a structure then the Courts should not allow him to later claim that the arrangement was in fact different"*⁸.

[59] In support of this submission, Mr Malone cites the observations made in *Massey v. Crown Life Insurance Co*⁹. In that decision, Lawton LJ stated:

In the administration of justice the union of fairness, commonsense 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, commonsense and the law is strained almost to breaking point.

⁸ Malone closing submissions, para.32

⁹ [1978] 2 All ER 576

[60] As submitted by Mr Malone, that principle has been applied by the New Zealand Courts and in the employment jurisdiction in *Excell Corp Ltd v. Carmichael*¹⁰ and in *Chief of Defence Force v. Ross-Taylor*¹¹.

Control

[61] Mr Davison's representative, Mr Wallace, argued that Talley's exerted control over Mr Davison's work. Mr Wallace pointed to the exclusivity clause in the Agreement for services and the fact that Mr Davison's work was monitored closely by Mr Talley in support of this argument. These factors could be indicators of employment. The same factors could also be indicative of a new and unknown consulting role which needed to be assessed by Talley's.

[62] Mr Davison worked from home and was responsible for providing the equipment required to do the work for Talley's, including stationery, computer and office furniture. Mr Davison did have a Talley's email address.

[63] There were features or indications present suggesting the relationship may be one of employment. There were more features in my view of an independent contract relationship. Of importance in my assessment of the relationship, is Mr Davison's failure at any time, despite obtaining advice, to raise with Mr Talley his view that he believed he was an employee.

[64] Nor did Mr Davison ever tell Mr Talley that he believed the relationship was in fact between him and Talley's and not between Jay D and Talley's. This is a relevant factor in assessing whether at some point the relationship changed from being one of a contract for services to becoming that of an employment agreement.

Overall impression

[65] From the evidence, the overall impression gained by the Authority of the underlying and true nature of the relationship between Mr Davison and Talley's was that it was one of a contract for services.

[66] It must follow that any claims Mr Davison has in relation to the termination of that contract must be determined in a jurisdiction other than the Authority.

¹⁰ [2003] 1 ERNZ 473

¹¹ [2010] ERNZ 61

Costs

[67] Costs are reserved. If Counsel for the parties are unable to resolve the issue, Talley's has 14 days from the date of this determination to file a submission as to costs. Mr Davison has 14 days in which to file his response.

Anna Fitzgibbon
Member of the Employment Relations Authority