

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Jerome David King (Applicant)  
**AND** Drake Personnel (New Zealand) Limited (Respondent)  
**REPRESENTATIVES** Jerome David King, in person  
Maurice O'Brien, for Respondent  
**MEMBER OF AUTHORITY** Vicki Campbell  
**INVESTIGATION MEETING** 7 February 2006  
**DATE OF DETERMINATION** 22 February 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] Mr Jerome King says he was engaged by Drake Personnel (New Zealand) Limited (Drake) as an employee for two separate periods:

- 13 February to 4 July 2003; and
- 1 December 2003 to 16 July 2004.

[2] Mr King claims holiday pay and payment for statutory holidays for each period.

[3] Drake says Mr King was originally employed as an employee on 13 February 2003 but that his status was changed to that of independent contractor as his own request, on 20 February 2003.

[4] This determination requires me to establish:

- The nature of Mr King's employment relationship with Drake; and
- If Mr King was an employee, what holiday pay and statutory holiday payments are owing to him.

**What was the nature of Mr King's employment relationship with Drake?**

[5] Mr King told me at the investigation meeting that he has always worked for himself and is not accustomed to having PAYE deducted from his payments received. Mr King told me he was an experienced businessman.

[6] Initially Mr King was employed by Drake as an employee on \$25.00 per hour. The pay slip provided by Mr King shows that as an employee he had PAYE deducted and holiday pay accrued.

[7] Two weeks into his employment relationship, on 20 February 2003, Mr King approached Mr Maurice O'Brien and requested to have his employment status changed from employee to independent contractor. Mr King told me at the investigation meeting that he did this because he has another business, Hargreaves & Allen Limited, which is GST registered and he thought it best to combine the two. Mr King was clear that it was his idea to change his status. Mr King completed the requisite form and from 20 February 2003 he was paid as an independent contractor receiving \$25.00 per hour plus 12.5% GST.

[8] There was no written agreement between the parties.

[9] Drake had a contract with Auckland City Council to provide services to assist with the peak workload in valuations as part of preparing its annual plan. During his two periods of engagement with Drake, Mr King, who is an experienced valuer, worked at Auckland City Council and was supervised there by Mr John Wells, an employee of Auckland City Council.

**The Law**

[10] The nature of employment relationships is governed by section 6 of the Employment Relations Act 2000. The tests applicable to establishing the real nature of the relationship include consideration of :

- statements by the parties including any contractual statements;
- the intention of the parties – although this is not determinative;
- analysis of the historical control and 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; and *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585; *Bryson v Three Foot Six* [2003] 1 ERNZ 585).

**Conditions of employment**

[11] As already set out in this determination, on 13 February 2003 Mr King was employed as an employee but changed his status at his request. On 20 February 2003 he completed a contractor form which included his GST number and requested that he no longer pay PAYE. It was common ground that no withholding tax or other tax was deducted from Mr King's payments, as he was responsible for the payment of his tax to the Inland Revenue Department.

[12] The only written document between the parties indicating the status of the relationship was the form completed by Mr King to change his status to GST self-employed.

[13] Tax invoices were generated by Drake after Mr King had submitted his hours worked during the relevant period and as approved by Auckland City Council. Mr King continued to receive \$25.00 per hour after his status changed. In addition to his hourly rate Mr King also received 12.5% GST. No withholding tax was deducted – Mr King was liable for his own tax arrangements.

[14] I find that there were no terms or conditions applicable after 20 February 2003 that would be indicative of an employment relationship

**Intention of the parties**

[15] The initiation of the change in Mr King's status came from him. He decided it would be better to be GST registered instead of an employee and specifically requested the change in status. This request for a change required both Mr King and Drake Personnel to turn their minds to the nature of the employment relationship.

[16] I find that it was Mr King's intention to be employed as an independent contractor and that this was agreed to by Drake.

## **The tests**

### *Control Test*

[17] Mr King was assigned to Auckland City Council to provide valuation services during its peak work period relating to the annual planning process. He was engaged in an area of his expertise and required no training. He was supervised by Mr John Wells, an employee of Auckland City Council. Once he took up the assignment, Drake Personnel had no control over how, when or where Mr King undertook his tasks. Mr King entered his hours worked into a computer database, these hours were confirmed by Mr Wells, and Drake generated an invoice and paid him on the basis of the hours submitted.

[18] I find that Drake did not impose any control on Mr King when he was undertaking his assignment at Auckland City Council.

### *Integration test*

[19] The question for the Authority is whether Mr King was employed as part of the business and whether his work was being done as an integral part of the business. Drake provides temporary staff to cover staff shortages in various businesses. The type of work and the type of businesses using temporary staff from Drake is varied. Mr King was engaged to provide valuation services on two separate and distinct occasions. It was common ground that Mr King's periods of engagement coincided with the peak time for Auckland City Council's valuation work relating to the annual planning process.

[20] It is arguable that Mr King's work was integral to the Drake business of providing short term coverage for clients during peak work periods. However, I find that this is not decisive in determining whether Mr King was an employee or a contractor.

### *Fundamental test*

[21] The question for the Authority is whether Mr King was a person in business on his own account. For the first two weeks of his employment Mr King was treated as an employee and had PAYE deducted from his wages and holiday pay accrued. Mr King changed his tax status as he decided it was better for him to be self employed and have the income from his work with Drake attributed to his business, Hargreaves & Allen Limited.

[22] Mr King provided copies of the Profit and Loss statements and GST returns for Hargreaves & Allen Limited, for the applicable periods. These documents show that Mr King recorded his income from the Auckland City Council contract into his business accounts and used the income as part of the calculation on his GST returns. He also claimed expenses relating to his travel to and from the work he undertook at Auckland City Council. Mr King told me that in 2003 he did not have to pay any tax at all because his business only made about \$3,000 for the year. The documents demonstrate that for all intents and purposes Mr King was in business on his own account and was able to profit from such business in that he did not have to pay any tax (for the 2003 year).

[23] Mr King derived a benefit not generally available to employees. He was able to use the GST he received from Drake for up to six months before he was required to account for it to the IRD. He derived a tax advantage in that he was able to offset his income against his expenses within his business accounts and never had to pay tax at source (PAYE or withholding tax).

[24] I find these arrangements to be indicative of Mr King being an independent contractor.

#### *Industry practice*

[25] As mentioned earlier in this determination Drake are in the business of providing temporary staff cover to other businesses. I am satisfied that it is not uncommon in the temping industry to employ both employees and contractors. It was the evidence of Drake that because of the specialised nature of the work for which Mr King was engaged it is not unusual for such individuals to be self employed.

[26] I find that while the arrangement requested by Mr King and agreed to by Drake was not an unusual arrangement in the industry applicable to the business of Drake Personnel, it is not decisive in determining whether Mr King was a contractor or an employee.

#### **Conclusion**

[27] In light of the facts measured against the established principles I find that the real relationship is that of contract for service.

[28] Mr King was not an employee and therefore I have no jurisdiction to assist with his problem any further.

**Costs**

[1] Neither party was represented at the investigation meeting and have not incurred any legal costs. Therefore it follows that no costs will be awarded. However, if I am wrong about that, then I encourage the parties to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell  
Member of Employment Relations Authority