

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 143  
5408465

BETWEEN	ELIAS WYBER Applicant
AND	MIDAS INFOMEDIA LIMITED First Respondent
AND	AMARDEEP SANDHU Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Megan Richards and Amberley James, for the Applicant  
Mike Gould, for the Respondents

Investigation Meeting: 20 and 21 August 2013 at Wellington

Determination: 11 November 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Elias Wyber claims he was unjustifiably dismissed by Midas Infomedia Limited and/or Amardeep Sandhu by actions they took on 18 May 2012. Alternatively, Mr Wyber claims that the conduct and treatment of him by Midas Infomedia Limited and Mr Sandhu amounts to an unjustified constructive dismissal.

[2] Mr Wyber also claims that Midas Infomedia Limited and Mr Sandhu breached the Employment Relations Act 2000 (the Act) by failing to supply him with a written employment agreement. He says they also breached the Holidays Act 2003 for failing to provide wage records upon his request.

[3] Mr Wyber seeks a number of remedies including lost wages, compensation for hurt and humiliation, penalties for breaches of the Act and the Holidays Act, interest on lost wages, and costs.

[4] Midas Infomedia Limited (Midas), an IT consultancy firm, and Mr Sandhu deny that Mr Wyber was employed by either of them, or that he was constructively dismissed. At the time Mr Wyber had a relationship with Midas, Mr Sandhu was the Chief Executive Officer for that company and held a majority shareholding in it. Midas and Mr Sandhu say that Midas engaged Mr Wyber, who was a professional contractor, on a contract for services basis between April 2011 and May 2012.

[5] Mr Wyber ended that relationship in May 2012 when he realised Mr Sandhu did not intend to sell down his 80% shareholding in the company. There was no dismissal and, as there was no employment relationship with Mr Wyber, there was no breach of the Act or the Holidays Act.

[6] By agreement, the investigation meeting encompassed both the preliminary issue of whether Mr Wyber's relationship with Midas and/or Mr Sandhu was one of employment or contract for services, and the substantive employment claims made by Mr Wyber.

**Preliminary issue – was Mr Wyber an employee or an independent contractor?**

*Evidence of the working relationship*

[7] Mr Wyber, who is an experienced project manager and business process consultant, initially met the founding directors of Midas in early 2008. They were Mr Sandhu and Dr Jeremy Buckley. Discussions among them resulted in Mr Wyber securing a contract with a Government agency in 2010, through Midas. Mr Wyber performed the work, invoicing Midas through one of his companies, Exploratory Technology Group (NZ) Limited ("ETG"). Midas invoiced the Government agency and paid Mr Wyber.

[8] In April 2011, Mr Sandhu verbally offered work to Mr Wyber, on terms that are now disputed between them. Mr Sandhu says he offered a three month contract to work for Midas on a particular project for an external organisation. The length of the contract was to line up with the expected completion date of that project. Mr Wyber's account is that Mr Sandhu asked him to join him as Head of Operations,

initially on a trial period of three months. This was to test the working relationship between Midas/Mr Sandhu and himself to ensure it was one that could endure on a long term basis.

[9] Mr Sandhu and Mr Wyber agreed on a rate of \$8,000 plus GST per month. Mr Sandhu says he engaged Mr Wyber for the performance of services for Midas. ETG invoiced Midas for Mr Wyber's services, and Midas paid those invoices.

[10] The project was incomplete after three months and Mr Wyber continued working for the company. He says he had a 3 month review in July 2011 with Mr Sandhu and Dr Buckley, and that he became a permanent employee from this time. Mr Wyber's evidence of the agreement over remuneration was that he *"would be remunerated by a base salary of \$108,000 per annum (net) plus bonus and overtime payments. These payments were calculated on the basis that, as an incentive, I was to receive 70% of any billable revenue I generated over \$160,000"*.

[11] Mr Sandhu disputes this account and says he agreed that Mr Wyber could extend his contract indefinitely to the end of the project. He also agreed to widen their arrangement to include other services to be performed for and on behalf of Midas. Mr Wyber was given the title Head of Operations at this time, and his contract rate was increased to \$9,000 plus GST per month.

[12] Mr Sandhu says Mr Wyber was free to take up other contracting work outside Midas. He denies the bonus and overtime agreement claimed by Mr Wyber. Mr Sandhu says their discussions were over Mr Wyber undertaking independent consultancy services with Midas acting as a brokering firm.

[13] Dr Buckley told the Authority he had no recollection of being present at a 3 month review. He could not recall *"employment"* ever being mentioned in relation to Mr Wyber although he could recall discussions about him buying into the company, or becoming a partner. While he was unsure of Mr Wyber's status, Dr Buckley regarded him as having a permanent position with Midas. He did not deny telling another witness, after Mr Wyber had left Midas, that Mr Wyber was brought into the company as a contractor and, as far as he knew, that situation had not changed. Dr Buckley resigned his directorship of Midas in or around October 2011.

[14] In October 2011 Midas engaged Robin Whitaker, for what was initially intended as a short term engagement. Mr Wyber had introduced Mr Whitaker to Midas.

[15] Mr Sandhu says Midas had no employees until November 2011 when employees from Effacy IT Services Limited (Effacy) transferred to the company. Dr Buckley was a director of Effacy, and that company's employees had been predominantly carrying out software development work for Midas. Dr Buckley says he was aware of his responsibilities as an employer and had drafted their employment agreements. He confirmed that, until October 2011, Midas had not been registered with the Inland Revenue Department ("IRD") for PAYE.

[16] Mr Wyber continued to invoice Midas through ETG, through the remainder of his time working for the company. He said he did this because Mr Sandhu instructed him to do so until such time as he sorted out PAYE arrangements. Mr Wyber says he assumed that Midas would be taking care of all the payment of his PAYE.

[17] Mr Sandhu's evidence is that the arrangement for Mr Wyber to invoice on a monthly basis was by agreement, and in accordance with the contract for services relationship between Mr Wyber and Midas. He says that in February 2012 he asked Mr Wyber if he wanted to become an employee of Midas, but Mr Wyber refused. His reason was that he *"had set himself up for tax purposes as a contractor, and that he had other interests including Pragmatic, and a gaming company that he was working on."*

[18] Mr Wyber's version of that conversation is that Mr Sandhu did not offer him employment at that time, but a directorship of Midas. He refused the offer because of the risks associated with directorial responsibility for a company with a single majority shareholder.

[19] From late February 2012 Mr Sandhu says that Mr Wyber's behaviour changed towards him and he became more aggressive in their discussions. In April 2012 Mr Wyber and one of the employees who transferred from Effacy, Steve Baker, informed him that they were not comfortable with his majority share in Midas.

[20] At that stage, Mr Wyber and Mr Baker had a 10% shareholding each in the company. Mr Sandhu says the pair gave him an ultimatum that he was to sell down his shareholding to them to correct the balance of power in Midas. He felt he had no

option but to consider selling as they had threatened to leave, along with all employees and contractors, without whom the company could not operate. Following discussions they agreed on a sum that would see Mr Sandhu exiting from the company, subject to Mr Wyber and Mr Baker securing finance, and the three of them agreeing terms on how and when the money would be paid.

[21] On 2 May 2012 Mr Wyber announced Mr Sandhu's exit from the company to the Midas team. Mr Sandhu says this followed Mr Wyber asking him to announce his departure, and his refusal to do so. At that stage the terms for Mr Sandhu's exit had been agreed in principle only and nothing had been finalised. Mr Wyber says that, although it was not ideal, it was necessary to give certainty to the Midas staff and to let them know their positions were secure.

[22] On 18 May 2012 Mr Sandhu called Mr Wyber to a meeting over invoices due for payment, one of which was Mr Wyber's monthly remuneration, the other being for another member of the Midas team who was a contractor. That person's invoices were normally authorised by Mr Sandhu.

[23] Mr Wyber's invoice was for a higher amount than his usual monthly invoice, which Mr Wyber says reflected an agreed increase. According to Mr Sandhu the increase had been discussed as something for the future, not for immediate implementation. He was upset over the invoices which he viewed as a premature attempt by Mr Wyber to wrest financial control of Midas before any agreement had been concluded over the change of ownership of the company.

[24] In the course of a heated discussion, about which Messrs Sandhu and Wyber have different recollections, Mr Wyber tendered his resignation when Mr Sandhu said he did not wish to sell his shareholding in Midas. Mr Sandhu accepted the resignation which was to take effect immediately.

### **Legal principles**

[25] To decide Mr Wyber's status it is necessary to determine the "*real nature of the relationship*" as provided by Section 6 of the Act, which provides the meaning of employee as follows:

- (1) *In this Act, unless the context otherwise requires, **employee***

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- (a) *Means any 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 home worker; or*
  - (ii) *A person intending to work; but*
  - (iii) *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; and*
- ...
- (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 persons; and*
  - (b) *Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[26] In the Supreme Court judgment in *Bryson v. Three Foot Six Ltd (No 2)*<sup>1</sup> the Court held that “*all relevant matters*” included the written and oral terms of the contract between the parties which would usually contain indications of their common intention concerning the status of their relationship.

[27] “*All relevant matters*” would also include any divergences from, or supplementation of, those terms and conditions which were apparent in the way in which the relationship had operated in practice. The Court said it was important that the Court or the Authority should consider the way in which the parties had actually behaved in implementing their contract. How their relationship operated in practice was crucial to a determination of its real nature.

[28] The written intention of the parties was relevant but not decisive in determining the real nature of the relationship. To determine the real nature of the relationship, the Court or Authority was required to “*have regard to features of*

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<sup>1</sup> [2005] NZSC 34

*control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test) ”.*

### ***Intention of the parties***

[29] As there was no documented record of the arrangement between Mr Wyber and Midas and/or Mr Sandhu, no intention can be inferred by that means. The parties' claims over their respective intentions differ.

[30] In the investigation meeting Mr Wyber referred to his initial 3 months' work at Midas as a "*90 day trial period*". He said he had not worked with Mr Sandhu before and was uncertain whether it would work out, although he was confident of his ability to succeed.

[31] His statement of problem claimed that he had been "*employed*" by Midas "*initially in a fixed term role*" with an "*understanding that he would be employed on a permanent basis... after three months*". Under questioning, however, Mr Wyber conceded that he had been happy to be a contractor for the first 3 months.

[32] I conclude from this that Mr Sandhu and Mr Wyber respectively assumed or accepted their relationship to be a contract for services in April 2011 when they agreed that Mr Wyber would work on a particular Midas project. That was the relationship they had in 2010 when Mr Wyber worked for a government agency after being put forward by Midas. It was also the relationship Mr Sandhu says he himself had with Midas, so it was an arrangement that was familiar to them both.

[33] Mr Wyber may have seen the 3 months of project work as a test of whether he and Mr Sandhu could work effectively together. This did not, however, transform the 3 months' project work into a "*90 day trial period*" as Mr Wyber characterised it in the investigation meeting.

[34] Mr Wyber claims to have asked for an employment agreement and questioned the deduction of PAYE from his remuneration after the initial 3 month period. Mr Sandhu denies that these matters were raised or discussed.

[35] Mr Wyber continued to be paid by Midas on the submission of monthly invoices issued in the name of his company, ETG, although such remuneration

arrangements are not necessarily determinative of the real relationship between them<sup>2</sup>. The amount invoiced changed to \$9,000 per month plus GST which, in Mr Sandhu's evidence, was to reflect the additional services Mr Wyber would provide Midas. Mr Wyber referred to "*a base salary of \$108,000 per annum (net)*".

[36] I prefer Mr Sandhu's evidence that Mr Wyber did not ask for an employment agreement, over Mr Wyber's claim that he did. I find it likely that both men considered there to be a greater degree of permanency over Mr Wyber's involvement with Midas after the initial 3 month period, by virtue of the broader range of work he was to undertake. However, I am not persuaded that they discussed a change from a contracting to an employment arrangement. Mr Wyber's acknowledgement in the investigation meeting that he could not ever recall Mr Sandhu referring to "*employment*" in relation to him undermined his assertions over such a discussion.

[37] It was clear from Mr Sandhu's evidence that he was comfortable with having contractors as a long-term part of the Midas team, including Dr Buckley and himself. The employment status of the transferring Effacy employees was the exception rather than the norm in Midas.

[38] Dr Buckley was well aware of the obligations of an employer in relation to employment agreements and establishing arrangements for the deduction of PAYE. This is evident from the steps he took to ensure that appropriate documentation and PAYE arrangements were in place for the Effacy employees when they transferred to Midas.

[39] If Dr Buckley had understood Mr Wyber to have changed from a contract for services to an employment relationship in July 2011, it is improbable that, as a co-Director of Midas, he would not have raised with Mr Sandhu the ensuing obligations for an employment agreement and arrangements for PAYE deductions. There was no evidence to suggest that he had done so.

[40] Mr Wyber referred, as support for his claim to have been an employee, to a document relating to financial projections that was prepared by Mr Sandhu. In the document there is a reference to "*Staff Costs*" under which one of the entries is "*Operations/PM*", which Mr Wyber says referred to his role.

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<sup>2</sup> Ibid at [37]

[41] I do not find that compelling, primarily because the document was prepared at a time when Mr Wyber and Mr Baker were negotiating with Mr Sandhu to buy out his majority shareholding. It was designed to assist them in their approaches to financial institutions. Also, it appeared that "*staff*" was not used as a term exclusively for employees, but was also intended to cover personnel who were engaged as contractors by Midas.

[42] Mr Whitaker gave evidence that when he agreed to Mr Wyber's request that he join Midas, he made particular enquiry of Mr Wyber about the nature of the relationship he would have with the company. This was because he had always been an employee throughout his career. Mr Wyber told him that he would have the same status as everybody else at Midas, which was that "*we are all contractors*", and that Mr Wyber would be on the same rate as him, which was \$9,000 plus GST per month.

[43] Mr Wyber says that the focus of the discussion he had with Mr Whitaker was on the rate that Mr Whitaker would be paid. It was not on whether his status would be as an employee or a contractor. He had no recollection of, but did not deny, telling Mr Whitaker that "*we are all contractors*".

[44] The day after he had been introduced to key Midas personnel, Mr Wyber emailed Mr Sandhu and others at Midas, copying in Mr Whitaker. The email referred to a possible starting date for Mr Whitaker and to his remuneration which would be "*at the same rate as me/us*". It also said that "*Assuming everything goes well, we will revisit commercials once we have a better idea of his ongoing role*". I find the terminology used by Mr Wyber indicated that Mr Whitaker would have a contract for services relationship with Midas, as he himself did.

[45] I find there was no intention between the parties that the nature of their contract for services relationship would change, either at the conclusion of the initial 3 month period, or at any later stage. I also find it was not a matter that the parties discussed or considered. I have reservations over the extent to which Mr Wyber turned his mind to the issue at the time, and am not persuaded that he formed a view about the change in nature of the relationship until after it had come to an end.

### ***Control***

[46] How the parties labelled their relationship, or intended it to operate, is only one consideration and does not necessarily determine its "*real*" nature. There is

conflicting evidence over the amount of control exercised by the company over Mr Wyber's work.

[47] Mr Wyber says it was Midas and/or Mr Sandhu who had control over who the company worked for, when that work would be done and what work would be performed. He did not have his own clients but took instructions from Midas and/or Mr Sandhu about that work.

[48] Mr Wyber's evidence about his first 3 months' work with Midas refers to his "*consulting/delivery*" work in relation to rescuing of a number of Midas projects and client relationships. He refers to implementing status reporting and mapping and costing various organisational processes. It appears that he had a free hand to operate within the broad outlines of the requirements Mr Sandhu specified.

[49] Throughout his working relationship with Midas, Mr Wyber claims that he was required to work regular hours in the company premises. Mr Sandhu had a great deal of control and supervision over his work, and he was required to report to him. He says his reports did not go out to external clients without first being approved by Mr Sandhu and he was required to meet project deadlines.

[50] Midas supplied the premises from which he worked and supplied much of the equipment he used in the performance of his duties, including an ipad. Mr Wyber used his own laptop, as a matter of preference, but could have had a computer supplied to him by Midas. The company reimbursed him for a computer monitor he purchased for work purposes. Mr Wyber also used his own mobile phone and some software, for which he was reimbursed.

[51] Dr Buckley, who left Midas in October 2011, referred in his evidence to Mr Wyber working from the Midas' office "*unless he was required to attend meetings offsite on Midas' behalf for its clients.*"

[52] Mr Sandhu says Mr Wyber had no contracted hours and was free to come and go as he pleased. He could choose to work from either home or Midas premises, or anywhere else at his discretion.

[53] Mr Whitaker, who joined Midas the same month that Dr Buckley left the company, says that Mr Wyber "*often arrived at work mid-morning and often left mid-afternoon ... (and) seldom kept regular hours*". Mr Wyber notes that he worked long

hours for Midas and was often required to make telephone calls from home at night to other parts of the world. He also says he frequently attended client meetings off-site.

[54] Mr Sandhu says he had little control over Mr Wyber's work flow and that Mr Wyber had "*complete freedom and flexibility to perform his services in order to deliver the projects he was involved in.*" Mr Wyber did not ever ask to take leave but simply informed other Midas staff and clients when he would not be in the office. In Mr Wyber's view, this supports his claim that he was expected to be in the office during working hours. If that expectation had not been present, there would have been no need for him to self-report his absences.

[55] I prefer Mr Sandhu and Mr Whitaker's evidence over this aspect of Mr Wyber's working arrangements. While Mr Wyber may have spent a considerable time in the Midas offices, I am not persuaded that he was required to do so. I accept Mr Sandhu's evidence that he could have chosen whether to work from home or elsewhere. I also accept Mr Sandhu's evidence that Mr Wyber was not required to, and did not, request leave for his absences. His notification to staff and clients of these were a matter of courtesy rather than obligation. Emails that were included in the agreed bundle of evidence presented to the Authority support that conclusion.

[56] Mr Wyber's evidence about project deadlines and approval by Mr Sandhu of his work for external clients is not compelling as an indication of an employment relationship. The completion of work within agreed timeframes and its checking for quality by a director is unremarkable, regardless of whether the work is performed by an employee or a contractor.

[57] I find that the application of the control test yields a mixed result but overall indicates more of a contract for services relationship than one of employment.

### ***Integration***

[58] The integration test entails examining factors such as whether the person was performing a role that was part and parcel of the business or whether the role was more of an adjunct to it. Where the person is performing the former type of role they are more likely to be considered to be an employee.

[59] Mr Wyber says that Mr Sandhu presented him to clients of Midas "*as their permanent employee*". The work he undertook at Midas was for Midas and was not

on his own account or for another organisation. He was expected to undertake the work personally and there was no opportunity for him to hire anyone to assist him.

[60] Mr Sandhu denies that Mr Wyber was introduced to clients as an employee. He says he introduced Mr Wyber as Head of Operations and a shareholder in Midas. He acknowledges the importance of Mr Wyber's role in the company, particularly in the latter months. Mr Sandhu says the first indication he had that Mr Wyber regarded himself as an employee was when he received the letter notifying Mr Wyber's personal grievance following his departure from Midas.

[61] Evidence put forward to support Mr Wyber's claim to have been an employee included a proposal document for a joint tender by Midas and another agency. The document contained information about Midas and referred to the company as having "9 employees". I do not find this to be compelling evidence of the company's relationships with the 9 people working for, or on its behalf, at the time. The number of "employees" appeared to include both directors of the company and is likely to echo the imprecise terminology used in the financial projections document I have referred to earlier. I do not accept it was necessarily an accurate description of the relationships those people had with Midas.

[62] Mr Sandhu and Mr Wyber have different views of Mr Wyber's ability to engage other persons to perform services to assist him. Mr Sandhu notes that it was Mr Wyber who was responsible for bringing Mr Whitaker into Midas. Mr Wyber acknowledges introducing Mr Whitaker to the company but denies having any involvement in engaging him. His evidence was that he "*introduced (Mr Whitaker) to Midas and facilitated the initial conversation between them, but was not involved in any discussion concerning hiring him.*"

[63] I do not accept that Mr Wyber had such a restricted role in relation to Mr Whitaker's recruitment. I prefer Mr Whitaker's evidence, which is supported by email correspondence, that it was Mr Wyber who had asked him to join Midas. However, as it was Midas that paid Mr Whitaker, and as he did not seem to have taken on any of Mr Wyber's functions, this simply confirms that Mr Wyber had influence within the company and does not indicate his ability to replace himself by a contractor.

[64] I accept Mr Sandhu's evidence that Mr Wyber had the ability to take on other contracting work during his relationship with Midas, whether or not he chose to do so. In doing so I am mindful of Mr Whitaker's evidence about a discussion he had with Mr Wyber shortly after he joined Midas. Mr Whitaker initiated the discussion as he wished to know if he was able to take on other contract work during his engagement with the company. Mr Wyber told him this was allowed, if time permitted, and noted that he had the same agreement with Midas. Although Mr Wyber denies that conversation occurred, I found Mr Whitaker to be the more consistent and credible witness and I prefer his evidence on the matter.

[65] It seems apparent that, after the first 3 months of the relationship, Mr Wyber became more integrated into the business of Midas. He was given the title of Head of Operations, and embarked on work other than that for the government agency for which he had initially been engaged. By early November 2011 he had been allocated a 10% shareholding in Midas. Mr Sandhu began to include him in "*more strategic discussions about the company*" from this time. He also gave Mr Wyber complete access to all Midas accounts and full access to the company's financial system. Mr Sandhu says this was on the basis of Mr Wyber's shareholding.

[66] Following Dr Buckley's departure from Midas in October 2011, Mr Wyber's importance to the company appears to have increased. Mr Wyber says that he was left in charge of the company when Mr Sandhu went overseas to visit his elderly parents. Mr Sandhu says that he gave Mr Wyber the authority to pay some contractors' invoices at this time, including Mr Wyber's own invoices.

[67] I conclude that Mr Wyber's skill set and experience was seen as greatly beneficial to the future growth of Midas and he was viewed as an important person in the company who had become integral to its development. As noted by Perkins J in *Clark v Northland Hunt Inc*<sup>3</sup>, none of the tests individually will necessarily be conclusive. "*The weight to be placed on them respectively will depend on the overall factual matrix. A consideration of each of the tests in turn, will give the Court an overall feeling for the underlying nature of the relationship. In some cases the position will be patently obvious, in other cases there will be a fine balance.*"

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<sup>3</sup>(2006) 4 NZELR 23 at [22]

### ***Fundamental test***

[68] This test looks at how the person engaged him/herself to perform the duties undertaken, and whether they did so as a person in business on their own account. The fact that Mr Wyber invoiced Midas through one of his companies, ETG, is a pertinent element. Mr Wyber's evidence was that, throughout his career, he had periods when he worked as an employee, and others where he was engaged on a contract for services basis. Since his arrival in New Zealand in 2006 he had mainly worked as a contractor and was registered for GST.

[69] He said he had not completed GST returns since July 2011 as he regarded himself as an employee. Evidence put to Mr Wyber in the course of the investigation meeting revealed that he had submitted a GST return for the period from 1 October 2011 to 30 April 2012. In that return, he accounted for the revenue he had invoiced Midas, and claimed GST credits for purchases made during the period.

[70] Mr Wyber says the fact that he had guaranteed remuneration each year, and did not profit or lose money from the success of the first respondent, shows that he had no real investment in the company or took no risks in working for the company, other than through his 10% shareholding.

[71] Mr Wyber's invoices to Midas contained Mr Wyber's personal physical and email addresses and telephone number. They did not describe the "*Services*", for which an amount of \$9,000 was invoiced monthly, other than under the heading Project Description, which was "*Operations*". An amount of \$65 was invoiced monthly for "*Telephone*". GST was added to these amounts.

[72] It seemed that Mr Wyber received only 2 payments from Midas for which he did not submit invoices over the 13 months of his association with the company. These were both made in April 2012, totalling \$12,650. Mr Wyber said these were bonus payments, comprising \$11,000 plus GST. Mr Sandhu acknowledged the payments, which he said he had felt "*badgered*" into giving Mr Wyber. He had given all Midas employees and contractors a financial '*thank you*', or a '*bonus*' around that time, when it seemed that the company's financial position was promising.

[73] Counsel for the respondents, Mr Gould, submitted that the facts relating to Mr Wyber's work with Midas showed that he claimed self-employment status in order to gain tax advantages, but was now claiming employment status in order to claim compensation. He referred to Lord Denning who, in describing such conduct, noted

that in his judgment "*the union between fairness, common sense and the law is strained almost to breaking point*".<sup>4</sup>

[74] Mr Wyber says that he had asked Mr Sandhu about being set up for PAYE following his first 3 months of working for Midas and had expected him to action his request. Mr Sandhu denies that discussion occurred. I have already indicated that I prefer Mr Sandhu's evidence over their purported discussion regarding a change from a contracting to an employment relationship. It follows that I do not accept Mr Wyber's claim of having unsuccessfully sought a change to his tax arrangements at that time. His only evidence was the assertions he made after his exit from Midas, with no email, file note or other documentary evidence to back them.

[75] There is also the matter of Mr Wyber's 10% shareholding in Midas which he, along with Mr Baker, was attempting to increase by buying out Mr Sandhu and obtaining his agreement to resign from the company. In the months leading to Mr Wyber's departure from Midas in May 2012 there was evidence of his exerting increasing pressure on Mr Sandhu, including notifying the Midas team of the Chief Executive's departure before such arrangements had been finalised. Mr Wyber's claims to have been pressing for employment arrangements throughout this time are at odds with his efforts to exert more control over the direction of the company.

[76] I conclude from all this that Mr Wyber enjoyed the tax benefits of a contracting relationship with Midas. He also regarded the company as a business opportunity and wished to increase his influence within it by means of buying out Mr Sandhu's shareholding jointly with Mr Baker.

#### *Industry practice*

[77] From the scant evidence of industry practice that was before the Authority, it seems that there is no standard arrangement in the IT industry for either employment or contracting status. As noted above, Mr Wyber's experience of working in the industry in New Zealand was mainly as a contractor.

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<sup>4</sup> *Massey v Crown Life Insurance Co* [1978] ICR 590 (CA), cited by Colgan J in *Excell Corporation Ltd v Carmichael* [2003] 1 ERNZ at [28]

## **Conclusions**

[78] Mr Wyber joined Midas as a contractor. That was the intention of both Mr Sandhu, who was responsible for the arrangements on behalf of Midas, and Mr Wyber himself. There was no change in that intention over the course of their relationship.

[79] The application of the control and integration tests yields mixed results, with some indications of a contract for services relationship, and others supporting an employment relationship. Industry practice is a neutral factor. It is the fundamental test that I find the most forceful. Mr Wyber reaped tax advantages from contracting his services to Midas through his company, ETG. Additionally, he was seeking, jointly with Mr Baker, to increase his control over the company's direction by pressuring Mr Sandhu to sell down his 80% shareholding.

## **Determination**

[80] For the reasons given above I find that Mr Wyber was not an employee as defined by s. 6 of the Act.

[81] That being so, I have no jurisdiction to consider his claim to have been unjustifiably dismissed. It follows that Mr Wyber's claims relating to breaches of the Employment Relations Act and the Holidays Act fail.

## **Costs**

[82] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority