

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 122/08
5118006

BETWEEN RAEWYN TSE
 Applicant

AND CIEFFE NZ LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Matt McGoldrick, Counsel for the Applicant
 Monica Singleton, Counsel for the Respondent

Investigation Meeting: 17 June 2008 at Wellington

Further Information
Received 23, 24, 25 & 26 June 2008 E-mails and Affidavits

Determination: 17 September 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A preliminary matter exists between the parties on the real nature of Ms Tse's relationship with Cieffe NZ Limited (Cieffe). Ms Tse says she was an employee. Cieffe contended that she was a contractor. This determination is restricted to that issue only.

The Facts

[2] From July 2005 Ms Tse was required to design and implement internal processes for Cieffe. Initially, Ms Tse provided her services through her company, Assorted Hijinx Limited. In early 2006, a change occurred to that arrangement and Ms Tse invoiced Cieffe personally for the work that she undertook.

[3] Cieffe's business involves Ms Iva Sajdl the client relationship manager, Mr Dennis Sajdl director and Mrs Zlata Sajdl information analyst.

[4] There was no written agreement at the outset of the parties' relationship (from July 2005), but in February 2007, terms and conditions of the relationship were put in a written agreement.

[5] The written agreement was signed off by Ms Tse on 5 April 2007 purporting to take effect from 1 February 2007. The written agreement was headed *Consultancy Agreement* and purported to be a contract for services. There was an expected level of supervision over performance and the "work" undertaken.

[6] Ms Tse provided invoices for the work that she undertook. These were generally not checked because she was trusted to provide a true statement of the time taken to provide her duties.

[7] However, on Friday, 21 December 2007, Mrs Zlata Sajdl received an email from Ms Tse with her invoice for December 2007. That invoice was paid by Mrs Sajdl. Mrs Sajdl says that she did not notice at that time that the invoice made a charge against the respondent for providing services on 25 and 26 December 2007 for a total of 16 hours. She says the applicant did not provide such services on either of these days.

[8] Next, the applicant submitted an invoice for work carried out over the month of January 2008 and this was supplied to the respondent. When it was received, Mrs Sajdl noticed the invoice charged the respondent for 12 hours at overtime rates, even although she considered the applicant's work for the respondent in January was considerably reduced in volume. Mrs Sajdl says she was astonished to see that the applicant's time sheets for January 2008 recorded continuous work every day without any breaks. She says she knew that Ms Tse spent a lot of time on the respondent's premises dealing with private matters unrelated to the respondent and the services she had been engaged to provide, but did not expect the applicant would charge the respondent for that personal time.

[9] A check was made on some of the previous invoices submitted by the applicant including November 2007. It was found that the applicant's invoices showed continuous work every day without any breaks even although it was considered Ms Tse had taken breaks, and she had admitted that she had dealt with personal matters during those breaks.

[10] Ms Tse and Mrs Sajdl met when Mrs Sajdl requested the applicant to provide an explanation for her timesheets that did not include any breaks in the hours put in her invoices for January 2008. Following this meeting, Mrs Sajdl says she noticed that the applicant had charged Cieffe for three public holidays in January which she says Ms Tse had not worked. There was an email exchange between the parties from 5 February 2008.

[11] On 13 February, Ms Tse was informed by the respondent of a decision to review all her invoices which had been submitted to that date. The review concluded that Ms Tse had been overcharging Cieffe. Cieffe requested Ms Tse to review her invoices and provide her own calculation of the total hours charged and invoiced. Ms Tse was also asked to clarify the reason why she had stopped including GST in her invoices after March 2006.

[12] On 25 February 2008, Ms Tse wrote to the respondent and provided revised invoices for February-December 2007 including charging GST for that period as she had registered for GST subsequent to the respondent's advice. She also provided a credit note for the remittance of GST incorrectly charged between January and March 2006.

[13] In Ms Tse's amended invoice for January 2008 provided to Cieffe on 25 February 2008, the time for the public holidays was removed. However, Cieffe considered as an overcharge the time spent on matters other than supplying services.

[14] Ms Tse advised Cieffe by email that: "This is to let you know that I will not be at work tomorrow, Wednesday 27th Feb. I am taking some time to seek advice on issues recently raised." They then exchanged emails in dispute about Ms Tse's timesheets and overcharging claims.

[15] After Ms Tse had failed to take the opportunity to rectify the problem that Cieffe had identified, the contract was terminated by Cieffe. Ms Tse notified the respondent that she was raising an employment relationship problem and claimed compensation and requested mediation. The dispute between Ms Tse and Cieffe remains and it falls on the Authority to make a determination on the preliminary matter.

Determination

[16] I have no hesitation to find that during the course of the parties' relationship the label they put on their relationship was one of a contract for services. This finding is clearly supported by the written contract; Ms Tse's invoicing and contracting arrangements and the parties' conversations over the set up arrangements and work.

[17] Despite the finding above the legal test relates to the real nature of the position. I conclude that the real nature of the position is a contract for services because:

- a. The independence and autonomy of Ms Tse's work arrangements.
- b. Ms Tse was engaged for her skill set to carry out the work required.
- c. The arrangements were what Ms Tse wanted at the time.
- d. There were no set hours and no enforced routine required. Ms Tse was allowed to come and go as she wished.
- e. Ms Tse took on at least one other client.
- f. Ms Tse dealt with the taxation and invoiced for payments on a monthly basis.
- g. I accept that Tse's role was to provide her specialised services integral to the respondent's business.
- h. Ms Tse's activities were completely different to the respondent's core business.
- i. Although Ms Tse did carry out some administrative tasks the parties have a different opinion about the extent of that work, but by Ms Tse's own admission she took them on at her own initiative. She was not acting on any instruction. She was not supervised.
- j. Ms Tse acted in carrying out her own business. This was supported by:
 - i. her monthly invoices,
 - ii. charging an hourly rate and being paid a higher rate,

iii. GST was charged for three months even though Ms Tse was not registered and when the GST charging ceased Ms Tse remained responsible for her own tax.

k. Ms Tse had a fundamental knowledge of commercial arrangements supported by setting up her own company, completing “A Be Your Own Boss” course and accessed IRD websites relating to independent contracting arrangements.

[18] Ms Tse has relied upon her duties and the nature of her tasks, but these are in dispute and it is contended that she has overstated them and was wrong on some aspects of her evidence. Given that she submitted invoices in regard to the label she understood applied to her work I can not accept that there was such a change in her duties and the nature of her role that would have impacted on the nature of her arrangement with Cieffe. While there were some changes I hold that Ms Tse assumed other duties that were outside her terms and that they were not sanctioned in any formal change involving Cieffe.

[19] I find it would not have been inconsistent with a contracting arrangement for Ms Tse to have had a swipe card and pin number access to the building given the arrangements for her work. However, Mr Sajdl deposed that Ms Tse’s evidence was wrong and he was the only person with the master list and control of the swipe cards tags and pin numbers and her possession of the list gave her no responsibility. Given the conflict I hold that this can not be determinative. He also says that she only had access to where she worked.

[20] Further I find the credit card she had with her name and that of Cieffe is not conclusive in regard to arrangements for any charging. Mr Sajdl deposed that the card was only given to Ms Tse to use for a trip to Australia where she provided services to Cieffe and where it would be easier to charge than to invoice later. There were only three transactions.

[21] Ms Tse had branded clothing which some of the staff wore. Again this is not conclusive to any employment arrangement because it was voluntary and optional to use. It is not determinative. The clothing was not issued as a compulsory uniform, and was given to everybody including clients.

[22] Ms Tse has also relied upon her name existing on the phone list under the title “Reception” with an extension number and email address. Also, this is not determinative because of her role and the time she spent at Cieffe and for efficiency reasons it would reasonably be expected she would have at least an extension number and email address through Cieffe. Also, Iva Sajdl said Ms Tse’s role required her to be in attendance at the premises and included everyone. Ms Sajdl says that when she was away a temp was used and she covered for Ms Tse.

[23] Ms Tse says a business card was printed for her identifying her as “Office Manager” with Cieffe’s logo and livery. New Business cards were printed with the title “Client Relationship Business Manager”. Mr Sajdl says they were produced to enable contacts to be made and given to all employees and contractors and it was not unusual for them to have more than one.

[24] Ms Tse has also relied upon charging for holidays. However this is one of the aspects that has become the subject of a dispute over her charging and Mr Sajdl deposed that he never checked the invoices and another person who reviewed them would not have had the experience to know what the arrangements were for Ms Tse, and would not have known what Ms Tse was doing because that person did not work in the same office.

[25] I therefore conclude that the real nature of the relationship can be determined on the basis of the level of control, integration and fundamental economic tests applied in the circumstances; notwithstanding the label put on the relationship by the parties at the time. I conclude that Ms Tse was a contractor.

[26] In such circumstances Ms Tse’s claim that she was an employee is unsuccessful.

[27] Costs are reserved.