

and order South Pacific to:

B. return the vehicle

C. (pay him) unpaid wages of \$45,000; and

D. (pay him) \$80,000 for pain, suffering and humiliation; and

E. Interest; and

F. Costs; and

G. \$25,000 for trespass arising out of the employment.

[2] On 3 November 2009 South Pacific filed a statement in reply endorsed **Appearance Under Protest to Jurisdiction**. In this statement South Pacific said that Mr Liu had never been employee of South Pacific and at all times was a person in business on his own account. South Pacific submits, therefore, that the Authority has no jurisdiction to consider the matters raised by Mr Liu.

[3] The parties were directed to attend mediation but unfortunately were unable to settle their differences. After some discussion it was agreed that the Authority should, as a preliminary issue, determine whether Mr Liu was an employee of South Pacific. If he was not then, as submitted by South Pacific, the Authority has no jurisdiction to consider the matters he has raised.

The law

[4] The Employment Relations Act, (the Act) at section 6. says that:

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

(3) For the purposes of subsection (2), the Court or the 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 the relationship.

[5] Over the past few years there have been a number of cases in which the courts have interpreted these provisions and in particular have considered what *relevant matters* should be taken into account when considering *the real nature of the relationship*. The leading case in this regard is *Bryson v. Three foot Six Ltd*¹ to which both Counsel have referred in their submissions. In *Bryson* the Supreme Court confirmed that *all relevant matters* included:

- *the written and oral terms of the contract between the parties, including any divergence from those terms that is apparent in practice;*
- *the behaviour of the parties in implementing the contract;*
- *how the relationship operated in practice;*
- *features of control and integration;*
- *the fundamental test -- whether the person is effectively working in business on their own account; and*
- *industry practice.*

[6] More recently the Employment Court in *Chief of the Defence Force v. Fiona Ross-Taylor* [2010] NZ EMPC 22, made some significant comments regarding *the real nature of the relationship*. In particular the Court said:

One is reminded of the opening paragraph of Lawton LJ's judgment in Massey v Crown Life Insurance², when he stated:

In the administration of justice the union of fairness, common sense and the law is a highly desirable objective. If the law allows a man to claim that he is a self-employed person in order to obtain tax advantages for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then in my judgment the union between fairness, common sense and the law is strained almost to breaking point.

[29] A similar warning, also sourced from *Massey*, is to be found in the judgment of Sir Gordon Bisson J. in Telecom South v Post Office Union³

I am satisfied that the arrangement reached between the parties as to the manner of payment of remuneration in this case did not change the fundamental relationship of a contract of service. However, I think it is necessary to sound a word of warning to those who seek to introduce taxation advantages into the terms of their employment that they may have to abide by the consequences that they be classed as self-employed and not as a worker for the purposes of section 216(2)

¹ [2005] ERNZ 372(SC)

² [1978] 2 All ER 576 at 581

³ [1992] 1 ERNZ 711 at 725:

of the Labour Relations Act 1987.. In Massey v Crown Life Insurance Company [1978] 2 All ER 576 Lord Denning MR said at page 581:

In the present case there is a perfectly genuine agreement entered into at the instance of Mr Massey on the footing that he is "self-employed". He gets the benefit of it by avoiding tax deductions and getting his pension contributions returned. I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as being "self-employed", he must lie on it. He is not under a contract of service.

[30] It is a very serious matter for the Authority or the Court to find, notwithstanding the clear intention of highly capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually entered into, that, after those arrangements have been terminated, the real nature of the relationship was completely different.

Mr Liu's arrangements with South Pacific

[7] In October 2008 the parties entered into an "arrangement". The nature of this arrangement is disputed. The Directors of South Pacific say they agreed that they would pay some of the expenses of Mr Liu's up coming trip to China on the understanding that Mr Liu would start making contacts for South Pacific in China. They also say that they agreed to pay Mr Liu a retain a retainer of \$800 per week +10% commissions on the profits for any product that he managed to sell in China, payable when South Pacific was paid by the customer. One of the directors of South Pacific Mr Christopher Vincent, says that he:

Agreed with Mr Liu that he would work independently and be free to continue with any other business. Although we made it clear that we did not want him competing with South Pacific and using its suppliers to sell product into China on his own account, he was free to continue representing other unrelated products and selling them into China.

[8] Mr Liu's recollection of this arrangement is that he was to be on a three-month trial and, dependent on his success in obtaining Chinese contracts, a decision on securing his employment would be made after that three months. He says the three-month period began in mid-September 2008 and that he was be paid \$800 per week, that he would pay his own tax and if he was unsuccessful he would not be employed after the three-month trial period. He says he was never provided with an employment contract but it was agreed that he would be paid \$800 per week gross plus commission on sales. In his affidavit he goes on to say:

As part of the agreement with South Pacific, I paid my own tax as I was often working from home and this was a more convenient arrangement for me. I therefore invoiced South Pacific.

[9] The first few invoices submitted by Mr Liu were in his own name. Subsequent invoices were in the name of “Persina Developments Ltd” or (later) “Glory International Ltd”. All of these invoices included a GST component and all included the same GST number.

[10] It seems that the only sale Mr Liu made on behalf of South Pacific was to a Chinese baby furniture manufacturer, Goodbaby.

[11] In order to supply the necessary product to Goodbaby some of the production was carried out by another manufacturer, Kiwipallet. Mr Liu says that he spent a good deal of time overseeing this production to ensure the quality was at an acceptable level. The nature of Mr Liu’s involvement in supervising the manufacturing process is yet another dispute between the parties which I will deal with later in this determination.

[12] In March 2009 Mr Liu queried the calculation of commissions owing to him and, on 30 March 2009 advised South Pacific that he would give them *2 weeks notice*. Following this "resignation" Mr Liu subsequently met with Mr Christopher Vincent to renegotiated his arrangement with South Pacific. The revised arrangement effective from 1 April 2009, included:

- a discretionary bonus of \$1500 for March 2009.
- Mr Liu to receive a revised weekly payment for April, May and June of \$1500.
- An amended commission's arrangement.
- Mr Liu agreed that he would not sell product for other companies in New Zealand or deal in timber products with companies that had been contacted while working for South Pacific, for a period of 24 months after leaving South Pacific.

[13] At a meeting on 9 April 2009 Mr Liu and Mr Vincent made an arrangement regarding the purchase of a Hummer vehicle for Mr Liu. The hand written note of that agreement, signed by Mr Liu sets out that:

- South Pacific would assist Mr Liu to purchase a new vehicle and that Mr Liu would be fully liable for all aspects of the purchase and ongoing viability of the vehicle.
- Mr Liu would sell his boat (to assist with the purchase price of the vehicle)
- Mr Liu agreed to a *full restraint of trade relating to dealing in timber for a two-year period from when he leaves South Pacific.*
- Mr Liu would trade in his current vehicle for \$4000 to offset the price of the new vehicle.
- South Pacific would pay Mr Liu a \$5000 bonus to help offset the purchase price.
- Mr Liu would repay the cost of the new vehicle to South Pacific according to pay payment schedule to be provided.

[14] According to the Company directors, other than handing over his previous vehicle, Mr Liu did not fulfil any of the other conditions in respect to the Hummer and refused to agree to a repayment schedule. In accordance with the new agreement made in March 2009, payments of retainer to Mr Liu were ceased at the end of June 2009.

[15] Significantly on 10 July 2009 Mr Liu wrote to South Pacific proposing a new working contract the draft of which stated that *the professional services provided by (Mr Liu) (Contract Base only) were to be marketing, sales, production organization, management of production.* Under the heading **Tax** the draft agreement proposes that *(Mr Liu) will contract with (South Pacific) as sole trader or company base. All the tax and GST is responsible by (Mr Liu). (Mr Liu) will provide a copy of the receipt of the additional items as accountant required.*

[16] On 14 July Mr Liu advised that he was terminating his services with South Pacific. South Pacific say that they, about that time, discovered that Mr Liu had been, or had attempted, to sell timber products into China, including selling products directly to Goodbaby, on his own behalf.

[17] While there are a number of factual disputes between the parties, including the ownership of the Hummer and whether or not Mr Liu was competing with South Pacific, it is not necessary to resolve these disputes at this point.

The respective arguments

Why Mr Liu says he was an employee

[18] Mr Liu says that a number of factors point to him being an employee. He says that he paid his own tax only because that was more convenient and that that does not signify that he was not an employee. He points to the variation of his "employment" agreement in March/April 2009 which he suggests indicated an employment arrangement. He also points to:

- The company provided him with a business card which referred to him as *General Manager of International Division*.
- He was provided with a company e-mail address which was printed on his business card.
- The company purchased the Hummer for his use
- South Pacific provided and paid the cost of his cell phone.
- He had an office at the South Pacific head office.
- At South Pacific's request he undertook the role overseeing the production of product for Goodbaby and spent long hours at the factory during that time.
- He was required to manage other employees of South Pacific -- specifically an employee named Terry.
- He had to report to the director's directly *several times per day*.

[19] For Mr Liu Mr Hooker submits that Mr Liu was well integrated into South Pacific's business, South Pacific exercised control over him and publicly represented him as an employee. He argues that the evidence suggests that Mr Liu received no other income while employed by South Pacific and that while there were issues regarding taxes Mr Liu was not in business on his own account. Mr Hooker also argues that even if an employment relationship did not exist at the commencement of Mr Liu's engagement an employment relationship evolved over time.

South Pacific's response

[20] For South Pacific Ms Sunderland points to the new agreement proposed by Mr Liu in July 2009 and suggests that this is clear evidence that the relationship between the parties had always been that of a contract for services. She goes on to deal specifically with the points raised by Mr Liu:

- The business card provided to Mr Liu was at his request and to reinforce his status when dealing with customers in China. The wording on the card was created by Mr Liu and the card did not come into existence until approximately 7 months after he had begun representing South Pacific and then because of Mr Liu's impending trip to China. South Pacific has no international division and a general manager position never existed. The title was used specifically for the purpose of window dressing when visiting prospective Chinese customers in China.
- The e-mail address on the business card is not consistent with the e-mail addresses used by South Pacific and in fact the applicant treated all e-mail communications as his own. Despite the company not allowing employees to use their own personal e-mail addresses for company business Mr Liu continued to use his wife's e-mail address for all communications. South Pacific was unable to assert any authority over Mr Liu by insisting that he used their e-mail address. Ms Sunderland also points out that in addition to using his wife's e-mail address, on no occasion, in his e-mail communications, did Mr Liu use the title *General Manager of International Division*. She suggests *that this is evidence that the title on the business card was window dressing for the impending trip to China and nothing more.*
- The Company assisted Mr Liu to purchase the Hummer because he could not raise the finance and he indicated that it would help to impress Chinese clients when they visited New Zealand.
- South Pacific did not provide Mr Liu's cell phone they simply reimbursed him for the business expense involved.
- A room was made available for Mr Liu's use but this was not his "office" and he used it only occasionally.
- Mr Liu was not required to spend long hours at Kiwipallet and his involvement was only for a short time at the commencement of production

because he was familiar with the quality required by Goodbaby. South Pacific did not require him to work any specific hours.

- The company did not require Mr Liu to account for his hours but, after several months, did request that he provide reports on his sales activities.
- Mr Liu was not required to manage other employees. He was requested to assist “Terry” but not to manage him. (Terry is based in China, not New Zealand.).

Was Mr Liu an employee?

[21] I turn now to *the real nature of the relationship between Mr Liu and South Pacific Timber*. In assessing that relationship I must be guided by the provisions of section 6 of the Act and the *relevant matters* set out by the Supreme Court in *Bryson*.

The written and oral terms of the contract between the parties

[22] There was never a formal written contract between the parties. In March 2009 a revised arrangement was agreed and part of this was recorded in an e-mail from the company to Mr Liu. I am not persuaded by Mr Liu’s suggestion that he had understood that he was an employee and that the first three months of that employment was some form of trial period. It seems from the evidence that Mr Liu did not raise this proposition until after his relationship with South Pacific had been terminated. Certainly there is a direct conflict between Mr Liu’s assertion that the oral terms agreed with South Pacific were employment terms. On balance I am satisfied that, at the commencement of the relationship both parties were of the understanding that Mr Liu was on a contract for services.

[23] Mr Hooker suggests that the relationship between the parties developed over time to the point that, when he began supervising the production at Kiwipallet, Mr Liu was for all intents and purposes an employee. The only evidence supporting this contention is from Mr Liu who contends that he was required to undertake the supervision and worked extremely long hours in doing so. South Pacific reject this suggestion and say that Mr Liu was not required to supervise the production and was certainly not required to spend long hours doing so.

How did the parties implement the contract and how did the relationship operate in practice?

[24] Despite Mr Liu's argument that he was treated, and behaved as an employee the evidence would suggest otherwise. All of the transactions between the parties suggest that the relationship was that between contractor and principal. South Pacific required only that Mr Liu use his specialist knowledge of the Chinese market to act as their sales agent. For this service they would paid a retainer and (disputed) commission and reimburse him for expenses incurred.

Control and integration

[25] South Pacific exerted very little control over how Mr Liu went about representing them. In fact it could be said that they were extremely trusting of his ability to deliver clients and were prepared to advance substantial sums of money in anticipation of his securing business in China on their behalf. After several months they did request that Mr Liu provide regular reports of his sales activities. However they did not direct in advance what those activities should be. The only limitation on Mr Liu's activities was that he not compete with South Pacific.

[26] It cannot be said that Mr Liu was integrated into South Pacific's business. He was not on the payroll, he did not use the company's e-mail address and he was not part of the management structure. His activities in relation to the company were discussed and agreed with the directors and he was free to undertake whatever business activities he saw fit to achieve sales on behalf of South Pacific.

Is there a prevailing industry practice?

[27] Neither party provided me with any evidence as to any particular industry practice and I am forced to the conclusion that no standard practice exists.

The fundamental test - was Mr Liu in business on his own account?

[28] Having considered all of the evidence I have reached the clear conclusion that Mr Liu was in business on his own account. When Mr Liu approached South Pacific with a proposal that he seek customers for them in China he did so on the understanding that he would be representing several other companies in a similar way. All of the subsequent activities undertaken by Mr Liu on behalf of South Pacific, both in China and on his return to New Zealand stemmed from this initial proposal. Certainly there were times when Mr Liu spent much if not all of his time and activities associated with South Pacific but these activities were no more than pursuing his own business interests. It was in his interests that the contract with Goodbaby was successful and profitable. If it was successful it was likely to generate further sales; if it was profitable he would receive higher commission payments.

Determination

[29] Mr Liu approached South Pacific with a business proposition. It was agreed that he would act as their agent in making sales into China for which he would receive a retainer and commission and be reimbursed for his expenses. Other than by way of direct competition he was free to undertake other business activities on his own behalf. As quoted in *Ross-Taylor* (supra) if I were to find that Mr Liu was an employee *the union between fairness, common sense and the law (would be) strained almost to breaking point. Mr Liu was not an employee.* He was a contractor, in business on his own account, providing services to South Pacific.

[30] **As I have found that Mr Liu was not an employee it follows that it is not within the Authority's jurisdiction to consider his various claims against South Pacific Timber (1990) Ltd.**

Costs

[31] Costs are reserved and the parties are requested to attempt to resolve the issue between themselves in the first instance. If they are unable to do so South Pacific may file and serve submissions in respect to costs within 28 days of the date of this determination. Mr Liu will then have 14 days in which to file and serve a response. I will not accept submissions in respect to costs outside of this timeframe except with leave.

James Wilson

Member of the Employment Relations Authority