IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 33
5515024

	BETWEEN	MARK RANSLEY First Applicant
	AND	JOSEPHINE RANSLEY Second Applicant
	AND	CIRCUIT SOLUTIONS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Barbara Buckett, Counsel for Applicant Graham Mowbray, Counsel for Respondent
Investigation Meeting:	28 May 2015 and 19 May 2016 at Wellington
Submissions Received:	At the investigation meeting
Determination:	4 May 2017

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicants, Mark Ransley and Josephine Ransley, each claim they were unjustifiably dismissed by the respondent, Circuit Solutions Limited (CSL). Mr Ransley also seeks the repayment of loans he made to CSL while a Director.

[2] CSL denies the claim on the grounds neither applicant was an employee. It claims Mr Ransley was a director and shareholder and Mrs Ransley a tax avoidance scheme orchestrated by her husband.

[3] It was decided the issue of whether or not the Ransley's were employees be determined as a preliminary issue.

Background

[4] CSL, as its name implies, is an electrical business. It was formed in January 2012 with two principles, Mr Ransley and Clive Morgon, who were both directors and shareholders. In its early days the firm operated from a room at the back of the Ransley's home.

[5] About this arrangement CSL says the relationship was never one of employer and employee. It says Mr Ransley received his share of the earnings via various means including the receipt of payments owing to him as a director; the issuing of invoices from another company he owned, Big Red Electrical Services Limited (Big Red) and by having payments directed to Mrs Ransley. It goes on to say:

> *These arrangements were made at the Applicants direction as a director of the Respondent and were for the Applicant's personal tax and income benefit. Despite these arrangements, Josephine Ransley never worked for the Respondent and the payments made to Clive Morgon (the other director and 50% shareholder) were exactly equal to the payments made to the Applicant, his company and his wife.*

[6] In July 2013 the two made a decision to open a Christchurch branch in order to try and source rebuild work. Initially Mr Ransley went alone. The initial accommodation, the rent for which was paid by CSL, was not ideal and in January 2014 a flat was rented. Mrs Ransley joined her husband in March.

[7] Around that time an issue arose one of Big Red's clients. It claimed money was owed and advised it would not deal with CSL while Mr Ransley remained a director. About the solution Mr Ransley says:

> *In light of this Clive came up with a plan. The intention was that I would remove myself as a director of CSL and become an employee moving back as a Director once the heat was off and the dust settled.*[1]

[8] Mr Ransley goes on to say that notwithstanding his new status as an employee he was assured he would still have a say in how the company was managed. He says that did not occur and Mr Morgon took total control following which the relationship between the two deteriorated.

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[1] Brief of evidence at [33]

[9] On 24 April 2014 Mr Ransley's shares passed to Mr Morgan and he ceased to be a director. CSL says that at this time an interim arrangement was agreed under which Mr Ransley would continue to work for it … *on condition that there remained sufficient work for him to perform and that he produced enough income*.[2]

[10] Unfortunately Mr Morgon concluded the conditions under which Mr Ransley would remain were not being met and on 29 July 2014 he wrote to Mr Ransley advising:

> *As you are aware we have been operating under an interim arrangement since your resignation as a director of the Company. I consider that this interim arrangement is no longer working for the company and we need to make changes ungently.*
> *The operation in Christchurch is no longer profitable (and hasn't been for some time, as we discussed previously) and the Company cannot sustain ongoing losses. Therefore, based on the advice from the Company accountant and lawyer, I have made eth decision to immediately close the Christchurch operation effective today.*

[11] The letter goes on to advise arrangements would be made for the return of company property and CSL would no longer pay various costs such as rent and fuel. It ends with advice Mr Ransley not contact Mr Morgon but communicate through CSLs lawyer and that he not enter company premises.

Determination

[12] As already said the issue to be determined is the preliminary one of whether or not the Ransley's were employees of CSL.

[13] Section 6 of the Employment Relations Act 2000 provides the meaning of employee. The material provisions state:

> *(1) In this Act, unless the context otherwise requires, **employee** —*
> *(a) means any person of any age employed by an employer to do work for hire or reward under a contract of service; …*
>
> *(2) 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.*
>
> *(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 a person; and*

[2] Statement in Reply at 2

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

[14] In *Bryson v Three Foot Six Limited (No.2)*[3] the Supreme Court stated, amongst other things, what *all relevant matters*[4] means. It said:

> *"All relevant matters" certainly include 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 has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly require 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) which were important determinants of the relationship at common law…*

[15] In other words I am required to consider the following in order to determine the nature of the relationship:

a. The intention of the parties;

b. Was there anything in writing to indicate the terms of the relationship between the parties;

c. How the relationship operated in practice;

d. Features of integration and control in the relationship; and

e. Whether the Ransley were effectively working on their own account.

[16] Considering Mr Ransley first. On CSL's behalf Mr Mowbray submitted I need to consider his status both before and after his cessation as a director. I disagree. Mr Ransley's substantive claim is that he was unjustifiably dismissed. That occurred on 29 July 2014 and it is therefore only his status at that point which needs to be determined. If he was then an employee the claim may proceed and if not the Authority does not have the jurisdiction to consider it.

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[3] [2005] ERNZ 372
[4] Section 6(3)(a) of the Employment Relation Act 2000

[17] In the period leading up to 29 July 2014 Mr Ransley was no longer a director but continued to work for CSL. The question is in what capacity and I conclude the answer is quite clearly that of employee.

[18] In reaching this conclusion I note Mr Ransley's evidence concerning intent ([7] and [8] above) which remained unchanged under questioning. There is then Mr Morgon's evidence. For example he says that he was *blown away* by the extent of Mr Ransley's debts and considered it … *in Mark's interests to be seen to earn a wage rather than shareholder salary if he was made bankrupt.*[5] Mr Morgon also says *After the April meeting I started making changes in CSL to make sure that if anyone looked, Mark would be seen as an employee.*[6] Mr Morgon's answers when questioned were similar.

[19] The intent is clear as is the limited documentary evidence concerning the nature of the relationship. On 4 July Mr Morgon sent an e-mail in which he gives Mr Ransley *... a reminder that you are no longer a director, but an employee of CSL – at your request.* There was also talk of CSL preparing an employment agreement for Mr Ransley though this was never completed. Mr Ransley's last pay slip [period ending 27 July 2014] notes he was paid a salary, paid PAYE and took annual leave. These, and especially annual leave, are terms that apply to an employee.

[20] There is also evidence Mr Morgon was controlling Mr Ransley's work and the resources available for their performance. There is also a graphic illustration of the new relationship via the fact it was Mr Morgon's decision to cease the Christchurch arrangement and not Mr Ranlsey's. Finally I note there is no evidence Mr Ransley continued to conduct business on his own account via Big Red, which was removed from the company's register in 2013, or any other vehicle.

[21] The final issue is Mr Morgon's evidence Mr Ransley seemed to have regrets and sought to return as a director and shareholder. There is e-mail traffic which supports that with Mr Ransley going so far as to take the statement he was an employee as an affront. That said this does not change my conclusion as nothing occurred which overturned the April arrangement Mr Ransley become an employee. That employment was intended is clear and other elements of the test support a conclusion that is what occurred. I find Mr Ransley was employed by CSL.

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[5] Brief of evidence at [39]
[6] Brief of evidence at [43]

[22] Turning now to Mrs Ransley. Here I reach a different conclusion.

[23] Mrs Ransley claims she was employed as CSL's cleaner[7] while Mr Ransley describes her as a *Girl Friday*. For these roles she initially received a salary of $100,000 though this later reduced to $80,000 and with effect 9 March 2014 Mr Morgon ceased paying her. He did so on the advice of his accountant who asserts she was *…an employee of convenience and was simply being used as a way of reducing Mark's tax liability.*[8]

[24] When questioned about what she actually did Mrs Ransley's answers were less than satisfactory. These were uncertain and, at times, contradictory. Her initial position was she had no idea what hours she might have worked though when pushed she said she may have worked an hour a day with a bit more in weekends. When asked about how she got the cleaners role she said Mr Morgon had given her the role through her husband. When asked to elaborate she said she had never actually been told she was a cleaner but wanted to keep her home clean and did so as *a duty to my husband*.

[25] When asked about the payments and how this warranted $100,000 a year she said didn't know. She added she wasn't interested and left such things to her husband. When asked about her reaction to the reduction to $80,000 she said she just did as she was told and had no say in what her husband directed.

[26] Further questioning elicited suggestions she also performed occasional deliveries, some undefined paperwork and some stocktaking but again no detail could be provided.

[27] Mrs Ransley acknowledged the situation was a continuation of arrangements she and Mr Ransley had used with Big Red. Mr Ransley, when asked whether Mrs Ransley's employment was *a complete sham*, did not deny it but said it was a sham both he and Mr Morgon had created.

[28] At its simplest employment is an exchange of labour for remuneration. While Mrs Ransley was clearly remunerated it is difficult to conclude she was employed when there is no tangible evidence she fulfilled her part of the bargain and provided labour. I also note she could no longer have completed the work she is trying to say

[7] Statement of Problem at 2.7
[8] Brief of evidence at [7]

she performed after she shifted to Christchurch. I conclude Mrs Ransley was not an employee of CSL's.

[29] Even if I am wrong to conclude Mrs Ransley was not an employee I note her evidence that at the beginning of March Mr Morgon made it clear he did not want her and the arrangement was going to cease. He then acted on that and using Mrs Ransley word, she *complied*. If therefore she had been employed surely she was dismissed at this point. No action was taken in respect to the grievance till 5 August 2014 and even then there may be an argument that letter does not actually raise a grievance. The grievance, if there can be one, was not raised in the 90 days prescribed by s 114(1) and there is no application it be allowed beyond that time under s 114(3). In other words, and if Mrs Ransley was an employee, there appears to be no live cause of action in any event.

Conclusion and Costs

[30] For the above reasons I conclude

a. The first applicant, Mark Ransley, was an employee of Circuit Solutions Limited and may therefore proceed with his grievance claim;

b. The second applicant, Josephine Ransley, was not an employee of Circuit Solutions Limited and therefore the Authority does not have jurisdiction to hear her claim.

[31] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority