

- Mr Singh was not an employee of Eric James when a sales adviser, but became one when he was promoted to become an Area Manager; or
- Mr Singh remained an independent contractor to Eric James, under a contract for services, throughout.

Findings on the Genesis and Operation of the Relationship

[3] Eric James is a risk management brokerage that has contracts with several insurance companies to market and sell various insurance products on their behalf. In the main the insurance policies are for life or health insurance. In turn it uses sales advisers to sell the insurance policies on its behalf.

[4] Mr Singh came to work for Eric James after answering an advertisement for a sales adviser. Mr Singh had had some experience in the insurance industry, having worked for AMP as a commission sales agent many years previously. It was common ground that industry practice was such that, then and even now, people are engaged as commission sales persons and are not treated as employees. The positive difference with the Eric James' position for Mr Singh was that, unlike AMP, Eric James would provide him with the necessary customer leads, rather than him having to use networking and/or cold calling.

[5] Mr Singh badly needed a job, having just returned to New Zealand. He states that he took little or no notice of the contract that was offered to him, or what it meant about his contractual status. The contract was provided to Mr Singh in advance of him attending a week's training course with Eric James, so he had plenty of time to seek independent advice on it, had he wished to do so.

[6] The contract is in such a form that any reader would be under no illusion that it was labelled as anything other than a contract for services. Its title is *Independent Adviser Contractor's Agreement*. *Adviser* is defined as meaning the independent contractor referred to as *you* on the front page of the agreement. Clause 1.1 states that the person is appointed as an independent contractor to sell approved products to and to service the insurance and investment needs of Eric James' clients. The relationship is said to be as a self employed independent contractor and a person is not to be deemed an employee. It provides none of the usual types of clauses in an employment agreement such as hours of work, leave, wages payable (except by

commission), or a plain language explanation of the services available for resolution of employment relationship problems, with the exception of an appendix dealing with minimum performance levels. It also contains many provisions that are inconsistent with employment, such as a clause on indemnification and one stating that the agreement is binding on all agents, directors, partners and shareholders of the adviser.

[7] It was made clear at or before the training session that the agreement could not be varied in any way. Mr Singh signed the agreement in the presence of a witness. He set himself up as a self employed person and filed income tax and GST returns accordingly.

[8] Sales advisers were entitled to conduct other activities but Eric James wanted to ensure that they had sufficient time to follow its leads at all times. Thus Mr Singh was expected to follow up the leads provided to him within a reasonable timeframe and inform Eric James of any times that he was unavailable to make arranged meetings with potential clients. Mr Singh seldom did so because he wanted as much income as possible. He was required to attend regular briefing sessions from Eric James' management and/or representatives of the insurance companies. He was not allowed to sell insurance products on any other person's behalf.

[9] Mr Singh followed up the names given to him by Eric James at times that suited him, mostly in client's homes or in cafes. Mr Singh had to provide his own computer and vehicle, against which he was able to claim expenses, together with other deductions such as marketing, postage, and rent for that part of his home used as an office.

[10] He was very successful working for Eric James as a Sales Adviser and earned over \$100,000 in one year. I accept that the reference in Mr Singh's pay slips to employee charges and employee details are computer-generated by the service provider who Eric James uses to pay its advisers, and is therefore irrelevant to the issue before the Authority.

[11] Mr Singh and Eric James had been looking for opportunities to advance in Eric James and within four months he had been appointed as Waikato/Bay of Plenty Area Manager. I do not accept Mr Singh's evidence that this took up 40% of his time, as the tasks involved do not seem particularly time consuming, leads appeared to be allocated in the same ratio to area managers as sales adviser and his sales continued

unabated. Nevertheless, it is clear that he had to provide some advice and support to the sales advisers he was responsible for. No written agreement was entered into to cover his area manager role. Additional payment was by way of an override commission on the commission earned by all the sales advisers under Mr Singh's supervision.

[12] Problems occurred in 2006 after one of the two co-managing directors left. A number of advisers left and were not replaced. There were also issues between Mr Singh and Eric James about his commission and the decision to close the telemarketing centre, which Mr Singh believed would mean that all advisers would have to find their own leads to maintain their income.

[13] Mr Singh decided he had had enough and resigned. He secured a new role. The first time Mr Singh made the claim that he was an employee was at a Disputes Tribunal hearing where Eric James was suing him for breach of contract. Despite the differences between the parties mediation was never pursued as the contract envisaged, until directed by the Authority. Finally, I note that, in substance, the relationship operated as the written agreement contemplated, as supplemented by the oral agreement as to the area manager role.

The Law

[14] Section 6 of the Act defines the meaning of *employee*. The Authority must determine the real nature of the relationship between the parties. In doing so it must consider all relevant matters, including any matters that indicate the intention of the parties; and is not to treat as a determining matter any statement by the parties that describes the nature of their relationship.

[15] The Supreme Court in *Bryson v. Three Foot Six (No 2)* [2005] ERNZ 372 held, at 386, that in deciding whether a person is an employee or a contractor, the Authority:

...must consider "all relevant matters", including any matters that indicate the intention of the parties. But it is not to treat a determining matter any statement by the person that describes the nature of their relationship.

"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 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 requires 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) ...

[16] Finally, *Koia v. Carlyon Holdings Ltd* [2001] ERNZ 585 states that any type of employment relationship can also be structured as one of independent contractor and that a contract can not be of service for some purposes and for services for other - it must be one or the other.

Intention of the Parties

[17] Mr Dunning claims that Mr Singh had no choice but to sign the contract but I do not accept that. There is no doubt that times were difficult for Mr Singh and this was the best opportunity that came his way at the time, but that is not the same thing as to find that he was forced to sign the agreement. He chose to do so, without any duress or undue influence. He had the opportunity to obtain independent advice before doing so.

[18] Like any other signed contracts between parties, it is accordingly enforceable according to its tenor. Mr Singh can not now claim that he did not intend to be bound by the terms of the agreement. The agreement could not be clearer on its face. It is also consistent with industry practice of engaging sales advisers by way of independent contracts rather than as employees.

[19] The degree of income earned by Mr Singh tends to demonstrate that if there was an inequality of bargaining power when commencing the relationship, that did not remain and the relationship is not of the sort that requires the Act's protections, as submitted by Mr Dunning.

[20] I therefore conclude that the intention of the parties was that they would enter into a contract for services. The next issue is whether or not the parties had achieved their intention as a matter of law.

Control

[21] Minimal control was exerted by Eric James when Mr Singh was a sales adviser. He had to follow guidelines and attend staff meetings and was expected to meet a certain number of appointments and sell a certain amount of product each month. Those conditions related to performance and performance standards and were there to set standards of performance, rather than imposing conditions of control on Mr Singh. Beyond that, he was free to operate as he pleased. In particular, Mr Singh very much controlled his own hours of work. I therefore conclude that, as a sales adviser, the control test favours a conclusion of a contract for services.

[22] When Mr Singh became an area manager, that element of control did increase somewhat. The ultimate authority over Mr Singh for his activities as area manager was much greater than that as a sales adviser. However, given the limited significance of his area manager duties compared to the rest of Mr Singh's overall role, this change in control is not sufficient to alter the overall conclusion that the control test tends to favour the finding of a contract for services. In effect, Mr Singh was left largely to his own devices, see for instance the somewhat analogous case of *Cardy Business Ltd v. Bizaoui* (unreported, Colgan J, AC16/05, 24 March 2005), a case involving a salesperson who also was meant to supervise others and was to be paid override commissions accordingly. In that case Mr Bizaoui was found to be a contractor, despite him not being registered for GST, but being provided with clerical and administrative facilities, which are factors indicative of employment and yet not present in Mr Singh's case.

Integration

[23] Mr Singh was integrated with the operations of Eric James in the sense that without sales advisers Eric James would be unable to make sales and thus unable to make income. While Eric James would argue that this was simply a function that was contracted out, there would not be much left of Eric James without the sales advisers. This would, however, be to confuse advisers and managers being integral to the operations of Eric James rather than them being integrated with it. Particularly as a result of improvements in information and communications technology there are many aspects of a large number of businesses that are integral to its operations (such as computer support) that do not involve hiring employees.

[24] In terms of the integration test, as in *Bizaoui*, this could well be described as an arrangement of convenience whereby each was able to earn from the commissions generated by Mr Singh's sales of insurance policies, using Eric James' established commercial reputation and customer base. Until an exemption was provided by IRD Mr Singh was paid on providing GST invoices. Mr Singh provided his own tools of trade in terms of a computer, car and even did some of his own marketing. These are all factors that minimise Mr Singh's integration with Eric James.

[25] On balance, taking into account the training provided by the insurance companies, the nature of the arrangements and the method of payment, I conclude that the integration test favours a finding of a contract for services.

[26] When Mr Singh became an area manager he became more integrated into the organisation, however. Area managers were there to help supervise the activities of sales advisers and without them, Eric James would have had much less opportunity to assist sales advisers in their jobs and therefore, in that role, Mr Singh was more integrated into the operation of Eric James. The other factors remained the same. If that was his main role then he may well have been classified as an employee under the integration test. Because the management functions were ancillary to the main sales function, however, and a person can not be one thing for one purpose and another for others, I conclude that this test still favours a finding of a contract for services after Mr Singh became an area manager.

Economic Reality

[27] The issue here is whether Mr Singh was in business on his own account. There was no company here, although that would have been open to Mr Singh had he been of such a mind. Furthermore, there was no opportunity for Mr Singh through his own efforts to build up any goodwill that he could later sell.

[28] On the other hand, the deduction of withholding tax, the payment of GST and the absence of any time recording are indicators of Mr Singh being in business on his own account. While I accept that the benefits of being an independent contractor rather than an employee are more apparent than real, they are still indicators of the parties' relationship being one of a contract for services rather than of services.

[29] The key reason for concluding that Mr Singh was in business on his own account was the ability to improve his own income through his own efforts, at which

he was particularly good. The more he worked and the more sales he made, the more he earned. It was therefore very much up to him how much he earned. When he became an area manager there was no change to this. His efforts in motivating and otherwise improving the performance of sales advisers meant additional income to him directly.

[30] I therefore conclude that fundamentally Mr Singh was in business on his own account throughout the duration of his relationship with Eric James.

Conclusion

[31] The parties intended, as demonstrated by the written contract, to contract under a contract for services rather than a contract of service. The way the contract operated meant that fundamentally Mr Singh was in business on his own account throughout his relationship with Eric James. This is supported by the minimal control exerted by Eric James over Mr Singh throughout the course of the relationship with him, his limited integration with the operations of the firm and the fact that it is consistent with industry practice. The real nature of the relationship was therefore as intended. I conclude it was one of a contract for services. I am fortified in my conclusion by the finding of my colleague in a similar case, *Watt v. Eric James & Associates* (unreported, James Crichton, CA24/06, 17 February 2006). I therefore dismiss Mr Singh's application.

Costs

[32] Costs are reserved.

G J Wood
Member of the Employment Relations Authority