

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 73/07
5051226**

BETWEEN

PHILLIP SALEH
Applicant

AND

ENCOS GLOBAL SYSTEMS
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: David Beck, Advocate for the Applicant
Chris Hogg, for the Respondent

Investigation Meeting: Christchurch, 13 March 2007

Determination: 4 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Phillip Saleh says that he was unjustifiably dismissed by Encos Global Systems Limited. He also says he has an arrears claim and a breach of contract action against the company. Encos says that Mr Saleh was never engaged as an employee but was an independent contractor so he cannot pursue any of his complaints in the Employment Relations Authority.

[2] To resolve the problem it is necessary to review the formation of the relationship between Mr Saleh and Encos and how it developed over time in order to assess its real nature. First though, it will be helpful to give some background about the people involved.

The people involved

[3] Mr Saleh specialises in web media, graphics, GUI and software development. He was the sole shareholder and director in a company called Arabesque Limited incorporated in January 1999 but struck off the register of companies on 12 September 2006. Mr Saleh says that Arabesque was set up in 1999 and has completed projects for many companies such as Microsoft, Panasonic, Ihug, Heritage Hotels, Ray White, Massey University and many other major companies.

[4] Encos Global Systems Limited is a software development company that provides electronic solutions to record, manage and report on data. One of its developments is called Chameleon which provides disaster management communications infrastructure in situations such as an influenza pandemic. Greg Evans is a director of Encos and its founder. Chris Hogg is the chief executive officer and joined in March 2006. He is based in Auckland. Giles Beal is the general manager. Most staff are based at the company's offices in Christchurch.

The relationship in practice

[5] Around November 2005, Mr Evans engaged Mr Saleh to assist with various aspects of the development of Chameleon. At the time, Mr Saleh lived in Devonport. He had to engage several other people at different times to assist him to complete the required work. Arabesque invoiced Encos for Mr Saleh's time and for the fees payable to these other people. There are five invoices dated between 8 January 2006 and 16 March 2006. Mr Saleh is critical of Encos for not paying promptly but that is not relevant for present purposes. It is accepted that the relationship in respect of this work was never that of employment.

[6] Mr Saleh says that in February 2006 Mr Evans offered him a full time job working on the Chameleon development for which Mr Saleh would have to base himself in Port Levy. Initially a salary of \$70,000.00 pa was offered but that increased to \$120,000.00 pa plus the costs of relocating Mr Saleh and his family. Mr Saleh told Mr Evans that he was not comfortable accepting the offer until the earlier invoices had been paid and some assurances had been given about future payments. Mr Saleh's evidence is that Mr Evans told him to invoice Giles Beal every fortnight and he would be paid. Mr Saleh then agreed to the arrangements and commenced invoicing Encos in the name of Arabesque every fortnight at the rate of

\$4,615.40 plus GST. Ms Saleh describes these as invoices for his salary. The invoices show 14 March 2006 as the commencement date. The rate claimed (and paid) is \$120,000.00 pa plus GST.

[7] Mr Saleh says that they moved to Port Levy on 21 March 2006 and he started working at Encos Monday to Friday from 9.00 am to 5.00pm each week. Mr Saleh's partner (April Cureton) provided a statement in which she says that they moved to Port Levy on 21 April 2006, that Mr Saleh worked mostly from home but was required to commute into Christchurch two or three days per week to work at the company offices there. I prefer Ms Cureton's recollection as to when they moved to Port Levy. It also fits with Mr Hogg's evidence (which I accept) that he first met Mr Saleh at the flat in Devonport on 3 or 4 April 2006 and first met Ms Cureton in Auckland on 16 April 2006. I also accept Ms Cureton's information as to where Mr Saleh performed his work.

[8] Mr Saleh says that on about his second or third day at work Mr Hogg called him in to his office for a meeting with himself and Mr Beal. The timing cannot be right if an employment relationship arose when the fortnightly invoicing commenced in March 2006. Mr Saleh was still in Auckland at that point. Mr Saleh goes on to say that Mr Hogg said he was not happy with Mr Saleh being offered a fixed salary or indeed a job at Encos. He says that Mr Hogg was somewhat abusive but said he would honour Mr Evans' offer nonetheless. Mr Saleh was told that he was not to do any work for anyone else if he was working at Encos.

[9] Mr Hogg's evidence differs somewhat. He says that the company had received advice that Mr Saleh should be classified as an employee because of the regular billing. The advice caused Mr Beal to contact Mr Saleh by email on 16 May 2006. The email reads:

Phil

Can you be in here for 9am tomorrow please. Chris has asked that you be here 5 days a week in the future. We've also had advice from our lawyers, whilst getting a contract drawn up for you, that the nature of the relationship between you and Encos is that of an employee, and that as you are working full time for us, then you'll need to sign an employment contract. Maybe you should have a chat to your accountant and find out what the score is from your end.

I think that it would be a good idea for you me Chris and Greg to sit down tomorrow and get this sorted out. We'll also get the hardware issues resolved at the same time.

Give me a call if you need to discuss anything beforehand

Cheers

Giles.

[10] Mr Saleh sent a reply by email to Mr Hogg, copying it to Mr Beal and Mr Evans. The 16 May 2006 reply reads:

Hi Chris

I am a little concerned that it seems you wish to renege on our agreement made with yourself and Giles at our meeting at encos in regards to my working at encos?

This email below was not what we agreed, so I am some what confused to the reasoning behind this email?

We were quite clear about my contract with encos at the meeting, you gave your word of honor and I gave you mine.

It's important to me that I can trust the people I work with most of all the CEO. So I am a little confused about this email. I hope you can clarify this for me.

Chris, I and my equipment are contracted to encos. I am a professional. I do professional work, I meet my deadlines and more. As far as I am aware everyone at encos is happy with my work. If there is some problem with my work no one at encos has ever mentioned it.

It is very important to me that I do professional work to a high standard. This has not been possible at encos for a number of reasons mostly unsuitable equipment. I also work long hours, often into the early hours in the morning, again this is not possible at encos.

I have the best equipment for the job as you have seen for yourself in Devonport, therefore any equipment encos were to offer would be a huge downgrade and a huge loss of productivity for me and encos. It's not possible to service a Ferrari with a monkey wrench, as hard as you may try.

I understand the need for meetings face to face and propose I come and attend these, scheduled but my main productivity would be best utilised with my gear, art libraries and 7 years of reference materials which are at my home. The money spent on trying to replicate my gear could be spent on a lap top for the time I am in the office attending meetings etc.

The contractor issue I also don't understand. I was a contractor to encos. I have a company called Arabesque LTD that has traded since 1999, with a long history of projects, work and client base. I do not understand the issue here? I have been turning down work as I agreed I would dedicate all my time to encos as agreed. You buy my time, my experience and all my resources.

This is the relationship I understood we agreed to.

Look forward to discussing these issues at our meeting tomorrow.

Regards

Phil.

[11] Several points arise from Mr Saleh's email. First, it refers to an earlier meeting which I take to be the meeting referred to in Mr Saleh's evidence above. However, the references in the email do not support the tone of Mr Saleh's evidence. These references suggest that the earlier meeting was without rancour so I reject Mr Saleh's evidence that Mr Hogg was abusive during that earlier meeting. Secondly, throughout the email, Mr Saleh makes it clear that the relationship with Encos is through his company Arabesque Limited, not employment. It is clear that Mr Saleh is not willing to change the nature of the relationship, which from his perspective was never employment. He characterises any suggestion to the contrary as a breach of trust. The third point to note is that Mr Saleh sent his reply at 11.13 pm using his company's email address, consistent with the assertions in the email about when and how he preferred to work.

[12] At some point after this email exchange, Mr Saleh told Mr Beal that he had spoken to his accountant who assured him that there was enough income from other sources which with working from home and using his own gear, satisfied any requirements for being a contractor. He also told Mr Beal that he was happy to sign a contractor agreement. These statements by Mr Saleh are recorded in an email from Mr Beal to Mr Hogg and Mr Evans dated 25 May 2006. It supports Mr Hogg's evidence that Mr Saleh told them that his accountant was satisfied that he (Mr Saleh or Arabesque) had enough other work to satisfy the necessary rules regarding his contractor status. There is another email dated 11 August 2006 in which Mr Hogg also refers to Mr Saleh's assurances:

If you recall we had a serious discussion about you really being a full time employee and you were adamant that you had enough other work that your accountant could justify you remaining a contractor.

From this, I find that Mr Saleh did give the assurance mentioned by Mr Hogg to the effect that he was operating his own business. I also accept Mr Hogg's evidence that Mr Saleh was never asked to commit all his time solely to Encos. As Mr Hogg points out, the invoice number indicates that Arabesque invoiced others apart from Encos

during the period from March 2006 until the relationship ended. I also find that Mr Saleh continued to work at home utilising his own equipment and resources although he also attended at the company premises from time to time.

[13] On 31 May 2006 Mr Beal sent Mr Saleh an email with the subject line *Independent Contract* which included a template of a *contractor's agreement*. He noted that it needed to be drafted in the name of Arabesque Ltd and asked Mr Saleh to look through it and let him know if there was anything he was not happy with. Mr Saleh emailed the response *k* which is a text messaging shortcut for *okay*. However, nothing further happened about this. Mr Saleh's evidence is that his accountant told him that it was to his advantage if things got messy not to have a written contract. I infer that this is why Mr Saleh did nothing further about recording the arrangement. He also says that prior to his involvement with Encos he did things with a handshake rather than written contracts. It appears that Encos did not follow up on Mr Saleh's lack of response.

[14] Mr Saleh's evidence is that Encos provided him with business cards describing him as *Creative Director*. I accept Mr Hogg's evidence that Mr Saleh arranged the printing of these cards with that title but without authorisation from Encos. It is a title that Mr Saleh had given himself in other circumstances before the relationship with Encos. Encos provided Mr Saleh with a security pass and car park card for access to the Christchurch offices. Office equipment such as a desk and computer was provided and Mr Saleh had an Encos email address and remote access to the Encos computer network. A Sim card was also provided. Phone and internet connections were established at Port Levy in the name of Mr Saleh or Ms Cureton but costs were reimbursed by Encos on Arabesque's invoice. This and some other evidence indicates that there was a measure of integration of Mr Saleh into the business operated by Encos.

[15] Mr Saleh worked on Chameleon and other aspects of the company's business as required. Encos set the outcomes or objectives and Mr Saleh was able to determine how best to achieve these outcomes. As indicated above he enjoyed a significant degree of flexibility over when and how he performed his work.

The end of the relationship

[16] On or about 3 August 2006 Mr Hogg and Mr Evans called a meeting to tell staff that wages would be paid late. This also affected the fortnightly payment to Mr Saleh which was several days late. On or about 9 August there was a discussion between Mr Hogg, Mr Evans, Mr Beal and Mr Saleh to the effect that Encos could no longer sustain Mr Saleh's contract at \$120,000 pa. At this point a redundancy process with some staff had already been implemented. The discussion canvassed some ideas but nothing was resolved. Next, on 11 August Mr Saleh sent an email to Mr Hogg complaining about Encos not paying Mr Davis-Goff, one of the people who Mr Saleh had engaged before March 2006 and who had been more recently contracted by Encos (via Mr Saleh) to do some more work. In the email, Mr Saleh questioned Mr Hogg's integrity. Mr Hogg's response similarly questioned Mr Saleh's trustworthiness and invited Mr Saleh to call. The extract set out above comes from this email.

[17] On 14 and 15 August there were emails between Mr Saleh and Mr Beal during which Mr Saleh asked for a week off starting Thursday 17 August 2006 and Mr Beal consented. Mr Hogg, having not had any contact from Mr Saleh since the testy email exchange of 11 August 2006, sent an email to Mr Saleh on Friday 18 August 2006. Soon afterwards, Mr Saleh phoned Mr Hogg. That too was a testy exchange. Next, Mr Hogg sent an email advising that their relationship was terminated *effective today*.

[18] There are some subsequent exchanges and events which have aggravated the tensions between the parties but they are irrelevant for present purposes.

The real nature of the relationship

[19] The Employment Relations Act 2000 requires the Authority to determine the real nature of the relationship between Mr Saleh and Encos, having considered all relevant matters including any matters indicating their intention but not to treat as determining the matter any statement by them as to its status.

[20] By notice of direction dated 1 December 2006, Mr Saleh was required to lodge and serve relevant documents particularly business records relating to Arabesque or Arabesque Limited, to allow the Authority to ascertain the extent to which his relationship with the respondent was part of him operating a business on his own account. On 19 February 2007, Mr Saleh lodged bank account transaction lists for the period 22 February 2006 to 23 September 2006. A number of invoices were also lodged. The invoices are from Arabesque directed to Encos. They include a GST

number and show GST as a separate charge. The numbering sequence indicates that Arabesque invoiced other entities during the relationship with Encos. The transaction lists do not given the name of the bank account. However, they do establish that payments from Encos before and after the date of the alleged employment were received into the same account. They record expenditure during April 2006 in Devonport rather than in Christchurch or Port Levy, supporting Ms Cureton's statement. Much of the expenditure appears to be personal (groceries and so on) but several payments to Mr Davis-Goff are also recorded. Those payments must be in the course of the operation of a business. It also appears that Arabesque may have employed rather than contracted Mr Davis-Goff because the payments to him do not include the GST content claimed by Arabesque in respect of Mr Davis-Goff's work but it is not necessary to make such a finding. What is clear, accepting that the transaction lists are Mr Saleh's personal bank account, is that it was used for both business and personal transactions.

[21] During the investigation meeting, Mr Saleh was asked to provide the missing Arabesque invoices and his 31 March 2006 tax return information. This material has not been supplied. It is clear however, that Encos did not deduct any PAYE or other taxes from the payments made in response to the Arabesque invoices. From all this, I find that Mr Saleh did treat the money received from Encos in payment of Arabesque's invoices as income from the operation of a business.

[22] Mr Saleh intended a relationship of independent contractor from the outset while Encos was initially ambivalent as to its legal character. However, a common intention arose as a result of the May exchanges. Mr Saleh was somewhat integrated into the business. Encos exercised limited control over how he performed his duties. This all leaves something of a mixed picture but the just resolution of this matter is a determination that Mr Saleh was never engaged as an employee.

[23] In *Telecom South v Post Office Union* [1992] 1 ERNZ 711, the Court of Appeal was faced with a written agreement that required payment to be made to a senior manager of a monthly fee plus GST on production of an invoice with the manager to be responsible for all taxes as if self employed. The particular clause in the contract was described as *transparently a tax device* and the Court of Appeal barely paused to reject an argument that the manager was not an employee. However, Sir Gordon Bisson thought it necessary to sound a word of caution that those who seek to

introduce taxation advantages into terms of employment might have to abide by the consequence that they are classified as self employed for personal grievance purposes in line with *Massey v Crown Life Insurance Co* [1978] 2 All ER 576.

[24] In the present case, Mr Saleh steadfastly maintained that he wanted the relationship to be between Encos and his company even in the face of the doubt as to its real nature raised by Encos following advice. That is why he was supplied with a draft contractor's agreement and not provided with an employment agreement. These exchanges in May mirror what Mr Saleh had sought in February or March. Mr Saleh's reasons may have been wider than mere tax considerations but the aspect of fairness identified in *Telecom South* remains important. This is more than merely a label. For Mr Saleh it was a fundamental part of how he saw and conducted his rights and obligations within the relationship. That is why he reacted in such strong language referring to honour and trust in the 16 May 2006 email. Accordingly, I find that the real nature of the relationship was never that of employer-employee.

Post investigation meeting issues

[25] On 21 March 2007, Mr Saleh lodged some additional submissions. In that document he asserted his belief that the respondent had *doctored* the 16 May 2006 email sent by Mr Saleh to Mr Hogg. That is mostly based on the absence of an empty line between the subject line and the text in the printed document said to be the email. A phone conference was arranged. In light of the seriousness of the allegation, the applicant was required to lodge and serve an affidavit explaining the basis of the allegation. This subsequently happened.

[26] The affidavit now alleges a number of emails have been *doctored* based on textual and technical reasons. It is also said that the changes to the 16 May 2006 email mean it reads completely out of context to Mr Saleh's original response.

[27] I should note that Mr Saleh's 16 May 2006 email was originally sent to Mr Hogg and copied to Mr Beal and Mr Evans. A printed copy of this 16 May 2006 email was first provided to the Authority with the respondent's amended statement in reply. The printed copy indicates that it was printed from Mr Beal's computer on 14 September 2006. Printed copies of several other emails were provided at the same time. These documents were sent to the applicant on 21 November 2006. Another copy of the 16 May 2006 email was lodged with Mr Hogg's statement of evidence.

This was not printed from Mr Beal's computer. The two printed versions of the 16 May 2006 email contain identical text but there are some visual differences. Also, one uses the 24 hour clock and the other a 12 hour clock to record the time sent. If Mr Saleh is right, someone must have *doctored* the text before 14 September 2006 or perhaps 21 November 2006 when the first printed copy was posted to the Authority. They must also have *doctored* both printed versions that have been provided to the Authority but failed to make them look identical.

[28] Mr Hogg believes that the appearance changes are explained by the two documents being printed off different computers. In responding to the initial allegation and subsequently, he has offered the Authority access to the server for a computer forensic expert to analyse the email. That will not be necessary. I remain unconvinced that there is anything sinister in the differences between the two printed versions and it is not probable that Encos or an associated person tampered with the email (or other emails) as alleged.

[29] It will also be apparent from the foregoing determination that I do not consider it necessary to further the investigation by hearing evidence from Mr Evans or questioning Ms Cureton.

Summary

[30] Mr Saleh was never an employee of Encos Global Systems Limited so his claims are dismissed. The same applies to the issue Encos has about non return of some property.

[31] By agreement, there is an order prohibiting the publication of the information contained in the bank transaction lists provided with the applicants memorandum dated 16 February 2007. There is also an order prohibiting the publication of Encos Global Systems Limited's financial data, monthly *run rates* and business plan as disclosed during the investigation. Anything said in this determination may be published.

[32] Costs are reserved. Encos was not legally represented at the investigation meeting but there may be legal costs related to advice and earlier steps in the proceedings. If there is a claim for costs, it should be lodged and served within 28 days with the other party having 14 days to lodge and serve any response.

P Cheyne
Member of Employment Relations Authority