

[3] In essence the issue is whether Mr Taylor was employed by the respondent as Chief Operations Officer or in some other senior administrative role, or whether he was not. If the question is answered in the affirmative, the applicant is entitled to seek remedies under the Employment Relations Act 2000 and its amendments. If the answer is negative, he has no redress available to him before the Authority.

The history

[4] The applicant says he joined the respondent as a sales person in or about August 2003. Later, Mr Taylor signed a document confirming his engagement as a sales person as defined Real Estate Agents Act 1976 at the respondent's Rangiora office. The document states at para.4:

You agree that you are engaged (and have always been engaged) as an independent contractor and not as an employee, joint venture or partner of the licensee.

[5] Mr Taylor signed this document on 14 July 2004.

[6] In early 2006 Mr Paget began investigating development of a new business model which involved the incorporation of a new company to act as an overarching management enterprise for all his business interests.

[7] At a meeting on 1 February 2006 Mr Paget met with Ms Paige Cuthbert, the respondent's account, Mr Jonathan Cron, a specialist in trust structures, and Ms Ingrid Taylor, the respondent's solicitor, to discuss this new company and what compliance matters needed to be considered.

[8] It is clear that at this meeting Mr Paget was interested in involving the applicant in this company and proposed an equity situation which Mr Paget or his trust would hold 75% of the shares with Mr Taylor holding the balance.

[9] The situation was compounded by Mr Paget holding 50% of another real estate franchise, and hence the agreement of his fellow shareholder became critical to the envisaged plan. There were also tax issues to be resolved as well as matters relating to trust structures and a range of things to be decided, as when setting up any new enterprise.

[10] Mr Taylor says that in the latter part of 2005 he and Mr Paget had had discussions;

on me becoming involved in the ownership and management of the business ...By the early stages of 2006 we had decided in principal [sic] on how things would work, we had a purchase price agreement for the equity holding and I arranged for this to be financed by my bank. We had identified the management role and what its main purpose was to be and where it would be located (Northwood). ... This evolved from being involved in the Rangiora office to it being identified by Shane that he would like me involved in the whole business of Trends Realty Limited which was the licensee for the Rangiora, Shirley and the developing Northwood offices plus some other opportunities being explored. ... It was also agreed that the operations role was to commence at the start of April. ... I remember this very distinctly as I was very busy with property sales around about this time and Shane and I had a meeting where he said he was concerned that I was too busy to get started in the role and what could we do about it. I said that was easily fixed and said I could immediately hand over my listings to other agents within the business. This was a decision made and it was actioned immediately and I started at the start of April. ... The actual structure of the new entity was yet to be determined but it was agreed that this would not affect my role as Operations Manager as this would be incorporated into whatever structure would eventually take shape.

[11] In his evidence, the applicant details discussions regarding salary packages and benefits and said it was decided, agreed and budgeted that the salaries, including his own, would be \$70,000. In support of this contention, he says he had emails from various people inside and beyond the respondent company indicating that his role was one of management and also copies of the draft Trends Realty Management Group budgets that he had assembled with Mr Paget's agreement. He also says

Because I was becoming an employee in a management role I ceased working in the sales role and assisted other sales persons to complete the sales properties I had on the market. I gave all my listings to other sales people in the office and stopped selling real estate.

[12] Mr Taylor then says

On 13 June 2006, after about ten weeks in the role of Operations Manager I was suddenly and very unexpectedly advised that I was no longer needed and that Shane Paget intended on carrying forward with the business by himself.

[13] Mr Taylor also makes mention of a team meeting at the respondent's Rangiora office some two weeks before his unexpected dismissal where he said Mr Paget told the Rangiora team Mr Taylor had joined the management team and if they ever needed any help they could go to him if Mr Paget was not available.

[14] The evidence of Ms Taylor, Ms Cuthbert, Mr Hipango and Mr Paget is that a new company was under discussion, which company would perform the management

functions in respect of Mr Paget's business interests. Ms Taylor says that following a meeting on 15 February 2006, she reserved the company name of Trends Group Limited for the envisaged organisation. Mr Paget and Ms Taylor and Ms Cuthbert all say it was in this new entity that the applicant was offered a 25% equity, not in Trends Realty Limited.

The issues

[15] To determine this matter the Authority needs to make findings on the following issues:

- Did the status of the applicant change from that of an independent contractor to that of an employee on 1 April 2006; and
- If so, was he unjustifiably dismissed on 13 June 2006; and
- If so, to what remedies is the applicant entitled?

The investigation meeting

[16] The Authority heard evidence from the applicant himself and supporting evidence on his behalf from his wife, Belinda Taylor; Ms Catherine Smith, Branch Manager of the Rangiora office; Ms Sarah Watson, Office Administrator in the same office; Ms Jo Friend, the applicant's Personal Assistant between 1 November 2005 and 15 March 2006 and Mrs Carol Summerfield, the applicant's mother who on occasions provided temporary administration support to that office.

[17] On behalf of the respondent, evidence was heard from Mr Paget, Ms Cuthbert, Mr Hipango, Ms Taylor, Ms Celia Quinnell, Personal Assistant to Mr Paget, and Ms Louise Holland, the Office Administrator in Rangiora since July 2005.

[18] The meeting was generally cordial despite the diverse positions of the parties and the Authority records its appreciation of the assistance of counsel in largely confining questions to relevant issues and for their detailed and timely submissions.

[19] No major new issues arose in the meeting although I had the view at the time that witnesses for the applicant appeared to have obtained the bulk of their information on significant points of contention from Mr Taylor rather than independent sources. Also, it was unclear to me how Mr Taylor appeared unable to

distinguish a prospect of employment with a company yet to be formed from an arrangement with the respondent which clearly established him as an independent contractor.

Legal principles and analysis

[20] The starting point is s.6(1), (2) and (3) of the Employment Relations Act 2000

6. *Meaning of employee*

- (1) *In this Act, unless the context otherwise requires, **employee** –*
- (a) *means a person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
 - (b) *includes –*
 - (i) *a homemaker; or*
 - (ii) *a person intending to work; but*
 - (c) *excludes a volunteer who –*
 - (i) *does not expect to be rewarded for work to be performed as a volunteer; and*
 - (ii) *receives no reward for work performed as a volunteer.*
- (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 the person; and*
 - (b) *is not to treat as a determining matter any statement by the persons that describe the nature of their relationship.*

[21] In her decision in *Bryson v. Three Foot Six Ltd* [2003] 1 ERNZ 581, which was confirmed by the Supreme Court, [2005] 1 ERNZ 372 (SC), Judge Shaw considered the above provisions and set out the basis for the analysis of the facts which must follow:

[19] Since section 6 of the Employment Relations Act 2000 changed the tests for determining what constitutes a contract of service there have been two cases [Koia v. Carlyon Holdings Ltd [2001] ERNZ 585, and Curlaw v. Harvey Norman Stores (NZ) Pty Ltd [2002] 1 ERNZ 114] which have interpreted the changes to the law. The principles established by these cases may be summarised as follows:

- *The Court must determine the real nature of the relationship.*
- *The intention of the parties is still relevant but no longer decisive.*
- *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
- *The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the “fundamental” test.*
- *The fundamental test examines whether a person performing the services is doing so on their own account.*
- *Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.*

[22] In *Stephen Clark v. Northland Hunt Inc* (unreported, Perkins J, AC66/06) the Judge commented:

In the end it is necessary having considered the formulaic approach adopted in Bryson, to gain an overall impression of the underlying and true nature of the relationship between the parties.

Control Test

[23] The control test involves an assessment of the way in which the person providing the work exercises supervision and control over the person performing it. The question in this particular case is did Mr Paget, during the course of the ten weeks the applicant alleges he was an employee, directly or indirectly supervise the work he was doing. The evidence of Celia Quinnell was that she became aware in a general way that the applicant and Mr Paget were looking at going into business together and there was to be some restructuring of the overall business setup. She also said that the applicant went about the office speaking of where he was going and what he would be doing and what changes he would be making, but that she herself was never told by Mr Paget to report to the applicant and continued to take her instructions from Mr Paget. She says that Mr Taylor was working on figures for the new proposal.

[24] On the basis of that and other evidence there was clearly a number of meetings between various people engaged in the project and I expect there would have been discussions between Mr Paget and Mr Taylor in respect of the proposed financial projections Mr Taylor was preparing. On the evidence it appears that Mr Taylor had considerable autonomy and that Mr Paget exercised virtually no control in the sense of a master/servant relationship in respect of Mr Taylor. The behaviour of both men is redolent of an intended partnership rather than of an employment relationship.

Integration test

[25] The question here is to what extent was Mr Taylor integrated into the Trends Realty organisation in terms of its day-to-day operations.

[26] Again reviewing the evidence before the Authority, it appears that the tasks the applicant was performing were related not to the day-to-day operations of Trends Realty Limited, the respondent company, but the financial planning and structural elements for the entity that it was proposed to establish. It is clear from the evidence that in relation to some IT issues, Mr Taylor assisted some of the respondent's staff. Such assistance was occasional during the period in question, indicating the bulk of Mr Taylor's time was taken up with tasks relating to the company it was intended to establish.

Fundamental test

[27] This test examines whether Mr Taylor during the period in question was providing services on his own account. In other words, was Mr Taylor in business himself when undertaking these tasks or had he been employed by the respondent to undertake them. There is no question from the evidence that Mr Taylor was in business on his own account as a Real Estate Agent up until the period in question and as well had a small IT business and was also engaged in some property development work. Although Mr Taylor had handed his listings to other agents within the respondent company, he continued to be involved in his property development enterprise and to a lesser extent in his IT business. The evidence was the surrendering of those listings was at his own initiative.

[28] Standing back, it appears that the work Mr Taylor was undertaking was likely to be to the benefit of himself and of Mr Paget in the event that the planned enterprise went ahead. There is no evidence before the Authority indicating an offer on the part of the respondent to pay Mr Taylor for this work and this exercise has the air or flavour of the potential equity partner providing his time to ensure adequate planning is put in place for a planned enterprise in which he would have a substantial interest.

[29] There is no written documentation supporting Mr Taylor's claim to have been employed by the respondent in the period in question, not even a diary note or jottings taken during the course of a conversation with Mr Paget.

[30] It is accepted that the respondent company met the initial lease costs on the vehicle used by the applicant during this time. However, that in itself does not confirm the existence of an employment relationship. It seems likely that Mr Paget saw the provision of a lease car as his contribution to the work that Mr Taylor was undertaking on their mutual behalf, given that Mr Taylor had given his listings to other agents.

[31] Considered in the round, it appears unlikely that the applicant, who had been in business on his own account for a number of years and apparently very successfully so, would have seen himself (somewhat naively) as an employee of a company that was yet to be established, without some formal undertaking as to how his income was to be derived prior to that company being incorporated.

[32] It is clear that in the course of discussions and consultations with professional advisers it was envisaged that both Mr Paget and the applicant would eventually draw salaries from the company once it was set up. The harsh reality is that Mr Paget decided not to proceed with the enterprise and advised Mr Taylor of this. While it is understandable given his enthusiasm for the project that Mr Taylor would be upset, particularly in the light of his securing the funds needed to procure his 25% shareholding, nothing in the facts before the Authority convinced me that the applicant had become an employee of the respondent company as of 1 April 2006.

[33] Overall, I assess the position of the applicant to be that of a businessman engaged in the preliminary research and planning of an enterprise in which he was to have a 25% equity in the event that the project proceeded to incorporation.

[34] I am confirmed in this view by the evidence of most witnesses who appeared before the Authority including the applicant who referred to the proposed company as a *new entity* and a *new set up*. Others consistently referred to the work Mr Taylor was undertaking during this period as related to a structure which was to be put in place in the future. It follows that a company not established and incorporated is unable to act as an employer, and I am well satisfied on the balance of probabilities that no offer of employment on fixed remuneration terms was ever entered into between the applicant and the respondent company.

The determination

[35] Returning to the issues set out above in this determination, I find:

- Mr Taylor was not employed by the respondent after 1 April 2006 but was engaged in the planning tasks relating to the possible establishment of a company likely to be called Trends Group Limited. It follows that Mr Taylor was not unjustifiably dismissed by the respondent and that the Authority is unable to consider any remedies.

Costs

[36] Costs are reserved.

[37] The parties are to attempt to agree on the matter of costs. If this is not possible, Mr Shamy is to lodge and serve a copy of his memorandum 30 days following the issue of this determination. Mr Goldstein is to have a further 14 days to lodge and serve his memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority