

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 69
5403491

BETWEEN KARL DANIEL VARLEY
 Applicant

A N D RESULTS CHRISTCHURCH
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Karl Varley on his own behalf
 Ian MacKenzie for Respondent

Investigation meeting: 23 April 2013 at Christchurch

Submissions Received: At the investigation

Date of Determination: 24 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Karl Varley, seeks the payment of moneys he claims to be owed by the respondent, Results Christchurch Limited (Results Christchurch).

[2] Results Christchurch disputes any liability and contends Mr Varley owes money to it. That, however, is not the prime defence. Results Christchurch relies, at least before the Authority, on a contention Mr Varley was never employed and the Authority therefore has no jurisdiction.

Background

[3] Results Christchurch operates a management consultancy and coaching business. It does so pursuant to a licence issued by Results New Zealand Limited and is jointly owned by that company and local shareholders.

[4] Mr Varley first became aware of Results Christchurch when he saw an advertisement for a *sales entrepreneur*. He responded and was advised the need had changed. Results Christchurch was now looking for someone to manage its operation and address various difficulties it was facing. Mr Varley was asked if he was interested and replied *yes*.

[5] Mr Varley says he had a discussion with a Mr Ridler, then a principle of both Results NZ and Results Christchurch, over the form of their arrangement. He says he was offered the choice of working as an employee or being engaged as a contractor. He says he chose the latter as it would provide various tax benefits and was easily facilitated given his ownership of Varley Consulting Limited (previously known as Varley Enterprises Limited and trading as Business Solutions). It was agreed Varley Consulting would invoice Results Christchurch \$8,000 plus GST per month for services which would be provided by Mr Varley.

[6] As a result the parties never entered into an employment agreement and never intended to do so. Mr Varley also claims he never signed the consultancy agreement due to a disagreement with some of the terms contained there-in. Results Christchurch considers that odd but is unable to dispute the claim as it can no longer find the agreement.

[7] Mr Varley subsequently became a shareholder, and later still a director of Results Christchurch. The way in which he was remunerated also changed. Mr Varley says:

Due to the ongoing financial troubles of the business, in May 2008, Mr Ridler informed me he was looking at obtaining additional funds and asked if I could split invoices to show \$5,000 management fee and \$3,000 Sales Commission.

[8] Both sums would continue to attract GST.

[9] Some time after Mr Varley became a shareholder the method of payment changed yet again. He ceased furnishing invoices and began taking monthly payments of \$5,000 as a shareholder drawing. This meant Mr Varley's remuneration no longer appeared as an expense which increased the operating result and made Results Christchurch look more profitable. This would assist attempts to source additional capital. The evidence would indicate the \$3,000 payment ceased.

[10] Unfortunately Results Christchurch continued to struggle and this resulted in an agreed parting of the ways in August 2011. An initial dispute arose over Mr Varley's payments for that month and it was lodged in the Disputes Tribunal. The Disputes Tribunal heard the claim and adjourned the matter *sine die*. It did so given evidence which raised a question as to whether Mr Varley was an employee or a contractor. The Tribunal stated:

Where there is an arguable case that the contract between the parties is an employment contract it is appropriate that the matter be referred to the ERA for a determination in this regard.

[11] The rationale for that conclusion lay with the exclusive jurisdiction bestowed on the employment institutions to determine proceedings founded on an employment relationship.

[12] Since that time Mr Varley has had cause to revisit his situation and the amount sought has escalated. It now totals \$173,505 which is the alleged difference between what he says he was due and what he received for the entire period of the relationship which spanned August 2007 to August 2011. It also includes the repayment of a capital sum he injected into the business and interest on that sum.

Determination

[13] The parties agree the prime question is whether or not Mr Varley was an employee or contractor. That will decide where his substantive claim should be addressed. I can only address it if the conclusion is Mr Varley was an employee.

[14] I have considered the law as it applies to determining the status of an arrangement, the parties positions and the evidence. Mr Varley reflects on issues such as a contention his actions were the subject of stringent control and the work he performed integral to the conduct of the respondent's business. Notwithstanding the fact these claims are disputed such indicators pale into insignificance when balanced against a couple of key indicators.

[15] Mr Varley's initial instinct was to seek recourse through the Disputes Tribunal. He did so, according to the order of the Tribunal, on the grounds he was contracted to Results Christchurch. That his initial reaction was consistent with his understanding of the relationship was confirmed before me.

[16] As indicated earlier, Mr Varley's evidence is he and Mr Ridler discussed whether or not he should provide his services as an employee or a contractor. He chose the latter. He intended to be engaged as a contractor and that is consistent with the respondent's understanding of the relationship. I conclude it is difficult to now try and resile from a relationship freely and knowingly entered into.

[17] Mr Varley then chose to furnish invoices, which is not the behaviour of an employee. He added GST which is also not the behaviour of an employee. It is not even an option available to an employee. Whilst the manner of payment subsequently changed, especially as a result of Mr Varley becoming a shareholder, there is no evidence of any intent to change the basis of the relationship.

[18] These are key indicators and indicative of the relationship the parties intended, and subsequently entered into. Mr Varley was, I conclude, contracted to provide services to Results Christchurch through what was then known as Varley Enterprises Limited.

[19] It may be Mr Varley is owed money, but the foregoing conclusion means the Authority does not have jurisdiction to determine his claim.

[20] His application, at least as far as the Authority is concerned, is dismissed.

[21] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority