IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 210
5368914

	BETWEEN	GRAEME VALLANCE Applicant
	A N D	NELSON BRAKE SERVICES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Kevin Murray and Shayne Boyce, Advocates for Applicant Simon England and Clare North, Counsel for Respondent
Investigation meeting:	23 August 2012 at Nelson
Date of Determination:	25 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Vallance), seeks a determination from the Authority as to whether he was an employee or a contractor during the period 1 August 2008 down to 31 August 2011. In fact, as pleaded, Mr Vallance maintains that he was an employee for that period and is accordingly entitled to the payment of holiday pay over the period in question.

[2] The respondent (Nelson Brake Services), contends that Mr Vallance was at all times a contractor and not an employee and so insofar as Mr Vallance asserts that he was an employee for the relevant period, Nelson Brake Services resists that claim.

[3] It is common ground that between 1999 and August 2008, the present parties were respectively contractor and principal. During that period, Mr Vallance

distributed brake and clutch parts to customers of Nelson Brake Services and, in addition, he distributed oils as part of his business, GV Oils.

[4] Again, there is no dispute that at the beginning of the global economic crisis, Nelson Brake Services sought to address its significant trading losses by looking at its business structure and, amongst other things, reviewing expenditure. One of the consequences of that review was an engagement with Mr Vallance which culminated in the execution of a standard form employment agreement between Mr Vallance on the one hand and Nelson Brake Services on the other, which for the sake of identification purposes, the Authority will refer to as the 2008 agreement. This agreement was signed on 31 July 2008 and is expressed to be for one year from 1 August 2008 down to 31 July 2009. That time period indicates Nelson Brake Services' view at the time, that the financial difficulties that the firm was then facing, would be temporary in nature. The evidence the Authority heard was that Nelson Brake Services' expectation was that at the end of a 12 month period, things would return to normal and the implication of that was that Mr Vallance would return to the arrangements that had previously applied, insofar as there was any difference between the arrangements before the execution of this employment agreement and afterwards.

[5] The agreement is a standard employment agreement with the kinds of provisions that one would expect in an ordinary document of its kind. It is very clearly not structured so as to look in any way like an arrangement of a contractual nature. Indeed, the evidence the Authority heard was that Nelson Brake Services had simply pulled a blank employment agreement from the bottom drawer of the office desk, put Mr Vallance's name into the agreement and had him sign it.

[6] It is common ground that the only difference between the arrangements that applied prior to the execution of this employment agreement and the arrangements that applied afterwards was a reduction in the remuneration paid to Mr Vallance together with a reduction in the vehicle allowance that he was paid. In every other respect, the evidence is clear that there was no change in the arrangement between the parties. There was no change in the hours that Mr Vallance worked (he confirmed that in his evidence). Mr Vallance confirmed that he continued to file invoices with Nelson Brake Services and it continued to pay on those invoices. Mr Vallance never filed a timesheet, either before the employment agreement or afterward, he chose his own start and finish times and he would occasionally not turn up for work, especially

on a Friday when he had his own sporting commitments. Mr Vallance told the Authority that he never asked for holiday pay before August 2011 when the present employment relationship problem arose and throughout the whole period of his association with Nelson Brake Services, Mr Vallance traded as GV Oils. In effect, he told the Authority that Nelson Brake Services was the wholesaler of the oil and that he was the retailer, but the short point was that the more oil he sold, the more profit he himself made.

[7] Mr Vallance ran his own business as a sole trader and the Authority heard from his accountant that Mr Vallance's only income (apart from interest) was from his business. Mr Vallance's accountant confirmed that Mr Vallance charged expenses against his income as a self-employed person would be expected to, and that Mr Vallance could thus be seen to have received a benefit from being a contractor.

[8] Critically from the Authority's standpoint, Mr Cameron (Mr Vallance's accountant), confirmed to the Authority that in all of the years that Mr Cameron had acted for Mr Vallance, up to and including the end of the relationship with Nelson Brake Services, Mr Vallance had never informed Mr Cameron that the relationship was one of employment. Further, Mr Vallance's accounts had been prepared on the footing that he was a self-employed sole trader from the beginning of the contractual relationship with Nelson Brake Services down to August 2011. That is, there had been no change in the accounting treatment of Mr Vallance's situation over the whole period that he was working with Nelson Brake Services and in particular, no change to reflect the contention that there was a fundamental change in the relationship when the 2008 agreement was entered into.

[9] Although Mr Vallance's evidence was that he had never asked for holiday pay until August 2011, he told the Authority that he had invoiced Nelson Brake Services for statutory holidays and that those invoices were paid. But on inquiry at the investigation meeting, it became clear that the reason that Nelson Brake Services had paid those amounts was because there was no breakdown in the invoices rendered to indicate what the claim was for. Only Mr Vallance knew that he was actually claiming for statutory holidays. There was no timesheet record and absolutely no way of Nelson Brake Services knowing that part of the invoice it was paying for the month included statutory holiday payments.

[10] Nelson Brake Services gave the Authority the clearest evidence that it had certainly never understood that it was paying for statutory holidays and resented the fact that it had been made to pay statutory holidays by, in effect, sleight of hand. Accordingly, the Authority is satisfied that the contention that, because statutory holiday pay was made, it follows that annual holiday pay ought to be paid as well, is not made out because Nelson Brake Services was oblivious of having paid for statutory holidays and did it unwittingly.

[11] The way in which the invoicing system worked was that Mr Vallance was paid a weekly retainer and then at the end of the month he furnished an invoice for his hours worked and from that invoice the cumulative total of the weekly retainer was deducted and the balance then paid to Mr Vallance against that invoice. The structure of the invoices is simple. They simply record the number of days worked for Nelson Brake Services, the amount of product sold and the claim for vehicle expenses. The whole relationship was based on trust (a point made by both Mr Vallance and Nelson Brake Services' witnesses) and there was never any suggestion by either party that Nelson Brake Services would not pay Mr Vallance promptly on receipt of his invoice. There appears to have been only one occasion when there was a difficulty; during the financial crisis when the firm's revenue turned down dramatically, the bank bounced a cheque to Mr Vallance for his November 2009 invoice. That default was speedily remedied thereafter however.

[12] The 2008 agreement was expressed to come to an end on 31 July 2009. There was a subsequent employment agreement which, for the purposes of this determination, the Authority will refer to as the second agreement. That agreement appears to have been signed by the parties on 3 September 2009 and as drafted appears to provide for the period from 1 September 2009 down to 28 February 2011, but actually that provision has been struck out and the parties have written and initialled the following words: *1st March 2011 to 31st August* (presumably 2011). The relationship came to an end on 31 August 2011. Whatever the actual operative term of this second agreement, it is clear that it did not apply for the total period between the end of the 2008 agreement and the end of the relationship altogether, on 31 August 2011. It either covered only the period from 1 September 2009 to 28 February 2011, or the period from 1 March 2011 to 31 August 2011. Either way, there is a gap where there appears to be no coverage by an employment agreement and given that the first agreement and the subsequent agreement are term agreements

and that there is no provision in either agreement indicating that the arrangement will run on at the conclusion of the term, it seems reasonable to conclude that there are gaps in the coverage of the period for which there is no employment agreement in place.

[13] This conclusion is further supported by the plain evidence of Nelson Brake Services that it had no idea at all what it was doing when entered into either agreement with Mr Vallance. What it thought it was doing was reducing his costs to the business because of the economic downturn and it thought that it was doing no more than documenting those reductions in cost so as to protect the business into the future. It pointed out that there had been no written agreement at all prior to the employment agreements being undertaken and it was simply wanting to document the new arrangement. It was equally plain that it had no idea that what it was doing was purporting to change the nature of the arrangements between the parties and, in particular, as a matter of law, Mr Vallance's status as a contractor.

Issues

[14] The only issue in the present case is whether Mr Vallance remained a contractor after the execution of the two employment agreements, or not. It is common ground that he was a contractor before the execution of the 2008 employment agreement but he maintains that from that point on his status changed to one of an employee. That view is contested, of course, by Nelson Brake Services.

Did Mr Vallance become an employee in 2008?

[15] The Authority has no hesitation in concluding that Mr Vallance did not become an employee in July 2008 when he and Nelson Brake Services purported to enter into an employment agreement. It is common ground that prior to the execution of that document, both parties accepted the position was one of contractor and principal. The facts the Authority heard make it plain that there was no change at all in the relationship save for the execution of, first the 2008 agreement and then, some time later, the second agreement. Throughout the whole period of Mr Vallance's engagement, both before, during and after the execution of the two agreements, the relationship between these parties, on the evidence the Authority heard, was the relationship of a contractor and his principal and the mistaken execution of two completely inappropriate employment agreements did not change that position at all.

[16] If the factual matrix disclosed changes in the parties' behaviour after the execution of the 2008 agreement, then the Authority would have been more inclined to look for evidence that the real nature of the relationship had changed, but that is not the position in this case. All of the evidence supports the conclusion that the initial longstanding relationship of contractor and principal continued for the whole engagement, notwithstanding the erroneous execution of two disparate employment agreements which do not even provide coverage over the total period that Mr Vallance is claiming he was an employee.

[17] Looked at another way, if Mr Vallance was an employee because of the execution of the employment agreements, then he has failed to explain how those agreements cover the period between them when there appears to be no employment agreement in place. Is it the position that Mr Vallance had two discrete periods of employment separated by a period of some months when he was a contractor again, or is the Authority to imply the continuous coverage of the employment relationship from the execution of the first agreement down to the termination of the relationship?

[18] As the Authority has already observed, on the evidence it heard, there was no change whatever in the relationship between these parties during the whole time they had their association, notwithstanding the execution of the two agreements during that period. That is the evidence of both Nelson Brake Services and, importantly, Mr Vallance himself. It is also the evidence of Mr Vallance's accountant who told the Authority that he had never been advised that Mr Vallance was an employee and that throughout the whole period of Mr Vallance's relationship with Nelson Brake Services, Mr Vallance's accounts had always been prepared on the footing that he was in business on his own account as a sole trader.

[19] The law on this issue is well known. In *Bryson v. Three Foot Six Ltd* [2003] ERNZ 581, Judge Shaw in the Employment Court enunciated the test which was subsequently approved by the Supreme Court. Her Honour said that the task that the Court or the Authority must undertake was to identify the *"real nature of the relationship"* and that that was done primarily by looking at the common law tests that have traditionally been applied to determining that relationship.

[20] Looking first at the control test, this test requires an assessment of the amount of control that the principal or employer has over the other party. Here, the evidence is as plain as can be that Nelson Brake Services had little real control over

Mr Vallance's activities. Again, even on his evidence, he set his own hours of work (albeit regular ones) and he would occasionally not attend at work at all if he had sporting commitments, or on occasions, leave work early. He determined his own rounds (again no doubt in a logical and regular way, but the determinations were his and not Nelson Brake Services'). He did not account for his time in any way save by claiming at the end of the month that he worked for Nelson Brake Services for so many days. In that respect, Mr Vallance was different from every other person engaged with Nelson Brake Services; those other individuals were all required to account for their time.

[21] The integration test seeks to assess how far the individual is integrated into the affairs of the employer or principal. Here, the integration is not well established. Mr Vallance's primary activity was the sale of oil products while Nelson Brake Services' primary activity was repairing brakes and clutches in vehicles and providing parts for that activity to others.

[22] Mr Vallance was the only person doing the sort of mix of activity that he performed; nobody else in Nelson Brake Services did anything like what Mr Vallance did. When Mr Vallance's service came to an end on 31 August 2011, Nelson Brake Services took no steps to replace him. Mr Vallance had had a unique and special arrangement with Nelson Brake Services and with his retirement, it was not considered necessary or desirable to continue with a similar kind of arrangement.

[23] Mr Vallance always provided his own vehicle and trailer to undertake the work and, in summary, it seems best to describe Mr Vallance's activities as being "an accessory" to the business of Nelson Brake Services rather than integral to it.

[24] The fundamental test seeks to identify whether the person performing the services is doing so on his own account or not. In the present case, it seems as plain as can be that Mr Vallance was providing the services on his own account. The Authority's conclusion in that regard is greatly enhanced by the clear and unequivocal evidence of Mr Vallance's accountant who confirmed that throughout the whole period that Mr Vallance was engaged with Nelson Brake Services, he accounted for his tax as a self-employed person and that his principal income was derived from that engagement as a sole trader. Throughout the engagement with Nelson Brake Services, Mr Vallance furnished monthly invoices providing the barest of details and those invoices were paid by Nelson Brake Services. The invoices included

components for product sold and for vehicle expenses and provided for GST on all the amounts claimed.

[25] The Authority is satisfied, Mr Vallance was a self-employed person rendering invoices to his principal on a GST basis and obtaining payment against those invoices. None of the common law tests give any credence to the view that Mr Vallace was an employee. Indeed, properly construed, each supports the conclusion that Mr Vallance was a contractor. Moreover, when those tests are taken in their aggregate, that position is further reinforced.

Determination

[26] The Authority is satisfied that Mr Vallance was at all times a contractor to Nelson Brake Services and at no point was the relationship one of employment. It follows from the foregoing conclusion that Mr Vallance's claim to the Authority fails and that he is not entitled to receive payment for annual holiday leave, as he has claimed.

Costs

[27] Costs are reserved.

James Crichton
Member of the Employment Relations Authority