

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 394/07  
5069847

BETWEEN

NIGEL HOLLIS  
Applicant

AND

JV HIAB TRANSPORT LTD  
Respondent

Member of Authority: Vicki Campbell

Representatives: Allan Bright for Applicant  
Michelle Olsen for Respondent

Investigation Meeting 3 October 2007 at Tauranga

Further documents received 22 November 2007

Determination: 14 December 2007

---

DETERMINATION OF THE AUTHORITY

---

**Employment Relationship Problem**

[1] Mr Nigel Hollis claims he is owed \$9,200 as unpaid wages and holiday pay. JV Hiab Transport Ltd (“JVHTL”) denies the claim and says Mr Hollis was not an employee, rather he was one of two director/shareholders who received monthly drawings as and when the company could afford to pay.

[2] The issues for this determination:

- What was the real nature of the relationship between Mr Hollis and HV Hiab Transport Limited?
- If he was an employee – is there any outstanding wages owing?

**Background**

[3] From February 2002 until February 2004 Mr Hollis was employed by a company called Fastform 102 Ltd as a truck driver and was paid wages. Mr Henry

Pokai was a shareholder/director of that company. On 21 March 2003 Fastform 102 Ltd changed its name to Mahi Man Haulage Limited (MMHL).

[4] While Mr Hollis was employed at MMHL an opportunity to enter into a business arrangement with Mr Pokai presented itself and over a period of approximately nine months Mr Pokai and Mr Hollis discussed how the business relationship would operate.

[5] Mr Pokai says Mr Hollis was one of the most experienced truck drivers in the business and had always had a dream of owning his own truck. Mr Pokai told me that in a fit of passion he thought he could help Mr Hollis achieve his dream, and that he would be better off being an owner rather than just an employee.

[6] It was common ground that the discussions between Mr Hollis and Mr Pokai resulted in the two men forming a new company, JVHTL. The only shareholders of JVHTL were Mr Pokai and Mr Hollis who each had a parcel of 50 shares worth \$1.00.

[7] Mr Hollis was a B class shareholder, while Mr Pokai was an A class shareholder. Mr Hollis gave evidence that he did not know he was a B class shareholder until after the JVHTL business was sold to ITM. I do not accept that evidence. A document produced to the Authority and which was signed by Mr Hollis on 27 September 2004 clearly identifies Mr Hollis as a B class shareholder. This document was the transfer of shares document which was necessary in order to transfer shares that were in Mr Pokai's name to Mr Hollis.

[8] Mr Hollis and Mr Pokai travelled to the South Island at the end of 2003 and purchased a Hiab truck. The Hiab was purchased by MMHL.

[9] Mr Hollis believed JVHTL owned the truck purchased in 2003. However, according to all the financial records and other evidence provided to me at the investigation meeting, the Hiab was at all times owned by MMHL and leased back to JVHTL, although no formal lease document was entered into. I am satisfied the Hiab was never an asset belonging to JVHTL, as JVHTL was not in a financial position to purchase the Hiab outright. As a leasing fee JVHTL paid the interest and principal on

the loan used to finance the purchase of the Hiab. These payments were made directly by JVHTL to the finance company.

[10] Mr Paul Thomas, the accountant for Mr Pokai, attended the investigation meeting to answer questions related to the financial statements provided to the Authority. Mr Thomas was involved with JVHTL from its inception and was responsible for the provision of all financial statements and returns. Mr Thomas also provided advice to JVHTL on an ad hoc basis.

[11] It was common ground that neither Mr Pokai nor Mr Hollis paid any capital into JVHTL when the company was formed. Mr Pokai says he acted on his accountant's advice not to transfer the Hiab as an asset from MMHL. Mr Thomas told me there were already charges against that asset. Rather, the assessed value of the goodwill for the business diverted from MMHL to JVHTL was recognised in the accounts as a loan of \$120,000 from MMHL to JVHTL. In this way JVHTL received the benefit of the contracts that were already in place between MMHL and its contractors, which MMHL lost.

[12] Mr Thomas told me that the loan of \$120,000 for the goodwill has never been repaid to MMHL. He said the company ceased operating and it never had the money to pay.

### **What was the real nature of the employment relationship?**

[13] The nature of employment relationships is governed by section 6 of the Employment Relations Act 2000. The issue for the Authority is whether the evidence establishes the existence of a contract of or for services, when it is viewed in its totality (see *Smith v Practical Plastics Ltd*, [1998] 1 ERNZ 323).

[14] The tests applicable to establishing the real nature of the relationship include consideration of:

- Analysis of the terms and conditions which the parties have agreed to;
- The intention of the parties – although this is not decisive;
- Analysis of the historical control, integration tests and the fundamental test (which examines whether a person is performing the services on their own account); and
- Industry practice.

*(Curlew v Harvey Norman Stores (NZ) Pty Ltd [2002] 1 ERNZ 114; Koia v Carlyon Holdings Ltd [2001] 1 ERNZ 585; Bryson v Three Foot Six [2003] 1 ERNZ 581 (EC) and Bryson v Three Foot Six [2005] 3 NZLR 729 (SC)).*

*Analysis of the terms and conditions which the parties have agreed to*

[15] It was common ground that there was no written employment agreement and there were no staff employed by the company. The only written documentation was the company constitution. Mr Hollis had an interest in a company called M&M Retaining and Fencing Limited (M&M). Mr Hollis says M&M employed staff and each of those staff members had a written employment agreement. Mr Hollis acknowledged at the investigation meeting that when he was working for JVHTL he did not ask for an employment agreement because he knew he was a shareholder.

[16] It was common ground that Mr Pokai told Mr Hollis that developing the business was going to be a struggle; but that the business would pay Mr Hollis what it could afford. Mr Hollis says that after working out what he needed to survive on, it was agreed the company would pay him \$3,000 per month. Mr Thomas confirmed at the investigation meeting that Mr Hollis took drawings out of the business and PAYE was never deducted. Mr Pokai did not receive any remuneration from the company because the company was not financial enough.

[17] It was common ground that by 2005 the business was starting to get on its feet, to the extent that the company was financial enough to pay Mr Hollis an extra \$1,000 per month. Mr Hollis acknowledged that Mr Pokai did not take drawings from the business because he had another source of income.

[18] The accounting records the year 2004-2006 show Mr Hollis received drawings from the company. In the usual way, the payments made by JVHT to Mr Hollis were debited to the current account. After the profit position was determined each year the shareholder salary attributable to Mr Hollis was credited against any profit from the company.

[19] Mr Hollis maintained at the investigation meeting that he never took any holidays while he was engaged with the company but he acknowledged that he did take time off to attend funerals. However, Mr Pokai's undisputed evidence is that Mr Hollis took the Christmas period off between 2005 and 2006. The principal

income for the company came from the work undertaken by Mr Hollis in the Hiab. When Mr Hollis took time off work, the Hiab was parked up and therefore no income was being generated.

[20] It was also Mr Pokai's uncontested evidence that when Mr Hollis took time off work for any reason, he did so at his own volition and did not seek permission.

[21] With regard to hours of work, Mr Hollis told me that he had set hours, however, on further questioning he conceded that his hours were guided by the requirements of JVHTL's major client, Tauranga ITM.

*Intention of the parties*

[22] Mr Hollis confirmed at the investigation meeting that the joint intention of both he and Mr Pokai was to be equal shareholders and to work the business by undertaking the work with the Hiab. Mr Hollis also confirmed that the company would owe MMHL the assessed value of the goodwill for the business taken from MMHL.

[23] Mr Hollis maintained that he was only a shareholder for seven days. However, I do not accept that evidence. I am satisfied Mr Hollis became a 50/50 shareholder on 27 September 2004 when he signed the transfer of shares document albeit holding 50 B class shares whereas Mr Pokai held 50 A class shares. I am supported in my conclusion by Mr Hollis's own evidence where he told me that he thought he was a working shareholder in the company, and he only changed that view after filing his statement in the Employment Relations Authority.

[24] Initially Mr Hollis claimed that he did not have access to any financial documents or other information, nor did he contribute to any decisions made about the direction the company was heading. However, later in the investigation meeting Mr Hollis told me he had access to copies of the bank statements and other company documents and that he and Mr Pokai would discuss the bank statements. Mr Hollis accepted at the investigation meeting that it is not normal for employees to have such free access to company documents.

### *Control and Integration*

[25] In answer to questions in relation to his role in the company, Mr Hollis told me that he drove the Hiab. He said both he and Mr Pokai equally received and quoted on jobs. Mr Hollis initially told me that he was required to complete a time sheet. However, after questioning he conceded that what he completed was a daily running sheet which I am satisfied was for the sole purpose of being able to bill clients for the work he undertook. The running sheet recorded the client name, work completed, rate being charged, how long the work took and what was eventually being charged to the client.

[26] Mr Hollis told me that they had a client base of two, one being Tauranga ITM Supplies who would book the Hiab in advance. He said if the Hiab was booked he would do the job, but, if there was no work booked, both he and Mr Pokai would find something for the Hiab to do. Mr Pokai's unchallenged evidence was that due to not having enough work it was not uncommon for the Hiab to be charged out for as little as 15 hours per week.

[27] Mr Hollis managed his own time. He considered that he and Mr Pokai were equal partners. Mr Hollis accepted he and Mr Pokai had 50/50 responsibility for running and managing of the business. He told me he managed the truck driving aspects of the business and did all the truck work, while Mr Pokai undertook the administration of the company.

[28] It was common ground that the only factor dictating what, when and how Mr Hollis did his job was the client. Further, Mr Hollis operated with his own fuel card, and had full authority to arrange any maintenance to be undertaken on the Hiab without the need for him to refer the matter back to Mr Pokai.

### *Fundamental*

[29] While tax status can be an indication of what a person intends his contractual relationship to be, in Mr Hollis's case the evidence as to his tax status is not conclusive. It was common ground that JVHTL was not registered for PAYE as it had no employees.

[30] As events transpired, neither the company nor Mr Hollis has ever paid tax on the remuneration Mr Hollis received from the company. It was common ground that

Mr Hollis had previously advised Mr Pokai that he had his own accountant and his own lawyer. Mr Pokai says that the intention was for Mr Hollis to arrange for his own accountant to take care of his tax matters.

[31] In answer to questions at the investigation meeting, Mr Hollis acknowledged that he had other business interests due to his shareholding in M&M and that he had undertaken work for that company during the period he was in business with Mr Pokai.

### **Determination**

[32] I find that Mr Hollis was a 50/50 working shareholder in the business of JVHTL. He was paid a shareholder salary by way of drawings, on the proviso that he ran himself as a business. Further, I find that Mr Hollis went into the business on the understanding that he was a working shareholder, and not an employee.

[33] I find that the relationship between the two shareholders was at all times as equals in the business with equal rights to decision making. Further, I am satisfied Mr Hollis worked autonomously and that he had a degree of responsibility in the management of the business with regard to the care and maintenance of the Hiab.

[34] In light of the facts, measured against the established principals, I find the real nature of the relationship was not a contract of service, Mr Hollis was not an employee of JVHTL. I am unable to be of any further assistance to him.

### **Costs**

[35] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority

