

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 180  
5567872

BETWEEN            LABOUR INSPECTOR (MIKE  
                                 HEYWARD)  
                                 Applicant

A N D                SOLUTIONS PERSONNEL  
                                 LIMITED  
                                 Respondent

Member of Authority:     James Crichton

Representatives:         Ella Tait and Alastair Dumbleton, Counsel for Applicant  
                                 Paul Wicks QC, Counsel for Respondent

Investigation Meeting:    27 and 28 April 2016 at Christchurch

Submissions Received:    1 June and 12 July 2016, from the Applicant  
                                 1 July 2016, from the Respondent

Date of Determination:    4 October 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant Labour Inspector (the Inspector or Mr Heyward) alleges that the respondent (Solutions) employed seven persons ( the named individuals ) but in doing so did not fulfil its obligations in terms of the employment statutes, specifically the Employment Relations Act 2000, the Holidays Act 2003 and the Minimum Wage Act 1983.

[2]     Solutions maintains that the seven persons identified were in fact independent contractors and not employees and that as a consequence, the purported breaches of the employment legislation is not made out.

[3] In the alternative, Solutions maintains that if the subject individuals are, in truth, employees, they are employees of other entities and not employees of Solutions.

[4] Solutions is a labour hire company whose method of operation is to recruit a pool of workers who it then on-hires to its clients to meet the employment needs of those clients.

[5] The essence of the decision that the Authority must make in the present case, is the proper categorisation of the legal relationship between Solutions and the seven individuals who gave evidence before the Authority, and who were each of them a member of the labour pool that Solutions recruited to then on-hire to third parties, who were Solutions' clients.

[6] It is common cause that the only issues for the Authority in the present case are whether the persons referred to throughout this determination are independent contractors or employees of Solutions.

[7] There is some difference of emphasis between the parties as to whether it is available to the Authority to consider the seven persons as seven individual examples of the matters in contention or whether a global approach is possible but nothing really turns on that question.

[8] What is incontrovertible is that the only purpose of this determination is to deal with the issues that I have identified above; any subsequent consideration of the entitlement or otherwise of the seven individuals to particular payments in terms of the employment legislation must wait until these initial decisions have been taken and assuming there is a finding that these seven individuals, or any of them, are employees of Solutions, there will need to be further evidence heard by this Authority on what their entitlements are vis-à-vis Solutions.

[9] With the exception of the categorisation of the relationship between Solutions and the individuals who gave evidence before this Authority, the facts are not greatly disputed. All of the seven individuals were recruited by Solutions to join their pool of labour which Solutions subsequently "on-sold" to its clients to fulfil the latter's labour needs.

[10] It is fair to say that the nature of that subsequent relationship (that is, the relationship between one of the seven individuals and Solutions' client) is also in

dispute although not for determination here; Solutions says that it is clear on its face that the relationship between the individual and one of its clients is characterised by quite different principles from the ones that characterise the relationship between the individuals and Solutions, such that it is helpful to effectively compare and contrast the different character of the two relationships. Conversely, the Inspector maintains that the nature of the subsequent relationship between the individual and Solutions' clients is no more and no less than a sham designed to avoid the normal incidents of employment.

[11] The evidence I heard disclosed that first, each of the seven individuals executed an independent contractor agreement with Solutions. Put simply, that agreement, drafted for Solutions, is quite clearly an independent contractor agreement and not an employment agreement. While Mr Heyward submits that some of the provisions in that agreement could suggest an employment relationship, I do not accept that contention. I think it is more accurate to say that not all of the provisions in this independent contractor agreement (or indeed any other independent contractor agreement) relate exclusively to the relationship of contractor and principal. Some provisions can appear in both classes of agreement. Examples of these sorts of provisions include clauses which would be consistent both with casual employment and with a contractor relationship, and clauses concerning health and safety.

[12] As I have already noted, all of the seven individuals signed the subject document. But I accept the Inspector's view that the context in which that execution took place is relevant to disposition; issues I will need to consider include whether there were language barriers for instance and whether Solutions made any genuine attempt to explain the nature of the agreement to any or all of the seven individuals.

[13] It is clear from the evidence that Solutions obtained confirmation from each of the employees that they had read and understood the agreement and had had an opportunity to take advice.

[14] However, Mr Heyward points out that all of the seven individuals spoke English as a second language and there are various examples from the evidence for the individuals, about what they understood. For example, Manpreet Singh denies having the contract explained to him when he signed the first of two contracts with Solutions, also denied being told to go away and get advice but he did confirm that the document which appeared to have his signature on it was in fact signed as an original

by him. He also confirmed that he had signed a document in exactly similar terms the following year with the same party (Solutions).

[15] So, while Mr Singh expressed some doubt about exactly what it was that he had agreed to, he was sufficiently unconcerned about the matter to be prepared to enter into exactly the same relationship again 12 months after his initial engagement.

[16] Solutions said in its evidence that it conducted an interview with each individual and that part of that interview was designed to ensure that the individual understood that they were engaged as a contractor and understood the difference between being an employee and being a contractor.

[17] Mr Singh claimed not to know the difference between an employee and a contractor, and said that he was not told that he had to pay his own tax.

[18] Another witness, Anukishan Kaki, was very clear that he thought he was signing an employment agreement although he acknowledged that he read various references to “*contractor*” on the signature page. Mr Kaki told me that if he were a contractor, he would not have taken the role because in terms of his visa, he was not legally entitled to be a contractor. But then later in his evidence, Mr Kaki said that he thought that he was a contractor with Mr Chips (the third party client of Solutions to whom he was provided by Solutions).

[19] But of more significance in my view than concerns about whether any of the seven individuals knew the difference between being an employee and being a contractor is whether they understood the practical effects of the different arrangement. For example, Mr Kaki was very clear in his evidence to me that Solutions never used the word “*contractor*” but did explain about the incidence of tax and who paid it. This witness was very clear that he understood he paid his own income tax and ACC. Similarly, Ms Diana Apal told me that she remembers being told that she was a contractor and not an employee, but more importantly she understood that she received no holiday pay and no sick pay.

[20] Similarly, Mr Anthony Koole did not remember if he was told that he was an independent contractor under this agreement but he does remember being told that he had to pay his own tax and ACC and that he got no holiday leave paid or sick pay although despite those concessions, Mr Koole still maintained that he thought was an employee.

[21] Lana Palekotama appeared to be uncertain of most things in her evidence although she had previously worked for another recruitment company that operated on a similar basis to Solutions and agreed that she received no holiday pay working for that other entity.

[22] Against those recollections of the subject individuals, the evidence for Solutions was provided principally by Ms Raneet Kaur who did much of the basic recruitment work for Solutions in Christchurch at the relevant time, although she is no longer employed by Solutions. She said that she had dealt with around 400 people in her time at Solutions but she could only directly remember dealing with one of the seven named individuals.

[23] However, her evidence was crystal clear that she adopted an absolutely standard process in recruiting staff and that that process was not her unique process but the Solutions' template. The principal of Solutions, Mr Ahmed Said Abdel Hamid Abdel, (known as Mr Moniem), told me that all of the recruiters for Solutions followed the company template but that they used their own words to explain the standard contract which was used right across the company.

[24] Ms Kaur was very explicit about the nature of the information that she provided to potential recruits, saying that she concentrated on explaining what the consequences of the contractor model were in a practical sense, that is being your own boss, but not getting holiday pay or sick pay.

[25] Equally importantly, Ms Kaur maintained that if she became anxious about the ability of a potential recruit to understand what she was saying (that is, to be able to communicate effectively in the English language), she would immediately terminate the interview. This observation was supported further by Mr Moniem who maintained that the Inspector had chosen individuals to give evidence for his case who were in no way representative of the 30,000 odd recruits who had passed through Solutions' books because the seven individuals who were giving evidence against Solutions appeared to have been selected on the basis of their weakness in English.

[26] Assuming the individual was engaged by Solutions, they would then be offered roles with Solutions' clients that were commensurate with their skills and experience. They could either accept or reject the roles offered and it is clear from the evidence that I heard from some of the individuals anyway that they would go back to

Solutions, even during a placement, so as to obtain additional work, perhaps with an additional placement, that is additional to the placement that they were already involved with.

[27] During placements, the individuals would have their hours determined by Solutions' client, work under the supervision of the client, as a part of the client's business, and be paid at a rate determined by the client.

[28] During the placement, the individuals had little or no contact with Solutions and what contact there was typically related to Solutions' obligation to its client; for instance, if an individual intended to be absent from the client's workplace, they would advise Solutions so that Solutions could provide an alternative person to fill their role during the period they were not working.

### **The issues**

[29] The issue for determination is the question whether these seven individuals were employees of Solutions or not.

[30] The flow on consequences of whatever that decision might entail, may need further evidence to be heard and considered by the Authority, such as what benefits ought to accrue if the named individuals were employees of Solutions.

[31] Of course, if the Authority's conclusion is that, properly construed, these seven named individuals are in truth independent contractors to Solutions, then the Authority has no jurisdiction to take matters any further and its investigation must be concluded at that point.

### **Are the named individuals employees of Solutions?**

[32] The starting point for any consideration of the question whether a particular individual is or is not an employee of another entity must be s.6 of the Employment Relations Act 2000 (the Act). Broadly, that section defines what an employee is (a person of any age employed by an employer to do any work for hire or reward under a contract of service), and then goes on to require the Authority to identify "*the real nature of the relationship*".

[33] To determine the real nature of the relationship, the Authority is required to consider all relevant matters including the intention of the parties with the proviso that statements by the parties about the nature of the relationship are not determinative.

[34] Both counsel have helpfully referred me to a number of authorities which I have read. I have found it helpful to dwell on the analysis provided in *Rothesay Bay Physiotherapy v Katherine Pryce-Jones* [2015] NZEmpC 224 where Her Honour Judge Inglis analysed the factual matrix in that case. I adopt the same process here.

[35] At para.[12] of the judgment, Her Honour says:

In determining the real nature of the relationship, regard must be had to all relevant matters that indicate the intention of the parties. It is important to have regard to the way in which the relationship operated in practice.

[36] That latter observation of course echoes the remark in the Supreme Court judgment in *Bryson v. Three Foot Six Ltd (No 2)*<sup>1</sup> when the Supreme Court referred to how the parties had “*behaved*” in forming their contractual bond.

[37] The parties’ intention can to some degree be discerned from their written agreement. As I have already noted earlier in this determination, the agreement entered into between Solutions on the one hand and each of the seven individuals on the other is, in my judgement, plainly an independent contractor agreement. While one can say, as the submissions for Solutions do, that a written agreement executed by the parties at the commencement of the relationship is powerful evidence of the nature of the relationship they intend, that view of matters rather presupposes a level playing field and certainly, in the present case, that is not the Inspector’s assessment of the position.

[38] In *Hook v JB’s Contractors Ltd* (Employment Relations Authority, Auckland, 22 March 2001, AA21/01), Member Wilson observed:

Where there is a detailed written contract this will usually go a long way to establishing the intention of the parties.

[39] I venture an amendment to that proposition. I think that view of matters can only apply where there is an equality of bargaining between the parties. What is certainly clear is that the presentation of an agreement which is plainly an independent

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<sup>1</sup> *Bryson v. Three Foot Six Ltd (No 2)* [2005] NZSC 34

contractor agreement certainly establishes the intention of the writer of that agreement but to imply that, without more, the other signatory has a similar intention goes too far.

[40] What can be said is that all of the seven named individuals signed the independent contractor agreement when invited to do so by Solutions. The evidence for Solutions, while generic in tone especially since the principal operational witness for Solutions could only remember actually dealing with one of the named individuals, did emphasise a particular process which she maintained was a company-wide process. As I have already made clear, Ms Kaur focused especially on the differences between employment and being an independent contractor. This involved, I was told, emphasising that the proposed arrangement meant that the individuals would not receive holiday pay or sick pay, would pay their own tax but would have control of which jobs they accepted and which they did not.

[41] Ms Kaur maintained that once she got to a point with any new recruit where she felt the recruit did not grasp the differences between the two concepts, she would terminate the interview and not sign up the recruit.

[42] Moreover, there was some equivocal evidence of the existence of a sign at Solutions' offices which was allegedly designed to alert new recruits to the nature of what they were potentially signing up to. Some of the named individuals agreed that there was a sign of some sort but denied that the version shown to them by counsel was the one they had seen (Manpreet Singh for example), while Anukishan Kaki did not see a sign at all. Anthony Koole did not remember seeing a sign but accepted it was possible there was one there while Lucie Kolencikova did not see the sign either.

[43] Put shortly, the evidence for Solutions is that it took all reasonable steps to communicate to new recruits that what those new recruits were signing up for was not an employment relationship but an independent contractor relationship. As I have already noted, it is apparent that the intention of Solutions as to the nature of the proposed relationship is as plain as can be. The question must be how clear the discerned intention of the named individuals is.

[44] I am referred to Member Oldfield's decision in *Downey v New Zealand Greyhound Racing Association Inc* (Employment Relations Authority, Auckland, 18 August 2005, AA315/05) where the Member, relying on Justice McGrath's

dissenting judgment in the Court of Appeal decision in *Bryson*, concluded that in a finely balanced case, which the Member had previously decided *Downey* was, the intention of the parties became the deciding factor. She then went on to determine that while the intention of the Greyhound Racing Association was plain enough (it sought a contractual relationship), Mr Downey's contention was that he was an employee but the Member decided that in the particular circumstances of the case, Mr Downey had evidenced his real intention as accepting a contractual relationship and that is where the decision rested.

[45] In the present case before me, were there nothing but the intention of the parties on which to base the decision, I should be left with the conclusion I have already made plain that Solutions sought an independent contractor model but it is by no means clear on the evidence that that was understood or even accepted by the seven named individuals.

[46] All that can be said about the intention of the named individuals, is that they signed the document put in front of them. In Manpreet Singh's case, it can also be said that he signed an agreement not once but twice so his protestations of not understanding the position need to be treated with more caution than is the case with the other named individuals. Notwithstanding that, Mr Singh denies having the contract explained to him, denies being told to go away and get advice, denies being told that he paid his own tax, and said that at the relevant time, he did not know the difference between employment and independent contract.

[47] Anukishan Kaki gave particularly graphic evidence that he would not have accepted the role if he had understood that he was a contractor because he was very clear that the immigration rules did not allow him to be a contractor. Mr Kaki said that he was on a work visa and so he asked about the tax code for compliance purposes. While Mr Kaki was the only one of the seven named individuals that satisfied me that he knew the difference between being an employee and being a contractor, he nonetheless thought that he was signing an employment agreement when he signed on with Solutions. Moreover, it is clear from his evidence that he understood that he paid his own tax and ACC.

[48] Diana Apal agrees that she was told she was a contractor and not an employee, agrees that she was told that she would not get holiday pay or sick pay but her evidence was very clear that she did not understand the agreement she had been given

to read and she did not disclose that to Solutions. Moreover, she had no idea about the difference between being an employee and being a contractor.

[49] Anthony Koole agreed the agreement he was offered was an independent contractor agreement but he did not remember if he was told that the effect of signing such an agreement was that he became an independent contractor rather than an employee. Indeed, his evidence really was that he was confused about the position because while he believes that he was told he had to pay his own tax and ACC and that he did not receive either holiday or sick pay, he still thought that he was an employee.

[50] Lana Palekotama had previously worked for other agencies that recruited on a similar basis to Solutions but it was abundantly plain from her evidence that she had no idea what she was signing or what its implications were.

[51] Desmond Tiotala was equally confused; while he agrees he was told he would be a contractor he had no idea what that meant.

[52] Lucie Kolencikova was clear that she spent a great deal of time with Ms Kaur (she thought about four hours) and her evidence is that she understood it was a contractor document but she did not understand what that meant. She said she needed a job and she just signed it.

[53] Before leaving the evidence of the named individuals, I should make two other points which are common to all the named individuals or all but one of them. The first point is that all of the named individuals ( save one ) are solicited witnesses, that is to say, they were approached by the Inspector and asked to give evidence about their experiences in engaging with Solutions. While it is inevitable that the Inspector will, as a practical exercise, not seek to present evidence to the Authority of each and every one of the persons allegedly affected by an issue, there are risks in the involvement of witnesses who purport to be representative of a wider body of persons in a similar position. While the Authority will always want to deal with the evidence before it and not try to extrapolate evidence it has heard into wider propositions that do not have the evidentiary infrastructure to support them, in a case such as this one, the Inspector is seeking to have the Authority make findings about the modus operandi of this employer and to do that through the evidence of these seven named individuals.

[54] What Solutions says about these seven individuals is that they are in no way representative of the persons passing through the books of Solutions and that in effect, the Inspector has approached only individuals who are most likely to give support to the Inspector's view.

[55] That observation brings me neatly to the next point I want to make which is that all of these named individuals spoke English as a second language and to a greater or lesser extent, all seemed to have genuine difficulty with comprehending what it was that they were being asked to sign although each of them actually signed the relevant agreement. While the Inspector denies it, Solutions says that the people who the Inspector has chosen to give evidence are the most supportive of the Inspector's position because of that single fact. Although a couple of the named individuals are New Zealand citizens, all speak English as a second language and all in my view would be in a more vulnerable position than Solutions was, in completing a legal agreement.

[56] I have said all I want to say about the intention of the parties. In summary, I am satisfied that Solutions' intention was apparent but that nothing usefully can be derived from the evidence for the named individuals as to their intentions in the matter. I need now to consider the way that the relationship operated in practice. It is convenient here to assess the extent to which any or all of the named individuals fell within the terms of either the control test, the integration test, or the fundamental test. In applying those tests to the present circumstances, it is important that I make it plain that I consider the issue to be how the relationship between Solutions and one or other of the named individuals operates and not how the relationship between any of the named individuals and a client or clients of Solutions should operate.

[57] Turning first to consider the control test, it seems apparent on the evidence that Solutions had virtually no control over the named individuals at all. Once those named individuals were on Solutions' books, those individuals were free to accept or decline placements to particular roles or even to revert to Solutions after being placed and seek different roles with additional clients (Mr Singh).

[58] Moreover, the individuals could negotiate the terms of any placement at least to the extent of declining to work on particular days. Solutions had no power to determine hours of work, duties, or the taking of leave, all of which were the

responsibility of the client. Ultimately, the individual could cease the engagement at any point, return to Solutions and ask for a new role, as indeed some did.

[59] I have not found any evidence at all that Solutions exercised any degree of control over the named individuals to the extent that would be necessary to evidence an employment relationship. While it is true that the named individuals needed to contact Solutions if they were ill or wished to take a day off, that fact needs to be correctly interpreted and I am satisfied that it is not evidence of control by Solutions but simply evidence of the fact that if a labour unit supplied by Solutions was not actually producing for Solutions' client on a particular day or days, then Solutions had a contractual obligation to find an alternative person for their client.

[60] At its most basic level, Solutions did not give instruction to the named individuals about how to do the job, had no disciplinary power over the named individuals, and was really no more and no less than an agent for the client, tasked with the job of finding labour and being the paymaster.

[61] It is misguided of the Inspector to, as it were, amalgamate the role of Solutions with the role of Solutions' clients as if the two entities were one and the same. They are not. They are different legal entities with different rights and obligations. The question for the Authority is whether these named individuals were under the control of Solutions (or integrated into the business of Solutions), not whether they were controlled or integral to a Solutions client.

[62] Accordingly, when the named individuals give evidence as, for example, Mr Koole and Ms Palekotama did, that they had to fill in a timesheet for Solutions' client, those requirements go to the relationship between the named individuals and the Solutions client and do not bear at all on the relationship I am required to investigate which is the relationship between Solutions and the named individuals.

[63] While it would be true to say that the named individuals were integral to the Solutions business in the sense that were there not 30,000 individuals who had passed through the Solutions business over time, Solutions would have no business, I agree with the submission made by counsel for Solutions that what was most integral to Solutions' business was not the recruitment of people like the named individuals but their outplacement because simply having the named individuals, and others like them, on Solutions' books would, without more, result in pretty rapid financial failure.

[64] Solutions made its money by, to use a colloquialism, “*clipping the ticket*” whenever it placed a person with a client. In truth, the named individuals, and people like them, were only important to Solutions when they were not integrated into Solutions’ business, that is when they had passed through the recruitment phase organised by Solutions and out the other side to one of Solutions’ clients. Then, Solutions would derive income from them and then they would have importance for Solutions’ continued existence.

[65] So in a real sense, I hold that the seven named individuals are the antithesis of being integrated into Solutions’ business as the truth is that only when they cease to be part of the business do they really contribute to it.

[66] Next I consider the fundamental test, the essence of which is that all the evidence shows that the named individuals would be in business on their own account. Whether or not it was their intention, as a matter of fact I conclude that the named individuals were in business on their own account. It may well be that that was not their intention but I think on the evidence, that is the factual reality.

[67] Finally, I have found it helpful to consider an English decision referred to in the submissions for both parties: *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217. In that decision, the Civil Division of the English Court of Appeal considered a triangular relationship not dissimilar to the present case. In the English case an individual had been recruited by a recruitment agency and then placed with a company who was responsible for cleaning a local authority facility. The individual had subsequently been dismissed by the local authority, or more accurately the contractor had been told not to provide that individual again, and a claim for unfair dismissal was raised.

[68] The Court held that the individual was not an employee of the recruitment company but left open the question whether the individual might be an employee of the third party. Lord Justice Mummery said at para. 50:

The real problem for the tribunals is the application of the basic legal requirements to the case where an employment agency is interposed between the applicant and the end-user and where the functions normally found in a single employing entity are re distributed between two entities, each of which denies that it is the employer.

[69] In concluding that the recruitment agency was not the employer Mummery LJ referred to the factors which would militate against the finding of an employment relationship:

- (a) The principal had no obligation to provide work;
- (b) The contractor was under no obligation to accept any work that was offered; and
- (c) Where the contractor accepted the work that was offered, the principal exercised no day-to-day control of the contractor; and
- (d) That control was exercised by the third party; and
- (e) The fact that the principal did some things an employer normally did (like payment for the services of the individual) did not make the principal an employer.

[70] Moreover, in the interesting third judgement in the case, Mr Justice Munby, while agreeing with the majority conclusion, begs to differ on the suggestion made by the majority that liability as employer might rest with the third party, in our terms the client of the recruitment company. His analysis postulates that the recruitment industry relies on a separation of what he calls the mutuality of obligation on the one hand, with the control of the employee by the employer on the other. So long as the remuneration of the person was in the hands of one party and the control of the person in the hands of the other party there cannot be a contract of employment between the individual and either party.

[71] Applying *Dacas*, the present matter is a case where the principal has no obligation to provide work, the individual has no obligation to accept work, if it is provided, but where the work is accepted, the principal provides no day to day control and that that control is provided by a third party and that just because the principal performs some services that we associate with an employer, like paying for labour, it does not necessarily follow that that principal is an employer.

[72] I am persuaded the logic of the decision in *Dacas* is robust; moreover applying Munby J's analysis on separation achieves the same outcome.

[73] So to summarise my conclusions in this matter, I am satisfied that the real nature of the relationship between these named individuals and Solutions is not an employment relationship. I reach this view because first, it seems to me the intention of one of the parties (Solutions) is as clear as can be that they want to have a contractual relationship with the named individuals. But, as I have been at pains to point out I have not been satisfied that the named individuals have that same clear intention. Indeed, it might be said that their intention is at best muddled.

[74] Certainly they all signed the agreement put before them but their evidence was redolent with confusion about what it was they were signing up to. That said, Solutions' evidence sought to satisfy me they had taken all reasonable steps to explain the nature of the relationship; I was not so persuaded.

[75] But I need to also consider the way the relationship operated in practice and in that regard, I have concluded that the common law tests of control, integration and the fundamental test all produce an outcome which suggests a relationship which is not one of employment.

[76] Finally, I applied the decision in *Dacas* to the factual matrix here and concluded that the factors identified by the English Court of Appeal all militated against the relationship being one of employment.

### **Determination**

[77] I have not been persuaded that the seven named individuals are employees of Solutions Personnel Limited and on that footing Mr Heyward's claim fails in its entirety.

### **Costs**

[78] Costs are reserved but if the parties are unable to reach an agreement in respect of costs, then Solutions may file and serve a memorandum seeking costs to be fixed in the Authority and the Inspector will have 14 days after receipt to file and serve his response.

James Crichton  
Chief of the Employment Relations Authority