

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Andrew Schaw (First Applicant)
AND Andrew Schaw (Second Initiating party)

AND Compac Sorting Equipment Limited (First Respondent)
AND Compac Sorting Equipment Limited (Second Responding party)

REPRESENTATIVES Andrew Gallie, Counsel for Applicant
Richard Harrison, Counsel for Respondent

MEMBER OF AUTHORITY Dzintra King

INVESTIGATION MEETING 24 June 2005

SUBMISSIONS RECEIVED From respondent, 24 June and 10 July 2005
From applicant, 4 July 2005

DATE OF DETERMINATION 17 August 2005

DETERMINATION OF THE AUTHORITY

Mr Andrew Schaw, the applicant, says that the respondent, Compac Sorting Equipment Ltd (“Compac”), has unjustifiably dismissed him. The respondent says Mr. Schaw was a contractor and therefore the Authority does not have jurisdiction. The issue for determination is solely Mr. Schaw’s employment status.

Compac Sorting Equipment Ltd manufactures computer-controlled, fruit-sorting equipment and operates internationally, much of its business being carried out in the United States.

Work History

Mr. Schaw was employed on a fixed term contract to provide technical and operator support at the Sun Pacific plant at Maricopa in California. When this employment came to an end, Sun Pacific wished to continue to have Mr. Schaw’s services. An arrangement was made whereby Sun Pacific invoiced Compac for Mr. Schaw’s services. This appears to be an arrangement entered into because Mr. Schaw’s visa did not permit him to be an employee of an American company.

Compac maintains that this was not an employment relationship but a contract for services. The contract specified that it was for work as a contractor and Mr. Schaw was to take responsibility for taxes and to indemnify Compac; Sun Pacific was to arrange medical and general liability insurance. The contract was dated 14 March 2004. However, on 30 March 2004, Mr. David Buys, the International Sales Director of Compac, emailed Mr. Schaw and Mr. Paul Hornell, the Financial Controller, saying “I think that Andy will have to remain as a NZ employee of Compac NZ”. On 24 March Mr. Buys wrote regarding insurance:

This will cover you while you are a Compac employee. – ACC premium does still have to be paid as you are an employee of a NZ company and we have to pay the premium whether you work here or in the US.

Mr. Schaw was given use of the Compac vehicle and was to use the Compac credit card for fuel with any other purchases or cash withdrawals to be preapproved by either Mr. Buys or Mr. Gerhard Nagele, the Service Manager. Although this arrangement was described as being a contract for services I think it was more in the nature of a secondment.

After Mr. Schaw finished with Sun Pacific at the end of August 2004 he was offered a position by Compac at Paramount at Del Ray, also in the United States. The period of work that is under scrutiny for the purposes of this case is that running from October 2004 until Mr. Schaw finished employment on 24 March 2005.

Mr. Schaw was offered short term work for a maximum of two months which expanded into a longer period. Mr. Schaw was approached in September 2004 by Mr. Nagel to work for Compac at customer sites in California. Mr. Schaw undertook work before issues of payment and conditions had been agreed. The company wanted Mr. Schaw to work as a contractor. He resisted this and maintained that he was an employee.

Issues regarding taxation liability, Mr. Schaw's visa status and ability to work in the United States were becoming of concern to the respondent. Compac did not believe Mr. Schaw was applying for the correct visa and was concerned that it might have tax liability as Mr. Schaw had, with IRD approval, declared himself non-resident for tax purposes in New Zealand and had not paid any tax in the United States, although he accepted he had a liability to do so.

Compac wished to retain Mr. Schaw's services and to sort out the immigration and tax matters. Accordingly, it offered him the position of Technical Manager with its American subsidiary, Compac Sorting Equipment Inc

Mr. Tim Seeley, the USA Market Manager for the American company, emailed Mr. Buys on 4 November stating that he had offered Mr. Schaw the position "under the parameters you and I discussed". He went on to say:

I discussed that the position is contingent on him acquiring a US residency status and he would then become an employee of Compac Sorting Equipment, Inc, until that is in place he would continue to work for Compac under the current terms.

On 14 November 2004 Mr. Schaw was given a letter of offer. The offer was subject to a work permit/residency being obtained within six months and a working relationship being established with Sun Pacific and it stated that "Current contractor arrangement with Compac NZ of \$NZ\$1800 per week continues until the above work permit is obtained."

Mr. Schaw accepted the offer of the position but disputed that he accepted that his current status was that of a contractor. Although much was made of whether or not Mr. Schaw had accepted he was a contractor at that time, in determining what his status actually was, it can only be a factor. Given the evidence that Mr. Schaw had consistently not accepted that he was a contractor I think it is more likely than not that his acceptance of the offer of employment was an acceptance of the position of Technical Manager and did not also include an acceptance of contractor status.

Mr. Schaw also accepted that he was, in the interim, to be paid \$NZ\$1800 per week although there had been previous mention in an email to Mr. Nagele that Mr. Schaw had an expectation that excess hours (unspecified) would be reimbursed; and an email from Mr. Buys to Mr. Schaw dated 5 January says: “You (sic) time and expenses for Mundosol are totally chargeable.” It appears, therefore, that Compac and Mr. Schaw had an unspecified understanding that excess hours would be reimbursed, although the basis of the reimbursement is at this stage unclear. The \$1800 figure was a figure that had been agreed with Mr. Nagele. It is likely that there was an agreement that an average 50 hour was expected.

An updated offer of employment with the US company was made by letter dated 25 February 2005. This says states:

Until the above is achieved you will operate as a staff member of Compac NZ at a weekly salary of \$1800. You will need to declare NZ residency until the “L” visa is obtained.

Both the offers were conditional offers. Despite that, it is evident that Mr. Schaw began to carry out the work he would have been doing had he been able to accept the conditional offer. What is in dispute is his status while he was doing so.

Duties and Conditions

There was no evidence that the majority of the duties carried out when Mr. Schaw was initially employed in August 2003 to provide technical and operator support at the Sun Pacific plant at Maricopa differed largely from the duties when he worked for Compac from October 2004.

The duties set out in the 8 August 2003 letter of offer included the following:

*Assist with the installation of both Compac machines and some Sorma equipment.
Assist with the commissioning of these.
Train and monitor the operators, as well ensure, that they are using the machines to the full potential.
Be available for on-site support and first line maintenance for the Compac and Sorma equipment, during all hours of operation.
Fault find and repair equipment, electronically and mechanically.
Provide phone support for the customer.*

The 18 November 2004 offer of the Technical Manager’s position includes in its objectives the requirement :to deliver high quality customer and Compac staff technology training and support in USA and International locations” and the position requirements are:

*Establish an effective customer and Compac staff training programme
Implement the program on an international basis, as part of the company Service delivery
Provide effective technical support for the USA Market manager, to build knowledge and experience
Undertake sales support activities as directed by the USA Manager
To participate in new sizer and retrofit installs
To provide service support for the USA customers (both coasts)
To assist the USA Market manager to build a top performing fruit sorting sales and service company
To manage various special projects as directed*

Neither did the conditions seem to vary much, if at all. Mr. Schaw was to be provided with transport, cell phone, tools and a laptop and with a company credit card with approval needing to be given for purchases of over NZD500. In essence, this did not change in October 2004.

Mr. Schaw said Mr. Nagele had a lot of control over his work and he was also managed by and answerable to Mr. Tim Seeley. He said Mr. Seeley phoned him most mornings and either directed him as to which tasks to carry out and to whom he was to allocate tasks, that is, other Compac employees who were trainee technicians.

The schedule for the trip to Spain was discussed at length with Mr. Nagel, Compac booked all travel plans and paid all related expenses. The discussion relating to the work to be completed was arranged between Mr. Nagel, Mr. Buys and Caustier of France. At the last minute he received an urgent email from Mr. Nagele to change tickets as the plans had changed.

Mr. Seeley told him to take statutory days off. The timesheet for each week was submitted to Ms Marston who reports to Mr. Nagel and also copied to Mr. Seeley and Mr. Nagel and the timesheet clearly indicated statutory days off.

Mr. Nagel regularly requested reports and updates on work progress and had a lot of influence on how the services were provided.

Mr. Schaw said it was illegal for him to trade as a contractor given his residency and visa status. His B1 visa only allowed him to work for a company outside the USA; he could not perform work on his own behalf or as an employee of an American company.

He performed work that was consistent with other Compac technicians, was paid a salary on a regular basis and was directed to work and managed by several superiors. He was an integral part of Compac's business trusted with the service of multimillion dollar machinery and customers. He used company supplied specialist equipment, cell phone, vehicle, fuel, credit cards, tools and had expenses reimbursed. He reported to the company offices when he was not required to work in the field and was paid regardless of whether he performed services to clients.

He was required to submit timesheets and undertook training of company employees and Compac business partners and performed work as directed and required. Work was provided continuously and was for the benefit of the company and he did not involve the company. He did not run a separate business identity, work for other people, hire employees or advertise. Neither did he negotiate pricing for any work completed nor could he profit from any of the work completed.

The company said that it created invoices for Mr. Schaw but he said he was unaware of this and I accept that evidence.

Ms Deanna Barnard of human resources provided a letter to US Immigration Services dated 21 February 2005 saying he was an employee of Compac, setting out the duties, and stating that accommodation, medical insurance and a vehicle would be provided. The US consulate granted extensions for the B1 visa in March 2005.

The Law

Since s 6 of the Employment Relations Act 2000 changed the tests for determining what constitutes a contract of service. The principles established by case law 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

Intention of the Parties

It is not possible to say that the parties had a common intention at any stage of their relationship apart from the first fixed term engagement. After that, Compac wanted to treat Mr. Schaw as a contractor and he was insistent that he was an employee.

It is, therefore, necessary to look at the type of work done in order to assess matters such as the degree of control, the extent to which his activities were integrated with those of Compac and whether Mr. Schaw was operating from the basis of his own business operation.

Control

Mr. Schaw did not appear to have set hours of work and one of his issues was that he worked very long hours. The work appears to have been dependant on dealing with problems as they arose. The hours of work in the first contract (August 2003) were stated to be flexible to match the needs of the customer. That was to be a 6 day 60 hour week.

The situation is also complicated by the fact that Mr. Schaw was working in a different country and there was no immediate supervisor, at least until the stage where he accepted, on a conditional basis, the offer to work for the American company, when Mr. Seeley seems to have taken on that function.

Although in the course of Mr. Schaw’s trips to Spain had some degree of independence in scheduling basically he went where he was instructed to go; and the arrangements were made through Compac.

Integration Test

Lord Denning gave a classic description of this test: Stevenson Jordan & Harrison Ltd v Macdonald [1952] 1 TLR 101 at p. 111:

...under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

Mr. Schaw was integrated into the business; he was not an accessory to it.

Fundamental Test

Did Mr. Schaw engage himself to perform the services with Compac as a person in business or on his own account? The fundamental test is an objective test.

The economic reality of the relationship was that Mr. Schaw was not in business for himself. His salary was set, he did not employ staff, the company paid all costs of travel and associated expenses, including overnight allowances, provided Mr. Schaw with a company credit card with a pre-approved limit, provided a laptop, petrol and the equipment needed to do the job. He was not responsible for any losses and could not benefit from any profits. I do not think Compac's argument that he could make a profit or loss from his actions because of the ability to manage his time is a sustainable one.

Although Mr. Schaw had at one point had a company, he had refused a previous request to set up and invoice through a company, stating that as he was not a New Zealand resident he could form a company in New Zealand.

There is no evidence of Mr. Schaw operating a business on his own account. He had no separate legal identity, his income from Compac was not linked in any way to that company's profits and losses, he was paid a regular wage on a monthly basis and the invoices on which he was paid were generated by the company.

Tax Status

Tax status may be an indicator of what a person intends his contractual status to be but it is not definitive.

Mr. Harrison submitted that this was a significant factor in this case, maintaining that Mr. Schaw had failed to pay tax in the US and had been declared non-resident for tax purposes in New Zealand. Mr. Harrison said employees did not insist on making their own arrangements to pay tax and that that could only be achieved through being a contractor. He submitted that the B1 visa was a means of having tax free status in both countries.

Even if there had been sufficient evidence provided for me to assess what the tax situation legally should have been, that is a function of the respective inland revenue bodies, not of the Authority. Mr. Schaw did tell Compac to tax him in New Zealand if it was a problem. On the information I have, the tax issue can only be a neutral factor.

Decision

Mr. Schaw was an employee at the time he was dismissed. The respondent submitted that many of the indicators of employment related only to the final period of Mr. Schaw's association with Compac, that is, after he was offered the position with the US company. I do not think the offer of employment with the American company made initially in November and then in February alters the nature of the employment relationship. While I accept that some of the duties carried out by Mr Schaw were in anticipation of his taking up the American employment offer the fact is that he was an employee of Compac NZ in October 2004 and that that employment continued after the two month period that had been originally discussed between the parties. It did not commence as a contractor relationship and then become one of employment; it was employment from commencement. Even if I were wrong about that, the fact is that the duties and the manner in which they were performed and the conditions that applied after the conditional employment offer were clearly those of a contract of service; and the employment could only be with a NZ company – which it was.

Costs

If the parties are unable to resolve this matter, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority