

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA150/08
5117364

BETWEEN LISA KING
 Applicant

AND CREATIVE ENERGY
 WHOLESale LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Tim Cleary for the Applicant
 David Burton for the Respondent

Investigation Meeting: 18 September 2008 and 2 October 2008

Further Information: Received by 6 October 2008

Determination: 11 November 2008

DETERMINATION OF THE AUTHORITY

Introduction

[1] The primary issue to determine in this case is whether the applicant, Ms Lisa King, was a contractor to or an employee of the respondent, Creative Energy Wholesale Limited. Creative produces and sells its own *healthcare* products, as well as doing so on behalf of other companies. Ms King was the managing director and a significant shareholder of two companies which had production agreements with Creative. At around the same time, October 2004, it had been agreed between Creative and Ms King that she would provide promotional services by way of an independent contract for services with Creative for 20 hours a week, through a partnership she was a member of. That partnership also provided

the services part-time of an employee of one of the *healthcare* product businesses, for two days a week.

[2] The office assistant became a full time employee of Creative in around June 2005. Ms King claims that she also became a full time employee of Creative at the same time, whereas Creative considers that she continued on her contract for services, albeit full time, instead of 20 hours per week. Ms King's role was that of National Sales Manager. This arrangement was allegedly agreed to by Mr Ted Sweetman, a director and major shareholder of Creative, who is now deceased.

[3] The invoicing arrangement between Ms King's partnership and Creative continued until March 2006, when she began invoicing Creative through a company of which she was the sole shareholder and director, Scoli Limited.

[4] In June 2007, all the shares in Creative were sold to Health Distributors Limited. Nothing otherwise changed immediately.

[5] Ms King and the new owners wished to negotiate new arrangements between them, but were unable to do so. Following the appointment of the other previous major shareholder of Creative, Mr Lew Horne, as Acting General Manager, Ms King raised a personal grievance for disadvantage. These matters were not resolved and Ms King went on stress leave. Subsequently, Creative terminated its agreement with Scoli Limited and thereby Ms King's associations with Creative.

[6] The key issues for determination are

- whether or not the real nature of the relationship between Ms King and Creative was that of employer and employee;
- if so, is Ms King entitled to a bonus of \$40,000 per year for the years 2007 and 2008; was she unjustifiably disadvantaged when a former director was appointed as Acting General Manager and was she later unjustifiably dismissed; and if so what remedies are appropriate.

Analysis

[7] The Supreme Court of New Zealand in *Bryson v. Three Foot 6 (No 2)* [2005] ERNZ 372 held, at 386, that in deciding whether a person is an employee or a contractor, the Authority:

... must consider “all relevant matters”, including any matters that indicate the intention of the persons. But it is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

“All relevant matters” certainly includes 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 operated in practice. ... “All relevant matters” equally clearly requires 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)...

[8] The parties are agreed that Ms King was a contractor when she commenced her relationship with Creative. She invoiced Creative a set monthly fee for her work and that of the office assistant. GST was added to each invoice. No withholding tax was paid. She only contracted to Creative for 20 hours a week. The rest of the time she worked for the companies of which she was managing director. The terms of the arrangement are set out by way of email.

[9] A clear issue for determination is on what basis Ms King came to work full time at Creative as its sales manager. There were no written arrangements to cover this change. By contrast, the office assistant went onto a written individual employment agreement as an employee of Creative. At that time Creative also changed its arrangements with the companies associated with Ms King, so that she had very little work to do for those companies, as Creative had become almost totally responsible for selling and distributing their products. A month or two later, the invoices from the partnership to Creative provided for deductions for withholding tax at 20%.

[10] Ms King was provided with a work car and her expenses (including those for her own cell phone) were claimed from Creative from then on. She was directly responsible as National Sales Manager for a number of staff. Ms King retained a franchise for a certain area for a number of *healthcare* products and did that work from Creative’s offices. It did not take much of her time.

Parties' Intentions

[11] There can be no certainty about events that took place several years ago, especially since one of the key participants is dead. Accordingly I had particular difficulty in determining what was agreed between Ms King and Mr Sweetman in 2006. Much of Ms King's evidence was self-serving, such as her efforts to instruct the office manager to make provision for annual and sick leave at a time when she was in dispute with Creative, rather than from the commencement of her alleged employment. Furthermore, I do not accept her claim of being ignorant in the ways of business. She was a shareholder and managing director of a number of commercial entities and her business acumen is displayed in a number of her emails on behalf of those other companies, as well as her success at Creative. In particular, I do not consider that Ms King is as naive on financial matters and taxation matters as she claims. She is a director of several companies. She established Scoli Limited for the purposes of contracting her own services, as she had done for several years through a partnership. She completed GST records on behalf of Scoli. Even if Ms King was not sophisticated in taxation matters, she certainly had professional advice and assistance. Ms King was a director of other companies and those companies received royalties from Creative. She was a sophisticated business person in her own right on behalf of those other companies, as the correspondence shows. She also undertook work such as seeking out leads for the other companies and creating formulations for sale by the other companies, at the same time working with Creative.

[12] Other than Mr Sweetman, there were no other direct witnesses to the discussions over Ms King's devoting much greater energies to work for Creative. Ms King now works in competition to Creative with Mr Kurt Renner, the former Export Manager for Creative, who was also upset at his treatment by Creative, which he left at around the same time as Ms King. Their evidence, therefore, needs to be treated with caution.

[13] The same must be said, however, for the witnesses for Creative. In particular, Mr Horne's evidence was less than balanced. The more adamant he was that he had not agreed to any bonuses except for one year (despite documentary evidence that bonuses were provided for in ongoing budgets) the less persuasive I found his evidence. Furthermore, it was difficult to accept that Mr Renner and Ms King would have continued to devote as much effort as they did to their work in the subsequent years after the written bonus agreement, if their potential pay was effectively being dropped by one third. It is also unlikely that Mr Horne is correct when he stated that even after the loss of a major product, Creative was

still trying to meet the profit projections in the first budget, rather than the redesigned budget, after the loss of that key product. Finally, Mr Horne wrote a letter dated 11 November 2005 stating that Mr Renner was subject to a performance bonus of \$40,000 gross paid annually. It is difficult to accept that Mr Horne would have signed such a letter if it had not been true.

[14] Similarly, Creative's accountant/director, Mr Joe Vega, approached issues in a manner that, while no doubt useful for a forensic accountant, is at variance with legal principles. This is because Mr Vega would only accept as agreed matters that had been committed to writing and signed. Other than for purchases of land, the general law in New Zealand is that an oral agreement is binding. As Mr Vega did not approach matters on this basis, his evidence about the discussions between Ms King and Mr Sweetman, to which he was not privy, can not assist me.

[15] A statement of evidence was provided by a Mr John Alexander, disputing Ms King's view of events, but he never attended the investigation meeting on either day, despite being expected. I take no account of his statement accordingly, as there was no good reason for him not to attend the investigation meeting.

[16] In order to determine the question of the intent of the parties as at June 2005 I therefore have relied on documentary evidence and the evidence of Ms Sandra Orpin. Although Ms Orpin is an employee of Creative, I found her evidence, in combination with the documentary evidence, to be persuasive. She stated that she had approached Ms King after the new arrangement and asked her if she was an employee now she was working full time and that Ms King was adamant that she was a contractor.

[17] Ms King claims that she had agreed with Mr Sweetman that she would be a full time employee, but that he left it to her as to how she would be paid and that she wanted to continue invoicing Creative. She claims that it was also agreed that if she did work for her other companies, she would make the time up. That latter point is consistent with Ms Orpin's evidence that when she approached Ms King, in her capacity as office manager, to sort out tax issues, she was told that although she would be spending most of her time working for Creative, she would still be doing work for other companies. I also accept Ms Orpin's contested evidence that Ms King also stated that there were tax implications for the partnership she was in if she was paid as an employee. Ms Orpin says she raised the issue again after Creative began being invoiced by Scoli Limited rather than the partnership and was told that the matter was not up for discussion.

[18] I prefer Ms Orpin's evidence because it is likely that she would have raised the issue, given her human resources responsibilities, and she would not just have accepted Ms King's assurance that she was an employee but paid as a contractor, because she knew the difference between the two. Therefore her evidence has more of the ring of truth to it than Ms King's evidence. Furthermore, Ms King never invoiced Creative directly, but through a partnership and then a company. Ms King was the sole director and shareholder of that company, Scoli. It also claimed for expenses that Scoli Limited claimed it had incurred, but not on Creative's behalf, for a trip Ms King took while absent from Creative. No employee could make such claims. Ms King provided GST returns for Scoli Limited, which she signed stating that they were true and correct in terms with the applicable law. If she felt she was an employee, it would have been a breach of Inland Revenue legislation to have done so. I do not accept that Ms King would be a party to misleading the Inland Revenue.

[19] Ms King also created products while at Creative which were the property of the other companies with which she was associated and for which Creative had to pay royalties.

[20] Instructive as to Ms King's intentions is an update sent on 30 November 2007 to the directors of one of the companies with which she was associated. It shows that she was working for Creative and the other companies at the same time and how interrelated they are. In the email she discusses business opportunities for another company and states:

I am still no further ahead with Creative Energy and as discussed on the phone, have legal representations to proceed with outstanding money.

I continue to be based out of CE as they are still our distributor and I need to be able to oversee the sale and promotion of these products.

Every opportunity I get I advertise Slim Fast and it continues to grow. I do not believe there is an opportunity for UPL to add additional products from the CE group.

[21] Finally, when approached by Mr Vega in November 2007 about documentation in relation to her *personnel and/or contractor/file*, she did not provide any documentation supporting her claim that she was an employee, other than a position description for her as New Zealand Business Manager and a company structure document written by her, which showed her staff responsibilities.

[22] I therefore conclude that the parties' intentions were that their relationship was to continue as one of principal and contractor, not employer and employee.

[23] The next issue is whether or not the parties have achieved their intention as a matter of law. In doing so it is important to remember that any type of employment relationship can also be structured as one of independent contractor (*Koia v. Carlyon Holdings Ltd* [2001] ERNZ 585).

Control

[24] There are evidential issues here because Mr Sweetman was the only one, if anyone, who controlled Ms King's day to day activities. It was common ground that they met regularly and that Mr Sweetman was the director responsible for the sales area. Mr Horne concentrated on production. The other shareholder, Mr Renner, worked on the export side of the business.

[25] There is no doubt that Ms King worked hard and effectively as its New Zealand business manager. It is also clear that control over Ms King was able to be exercised by Mr Sweetman as a working director. On the other hand, whatever her contractual status, as a senior manager she had great discretion as to how she conducted her work. She was also able to do work for her other business interests at the same time, provided she made the time up. In Ms King's own evidence, Creative had no control over that important work, such as the formulations for new products which Ms King prepared, albeit in her own time.

[26] On balance, Ms King could not make any significant decisions within her sphere of responsibility without the approval of Mr Sweetman. Therefore the control test favours a finding of employer/employee.

Integration

[27] There is no doubt that Ms King was, with few exceptions, closely integrated into the operation of Creative. She held a senior management position working onsite with direct staff reports. She had a company car and Creative paid for her cellphone. Ms King's role was therefore part and parcel of the organisation. On the other hand, she had other business interests which she was entitled to work on, but so did Mr Renner, who was an employee on an employment agreement.

[28] Clearly, Ms King's great degree of integration within the organisation points to her being an employee rather than a contractor.

Economic reality

[29] The key issue here is whether Ms King was in business on her own account. As is made clear above, I have found that Ms King intended to be in business on her own account. In assessing this matter it is necessary to go back to the time at which the relationship changed in 2005. Previously, Ms King was dividing her time between the other companies, selling their products in her own time, as well as Creative's in its time. After the change, she focused on selling Creative's products, but these now included the other companies' products. Therefore Ms King would benefit indirectly from increased sales of Creative's products produced in association with her other companies. I also note that the partnership described itself as running a business involving the provision of marketing and management services.

[30] Ms King was also allowed to develop new products owned by those companies and continue with the local distributorship for another product. Thus in these two important ways she was able to act in business on her own account and benefit from sales by those other companies.

[31] Certainly the way Ms King was paid and the arrangements she made for tax point to her being in business on her own account, as in *Davis v. CanWest Radio Works Ltd* (unreported, Travis J, AC21/07, 4 May 2007). I now paraphrase from *Davis*, at paragraph 71, but replace the names used with those of the participants here, as the comments are entirely applicable. To ignore the position of Scoli Limited would be effectively to deny its existence as a separate legal entity and would amount to a lifting of the corporate veil and recasting the arrangement as though it had been made directly between Creative and Ms King. This would not have been an appropriate case for lifting the corporate veil. Scoli Limited is not a sham entity. It was also earning income from other sources such as those mentioned above, and an investment property owned by it. All the invoices were sent by Scoli Limited. The moneys were paid into its account and GST accounted for.

[32] To summarise, I have already found that the parties have agreed as to the true nature of their contractual arrangement, namely a contract for services, and to achieve the result Ms King seeks would be to ignore the involvement of Scoli Limited. The case is similar to *Davis* where Mr Davis was found to be a contractor and not an employee. I therefore conclude that fundamentally Ms King was in business on her own account when invoicing Creative through her company Scoli Limited.

Real Nature of the Relationship

[33] The real nature of the relationship is difficult to ascertain, but as in all cases it can only be either contracting or employment, and any arrangement can be so structured that in law it is either an employment or an independent contracting relationship.

[34] There is no doubt that a person in Ms King's situation would normally be an employee. Ms King was fully integrated within the business of Creative as its New Zealand Sales Manager. Her management responsibilities, her reporting to Mr Sweetman and her phone and car are all examples of that integration and indeed control by Creative through Mr Sweetman. She did have other business interests, but so did all the other senior managers, including the previous directors Messrs Horne and Sweetman.

[35] These factors are outweighed, however, by the interdependent relationship between the companies in which Ms King was an officer, shareholder and director, and Creative. They had royalty arrangements with Creative and she did work for them while at Creative's premises, including financial record-keeping, conducting sales and seeking new business opportunities. Furthermore, Ms King contracted her services through a partnership and then a company. These financial and tax structures clearly demonstrate the intention of the parties and that Ms King was in business on her own account through her company Scoli.

[36] To conclude that Ms King was an employee would also be to conclude that Scoli was a sham, which I am sure is not a conclusion Ms King would like to see, given the other activities of the company, particularly as a landlord.

[37] For all these reasons I conclude that the real relationship between Ms King and Creative was not that of employer and employee. I dismiss her claims accordingly.

Costs

[38] Costs are reserved.

G J Wood
Member of the Employment Relations Authority