New Zealand Employment Relations Authority Decisions

Down v Web Genius Central NZ Limited (Wellington) [2017] NZERA 2069; [2017] NZERA Wellington 69 (4 August 2017)

Last Updated: 17 August 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 69
5633804

BETWEEN NICHOLAS JAMES DOWN Applicant

AND WEB GENIUS CENTRAL NZ LIMITED

Respondent

Member of Authority: M B Loftus

Representatives: Andrew Bell, Counsel for Applicant

Peter Cullen and Chris Scarrott, Counsel for Respondent

Investigation Meeting: 12 April 2017 at Wellington

Submissions Received: 20 April 2017 from both parties along with additional information and input up to and including 4 May 2017

Determination: 4 August 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Nicholas Down, claims he was unjustifiably dismissed by the respondent, Web Genius Central NZ Limited (Web Genius), on or about 27 February

2017.

[2] Web Genius is of the view Mr Down was not an employee and the Authority lacks the jurisdiction to determine his claim.

[3] After some discussion the parties agreed the question of whether Mr Down was an employee or not be determined as a preliminary issue.

[4] Web Genius provides website and web marketing solutions for small to mid- size businesses. In August 2014 Mr Down responded to an advertisement Web Genus placed for a Licensed Web Marketing Advisor.

[5] Having been successful with his application Mr Down says he was presented with, and signed, a document entitled *License Agreement to Provide Services as a Licensed Local Web Marketing Adviser*.

[6] It is that, and its content, which has given rise to this preliminary issue. Mr Down says *I am not well versed in the distinction between contractor and employee, the arrangement in the agreement seemed very much like one of employment* and that is what he claims he was. He also says he formed the view the agreements purpose *was likely to be to sidestep obligations owed to employees*. He says he tried to discuss the issue but to no avail. Web Genius denies any such approach.

[7] It should also be noted Mr Down temporarily filed the role of sales manager but found he could not cope with the extra duties while maintaining his sales volume. As a result he reverted to sales after some four months. He says during this period he was recruiting new advisors and asked why they were not getting holiday pay. He says he was told that was because they parties to a licences agreement and not employees.

[8] In August 2015 Mr Down incorporated a company called Web Genius Wellington Limited and at that time he had a discussion with an accountant with whom he discussed the license arrangement and the appropriateness there-of. Mr Down say he incorporated the company as he felt that if he were a contractor there would be some tax benefits in having Web Genius deal through it. He says Web Genius refused to do so.

[9] During 2016 Web Genius produced a new licence agreement and it became operative as of 1 July. It changed conditions such as the commission and bonus structure and Mr Down says he was given no choice but to accept.

[10] As already said this determination addresses the question of whether or not Mr Down was an employee or not. If an employee the substantive claim may proceed but if not the Authority has no jurisdiction to consider his claims.

[11] Section 6 of the Employment Relations Act 2000 provides the meaning of employee. The material provisions state:

(1) In this Act, unless the context otherwise requires, ***employee*** *—*

(a) means any person of any age employed by an employer to do work

for hire or reward under a contract of service; ...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of 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 subsection (2), the court or the Authority —

(a) must consider all relevant matters, including any matters that indicate the intention of a person; and

(b) is not to treat as a determining matter any statement by the

persons that describes the nature of their relationship

[12] In *Bryson v Three Foot Six Limited (No.2)*1 the Supreme Court stated, amongst other things, what *all relevant matters* in s 6(3)(a) of the Act means. It said:

"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. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly require the Court or 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...

[13] The above dicta means I will need to consider the following in order to determine the nature of the relationship:

a. What was the intention of the parties;

b. Was there anything in writing to indicate the terms of the relationship between the parties;

c. Were there features of integration and control in the relationship; and d. Was Mr Down effectively working on his own account?

What was the intention of the parties?

[14] It is clear from the evidence Web Genius did not intend Mr Down be engaged as an employee. It is adamant it engages licensees who are self-employed to source work that can then be completed by employed staff such as web designers and technicians. That was its intent and that is how the license agreement to which Mr Down was a party reads.

[15] Mr Down is somewhat contradictory. In his original application he labels the agreement *ambiguous* and says he formed the view it was designed to *sidestep obligations owed to employees*. He also says he formed the view he was engaged as an employee and goes on to say he tried to raise this with Web Genius' managing director, Richard Calkin, but was told this was the way it was done and there was no room for negotiation.

[16] That has now changed with the current position, as enunciated by Mr Bell after the hearing of evidence, being:

*It is accepted that both parties had signed the agreement with the intention of executing a contract for services.*2

[17] However he goes on to say:

As it is stated in Bryson, the intention of the parties is a relevant starting point but it is certainly not decisive when it comes to the examination of the relationship's real nature.3

[18] The admission the parties intended entering into a contract for services as opposed to an employment agreement is, in my view, significant. It is also consistent

with various aspects of the evidence. Examples include:

1 [2005] NZSC 34; [2005] ERNZ 372

2 Closing submission at [15]

3 Closing submission at [16] citing *Bryson v Three Foot Six Ltd* [2005] NZSC 34

a. On 26 August 2015 Mr Down registered his company. He says he did so after discussions with the respondent and with a view Web Genius deal with him through that company. Ultimately this did not occur. Mr Down says that was because Web Genius refused to deal with the company though there appears to be other factors that impeded this approach such as who was going to pay for Mr Down's company's website. Irrespective of why this approach was not adopted this action shows a clear intent on Mr Down's behalf.

b. Mr Down sought advice on GST and withholding tax obligations which is again consistent with either self-employment or the provision of services through a sub-contracting company;

c. Mr Down signed the new agreement in 2016 having by that time obtained advice and being knowledgeable about the nature of the relationship described in the agreement. While Mr Down now says he was forced into doing so the evidence is inconclusive but in any event I conclude resigning is not the action of someone opposed to such an arrangement;

d. Mr Calkin gave evidence Mr Down often made comments about his delight the arrangement was not one of employment with that evidence going unchallenged;

e. On 14 October 2016 Mr Down sent an e-mail to various managers of Web Genius in which he states *I was under the impression our agreements referred to us as a contractor and that I didn't work for Webgenius.*

[19] The above leads me to conclude the parties not only intended the arrangement not be one of employment as is conceded by Mr Down but he was reaffirming that to be the position as late recently as mid-October 2016.

Was there anything in writing to indicate the nature of the relationship?

[20] Apart from the e-mail of 14 October 2014 there is the advertisement Mr Down originally answered though its content might be considered ambiguous.

[21] On one hand it identifies the role as Licensed in its title. It also purports to seek a *motivated Licensee ... to establish a successful local web marketing consulting business, based on Web Genius methodologies.* The use of the word licensee and the goal of establishing ones' own consulting business strongly indicate the successful applicant would not be an employee. Contrary to that is advise the role is *Full time, Permanent* and that remuneration would be by way of a *competitive base salary, plus commission...* which, in my view, are terms indicative of an employment relationship.

[22] There are then the two agreement(s) the parties concluded. While the parties are unable to source a signed copy of the first it is common ground the document was stated to be a *License Agreement to Provide Services as a Licensed Local Web Marketing Adviser*. Neither agreement indicates the existence of an employment relationship.

[23] It is WebGenius' position licensees are service providers operating under an authority granted by another. It is noted the Privy Council has held licensees are a class of person distinct from employees.4

[24] On behalf of Mr Down it is conceded the parties executed a contract for services.5 While it is conceded the written agreement is not one of employment it is submitted the content is inconsistent with the true nature of the relationship between the parties which was one of employment.

[25] I conclude these documents, especially when considered in the light of Mr Bell's concession ([24] above), indicate the relationship was not one of employment. That said, and while strongly indicative, it should be noted words and labels are not decisive and do not necessarily determine the nature of the relationship.6 To do that I need to look at other factors.

Control and integration

[26] A key element of Mr Down's argument is he was subject to an inordinate level of control. He says he was required to provide daily reports and regularly update an internal control system. He was supposed to attend regular meetings with non-

attendance potentially rendering him liable to a penalty. His claims he was required

4 *Cheng v Royal Hong Kong Golf Club* [1997] UKPC 40; [1998] ICR 131 (PC)

5 Closing submission at [3]

6 *Koia v Carylon Holdings Limited* [2001] NZEmpC 130; [2001] ERNZ 585 at [28]

to adhere to marketing scripts designed by Web Genius and the company could set targets, assign tasks and make appointments. Also noted was the fact Mr Down could not take any other role without Web Genius' approval. It is submitted the level of control went well beyond that considered necessary for franchisees7 and are therefore indicative of an employment relationship.

[27] With respect to integration is noted the attainment of clients is fundamental to the businesses success and any Mr Down acquired were considered clients of Web Genius.

[28] Opposing that Web Genius notes some degree of control is to be expected and it may, at times, be quite extensive.8 It also notes that while Mr Down was, for a while, required to provide daily reports the evidence shows this was not enforced with any vigor and subsequently abandoned. That is correct.

[29] It is accepted Mr Down was required to regularly update the internal control system but this is defended on the grounds that was so Web Genius could monitor prospective clients and ensure licensees were not duplicating each others efforts. It is added the information was also needed to coordinate production and Web Genius notes Mr Down did not always adhere to the requirement in any event.

[30] Web Genius says, and the evidence supports this assertion, that the meetings were designed to provide training and support to Licensees but once again the evidence shows attendance did not always occur and while demands were made this be addressed there were no subsequent penalties.

[31] With respect to the marketing scripts Web Genius says they were not as prescriptive as Mr Down portrays. It says they were guidelines and I note Mr Down's evidence he both made and discussed changes he says he had found to work. In other words his own evidence is the scripts could be varied if he so chose.

[32] Web Genius accepts Mr Down could not take other roles without its approval and puts this down to a desire it ensure Licensees not compete with it. It also notes, and the evidence shows, Mr Down was engaged in other revenue generating activities,

albeit minor. Though not all were know to Web Genius the only evidence of any

7 *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] NZEmpC 111; [2002] 1 ERNZ 114

8 For example Cunningham v TNT Worldwide Express (NZ) Ltd [1993] 1 ERNZ 695 (CA)

attempt to restrain his activities relates to a software system Web Genius did not support.

[33] Finally I note the evidence is that while Web Genius did schedule appointments for Mr Down these would not have taken all his working time to address. He could, and did, make appointments of his own and he could perform them when he chose.

[34] With respect to integration I note the Court's comment in *Enterprise Cars Ltd v Commissioner of Inland Revenue*9 that *...the test is whether the person is part and parcel of the organisation and not whether the work itself is necessary for the running of the business"*.

[35] Here I note, and given the evidence accept, Web Genius' submission its core business is developing websites for clients. While the Licensees convert leads into clients and bring them in, they do not perform that core function.

Fundamental or economic reality test

[36] This test requires a consideration of whether Mr Down was effectively working on his own account. This involves an analysis of features such as whether or not the applicant provided his own equipment; could delegate his responsibilities; took financial risk and had an opportunity to profit from sound management of his work and performance.

[37] Mr Down did provide various tools of trade. These included his computer, phone and premises. He was also initially required to provide his own vehicle though more latterly Web Genius contributed as both a reward and incentive to achieve a higher sales target.

[38] While Mr Down did not hire staff to assist him preform the requirements of his License the agreement permitted him to do so in respect to some, but not all, of the tasks and the evidence shows other Licensees availed themselves of this right.

[39] With respect to financial risk I repeat Web Genius' submission with which I

agree. It says:

9 [1988] NZHC 1208; (1988) 10 NZTC 5,126 at 11

The applicant incurred financial risk and had the opportunity to profit, in the sense that he hired his own premises, with the obligations that entails, and could control revenue and expenses by sound management and expedient performance of his obligations.

[40] Mr Down also established his own company for the purpose of dealing with

Web Genius and conducted other business activities.

[41] Finally I note the requirement Mr Down be GST registered if his revenue was at the required level and he acknowledged it was always his intention he be registered. This raises an issue as Web Genius claims Mr Down told them he was GST registered and there is evidence they accounted for this after they say they were so told. Mr Down now says he was not GST registered but it is difficult to progress this matter or reach any conclusions. Mr Down's evidence on these issues was confusing and Web Genius accepts its GST processes were deficient though it is now working with the Inland Revenue to remedy this. What is known is Web Genius also deducted withholding tax as opposed to PAYE from Mr Down's earnings.

[42] Having considered the above factors I conclude the indications are it is more likely Mr Down was operating under his own account than as an employee.

Conclusion and costs

[43] Having considered the evidence and the tests I conclude Mr Down was a

Licensee and not an employee.

[44] In reaching this conclusion I find it hard to ignore the admission Mr Down accepts he intended he be self-employed. That is what he got and he confirmed that intent by signing not one but two agreements to that effect. These are, I conclude, overwhelming indicators of the true nature of this relationship and that conclusion is not altered by a consideration of the other parts of the test.

[45] While there was a significant level of control exercised by Web Genius it was not so overwhelming as to deprive Mr Down of some control over his destiny and the way in which he performed his duties. The factors to be considered under the economic reality test also indicate Mr Down was working on his own account.

[46] The conclusion Mr Down was a Licensee and not an employee means the Authority does not have jurisdiction to consider his substantive claim. It is therefore dismissed.

[47] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority
