

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 197
5356396

BETWEEN KEVIN DIXON
 Applicant

AND SKY NETWORK
 TELEVISION LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Applicant In Person
 Sherridan Cook and Louise Holden, Counsel for
 Respondent

Investigation Meeting: 9 March 2012

Submissions received: 20 March 2012 from Applicant
 9 and 29 March 2012 from Respondent

Determination: 11 June 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Kevin Dixon, says he has been unjustifiably dismissed by the respondent, Sky Network Television Limited (“Sky”). Sky denies that it had an employment relationship with Mr Dixon. Whether or not there was an employment relationship is the sole issue for determination at this stage.

[2] Sky says Mr Dixon was engaged as an independent contractor by Quantum Communications Limited (“Quantum”), which contracted to Sky.

[3] Sky engages six contractor companies in the Auckland region, including Quantum, which has been a contractor since 1994. Quantum engages a number of subcontractors as field technicians to carry out Sky’s installation and repair work.

Sky's contract with Quantum is renewable annually. The most recent contract is dated 1 July 2011. The people engaged by Quantum are subcontractors.

[4] Sky also employs an in house team of field technicians to provide installation and repair services.

[5] Mr Dixon was engaged by Quantum as a field technician under the trading name of KD Communications for six or seven years before his contract was terminated on 22 August 2011. Mr James Patterson, the director of Quantum, has been unable to locate a copy of the contract between Quantum and Mr Dixon trading as KD Communications. It is accepted that there was no written contract between Sky and Mr Dixon.

[6] Pursuant to the contract between Sky and Quantum, Quantum is to carry out the work set out in Schedule A which includes installation, supervision and quality control services.

[7] Mr Clifford Brown, the Regional Manager for Sky, stated that the manner in which Quantum engaged its field technicians was entirely a matter for Quantum and that Sky did not have any oversight or control of Quantum's day to day operations.

[8] The work performed by Quantum for Sky is allocated by Sky's dispatch team on a daily basis in the form of work orders, which generally allocate an appointment time slot or the timeframe within which the work is to be completed. Quantum was responsible for completing the work allocated by the work order. Sky did not allocate work orders to technicians engaged by Quantum.

[9] Quantum provides completed work orders to Sky and invoices it on a monthly basis.

[10] Mr Brown deposed that Sky did not control who Quantum engaged nor did it set their terms and conditions or pay rates. Mr Brown referred to clause 6 of the Sky/Quantum contract which provides that Quantum will not enter into any subcontract agreement for the performance of the contract work without Sky's prior written consent. He explained this provision by calling it a "just in case" provision

and saying it was rarely used and would only be invoked if Sky had a serious concern about an aspect of Quantum's relationship with one of its subcontractors that might impact on the services delivered to Sky's customers. This clause does give Sky the ability to veto Quantum's employment of a subcontractor. This clause was not used in the case of Mr Dixon.

[11] Sky requires Quantum to have certificate insurance and it is Quantum's responsibility to ensure the same of its subcontractors.

[12] Sky does not provide field technicians with installation training – that is Quantum's responsibility. Sky is involved in health and safety training which is to ensure that it complies with its health and safety obligations as the principal contractor pursuant to s 18 Health and Safety in Employment Act. After training Quantum provides the technicians with an identity card and number. Prior to a new subcontractor being issued with a card and number one of Sky's quality control personnel accompany the subcontractor at least once to observe and check the work carried out.

[13] Sky requires technicians to wear an identification badge (which has a Sky logo) and the uniform of the contractor company so the technicians can be identified by the Sky customers. Technicians' vans display either the technicians' own logo, the contractor's logo and/or a Sky logo.

[14] A point of contention was whether subcontractors were able to carry out other work. Mr Brown asserted Sky had no control over other work but accepted that when Sky viewed Freeview as a competitor subcontractors were not permitted to do Freeview work.

[15] Sky carries out stock takes of decoders and smart cards held by Quantum on a quarterly basis including property which may be in technicians' vans. During such stock takes Sky also carries out health and safety checks of some technician equipment such as ladders and tools and ensures that the vehicle is in good condition and sometimes checks drivers' licences.

[16] Quantum is responsible for undertaking quality checks on 10% of its technicians' completed installations and service repair work each month as set out in Schedule A. Sky carries out random checks on Quantum's quality control checks.

[17] Mr Brown said that Sky was not privy to Mr Dixon's contract with Quantum nor to the recruitment and training of Mr Dixon. However, Sky would have provided Mr Dixon with his identification number and card and carried out an initial competence assessment.

[18] Ms Nikki Hamilton, Sky's Field Service Supervisor, deposed that Sky would occasionally send out a mass communication, either by email or memorandum to all contractor companies. The companies would forward these to their subcontractors. These communications generally related to changes regarding equipment specifications or information that should be included in a work order. Apart from some audits and quality checks the only contact Sky had with the subcontractors was to pass on urgent information about faults, job rescheduling or cancellations.

[19] Mr Patterson said Quantum engaged field technicians as subcontractors and advertised for technicians under the "business for sale" section of job publications, not the situations vacant section. When workers were engaged Quantum made it clear that Sky work was not guaranteed and that it reserved the right to choose which technicians to give Sky work to and could decide not to give a technician any work.

[20] Technicians decide their own hours and were paid by Quantum on a piece rate for each job. Technicians invoiced Quantum monthly and Quantum invoiced Sky. Technicians supplied their own tools and equipment, had a GST number, supplied their own vehicle, had a certificate of insurance for their own equipment and had to have adequate public liability insurance. There was no rostering and no regular hours although technicians were required to notify Quantum if they were not working on a particular day.

Tripartite employment relationships

[21] *McDonald v Ontrack Infrastructure Limited* [2010] NZEmpC 132 deals with tripartite employment relationships. At paras [51] and [52] the Court stated that

Courts should move cautiously in developing doctrines such as implied triangular employment relationships, especially where only very broad principles could be stated; and that it was open for an applicant to claim that he or she was employed by an entity at the third point of the triangle but with whom his or her employer had a commercial relationship which included the exclusive provision of the employee's services to that third party.

[22] Mr Dixon's relationship with Quantum was not that of an employee but a subcontractor. Quantum did not have a commercial relationship with Sky which included the exclusive provision of Mr Dixon's services to Sky.

[23] Leaving the above issues aside, the onus is still on Mr Dixon to establish that there was an employment relationship between himself and Sky.

[24] Section 6 Employment Relations Act 2000 provides that the Authority must consider the real nature of the relationship and take into account all relevant factors in determining employment status including any matters that indicate the intention of the parties. The tests to be applied are those set out in *Bryson v Three Foot Six* [2005] ERNZ 372, namely the intention, control, integration, and the fundamental tests. This will only be necessary if intention to establish contractual relations is established.

Did Sky and Mr Dixon intend to enter into a legally binding contract?

[25] Before a contract of any nature can be imposed the common law requirements of offer, acceptance, contractual intention, consideration and certainty must be established: *McDonald* para [36].

[26] There was no written contract between Mr Dixon and Sky. Mr Dixon asserted that there was a "verbal contractual relationship for service" and that this existed primarily because Sky controlled or directed him while he did Sky work to such an extent that Sky was his employer. Any instructions given by Sky and any control exercised by Sky, for example, the passing on of customer instructions and the vehicle and tool checks, are not indicative of the formation of an employment contract.

[27] Sky did not pay Mr Dixon. Quantum paid Mr Dixon. Mr Dixon cannot say there was any consideration

[28] There was no mutual assent or intention to create a contractual relationship.

[29] As there was no contract or intention to create one between Mr Dixon and Sky it is not necessary to consider the nature of the relationship because there was no contractual relationship.

[30] Mr Dixon has not discharged the onus of establishing that he and Sky were in a contractual relationship. They were not in an employment relationship and the Authority does not have jurisdiction to hear Mr Dixon's claims.

Costs

[31] If the parties are unable to resolve the issue of costs, the respondent is to file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority