IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 1
WRC 18/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NARINDER PAL SINGH Plaintiff
AND	ERIC JAMES & ASSOCIATES LIMITED Defendant

Hearing: 3 and 4 December 2009
(Heard at Wellington)

Appearances: Nat Dunning, Counsel for Plaintiff
J S Fairclough, Counsel for Defendant

Judgment: 18 January 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This is a challenge by hearing de novo to the preliminary determination of the Employment Relations Authority (WA 68/09) that Narinder Singh was not an employee of Eric James & Associates Limited. That determination brought to an end in the Authority the defendant's claim to claim back commissions on non-durable sales of insurance policies.

[2] Eric James & Associates Limited ("EJAL") is an insurance/assurance brokerage operating throughout New Zealand. It sells policies of insurance and assurance (principally medical and income loss) of insurance companies to individual policy holders. EJAL engages a number of representatives (to use a neutral term) across New Zealand to be intermediaries. A particular feature of EJAL's business is that it provides its representatives (called "sales advisors") with

"leads", the details of potential customers who have expressed an interest in relevant insurance cover. Unlike some other brokerages, EJAL sales advisors do not "cold call" or otherwise spend substantial proportions of their time persuading people to take an interest in having insurance cover.

[3] Mr Singh says that despite outward appearances, he was in reality an employee of EJAL when it terminated their contractual relationship. EJAL is adamant that Mr Singh was not ever its employee.

[4] The statutory test for determining this important jurisdictional question is set out in s 6 of the Employment Relations Act 2000 ("the Act").

> **6 Meaning of employee**
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> (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
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> (b) includes—
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> (i) a homeworker; or
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> (ii) a person intending to work; but
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> (c) excludes a volunteer who—
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> (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.
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> (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.
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> (4) Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008 or the Sharemilking Agreements Act 1937.
>
> (5) The Court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—
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> (a) employees under this Act; or
>
> (b) employees or workers within the meaning of any of the Acts specified in section 223(1).

(6) The Court must not make an order under subsection (5) in relation to a person unless—

(a) the person—

(i) is the applicant; or

(ii) has consented in writing to another person applying for the order; and

(b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.

[5] Mr Singh, now in his 50s, has had a varied occupational background. He has owned and operated his own magazine/lottery sales business and has worked for a large and well established insurance company selling its products. Although Mr Singh has no formal tertiary education or other similar qualifications and can probably not be described as having a sophisticated knowledge of employment law or practice, he has nevertheless learnt new roles quickly and has been a successful salesman and businessman generally.

[6] In 2005 Mr Singh returned to New Zealand from Australia where he had been involved with a business enterprise that had failed. Mr Singh needed income and therefore work. He answered an advertisement placed in the *Waikato Times* newspaper for a "SALES ADVISOR". The advertisement summarised the attractions of a position with EJAL although did not specify the precise nature of the business or the products it sold. Among the attractions held out were the absence of prospecting, the ability to earn a desired income for reasonable hours, work flexibility in one's local community, and good earnings as part of a group where it said that top achievers earned more than $100,000 per year.

[7] Mr Singh attended two interviews at the end of which he was offered a position with EJAL. I am satisfied that during these interviews it was made clear to Mr Singh, as part of describing the position, that he would be an contractor to, and not an employee of, EJAL. Upon accepting this appointment in principle, Mr Singh was sent a draft contract about a week before an orientation and preliminary training meeting between representatives of EJAL and a number of similar new sales advisors. Mr Singh had the draft agreement for about a week before that meeting. Although the defendant expected all of the agreements of its new sales advisors to be signed by them at the orientation and training meeting, there was an opportunity

there to ask questions about it. In reality, EJAL would not have agreed to any modifications to its standard form of agreement had they been sought by new sales advisors including Mr Singh. Although some new sales advisors either disagreed with the provisions of the agreement or found working for EJAL otherwise disagreeable, they and EJAL parted company at that early stage rather than negotiate for alternative arrangements.

[8] Mr Singh had found a position in a field in which he was experienced and to which he looked forward. At the same time, Mr Singh's need for income was such that he could not afford to do other than accept the position on EJAL's terms. Surprisingly, because of his business background including selling contracts of insurance to people whom he recommended to read and understand these, Mr Singh did not either read the draft EJAL agreement, or at least more than cursorily, before signing it at the start of the orientation/training programme on 15 August 2005. Mr Singh through counsel now complains that the agreement was foisted on him unconscionably. However, it is not surprising that, in my assessment, he took the position on EJAL's terms in the hope that it would both provide him with a good income for the hard work he was prepared to put in, and that he might later be able to renegotiate better terms as indeed he attempted to do.

[9] Although the fairness of the way in which the contract was entered into and associated issues of conscionability are not for determination in this proceeding, I am nevertheless satisfied that Mr Singh entered into his commercial relationship with EJAL freely, un-coerced, and if unknowingly, then wilfully blindly. He can have no justifiable complaint about how he came to be in a commercial relationship with EJAL.

[10] Conformably with the advice that EJAL representatives gave to Mr Singh before he signed the contract, its contents also emphasise clearly the nature of the relationship entered into. The agreement is entitled "INDEPENDENT ADVISOR CONTRACTORS AGREEMENT". "Advisor" is defined as meaning "the independent contractor". The agreement records at paragraph 1.1 that the parties have agreed "to appoint you as an independent contractor to sell the approved products to and to service the insurance and investment needs of our clients."

[11] And, at clause 1.2: "Your relationship with us is as a self-employed independent contractor and you shall not be deemed to be an employee of ours. It is a contract for service."

[12] I turn now to the operation of the contract in practice. "Leads" or prospects were supplied to Mr Singh by EJAL's call centre. Appointments with potential customers were made by the call centre operators and passed on to Mr Singh. These could be changed by the advisors if the potential customer agreed. Many appointments were made for evenings and at weekends, particularly on Saturdays, for potential customers who preferred these times. Mr Singh was expected to be available to work at least 3 nights a week and as well as some potential customers having appointments during normal business hours there was also training, record-keeping, and other administrative elements of the position that occupied substantial parts of Mr Singh's Mondays to Fridays, 9 to 5, weeks.

[13] Mr Singh was remunerated solely on a commission basis by EJAL which itself took commissions from its contracted insurance companies for business written.

[14] Mr Singh submitted GST invoices to EJAL for his commissions and, after withholding tax was deducted, he was paid by the defendant depending solely on the amount of business written, calculated by reference to annual premium payments. Mr Singh had an accountant who produced annual accounts for him as a sole trader and in which his business expenses were deducted from his income and Mr Singh was taxed accordingly. The commissions paid to Mr Singh were able to be claimed back from him by EJAL if a policy did not subsist for a set minimum period.

[15] Mr Singh operated his business from his home and provided his own motor vehicle for travelling to appointments with customers and to sales meetings and other company training events. EJAL provided Mr Singh with a business card. This emphasised EJAL and its contact details. The card bore Mr Singh's name, described him as "ADVISOR" and contained only his mobile telephone number.

Decided cases

[16] The leading judgments giving guidance on the interpretation and application of s 6 of the Act are that of the Supreme Court in *Bryson v Three Foot Six Ltd*[1] and of this Court in the same case at first instance that was upheld on appeal[2]. Section 6 requires the Court to consider and determine the real nature of the relationship between Mr Singh and EJAL. The inquiry in each case is intensely factual.

[17] Principles in deciding cases such as this, identified by the Supreme Court, include:

- Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law.

- The Authority or the Court, in deciding whether a person is employed under a contract of service, is to determine "the real nature of the relationship between them": s 6(2).

- The Authority or the Court must consider "all relevant matters" including any matters that indicate the intention of the persons: s 6(3)(a).

- The Authority or the Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship: s 6(3)(b).

- "All relevant matters" include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship.

[1] [2005] NZSC 34, [2005] 3 NZLR 721
[2] [2003] 1 ERNZ 581

- "All relevant matters" will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.

- "All relevant matters" include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

- Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental tests.

- Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor.

- Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.

- Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.

Intentions of parties

[18] Although Mr Singh did not enter into the commercial relationship with EJAL with any great consideration, if any, as to his status, that does not mean that he intended to be an employee and not a contractor to the company. Its intention, evidenced by its documentation formally recording the relationship and consistent with oral advice, was that Mr Singh was not to be an employee. He agreed with this position by accepting engagement on EJAL's terms and so in this sense there was a common intention at the start of the relationship that Mr Singh was not to be an employee.

Alteration of mutual intention?

[19] There is no, or at least insufficient, evidence to persuade the Court that the preliminary intention of either party about the status of their agreement changed during its course. It was only when EJAL sued Mr Singh in the District Court to recover overpaid commissions, in reliance on the independent contractor status of their relationship, that Mr Singh asserted that he was an employee. By then the relationship was over. I conclude that, at all material times, the parties' common intention was that theirs was not a relationship of employer and employee.

Label

[20] Bearing in mind as the statute and case law require that the description by the parties of the nature of their relationship is not a determining factor, I nevertheless consider that the agreement's clear description of the nature of the relationship is both a strong element in favour of the defendant's position and, at least if not more decisively, consistent with other relevant indicia.

Operation of agreement in practice

[21] As already noted, there was really no suggestion by Mr Singh or conduct consistent with an employment relationship until after they had parted company and EJAL had sued for clawed back commissions. The operation in practice of the parties' relationship is consistent with the manner in which I was satisfied it was intended from the outset to be other than one of employer and employee.

Control and integration tests

[22] These are traditional tools of analysis which, despite the statute's overriding requirement to determine the "real" nature of the relationship, continue to be applied in cases such as this.

[23] As in many such cases, the defendant exercised significant control over the way in which Mr Singh operated. In one sense, his was a contract for personal services. Mr Singh was not able to delegate or sub-contract his work but had to perform it personally. Mr Singh was not entirely free to determine when, where and how he worked for EJAL. Appointments with potential customers were made for him and, unless he rearranged these, he was expected to keep them. Mr Singh was expected to be available at least several evenings a week and at weekends. There were training and reporting requirements to which he was expected to adhere and Mr Singh was not permitted to engage in additional or alternative work in the same field, or certainly that would have been in competition with EJAL and its contracted insurers.

[24] But there were also elements of the relationship in which there was not that degree of control. Mr Singh's remuneration was not controlled by EJAL, at least to the extent of how much he could earn. The rates at which his earnings accrued were controlled by the defendant but, as with all commission salespersons, Mr Singh had considerable freedom to maintain, increase or even reduce his income by application of such personal attributes as his sales ability, his own contacts, innovative methods of operation and extended hours of work.

[25] Such elements of control of Mr Singh's working activities are, although significant, not uncommon in non-employment situations, what have sometimes been described as dependent contractor relationships.

[26] Mr Singh was not an integral part of EJAL's business. He provided his own support systems and operated his own motor vehicle as an expense of his business. Although having his name on an EJAL business card, the only contact details for Mr Singh were his own mobile telephone number. The plaintiff rendered invoices to

EJAL not for time worked but rather for business written and these, including goods and services tax, were met by the company. The ability to claw back remuneration on commission sales is a feature not consistent with a wage or salary in employment but more with an independent contractual relationship. The degree of training, record-keeping, support and reporting required by EJAL of Mr Singh was more akin to that of a franchisor/ franchisee commercial arrangement than with one of employment.

[27] So although in applying the control and integration test elements consistent with an employment relationship can be identified, such elements are not inimical to one of an independent contractor and, on balance, both tests tend to point away from a relationship in the nature of employment.

Fundamental test

[28] This examines whether it may truly be said that Mr Singh was in business on his own account rather than employed by EJAL. I conclude that Mr Singh was in business on his own account as a sales agent for an entity (EJAL) that was entrepreneurial, in the original sense of the word, selling on commission policies of insurance or assurance of specified contracted insurance companies. The nature of Mr Singh's position was sub-entrepreneurial in the same original sense of the word. The plaintiff took substantial business risks of the sort not seen in employment relationships but equally had the opportunity to take significant benefits in a way also not seen in employment relationships. In these circumstances I conclude that Mr Singh was truly in business on his own account.

Industry or sector practice

[29] Most sales advisors or insurance/assurance brokers' agents are independent contractors as opposed to employees although not all their remuneration is necessarily earned by commission as in the case of EJAL. There are, however, such persons who are employees of brokers and/or of insurance companies directly whose functions nevertheless closely resemble those of brokers' agents. Indeed, Mr Singh

continued to work in the same field as he did previously with EJAL but is now an employee with a written employment agreement tending to confirm this status.

[30] So although sector or industry practice is predominantly and certainly historically of relationships other than of employment, that is not now universal. I conclude that Mr Singh was one of those majority of sales agents in the industry or sector who was not an employee.

Taxation

[31] The tax arrangements entered into and maintained by the parties favour strongly an independent contractual relationship rather than one of employment. As already noted, Mr Singh rendered invoices to EJAL on the basis of the value of business sold and, although paid accordingly, could expect to have clawed back those commissions on sales that proved subsequently not to be durable. All expenses of operating were claimed by Mr Singh through his accountant who prepared books and statements of account for his business that formed the basis of his taxation returns. I do not consider that these tax arrangements were simply a consequence of the labelling of Mr Singh's activities as a business and not as employment.

Mr Singh's managerial role

[32] For the foregoing reasons it is very clear that in his role as sales advisor Mr Singh was not an employee of EJAL. It is necessary, however, to deal with a period of his engagement when Mr Singh took on a managerial role in addition to his sales' business. Relatively soon after his engagement by EJAL as a sales advisor, Mr Singh was promoted on merit to a combined managerial/sales role in his area. He continued to sell policies as previously but had additional responsibilities. These included managing a team of sales agents, arranging and running sales meetings, organising training, having responsibility for records, and generally relieving the managing directors of the defendant of these responsibilities, particularly in areas of New Zealand other than where the defendant's head office was based. In addition to continuing to receive commissions on sales made by himself, Mr Singh was

rewarded for these managerial activities by what was known as an "override commission", that is an additional commission based on the commissions of the sales advisors he managed.

[33] There is dispute between the parties as to how much of Mr Singh's working time this additional role took up. He claims that it was up to 40 per cent of his time whilst the defendant says that it would have been no more than about 5 per cent at most as is reflected by the override commissions as a proportion of his overall earnings. The respective commission figures earned would tend to indicate less time (as EJAL claimed) than Mr Singh contended, but in any event the proportions are not determinative of the question.

[34] Although I consider that this combined sales/management role that Mr Singh held for much of his time with the defendant strengthens his argument that theirs was an employment relationship, at least for that period, it is significant that Mr Singh ceased to have this enhanced role within the company some time before their relationship was terminated by it. So at that crucial time when Mr Singh says he was dismissed from employment, he was a sales advisor alone as he had been at the start of his engagement by EJAL. In any event, I do not think on balance that Mr Singh's area managerial role (combined with his sales role) constituted an employment relationship.

Summary of judgment

[35] For the foregoing reasons I conclude that the Employment Relations Authority correctly determined that Mr Singh was not an employee of EJAL when their relationship concluded.

[36] Because s 188(3) of the Employment Relations Act 2000 nullifies automatically the Authority's determination even if the Court upholds it, I conclude, independently in substitution for the Authority's determination, that the plaintiff was not an employee of the defendant. It follows that the plaintiff's proceedings based on that relationship are in the ordinary civil courts and not in the Employment Relations Authority.

Costs

[37] The defendant is entitled to a reasonable contribution to its costs reasonably incurred in the litigation which, if they cannot be agreed between counsel, may be the subject of memoranda filed and served, in the case of the defendant, within 2 calendar months of this judgment, and in the case of the plaintiff, within 1 further calendar month. The Authority's costs award paid into court by the plaintiff and the interest thereon should be retained by the Registrar until questions of costs in this court are determined or released by agreement of the parties.

G L Colgan
Chief Judge

Judgment signed at 2pm on Monday 18 January 2010