

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Craig Hansen (Applicant)
AND Case Boreham Associates Ltd (Respondent)
REPRESENTATIVES Craig Hansen In person
Ravi Iyer, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 10 November 2005
SUBMISSIONS RECEIVED 25 November and 14 December 2005
DATE OF DETERMINATION 23 December 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Craig Hansen has a series of complaints about the way he was treated by his former employer, Case Boreham Associates Limited (“CBA”). CBA says Mr Hansen was not an employee, but a contractor. This determination addresses whether the parties were in an employment relationship.

The parties’ entry into an agreement

[2] CBA is a private training establishment which offers teacher aide training. To that end it offers two full time 21-week block courses per year, through its 7 branches in Auckland and 5 branches outside Auckland. In or about June 2005 it advertised for a course manager to manage its head office and oversee the day to day running of the branches.

[3] Mr Hansen replied to the advertisement. Robyn Case, a director of CBA, arranged to meet with him to discuss the position. A business consultant associated with CBA, Shane Wenzel, also attended. He effectively conducted the meetings, of which there were two.

[4] According to Ms Case some time was spent discussing the business’ philosophy, which is based on what Ms Case called metaphysical concepts. It was common ground that an entrepreneurial approach was also discussed. It was important to Ms Case that people associated with CBA understood its philosophy, and she referred to it frequently in evidence. There was an overview of the way the organisation did business, and Ms Case advised that all staff were engaged on contract with the exception of certain part-time and administrative staff.

[5] The parties also had a wider discussion about the kind of organisation CBA was, and the duties associated with the position being advertised. According to what I take as the applicable

written position description, the position covered: meeting and monitoring CBA's Key Performance Indicators including recruitment, retention and outcomes for students; administration including financial reporting and monitoring funding; monitoring and managing course tutors; monitoring the content and delivery of courses; managing the administration staff and providing support for tutors and students.

[6] In addition there was a discussion about the fact that Mr Hansen had been running an after school care programme called the Clear Horizon Kidz Club, and could organise his hours of work to allow him to continue to do that. He is the registered director and a 50% shareholder in a company named Clear Horizon Kidz Club Limited. For his part Mr Hansen indicated he was prepared to hand some of that work to someone else so he could spend more time at CBA. It was common ground that Mr Hansen would need to spend a reasonable amount of time on CBA activities. It was also common ground that CBA would provide him with some facilities including a laptop, which he could use at CBA's premises or at premises he used for his other activities if he wished.

[7] Mr Hansen went further and said there was a generalised discussion with Mr Wenzel, who did not give evidence, about the possibility of a franchise arrangement in the future. He also said he was looking for an opportunity to learn, grow and make money. That kind of exchange, against a background of the overall tone of the discussions and Mr Hansen's other activities, leads me to conclude the discussions were concerned with identifying business opportunities, not employment opportunities.

[8] It was common ground that the parties signed two written agreements at a meeting on 24 June 2005. The first was headed 'individual employment agreement', although it referred throughout to 'the contractor' rather than to 'the employee'. It contained several other oddities and internal contradictions, although a number of the clauses were indicative of an employment relationship rather than one of independent contractor and employee. It also contained the position description I attempted to summarise in [5].

[9] The second agreement was headed 'independent contractor agreement (individual)'. Clauses 1.1 and 1.2 expressly defined it as an independent contractor's agreement and not an employment agreement. Consistently with that definition clause 1.9 required the contractor to perform his duties through a limited liability company, clause 4 referred to an obligation to submit invoices for fees, and clause 6 referred to the contractor's responsibility for tax matters. Further, clause 7 permitted the assigning of rights under the agreement (but only with CBA's written consent in the contractor's case) and there were no express requirements regarding hours of work.

[10] Although provisions like those were inconsistent with some of the provisions in the first agreement, the oral evidence indicated that overall they were consistent with the parties' discussions that day. Not only that, CBA subsequently facilitated Mr Hansen's registration on 4 August 2005 of a company named Hansen Management Limited - with Mr Hansen as the registered director and he and his wife as shareholders. Mr Hansen's services were provided through that company, which invoiced CBA for its services.

[11] Mr Hansen said Ms Case's explanation on 24 June of the need for two agreements was that the first contained the list of duties he was to carry out, and the second set out the business basis of the relationship. That was an extremely ill-advised approach on her part to the completion of written contractual arrangements. A single, properly drafted document should have been prepared for the parties' signature, rather than the two patchily cobbled together and inconsistent documents that were signed. However for present purposes Mr Hansen's evidence is significant because, in effect, he accepted his attention was drawn to the second agreement as the one defining the nature

of the parties' relationship, and he signed it. Overall, there was nothing in his oral evidence to indicate that the parties' discussions covered entry into an employment relationship - rather the tenor was that there would be a contractor's relationship - and nothing to indicate that he challenged the nature of the relationship when he signed the second agreement.

[12] Even so I found unconvincing a note Ms Case wrote, dated 24 June 2005, purporting to cancel 'the original employment contract dated 24 June 2005' and preferring the 'independent contractor agreement'. Her oral evidence about the note was not convincing either, and counsel's submission that the agreement was signed 'wrongly' would have been better worded as a submission that the agreements were signed as a result of poor practice.

[13] Moreover Mr Hansen said he was not given the 24 June note at the time. The lack of evidence of any discussion between the parties about cancellation of the first agreement, as well as the unconvincing nature of Ms Case's explanation of the note, means I accept his evidence. The note struck me as an ex post facto attempt to cover the problem created by the signing of two agreements which were inconsistent in a material respect. Fortunately for CBA, the surrounding evidence at least persuades me that, when they negotiated their agreement, the mutual intention of the parties was to enter into an independent contractor's arrangement.

The relationship in practice

[14] Mr Hansen said that, in reality and in practice the relationship was conducted as if it were one of employment. In particular he said a considerable degree of control was exercised over the way he did his work. He was expected to be on-site by 7.30 am, work at least 40 hours per week, attend several daily professional development and training meetings, report hourly to Mr Wenzel on his activities and receive feedback, and use the CBA-provided facilities including its offices.

[15] There is some support for the proposition that a high level of control was imposed even in the 'independent contractor agreement (individual)'. While clauses such as those I have highlighted are indicators of an independent contractor's arrangement, the control took the form of requirements to participate in performance reviews and professional development training (clause 16.1), a code of conduct, 'rules of the game' (also described as 'guidelines to support communication and relationships within CBA staff'), and the holiday/leave procedures. The latter specified when leave could be taken, limiting leave periods for 'ongoing contracts with CBA' to the early weeks in term-time and to Christmas.

[16] At the same time it does not follow necessarily from this that the real nature of the relationship is one of employment. There is some acceptance in the case law of the notion that an organisation is entitled to require a certain standard of conduct and performance on the part of contractors whose work associates the contractors' actions with the organisation's when dealing with third parties. Similarly there is some justification for the restrictions on the taking of leave, in that the timing of the performance of the contracted duties is closely related to the timing of the school term.

[17] Further assistance in identifying the real nature of the relationship came from the oral evidence about how the relationship operated.

[18] Mr Hansen's evidence was that for the first two weeks of his engagement he spent half of his time in an office he used at his church, although he said he was doing CBA work. If that is so it was not to the exclusion of his other activities because he said that, once he had arranged for someone else to carry out some of those other activities, he moved to the CBA premises.

[19] The commencement of Mr Hansen's engagement corresponded with the period immediately prior to the commencement of a new set of block courses. There was extra work associated with such a period so it is reasonable that in such circumstances, employee or not, Mr Hansen's attention to CBA matters would be needed full time. The focus of the work was on sales and the recruitment of students for the courses. Thus while I accept Mr Hansen worked for CBA full time once he had moved to its premises, that is not of itself an indicator that the relationship was one of employment.

[20] It was common ground that the number of enrolments for the courses was low, to the extent that enrolments continued to be sought after the courses had begun. The question of how this should be addressed became a source of friction between Mr Hansen on the one hand, and Mr Wenzel and Ms Case on the other. I would accept that, in the course of discussing the problem and attempting to address it, CBA came increasingly to issue instructions about how sales and recruitment should be carried out, rather than leaving the matter entirely to Mr Hansen. CBA certainly had a philosophy and set of practices Ms Case said had been useful in the past, and she believed they could be used to address the problem with low enrolments. In that sense CBA exercised control over Mr Hansen's activities.

[21] CBA also had a practice of addressing interpersonal problems or issues by using 'What I Feel Like Sayings' (WIFLS) to discuss and air upsets. Mr Hansen was expected to participate in this. I do not regard the expectation as an indicator of the existence of an employment relationship, rather it was in part a method of dispute resolution and an aspect of the 'metaphysical' philosophy Ms Case espoused.

[22] The practical effect of it, however, was that as disagreements between Messrs Wenzel and Hansen in particular increased, there was an increasing number of WIFL sessions and less time available for work. Much of this, as well as the wider disagreements developing between the parties, underlay Mr Hansen's evidence regarding his hours of work, and requirements that he attend CBA's premises and report to Mr Wenzel. The WIFL sessions did not have the desired effect and the parties' relationship deteriorated in acrimony.

[23] The relationship deteriorated so quickly that a document dated 11 August 2005 records: "By mutual agreement, Craig Hansen's contract with CBA shall terminate at the date of Sept 2nd 2005." In other words, in less than 6 weeks from its commencement the parties had called an end to the relationship. As I understand it the intention was that Mr Hansen continue to work until 2 September 2005, but the relationship deteriorated even further during that time and Mr Wenzel terminated the contract on 15 August 2005.

Employee or contractor

[24] I have already found that the parties' intention was to enter into a relationship of principal and contractor, but I am obliged to consider all relevant matters before determining whether that was the real nature of their relationship. Relevant matters include the degree of control exercised over Mr Hansen's work, and whether there was evidence that he was carrying on business on his own account.

[25] If this relationship had continued for any significant period, and Mr Hansen could show that during that period he devoted his personal services to CBA on a full time basis and under relatively close supervision, he would have had strong grounds for arguing that in reality he was an employee. However the relationship did not last long enough to enable a proper assessment of that kind. Instead, within a few weeks of its commencement the parties faced a serious problem in the form of the low enrolments, and that problem probably accounted for a great deal of the time commitment and the attempt at supervision that followed. Within a few more weeks the relationship had ended

in acrimony. I do not consider it appropriate to assess the true nature of the relationship on the basis of how the parties dealt with a particular and serious problem, since clearly the circumstances were out of the ordinary.

[26] For that reason, while I acknowledge there was at least an attempt to exercise control over Mr Hansen's activities, I do not regard the circumstances as indicating the real nature of the relationship was one of employment.

[27] Turning to whether Mr Hansen was in business for himself, I take into account that he came to CBA with a recent history of focussing on business activities rather than having been an employee. He had been involved in running the Clear Horizon Kidz Club, and was also a director and shareholder in another registered company named Global Vision Enterprises Limited. While I accept his evidence that GVEL did not trade, Mr Hansen said it was set up to assist people into business. I regard this as indicative that his outlook was concerned with commercial business management activities, not employment-based ones. He even said that, although Hansen Management Limited has not traded since the termination of the contract with CBA, he is hoping to be able to 'do something' with it. Overall he spoke as an entrepreneur, not an employee.

[28] The contract with CBA itself was in the form of a business arrangement and that was the parties' intention.

[29] For these reasons I conclude that the parties' relationship was one of principal and contractor. The Authority cannot take the termination of that relationship any further.

Costs

[30] Costs are reserved. The parties are invited to agree on the matter. If they are unable to do so they shall have 28 days from the date of this determination in which to file and exchange written statements of their positions on the matter.

R A Monaghan
Member, Employment Relations Authority