

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 128  
5420280

BETWEEN            TONY LAMERTON  
                                 Applicant  
  
AND                    COMSOL (COMPUTER  
                                 SOLUTIONS) LIMITED  
                                 Respondent

Member of Authority:    Trish MacKinnon  
  
Representatives:        Applicant in person  
                                 Stuart Brown for the Respondent  
  
Investigation Meeting:    On the papers  
  
Submissions Received:    15 August 2013 from the Applicant  
                                 7 and 19 August 2013 from the Respondent  
  
Determination:         15 October 2013

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     Tony Lamerton claims his remuneration has been reduced from 2010 without his agreement. He seeks a number of remedies including the reinstatement of his salary from that date.

[2]     Comsol (Computer Solutions) Limited, ("Comsol" or "the company") has applied to have Mr Lamerton's application dismissed on the grounds that this is not an employment matter but a dispute between the 2 directors of the company.

[3]     The parties agreed in the course of a telephone conference of 1 August 2013 that the Authority should determine the application for dismissal on the papers as a preliminary matter.

[4] This entails an initial consideration of whether Mr Lamerton is an employee of Comsol. If he is not, the Authority has no jurisdiction to consider further his application for remedies relating to the reduction of his remuneration.

[5] Submissions have been received, respectively, from Mr Lamerton and Comsol's Managing Director, Stuart Brown. Mr Lamerton and Mr Brown set up the IT company in 1985 and are directors and shareholders of it. They are the company's only directors, and are both actively involved in the business of the company.

### **The parties' perspectives**

[6] In accordance with the provisions of s. 174 (b) of the Employment Relations Act 2000 (the Act), I will not set out all the submissions and supporting documentation provided by Mr Lamerton or Comsol. Instead, I will attempt to encapsulate each of their positions.

[7] Mr Lamerton says he is, and has been from the outset, an employee of Comsol, as well as being a director. He says the company accounts have shown a salary for each of the directors since 1985, which is disclosed in the shareholder-employee current accounts. There was an agreement between himself and Mr Brown from the time the business started that their remuneration/salaries would be equal.

[8] Mr Lamerton says this was the situation until 31 October 2010 when Mr Brown reduced his remuneration. He acknowledges that he verbally acquiesced to the reduction to keep the peace and preserve his working relationship with Mr Brown, but says he was very unhappy about it and made that known.

[9] Mr Lamerton describes his remuneration as comprising the following 2 elements:

- a. direct remuneration, which is salary, and
- b. indirect remuneration, being the interest rate charged on his overdrawn current /advances account.

[10] Mr Brown says that he and Mr Lamerton are "*working directors/shareholders*" and should not be considered as employees. He submits that they are, therefore, outside the jurisdiction of the Authority.

[11] He says the issues Mr Lamerton has raised are part of a wider and continuing dispute between the 2 directors of the company. The dispute brought by Mr Lamerton

is over how each of the directors should be remunerated in relation to the services they provide for the company. Mr Brown says this is not a dispute with Comsol and nor is it an employment matter, but one that should be resolved by the directors through commercial mediation.

[12] As evidence for this assertion, Mr Brown referred to an email from Mr Lamerton dated 1 May 2013 in which Mr Lamerton acknowledged this. The relevant part of the email is as follows:

*"My dispute is with the other director of Comsol's board and not with the company itself."*

[13] In the same email Mr Lamerton refused to give his approval or authorisation for Comsol to incur any legal costs in defending the application he had filed against it in the Authority. Mr Brown also referred to an email to the Authority dated 14 June 2013 in which Mr Lamerton stated:

*"I feel it is unnecessary for the company to be legally represented as it is the actions/conduct of Stuart Brown in the salary/remuneration/employment process which is the subject of the ERA complaint."*

[14] Mr Brown says that he and Mr Lamerton are remunerated through drawings against their current shareholder accounts. These drawings are offset by shareholder salaries, the levels of which are set by agreement between the directors. He says that, other than for a 12 month period between 2011 and 2012, PAYE is not deducted.

[15] Mr Lamerton says PAYE was deducted from his salary for the tax years ending 31 March 2011 and 2012. He agrees that, after that, shareholder-employee salaries reverted to being taxed under the provisional tax regime, as had occurred in all other years.

[16] Mr Brown notes that he and Mr Lamerton have equal authority when it comes to decisions of the board, and that he is not Mr Lamerton's employer. He says that Mr Lamerton himself has confirmed this in email correspondence. The issue raised by Mr Lamerton over interest rates on his current account is relevant to his role as a shareholder, and is not an employment issue.

[17] Any issues over the level of Mr Lamerton's shareholder salary require the agreement of both directors, and any increase in the level would have to be based on an independent assessment, in order to meet their obligations under the Companies Act 1993 for any payments to directors to be "*fair to the company*".

[18] Mr Lamerton refers to the Statement of Financial Performance of the company. He says he, and Mr Brown, earn and take annual leave and sick leave. He is paid for public holidays. In this respect they are in no different a position from other employees of the company.

[19] He has no written employment agreement because he has been with the company for more than 25 years, and written employment agreements were not a requirement when he and Mr Brown started the company. Mr Lamerton maintains that his dispute with the company is in relation to arrears of salary owing to him as an employee, and is nothing to do with his status as a director of Comsol.

[20] As the basis for his claim for "*salary/remuneration arrears*" Mr Lamerton cites a Directors' Resolution, dated 29 May 2011 and signed by himself and Mr Brown. This document approved the payment of \$120,000 to each of the directors for the coming financial year. The resolution stated that "*remuneration*" included but was not limited to "*directors fees, salaries, wages, bonuses, commissions, management fees, and the like*".

### **The Law**

[21] Section 6 of the Employment Relations Act 2000 concerns the meaning of *employee* and provides, at section 6(2), that:

*In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*

[22] In order to determine the real nature of the relationship the court or Authority:

*(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*

*(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship<sup>1</sup>.*

[23] The leading case in determining the real nature of the relationship is that of the Supreme Court judgment in *Bryson v Three Foot Six Ltd (No 2)*<sup>2</sup>. In that case the court held (at page 386) that "*all relevant matters*" included the written and oral terms of the contract between the parties and the way it operated in practice. It required the

---

<sup>1</sup> Section 6(3) Employment Relations Act 2000

<sup>2</sup> [2005] ERNZ, 372

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)*".

[24] It is possible for a director and major shareholder of a company to enter into an employment agreement with the company in a personal capacity<sup>3</sup>. As Travis J noted in *Smith v Practical Plastics Ltd*<sup>4</sup>:

*"It is common ground that a company director is not, as such, an employee of the company but is an office holder upon appointment. It is clear that a director may however enter into a service contract and thereby become an employee, and that contract may be express or implied."*

[25] In noting that the result in any particular case would depend upon its facts, the Judge said that the issue was whether "*viewed as a totality, the evidence establishes the existence of a contract of service, whether express or implied, notwithstanding that the contracting party is a director and/or shareholder of the company.*"

[26] In that case he was persuaded that the plaintiff had a contract of service with the company. Factors that were persuasive were that the directors were at arm's length and had only a business relationship, the company's articles of association did not deal with the employment of directors and the plaintiff was a minority shareholder who could not exercise any control over the company's operations.

## **Discussion**

[27] I agree that Mr Lamerton's situation with Comsol has some of the features of an employment relationship. He has highlighted a number of these, including the fact that he works full time for the company, earns a salary, has an entitlement to annual and sick leave, and is paid for public holidays.

[28] Mr Brown acknowledges that there are many aspects of Mr Lamerton's relationship with Comsol, as well as his own relationship with the company, that are those of an employment relationship.

[29] He points to the crucial differences, however, including the fact that the agreement of both himself and Mr Lamerton is required for any alteration to remuneration of either of them. Similarly the company cannot discipline either of

---

<sup>3</sup> *Lee v Lees Air Farming Ltd* [1961] NZLR 325 (PC)

<sup>4</sup> [1998] 1 ERNZ 323 (EmpC) 323 at 340

them, or review their performance, or dictate their hours of work without the two directors' agreement.

[30] I find Mr Brown's view persuasive. Mr Lamerton's situation as a director of the company in which he has equal voting rights with Mr Brown makes his claim of employment unsustainable. He is equally responsible for setting the level of his remuneration and can be neither disciplined nor dismissed without his agreement.

[31] As a director of Comsol, Mr Lamerton has refused to authorise the company to obtain legal advice so that it can respond appropriately to his claims. The basis for his refusal is that it would be "*unfair for the company to bear the cost of his (i.e. Stuart Brown's) legal representation.*"

[32] Mr Lamerton has also said, perhaps disingenuously, that he would be happy to respond to his own claims for salary arrears on behalf of the company "*if the respondent wishes.*"

[33] This points to the confusion Mr Lamerton has over Mr Brown's position in relation to that of the company they both founded, control, and in which they are majority shareholders. At one point in his submissions he has referred to "*Stuart Brown the respondent.*" Mr Brown is not the respondent and nor is he Mr Lamerton's employer.

[34] It is untenable for Mr Lamerton to be both an employee of Comsol and a person who exercises the power of veto over the company's ability to defend his employment claim against it. The elements of the relationship suggesting employment are negated by the level of control over Comsol that is exercised by Mr Lamerton.

### **Determination**

[35] Mr Lamerton is not an employee of Comsol. The Authority therefore has no jurisdiction to consider this matter further.

**Costs**

[36] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority