Determination Number: WA 62/05
File Number: WEA 481/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	John Sealey (Applicant)
AND	Shaw Budgeting and Finance Company Limited (Respondent)
REPRESENTATIVES	Finn Collins for the Applicant Graeme Ogilvie for the Respondent
MEMBER OF AUTHORITY	P R Stapp
INVESTIGATION MEETING	Wellington, 7 April 2005
DATE OF DETERMINATION	21 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. John Sealey commenced working for Shaw Budgeting and Finance Company Limited on 7 June 2001. His relationship with Shaw was terminated on 2 July 2004. Mr Sealey worked in the role of systems and marketing manager responsible for its information technology.

2. A dispute subsequently arose as to whether Mr. Sealey was employed by way of a contract of or for services. I am required to assess the real nature of the relationship under s.6 of the Employment Relations Act.

3. Mr Sealey signed a contract with Shaw on 15 August 2001. It is common ground that this arrangement involved Vigel Solutions Limited, of which Mr. Sealey was a director, being involved in a contract for services.

4. The arrangement between the parties continued despite Mr Sealey's company being struck off on 6 July 2002, which he says he did not know about. However, Mr Sealey and the late Mr Jack Shaw, the principal director of the company, commenced negotiating a new arrangement not involving Vigel. An arrangement was concluded on 13 January 2004, and a new contract was signed.

5. This contract provided for the duties Mr Sealey was required to undertake. It made provision for his status as an independent contractor and not as an employee. His fee for services was $70,000 including GST, backdated to 1 April 2003. Under the terms he was not allowed to use Shaw time, telephone or computers for other business activities. Provision was allowed for lost time for public holidays and up to 10 days per year for sick and bereavement leave. He also had three weeks annual leave. The public holidays, sick and bereavement leave and annual leave were not contained in the earlier contract for services but the respondent says were available to Mr. Sealey.

6. His hours were stipulated from 8am to 5pm on all working days – Monday to Friday – at the Porirua office, or wherever he was directed to work, including working outside hours and on Saturdays if required. He was not allowed to work Sundays.

7. He was responsible to the Shaw's principal director Mr. Jack Shaw and its managing director Mrs Mary Shaw.

8. As part of the arrangements Mr. Sealey invoiced Shaw for goods he purchased in performing his duties and he profited by including a margin.

What are the factors in assessing whether Mr Sealey was a contractor or an employee?

9. There is a contract and it was signed with agreed terms for a contract for services. However, the contract does contain provisions that reflect the terms for an employee. They include:

   - The requirement to be available Monday to Friday 8am to 5pm as well as other times and on Saturdays;
   - Provision for public holidays and sick and bereavement leave;
   - Provision for 15 days paid annual leave.

10. However, Mr Sealey was paid a fee for services of $70,000 including GST backdated to 1 April 2003. It would appear that the backdating arrangement was paid on 16 January 2004, for the period 1 April 2003 to 16 January 2004, by invoice and with an IRD number.

11. Under the contract, Mr Sealey was required to carry out office duties as directed by Shaw, and he says he did cover reception duties. There also existed provision for a lunch break of one hour with an adjustment to be made up by the applicant for all time taken off outside that requirement, the chain of command in regard to who he took his instructions from and that the

contract made provision for life insurance covering the applicant to protect the interests of the company to cover any costs.

12. In addition, the applicant has produced a reference dated 11 June 2001 referring to him as having fulltime employment as systems and marketing manager. The applicant also used the respondent's letterhead in an internal memo dated 17 October 2001. The applicant also relies on the leave record relied upon from 7 June 2001 to 26 August 2003. Nothing turns on these.

13. He has also relied upon letter dated 17 May 2002 from Shaw to him stating that: *"Employing a fulltime computer programmer has proved its worth"* and another letter dated 29 August 2004 from Shaw to Tower Life Assurance stating that he was *"key personnel"*. Nothing will turn on the letter dated 17 May 2002 since it related to a period when Mr. Sealey agrees that he was employed under a contract for services. The second letter must be read in context of the assessment of the relationship and is not inconsistent with a contractor arrangement.

14. Although the applicant was paid and invoices were produced between him, Vigel and Shaw, the invoices ceased from the end of March 2004 for his consultancy services.

15. The respondent relies on the intention of the parties for an independent contracting relationship and that the arrangement was initially with Mr Sealey's company. When there was a change of arrangement because the company was struck off there was no other change in how the parties had been conducting their relationship. For example, invoicing continued at least until March 2004, and Mr Sealey had always taken holidays.

What was the intention of the parties?

16. The initial arrangements between the parties involved a relationship of independent contractor at least until the new contract was signed. Mr Sealey conceded that until he signed the contract dated January 2004 that indeed his relationship was one of a contractor. However he says that after January 2004 and under the terms of the contract that he signed, the real nature of his relationship was as an employee because he was integrated into the employer's business, he had to work under a chain of command and was not in employment on his own account.

17. The parties dispute the intention of their relationship. The signed contract was a contract for services as it was referred to under the terms of the contract: *Status of Mr John Sealey Computer Consultant*. Therefore, I have to assess what changed.

18. The only changes related to Mr. Sealey's company being struck off and arrangements made for him to be paid, that included a very similar contract, except for new written terms on sick and bereavement leave and holidays.

19. It is my conclusion, that despite the contracts referring to Mr Sealey personally, the acceptance by him that the earlier arrangements were a contract for service makes it compelling, that the intention of the parties was to continue this arrangement when the new contract was signed.

20. I am supported by there being very little by way of change in the arrangements between the parties. Even during the period that Mr. Sealey's company was struck off he accepted, that until the signing of the new contract, he was a contractor. He continued to invoice Shaw for goods that he profited from with a margin. He always took holidays. He agreed to the terms for the hours of work. His original agreement was signed by him personally even although he had an arrangement of sorts with his own company (before it was struck off).

Control and Integration in the employer's business

21. Mr. Sealey was required to work full time. He had stipulated hours and days to work. He also covered reception duties. His duties were prescribed which included *"any office job required by the directors"*. He was required to concentrate solely on the Shaw business during his working hours covered by the contract. He worked on the property owned by Shaw and utilised a finance package developed by him and his own company. He had to report to Mrs Mary Shaw and Mr. Shaw. He had to follow a chain of command and meet deadlines for performance that were monitored. There was also the insurance cover taken out on Mr Sealey to protect Shaw. As such these elements indicate a degree of control and supervision necessary for an employee.

22. However, Mr. Sealey invoiced Shaw for materials from which he profited because he put on a margin.

The fundamental and economic tests

23. Mr. Sealey was paid under the contract a fee of $70,000 including GST. He says he was responsible for his own tax arrangements. He invoiced Shaw but this stopped in March 2004. Unknown to the applicant, his own company, Vigel, had been struck off, and when that was brought to his attention, he renegotiated with Mr. Shaw for new terms personally. The earlier contractual arrangements do not appear to directly involve Vigel by name but both parties

accepted its role in practice until January 2004. Since it was struck off, invoices continued for consulting services but stopped from March 2004. Mr. Sealey was not GST registered and he says he has made no business expense deductions since January 2004. However, I hold that he was under the terms of the arrangement engaging in business in a personal capacity, and the messy trading arrangements, do not deflect from him being in business on his own account.

The real nature of the relationship and costs

24. There was a changed arrangement between the parties because of Mr. Sealey's company being struck off and the inclusion of written terms between the parties on public holidays, sick and bereavement leave and annual leave. There were elements of the parties' practice that had not changed and underpin the parties' intention. The elements of the relationship are tipped by the parties' intention to contract for services and therefore influence the real nature of their relationship. I conclude that the real nature of the parties' arrangement was that John Sealey was a contractor.

25. Costs are reserved.

P R Stapp
Member of Employment Relations Authority

Determination Number: Not Yet Allocated
File Number: WEA 481/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	John Sealey (Applicant)
AND	Shaw Budgeting and Finance Company Limited (Respondent)
REPRESENTATIVES	Finn Collins for the Applicant Graeme Ogilvie for the Respondent
MEMBER OF AUTHORITY	P R Stapp
INVESTIGATION MEETING	Wellington, 7 April 2005

DATE OF DETERMINATION 19 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

26. John Sealey commenced working for Shaw Budgeting and Finance Company Limited on 7 June 2001. His relationship with Shaw was terminated on 2 July 2004. Mr Sealey worked in the role of systems and marketing manager responsible for its information technology.

27. A dispute subsequently arose as to whether Mr. Sealey was employed by way of a contract of or for services. I am required to assess the real nature of the relationship under s.6 of the Employment Relations Act.

28. Mr Sealey signed a contract with Shaw on 15 August 2001. It is common ground that this arrangement involved Vigel Solutions Limited, of which Mr. Sealey was a director, being involved in a contract for services.

29. The arrangement between the parties continued despite Mr Sealey's company being struck off on 6 July 2002, which he says he did not know about. However, Mr Sealey and the late Mr Jack Shaw, the principal director of the company, commenced negotiating a new arrangement not involving Vigel. An arrangement was concluded on 13 January 2004, and a new contract was signed.

30. This contract provided for the duties Mr Sealey was required to undertake. It made provision for his status as an independent contractor and not as an employee. His fee for services was $70,000 including GST, backdated to 1 April 2003. Under the terms he was not allowed to use Shaw time, telephone or computers for other business activities. Provision was allowed for lost time for public holidays and up to 10 days per year for sick and bereavement leave. He also had three weeks annual leave. The public holidays, sick and bereavement leave and annual leave were not contained in the earlier contract for services but the respondent says were available to Mr. Sealey.

31. His hours were stipulated from 8am to 5pm on all working days – Monday to Friday – at the Porirua office, or wherever he was directed to work, including working outside hours and on Saturdays if required. He was not allowed to work Sundays.

32. He was responsible to the Shaw's principal director Mr. Jack Shaw and its managing director Mrs Mary Shaw.

33. As part of the arrangements Mr. Sealey invoiced Shaw for goods he purchased in performing his duties and he profited by including a margin.

What are the factors in assessing whether Mr Sealey was a contractor or an employee?

34. There is a contract and it was signed with agreed terms for a contract for services. However, the contract does contain provisions that reflect the terms for an employee. They include:

- The requirement to be available Monday to Friday 8am to 5pm as well as other times and on Saturdays;
- Provision for public holidays and sick and bereavement leave;
- Provision for 15 days paid annual leave.

35. However, Mr Sealey was paid a fee for services of $70,000 including GST backdated to 1 April 2003. It would appear that the backdating arrangement was paid on 16 January 2004, for the period 1 April 2003 to 16 January 2004, by invoice and with an IRD number.

36. Under the contract, Mr Sealey was required to carry out office duties as directed by Shaw, and he says he did cover reception duties. There also existed provision for a lunch break of one hour with an adjustment to be made up by the applicant for all time taken off outside that requirement, the chain of command in regard to who he took his instructions from and that the contract made provision for life insurance covering the applicant to protect the interests of the company to cover any costs.

37. In addition, the applicant has produced a reference dated 11 June 2001 referring to him as having fulltime employment as systems and marketing manager. The applicant also used the respondent's letterhead in an internal memo dated 17 October 2001. The applicant also relies on the leave record relied upon from 7 June 2001 to 26 August 2003. Nothing turns on these.

38. He has also relied upon letter dated 17 May 2002 from Shaw to him stating that: *"Employing a fulltime computer programmer has proved its worth"* and another letter dated 29 August 2004 from Shaw to Tower Life Assurance stating that he was *"key personnel"*. Nothing will turn on the letter dated 17 May 2002 since it related to a period when Mr. Sealey agrees that he was employed under a contract for services. The second letter must be read in context of the assessment of the relationship and is not inconsistent with a contractor arrangement.

39. Although the applicant was paid and invoices were produced between him, Vigel and Shaw, the invoices ceased from the end of March 2004 for his consultancy services.

40. The respondent relies on the intention of the parties for an independent contracting relationship and that the arrangement was initially with Mr Sealey's company. When there was a change of arrangement because the company was struck off there was no other change in how the parties had been conducting their relationship. For example, invoicing continued at least until March 2004, and Mr Sealey had always taken holidays.

What was the intention of the parties?

41. The initial arrangements between the parties involved a relationship of independent contractor at least until the new contract was signed. Mr Sealey conceded that until he signed the contract dated January 2004 that indeed his relationship was one of a contractor. However he says that after January 2004 and under the terms of the contract that he signed, the real nature of his relationship was as an employee because he was integrated into the employer's business, he had to work under a chain of command and was not in employment on his own account.

42. The parties dispute the intention of their relationship. The signed contract was a contract for services as it was referred to under the terms of the contract: *Status of Mr John Sealey Computer Consultant*. Therefore, I have to assess what changed.

43. The only changes related to Mr. Sealey's company being struck off and arrangements made for him to be paid, that included a very similar contract, except for new written terms on sick and bereavement leave and holidays.

44. It is my conclusion, that despite the contracts referring to Mr Sealey personally, the acceptance by him that the earlier arrangements were a contract for service makes it compelling, that the intention of the parties was to continue this arrangement when the new contract was signed.

45. I am supported by there being very little by way of change in the arrangements between the parties. Even during the period that Mr. Sealey's company was struck off he accepted, that until the signing of the new contract, he was a contractor. He continued to invoice Shaw for goods that he profited from with a margin. He always took holidays. He agreed to the terms for the hours of work. His original agreement was signed by him personally even although he had an arrangement of sorts with his own company (before it was struck off).

Control and Integration in the employer's business

46. Mr. Sealey was required to work full time. He had stipulated hours and days to work. He also covered reception duties. His duties were prescribed which included *"any office job required by the directors"*. He was required to concentrate solely on the Shaw business during his working hours covered by the contract. He worked on the property owned by Shaw and utilised a finance package developed by him and his own company. He had to report to Mrs Mary Shaw and Mr. Shaw. He had to follow a chain of command and meet deadlines for performance that were monitored. There was also the insurance cover taken out on Mr Sealey to protect Shaw. As such these elements indicate a degree of control and supervision necessary for an employee.

47. However, Mr. Sealey invoiced Shaw for materials from which he profited because he put on a margin.

The fundamental and economic tests

48. Mr. Sealey was paid under the contract a fee of $70,000 including GST. He says he was responsible for his own tax arrangements. He invoiced Shaw but this stopped in March 2004. Unknown to the applicant, his own company, Vigel, had been struck off, and when that was brought to his attention, he renegotiated with Mr. Shaw for new terms personally. The earlier contractual arrangements do not appear to directly involve Vigel by name but both parties accepted its role in practice until January 2004. Since it was struck off, invoices continued for consulting services but stopped from March 2004. Mr. Sealey was not GST registered and he says he has made no business expense deductions since January 2004. However, I hold that he was under the terms of the arrangement engaging in business in a personal capacity, and the messy trading arrangements, do not deflect from him being in business on his own account.

The real nature of the relationship and costs

49. There was a changed arrangement between the parties because of Mr. Sealey's company being struck off and the inclusion of written terms between the parties on public holidays, sick and bereavement leave and annual leave. There were elements of the parties' practice that had not changed and underpin the parties' intention. The elements of the relationship are tipped by the parties' intention to contract for services and therefore influence the real nature of their relationship. I conclude that the real nature of the parties' arrangement was that John Sealey was a contractor.

50. Costs are reserved.

P R Stapp
Member of Employment Relations Authority