

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 151
5426961

BETWEEN	GREG HARRINGTON Applicant
A N D	FLAVOUR CREATIONS PTY LIMITED First Respondent
A N D	BERNADETTE ERIKSEN Second Respondent

Member of Authority: Rachel Larmer

Representatives: Claire Mansell, Counsel for Applicant
Shan Wilson and Gemma Peachey, Counsel for
Respondents

Investigation Meeting: 08 April 2014 at Auckland

Date of Determination: 17 April 2014

DETERMINATION OF THE AUTHORITY

- A. Greg Harrington and Flavour Creations Pty Limited (Flavour Creations) were in an employment relationship so the Authority has jurisdiction to investigate the issues raised in his Statement of Problem.**

Employment relationship problem

[1] Flavour Creations is a privately held Australian owned and operated food manufacturing company based in Brisbane. It provides thickened fluids for patients who have difficulty swallowing. Mr Harrington worked as the New Zealand Business Manager for Flavour Creations from 05 August 2012 until 21 June 2013.

[2] Mr Harrington claims he was unjustifiably dismissed and that Flavour Creations breached its good faith obligations under the Employment Relations Act 2000 (the Act) and its duty to provide him with a safe workplace under the Health and Safety in Employment Act 1992 (HSEA).

[3] Mr Harrington also claims that Ms Eriksen (Flavour Creation's sole director and shareholder) wilfully aided and abetted Flavour Creations' breaches of his employment agreement in respect of the alleged failures to deal with him in good faith and to provide a safe working environment.

[4] Flavour Creations and Ms Eriksen deny Mr Harrington's claims. They say the Authority does not have jurisdiction to investigate his claims because he was not an employee. They claim Mr Harrington was an independent contractor for Flavour Creations and that Ms Eriksen was not a party to the contractual relationship between Mr Harrington and/or his company Ararimu Developments Limited (Ararimu) and Flavour Creations.

[5] Flavour Creations and Ms Eriksen (together referred to as "*the respondents*") say the real nature of the relationship was one of contractor/principal between Ararimu and Flavour Creations. It says it was free to terminate Ararimu's (and thereby Mr Harrington's) engagement as an independent contractor on 21 June 2013.

[6] Before engaging Mr Harrington Flavour Creations had employed a business manager who was based in New Zealand but paid from Australia via a payroll company Flavour Creations had set up in New Zealand. When the first business manager resigned Flavour Creations advertised for a replacement employee.

[7] Mr Harrington applied for the role and Ms Eriksen offered it to him during a telephone conversation on 04 August 2012. This offer was confirmed in an email sent by Ms Eriksen to Mr Harrington on 05 August 2012 which attached a "*contract of employment*". There is no dispute that Mr Harrington was offered and accepted employment with Flavour Creations.

[8] Flavour Creations arranged for Mr Harrington to fly to its Brisbane head office for a three day induction course on 07 August 2012 and he started work in New Zealand on 13 August 2012. Shortly after arriving at the Brisbane head office, Mr Harrington and Ms Eriksen signed a "*contract of employment*" which closely followed his original offer. Some adjustments were made to the probation clause and

to the remuneration and a new commission clause was added. Mr Harrington and Ms Eriksen on behalf of Flavour Creations both signed the agreed updated employment agreement.

[9] The parties agree that at this point there was a mutual intention that Mr Harrington would be employed by Flavour Creations. The conflict arises about what happened shortly after the parties signed the employment agreement. Mr Harrington claims Ms Eriksen asked him to arrange his own payroll whilst Ms Eriksen claims Mr Harrington asked to become an independent contractor.

[10] Mr Harrington claims that when he and Ms Eriksen discussed New Zealand related issues such as ACC, fringe benefit tax (FBT) on car allowances for employees and KiwiSaver contributions Ms Eriksen told him that although they had paid the previous New Zealand business manager through Flavour Creations' New Zealand subsidiary payroll company, this practice had proved to be difficult with the difference in tax rates and paying KiwiSaver.

[11] Mr Harrington claims that Ms Eriksen offered him an extra \$10,000 per year salary if he could organise his own payroll. Mr Harrington says he understood he would still be employed by Flavour Creations but would just take on the added responsibility of organising payment of his own PAYE, ACC levies and KiwiSaver. Mr Harrington says that after discussing the proposal with IRD and his wife he agreed that Flavour Creations could pay Ararimu and that Ararimu would make the necessary deductions for PAYE and ACC levies and then pay him the balance.

[12] Mr Harrington says there was never any mention of him or Ararimu contracting to Flavour Creations and that the arrangement was proposed by Ms Eriksen who believed it would make the "*PAYE process a simple exercise and make [the payroll clerk's] job a lot easier to manage*". Mr Harrington says he felt pressure to accept Ms Eriksen's proposal to arrange his own payroll because he was a new employee and wanted to make a good impression on her.

[13] Ms Eriksen strongly disputes Mr Harrington's account of their discussions. She claims that shortly after signing the employment agreement Mr Harrington told her "*he did not want to do it the way that had been proposed*". Ms Eriksen says although her preference was to employ someone for the role she was open to Mr Harrington's suggestion that the relationship work in a different way to what she

had originally presented him with so she took him to see the then Chief Financial Officer Mr David Gales to discuss the new arrangement.

[14] Mr Gales says that he and Mr Harrington discussed a rate that would be paid if there was to be a consultancy agreement but that later in the day Ms Eriksen advised him that Mr Harrington's remuneration was to be increased by \$10,000 per year. Mr Gale says he assumed that Mr Harrington had directly negotiated that with Ms Eriksen.

[15] Ms Eriksen's view is that she and Mr Harrington had agreed that the relationship between Flavour Creations and Mr Harrington was one of principal/contractor. She believes that was what Mr Harrington wanted because she says he had been the one to propose it. No documentation was ever presented to Mr Harrington recording the arrangements that had been agreed after the parties signed his employment agreement.

Issue

[16] The sole issue for the Authority to determine is whether or not Mr Harrington was in an employment relationship with Flavour Creations at the time his claims arose. Section 6 of the Employment Relations Act 2000 Act (the Act) defines an employee.

[17] Section 6(2) of the Act requires the Authority in determining whether or not a person is an employee for the purposes of the Act to "*determine the real nature of the relationship*". When doing so s.6(3) of the Act requires the Authority to consider all relevant matters, including the intention of the persons involved, but it is not to treat as determinative any statement by the persons involved which describes the nature of the relationship. That is merely one of the factors to be considered.

[18] The Supreme Court in *Bryson v. Three Foot Six Ltd*¹ held that "*all relevant matters*" includes the written and oral terms of the contract between the parties and any divergences from or supplementation of those terms which are apparent in the way in which the relationship has operated in practice. The intention of the parties is relevant but not decisive. Likewise statements by the parties, including contractual statements, are relevant but are also not decisive of the nature of the relationship.

¹ [2005] NZLR 721 (SC).

[19] The control test, the integration test, the fundamental test and the economic reality of the relationship are all relevant factors to consider. Industry practice may also be relevant. The Authority's inquiry into the "*real nature of the relationship*" is intensely factual.

Was Mr Harrington an employee of Flavour Creations at the relevant time?

What do the relevant documents suggest?

[20] The key document which records the intention of the parties is the written employment agreement. At the time it was signed there was a mutual intention that Mr Harrington would be employed by Flavour Creations. The advertisement for the role was for an employee, the offer of employment was for an employee and the communications relevant to offer and acceptance also proceeded on the basis that Mr Harrington would be an employee.

[21] On 07 May 2013 Flavour Creations emailed all of its business managers, including Mr Harrington, a "*revised and condensed job description, responsibilities and KPIs*" which was stated to be "*more relevant to your specific responsibilities and clearer to understand*".

[22] This document identifies that Mr Harrington "*reports to the National Sales Manager*" (Mr Sean Gleeson) and it sets out a number of key responsibilities and additional responsibilities. There was reference to "*performance measurement*" which include specific KPIs. The "*environment and position challenges*" section of the document states that Mr Harrington was to prioritise tasks and coordinate workload according to Flavour Creations' requirements. I find that this document indicates that the parties were in an employment relationship.

[23] Other relevant documents include email exchanges between Mr Harrington and various employees of Flavour Creations and Ms Eriksen. After Mr Harrington was away from work because he was unwell, he received an email from Flavour Creations' People and Performance Manager, Ms Sue Milner, who confirmed a phone message she had left for him on 3 June by sending a follow up email of that date stating "*we will need a clearance from you before you return to work tomorrow*".

[24] Ms Eriksen had an email exchange with one of Flavour Creations' clients which refers to Mr Harrington's appointment but does not identify him as a contractor - "*Greg Harrington has just joined us as our New Zealand Country Manager*" and "*we have appointed Greg Harrington as our New Zealand Business Manager*".

[25] Mr Harrington submitted a leave request on 24 October for annual leave he proposed to take on 16 November with a cover email asking for it to be approved. He was never advised that was not necessary.

[26] Ms Eriksen sent an email to Mr Harrington on 26 February 2013 which reprimands him and states "*you report directly to Sean*"(Mr Gleeson) and "*as I employed you [...]*" Mr Harrington responds saying "*I feel privileged to work for you and your company. I respect Sean as my manager and always support him 100%. It is exciting to be part of a company that is growing especially in New Zealand.*"

[27] On 19 June 2013, Mr Gleeson emailed Mr Harrington stating "I am simply asking you to perform your tasks and achieve your KPIs [...]" Mr Gleeson also refers to himself in that email as Mr Harrington's "*line manager*" and says that there is "*an expectation from me and the business [that Mr Harrington will] at least reply to your manager's emails*". Mr Gleeson also refers to himself to Mr Harrington as "*your Flavour Creations manager*" and refers to "*commitments, tasks and projects you [Mr Harrington] agreed upon when you commenced your employment with Flavour Creations.*"

[28] On 31 March 2014 Ms Milner emailed Mr Harrington confirming a voicemail that she had left for him regarding a telephone meeting the following day at which he was told he could have a "*support person*" at the meeting with him. Mr Harrington engaged a lawyer who emailed Ms Milner. His lawyer's email says "*if you wish to have his considered response on particular issues which **may affect his employment** [...]*" (emphasis added) Ms Milner responded to that email but did not take issue with the reference to Mr Harrington's "*employment*".

[29] After the telephone meeting on 21 June 2013, Ms Milner wrote to Mr Harrington terminating the "*services agreement*" with Ararimu. This letter refers to "*the position being made redundant*" and Mr Harrington is reminded of "*contractual obligations*" relating to confidential information and intellectual property

which are stated to continue after termination. The only reference to these matters is found in the employment agreement the parties signed so I find that Ms Milner must have been referring to that. Ms Milner ends the letter by thanking Mr Harrington for his contributions during his "*length of service with us*".

[30] Mr Harrington initially submitted a payslip prior to receiving his first payment from Flavour Creations. This resulted in Patricia Butler, Flavour Creations' then Assistant Accountant, emailing Mr Harrington a breakdown of his remuneration package and recording that he needed to send an invoice from his company in order to get paid. Ms Butler created a template for Mr Harrington to use and he was paid after invoicing Flavour Creations through Ararimu for the pro rata amount of remuneration which had been agreed.

[31] I find that all of the documents I refer to above support the existence of an employment relationship.

[32] The only documents that support the existence of an independent contractor arrangement are:

- (a) the invoices issued by Ararimu ;
- (b) Mr Harrington's IRD earnings printout which records Ararimu as his "*employer*".
- (c) Ararimu's tax returns which identify Mr Harrington as an "*employee*" of and which note that Ararimu was "*in business*".

[33] Overall I consider the documentation strongly supports the existence of an employment relationship rather than an independent contracting arrangement.

What did the parties intend?

[34] The intention of the parties is a significant factor in determining Mr Harrington's status. The key question is whether I am satisfied on the balance of probabilities that the initial mutual intention that Mr Harrington would be an employee was changed by mutual agreement. I am not.

[35] I accept Mr Harrington's evidence that the only real difference was that his remuneration was paid by Flavour Creations to Ararimu which made the necessary

deductions then remitted the balance to him. He continued to be treated exactly the same as Flavour Creations treated its other business managers all of whom it employed. Neither party terminated the signed employment agreement as required by clause 14 of the employment agreement.

[36] The parties appear to have acted in accordance with the obligations under the employment agreement in terms of commission payments, leave applications and leave reporting obligations, KPIs, line management and reporting responsibilities, performance measures, work requirements and expectations, and post termination obligations. Mr Harrington was advised of his right to have a “*support person*” at the termination meeting and there was discussion (later confirmed in the termination letter) about “*redundancy*” which are concepts that apply to employees not independent contractors.

[37] I find that the evidence regarding the parties’ intention supports the existence of an employment relationship.

How did the arrangement operate in practice?

[38] There is evidence that the parties acted consistently with the signed employment agreement;

- a. Mr Harrington was paid commission which is an obligation that only arose under the employment agreement. Commission was not discussed as part of the changes that occurred after the employment agreement had been signed;
- b. Mr Harrington was provided with a cash advance by Flavour Creations of \$500 to cover expenses whilst he was travelling on business. Mr Harrington was also required to complete a cash advance and expenses claim form recording his actual and necessary business expenses which was then approved by Flavour Creations. His business-related travel was also paid directly by Flavour Creations.
- c. Ms Milner advised Mr Harrington he was to continue to comply with the confidential information and intellectual property clauses in his employment agreement after termination.

[39] I accept Ms Mansell's submission that, aside from the payment arrangements, the parties acted in accordance with the employment agreement. This included:

- (a) Mr Harrington reporting to Mr Gleeson as his direct line manager as per clause 2.1 of the employment agreement;
- (b) Mr Harrington being paid quarterly commission on 25 October 2012 as per clause 4.2 of the employment agreement;
- (c) Mr Harrington being required to work from 8.30am until 5pm Monday to Friday as per clause 7.1 of the employment agreement;
- (d) Mr Harrington being provided with a mobile phone, computer and other electronic equipment as per clause 8.1 of the employment agreement;
- (e) Flavour Creations granting Mr Harrington annual leave and sick leave as per clause 9.1 of the employment agreement which he was allowed to take in advance as per clause 9.3 of the employment agreement;
- (f) And as per clause 10.1 of the employment agreement, Mr Harrington did not engage in any paid occupation or employment outside of his work with Flavour Creations.

[40] The termination letter of 21 June also indicates that Flavour Creations intended to hold Mr Harrington to the obligations he had committed to under clauses 11 and 12 the employment agreement because the contractual obligations Ms Milner refers to do not arise from anywhere else. There was no evidence that Flavour Creations and/or Ms Eriksen ever discussed with Mr Harrington the obligations referred to by Ms Milner in the termination letter subsequent to the employment agreement being signed.

[41] I consider the way the arrangement operated in practice suggests the existence of an employment relationship.

Tax and associated issues

[42] The tax arrangements whereby Ararimu received remuneration from Flavour Creations which it paid to Mr Harrington after making the necessary PAYE and ACC deductions under New Zealand employment law on the face of it suggests that he was not employed by Flavour Creations but was instead employed by Ararimu.

[43] However, this is a similar scenario to that in *Telecom South v. Post Office Union (Inc)*² in which the parties entered into an employment agreement which contained standard terms except concerning payment, which was to be made by the employee's company which would arrange for the relevant tax obligations to be remitted to the relevant authorities.

[44] The Court of Appeal upheld the Labour Court's decision concluding that the individual in *Telecom South* was an employee on the basis:

The provision for payment of remuneration does not purport to quantify those rights and obligations of employment [set out in the decision] and I read the provision as being limited to the mode of payment for that work. It was an attempt to assist Mr Devlin's tax position but without structuring the arrangement as one for the provision by Mr Devlin's company of services to Telecom South. In short, the salary clause does not change the true character of the underlying relationship between the parties.

[45] I accept Ms Mansell's submission that the only difference between Mr Harrington and the other business managers employed by Flavour Creations was the fact that he was paid through Ararimu. As in *Telecom South*, neither party has purported to qualify Mr Harrington's rights and obligations as an employee.

[46] Ararimu did not undertake any business operations other than processing Mr Harrington's salary and paying his tax and ACC obligations. There was no tax benefit for Mr Harrington or Ararimu in structuring their affairs in this way. In addition, Ararimu did not make any deductions on expenses (aside from payroll services) and did not deduct any expense for leasing office space in Mr Harrington's home or for any vehicle expenses. This is consistent with Mr Harrington's evidence that Ararimu was acting as a New Zealand based payroll company for Flavour Creations to simplify its administration of his remuneration.

² [1992] 1 NZLR 275

[47] I find that this is not a situation where Mr Harrington was availing himself of the tax advantages of self-employment. The overall financial position for Mr Harrington (aside from the extra \$10,000 he was paid overall for taking on the payroll responsibility) was the same as if he had been paid directly by Flavour Creations. He received salary and paid PAYE. There was no financial advantage for Ararimu as Mr Harrington's gross salary was paid to Ararimu, tax was deducted then the net amount was on-paid to Mr Harrington.

[48] I consider that can be contrasted with Flavour Creations' position in which they were alleviated of having to organise paying for one employee in New Zealand and all the administrative tasks that were associated with that arrangement. Ms Eriksen recognised that Flavour Creations would be provided with a small financial cost saving and would save a lot of time and red tape by Mr Harrington undertaking his own payroll in New Zealand.

[49] I do not consider this is a situation where an individual has obtained the benefits of being in business on their own account and then sought to assert they were an employee. Ararimu's role in the arrangement appears to be one of a paymaster and it did not have any other function rather than processing salary. That is similar to the situation in *Hutton v. Provencocadem Ltd (In Receivership)*³ in which the Employment Court held that despite employees having employment agreements with PCL but being paid through PPL, the payment arrangement had been put in place for administrative purposes only and did not make PPL the employer of the employees in issue.

The control test

[50] The control test looks for the degree of control that is exerted over the work done and the manner in which it is to be done. The greater the extent to which an individual is regulated and supervised then the more likely they are to be considered to be an employee.

[51] I find there was a significant degree of control exerted over Mr Harrington by Flavour Creations and/or Ms Eriksen. His duties were set by Flavour Creations and he was required to fulfil the requirements of his job description and the KPIs and responsibilities appended to his first employment agreement and the updated job

³ [2012] ERNZ 566

description/responsibilities document. Mr Harrington was required to attend weekly sales meetings at a particular time. He had very specific reporting obligations and he had to record all of his daily contacts through Flavour Creations' central reporting tool. Mr Harrington was required to meet exactly the same expectations Flavour Creations had of all its other business managers who were based in Australia.

[52] I do not consider that there is evidence of the sort of flexibility that would indicate an independent contractor arrangement. I find the control test favours the existence of an employment relationship.

The fundamental/economic reality test

[53] The fundamental test looks at whether the person performing the services is in business on their own account. Factors relevant to this test include whether an individual provides their own equipment, whether they hire their own helpers, what degree of financial risk they take, what degree of responsibility for investment and management the individual has, and whether and how far the person has an opportunity of profiting from their own endeavours in the performance of the services rendered.

[54] I find that Mr Harrington had the ability to profit from his endeavours only in respect of the quarterly commission payments. His main remuneration was not based on the financial success of the company. He acquired no goodwill in the business. Mr Harrington was unable to increase his income by working extra hours because his remuneration was fixed and he was unable to seek work outside of his arrangement with Flavour Creations.

[55] I find the fundamental/economic test favours the existence of an employment relationship.

Integration

[56] The integration test considers whether the work performed by the individual was an integral part of a business and whether the individual has effectively become part and parcel of the organisation. I recognise there are some limits to the application of this test in the situation like this where Mr Harrington was the only individual involved.

[57] However, notwithstanding that I consider that the evidence tends to suggest that Mr Harrington was integrated into the Flavour Creations business. Flavour Creations provided Mr Harrington with equipment necessary for him to carry out his duties and he was represented to the world by Flavour Creations as its “*NZ Business Manager*”, not as an independent contractor.

[58] Mr Harrington’s work day and activities were very closely monitored. He attended regular conferences with other business managers, but no steps were taken to differentiate him or his status from other employees doing the same job; he was represented to the outside world as part and parcel of Flavour Creations’ business not as an independent contractor. He had a Flavour Creations business card and was included into its information technology system in the same way its other employees were.

[59] I consider that this test tends to favour the existence of an employment relationship.

Industry practice

[60] I consider there is insufficient evidence about industry practice so this factor is inconclusive.

Outcome

[61] Standing back and carefully weighing all of the various factors, including but not limited to the stated intention of the parties, I am satisfied Mr Harrington has discharged the onus of establishing on the balance of probabilities that he was in an employment relationship with Flavour Creations at the material time.

[62] The Authority therefore has jurisdiction to investigate the claims in his Statement of Problem. The respondents have 14 days from the date of this determination within which to file Statement(s) in Reply.

Costs

[63] Mr Harrington as the successful party is entitled to a contribution towards his actual costs in respect of this application. However I consider it appropriate to reserve costs to be dealt with at the conclusion of the substantive matter.

Rachel Larmer
Member of the Employment Relations Authority