

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 98  
3020534

BETWEEN	LIUMAIHETAU LIUMAIHETAUTAMA Applicant
AND	NZL LIMITED (previously known as NZL METRO LIMITED First Respondent
AND	RSMG INVESTMENTS LIMITED Second Respondent
AND	GIRISH DAYAL Third Respondent
AND	RAMESH DAYAL Fourth Respondent
AND	SURESH DAYAL Fifth Respondent
AND	BHARAT DAYAL Sixth Respondent

Member of Authority: Michele Ryan

Representatives: Paul Stowers, advocate for Applicant  
Alyn Higgins, counsel for Respondents

Investigation Meeting: 29 January 2018

Submissions Received: 12 February 2018 for the Applicant  
22 February 2018 for the Respondents  
9 March 2018 "In Reply" for the Applicant

Determination: 2 November 2018

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Beginning April 2010 or thereabouts Mr Liumahetau Liumahetautama cleaned various bars and restaurants operated by NZL Limited (NZL). In mid-April 2017 he stopped performing the work due to health concerns.

[2] On 27 July 2017 Mr Liumahetautama advised NZL of his resignation. He has since raised a variety of claims including that he was unjustifiably constructively dismissed. He further alleges he is owed holiday pay and payment of statutory holidays.

[3] The respondents deny the applicant was an employee. They say at all times Mr Liumahetautama was engaged as an independent contractor under a contract for services with NZL.

[4] This determination decides, as a preliminary issue, whether Mr Liumahetautama was an employee or independent contractor when he undertook work for NZL. If an employment relationship existed he is free to pursue his claims at the Authority. If an employment relationship is not established the Authority has no jurisdiction to investigate those matters.

**The Authority's Investigation**

[5] The applicant and his wife, Fetu Liumahetautama, as well as Motu Liumahetautama (Motu), the applicant's brother, supplied brief written statements and attended the Authority's investigation.

[6] Regrettably there were impediments to obtaining Mr Liumahetautama's testimony. I questioned as to whether he felt confident answering questions in English but he assured me his English was excellent. However he struggled to recall material aspects of the relationship between himself and NZL. This may be explained by recent health issues but there was some consensus amongst witnesses that Mr Liumahetautama's communication style was relaxed and his approach before the Authority was not atypical or unusual. These matters were discussed with Mr Liumahetautama's advocate. Mr Liumahetautama wished to continue with the investigation meeting and the matter proceeded.

[7] The first and second respondents, NZL and RSMG Investments Limited (RSMG) respectively, are inter-related by family connections and involved in the same or similar business activities. Each company was cited as a respondent on the basis that Mr Liumahetautama was paid by NZL until 2013 and thereafter by RSMG. Mr Girish Dayal (Mr Dayal), and his nephew, Bharat Dayal, (Bharat) are directors of RSMG. They both attended the Authority's investigation meeting and gave written and oral evidence on behalf of all respondents.

[8] I have not referred to all the material placed before the Authority. Taking into account Mr Liumahetautama's written statements and his limited oral testimony alongside the evidence furnished on behalf of NZL I have formed conclusions based on the balance of what is more likely to have occurred than not.

### **The law**

[9] To determine whether a person is an employee, s 6(2) of the Employment Relations Act (the Act) requires the Authority to examine the "real nature of the relationship" between the parties. The law emphasises that the Authority is "not to treat as a determining matter" any statements (written or oral) that the parties have used to describe the relationship.<sup>1</sup> Rather, the Authority is obliged to consider "all relevant matters including any matters that indicate the intentions of the persons".<sup>2</sup>

[10] When determining the real nature of a relationship the Supreme Court in *Bryson v Three Foot Six Limited (No. 2.)* held that "all relevant matters" include:<sup>3</sup>

- any written and oral terms which indicate there was a common intention between the parties regarding the status of their relationship;
- divergences from agreed terms as reflected by how the relationship operated in practice;
- the existence or otherwise of:
  - (i) control by either party as to how the work was done (the control test);
  - (ii) the applicant's integration into the respondent's business (the integration test);
  - (iii) the applicant working on his own account (the fundamental test);

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<sup>1</sup> Section 6(3)(b) Employment Relations Act

<sup>2</sup> Section 6(3)(a) Employment Relations Act

<sup>3</sup> [2005] NZSC 34

[11] Additional factors to consider may include whether industry practice lends itself to a particular type of relationship, and the nature of the applicant's tax arrangements. Industry practice is not a factor that is necessary to consider in this case. Neither party argued against the proposition that cleaners may be employees or independent contractors.

[12] In *Poulter v Antipodean Growers Limited* the Court concluded that s 6 requires the Authority to gain an overall impression of the underlying and true nature of the relationship between the parties.<sup>4</sup>

### ***How the relationship began***

[13] Mr Liumahetautama is Niuean. At the time of the Authority's meeting he had lived in New Zealand for approximately thirty years. According to Mr Dayal the parties first met each other in 1988 or 1989 when Mr Liumahetautama worked for a company that provided cleaning services to one of the NZL's venues. He says an easy friendship developed amongst them.

[14] In early 2010 the respondents were in need of someone to clean the Wellington based premises. A family member had previously undertaken the work but was no longer able to do it.

[15] The respondents say they approached Mr Liumahetautama and another individual with a view to having the cleaning shared between them. The second individual, however, was not in a position to take up the work.

[16] In March 2010 the parties discussed between them the possibility of Mr Liumahetautama taking responsibility for cleaning the various venues.

### ***Written and oral terms***

[17] NZL provided a written contract for services (the contract) dated 1 April 2010 to demonstrate it always intended the relationship between it and Mr Liumahetautama to be that of a principal and contractor. The contract is not signed but it is NZL's position that the terms contained within it governed the relationship.

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<sup>4</sup> [2010] NZEmpC 77 at [21].

[18] The contract is headed “CONTRACT FOR CLEANING SERVICES”. Mr Liumahetautama is cited as “*the Contractor*”. The contract lists six venues. A individual monetary value for the provision of cleaning services is assigned to each venue. Payment for all venues combined is recorded as \$1,480.77 (gross) per week. Mr Dayal notes that when the contract began the total combined price of the services equated to over \$77,000 per annum. He says that sum is well over what a cleaner, working as an employee, could have expected in wages at that time.

[19] Mr Dayal says that he met with Mr Liumahetautama on several occasions to discuss the cleaning work before he provided him with the contract.

[20] Fetu Liumahetautama agrees she accompanied her husband to the first meeting. She says only the cleaning schedule was discussed. I prefer Mr Dayal’s evidence on this point. He says he discussed in detail what was what was needed by NZL because he held reservations as to whether Mr Liumahetautama would be able to clean six venues most evenings, which he considered “*a big job*”.

[21] Mr Liumahetautama acknowledges he told Mr Dayal his family would assist him with the work. That concession leads me to conclude that the scope of the work was thoroughly canvassed and more likely than not a discussion about remuneration formed part of the exchange. I then also accept Mr Dayal’s evidence that Fetu Liumahetautama bargained on her husband’s behalf for an increase to the rates NZL proposed for each venue.

[22] Mr Dayal says he met with Mr Liumahetautama again shortly after, and informed him he would need to provide invoices and pay his own tax. He says Mr Liumahetautama asked if the respondents could manage the taxation paperwork as he did not know how to do this. Mr Dayal says he agreed to do so. He presented the draft contract to Mr Liumahetautama sometime after the second meeting and told him to read it. He later made several requests to have the contract returned but says Mr Liumahetautama’s attitude was “*pretty blasé*” about the matter and Mr Dayal did not pursue it.

[23] Mr Liumahetautama denies there was any discussion about taxation. Nor does he recall seeing the contract for services prior to raising his claims.

[24] His representative points to a payroll document which records Mr Liumahetautama's commencement date with NZL as 1.03.2010, a month before the date recorded on the contract. This evidence raised two issues; firstly when was the contract constructed? Next, when did the relationship begin?

[25] There are divergences between the contents of the contract and the way the relationship operated in practice. I consider it unlikely that NZL would have constructed contractual terms that do not uniformly assist its position if the contract was drafted for the Authority's investigation as is suggested. This is not to say that I consider Mr Liumahetautama has sought to mislead the Authority. I consider it more likely that his focus at the time was on obtaining the work rather than the administrative detail of it. Given this approach and the passage of time, it is entirely possible Mr Liumahetautama has simply forgotten the discussion about tax and the existence of the contract.

[26] As a means to determine when the relationship began, Mr Liumahetautama provided a consolidated bank statement setting out when NZL deposited monies into his bank account. The first deposit occurred on 6 April 2010 and continued every week for over seven years thereafter. That information tends to suggest he began work on 1 April 2010 or thereabouts. I consider the payroll schedule date is likely to have been recorded in error, a matter I shall return to more fully later in this determination.

[27] I consider it likely Mr Liumahetautama received a copy of the contract, but it NZL accepts he did not sign it. It follows that there is no evidence of an express common intention between the parties as to Mr Liumahetautama's status.

[28] It is therefore necessary to examine how the relationship operated in practice.

#### ***How the relationship operated in practice***

[29] There is no dispute Mr Liumahetautama cleaned the venues listed in the contract for services. The following practices illustrate how the relationship operated:

- At the beginning of the relationship NZL provided the resources to perform. Later, both parties bought cleaning materials at different times.

- The volume, and hours, of work changed over time. . Between 2011 and 2015 three outlets listed in the contract were sold or the lease expired. The contract allowed for the price assigned to a particular venue to be deducted from payment for services should the outlet cease to operate. Mr Liumahetautama's bank records reflect weekly payments decreasing in or around the dates on which the various outlets closed. NZL purchased an additional outlet in 2011 which Mr Liumahetautama also cleaned although the contract for services was not amended to record the addition. By 2015 the cleaning work performed by Mr Liumahetautama (and corresponding remuneration) had almost halved.
- Mr Liumahetautama did not apply for leave entitlements until after he stopped working in April 2017;
- NZL paid Mr Liumahetautama the sum equal to three months' wages as annual leave in May 2017;
- Hours of work were not set but the cleaning work needed to be conducted when venues were closed;
- Mr Liumahetautama obtained alternative employment whilst maintaining his relationship with NZL;
- Mr Liumahetautama did not provide invoices to NZL;
- Taxation was deducted by way of PAYE as were ACC levies. NZL made KiwiSaver contributions;
- Members of Mr Liumahetautama's family also undertook the work.
- Contractual and administrative matters (separate to the performance of services) were usually communicated and conducted between Fetu Liumahetautama and the respondents.

[30] Mr Liumahetautama acknowledged under questioning that the way the relationship operated between the parties was different to his experience with previous employers but he was either unwilling to unable to describe what those variances were.

*Fundamental test*

[31] Under this test I am required to consider whether Mr Liumahetautama took on financial risk in providing the services, including whether he was in business on his own account.

*Taxation arrangements*

[32] A significant element to Mr Liumahetautama's claim that he was an employee arises from NZL's treatment of his tax whereby it deducted PAYE (a deduction that applies exclusively to employees) as well as ACC levies, and contributed to Mr Liumahetautama's KiwiSaver account.

[33] Mr Liumahetautama did not invoice the respondent. Nor did he register for GST or seek to obtain deductions for work-related expenses.

[34] Mr Dayal says when he agreed to manage Mr Liumahetautama's tax for him, he informed payroll that withholding tax should be applied but says Mr Liumahetautama was mistakenly recorded in NZL's electronic payroll system as an employee. He says there was no reason for the directors to check it and the anomaly was not picked up until Mr Liumahetautama had stopped working and Fetu Liumahetautama sought payment of leave.

[35] Mr Liumahetautama's representative contends it is not credible that the respondents did not identify the error over the course of seven years.

[36] On the face of it NZL's payment of PAYE is problematic. However, on balance I accept Mr Dayal's evidence that he agreed to manage Mr Liumahetautama's tax arrangements as a matter of expediency following his [Mr Liumahetautama's] request and that the application of PAYE was a result of a payroll error.

[37] Taxation arrangements may be a factor indicating the nature of the relationship, but a party's tax status is not determinative of employment status.<sup>5</sup>

[38] In the circumstances of this case the parties' arrangements concerning tax do not assist my assessment regarding the real nature of the relationship.

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<sup>5</sup> *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 at [46]

*Financial risk*

[39] It is clear that when NZL outlets were sold or closed the work undertaken by Mr Liumahetautama reduced, as did his remuneration. It is common ground that Mr Liumahetautama did not take issue with NZL about these changes.

[40] There was also evidence of additional work arrangements between the parties although these were not formally recorded. NZL purchased a new venue which Mr Liumahetautama serviced. Mr Liumahetautama did not challenge Bharat's testimony that he received payment for cleaning the new venue but the details of that arrangement are not clear. Testimony was also given whereby Mr Liumahetautama cleaned NZL's offices in exchange for NZL's weekly purchase of petrol for Mr Liumahetautama. The payment for work according to a rate ascribed to each venue (or for alternative goods) rather than an hourly rate or at an agreed salary is not typical of an employment relationship.

[41] There is no evidence Mr Liumahetautama was in business on his own account in the usual way, but I am satisfied the quantum of remuneration (and associated benefits) was closely linked to the continuation and/or success of NZL's endeavours and in this respect I find he took on financial risk in providing services.

*The control test*

[42] The control test involves an assessment of the manner in which the person providing the work exercises and assumes supervision and control over the person performing it.

*The nature of the work*

[43] Mr Liumahetautama says the work was controlled by the respondents and he regularly received instructions via text or a communications book advising what work needed to be done. Several text messages were provided. These appear to request Mr Liumahetautama to pay attention to a matter when prevailing circumstances demanded it.

[44] I am not persuaded the text messages demonstrate a degree of control that could be objectively regarded as extensive. Mr Liumahetautama's work was not supervised nor was he instructed on how to perform it. The work undertaken could

equally be performed as an employee or as a contractor. In each instance some direction from the respondent could be required.

*Who performed the work*

[45] Motu Liumahetautama, the applicant's brother, agreed he generally worked at the respondents' premises for at least one evening per week during Mr Liumahetautama's engagement with INZ. Brahat's evidence is that Motu was as much involved in the work between 2012 and 2015 as Mr Liumahetautama. No matter which of these accounts is more accurate I am satisfied Motu regularly cleaned at the venues listed in the contract. Mr Liumahetautama's two sons also performed the cleaning services in more recent years although this appears to have occurred as Mr Liumahetautama became increasingly unwell. Fetu Liumahetautama conceded she also undertook cleaning activities at the venues recorded in the contract.

[46] An "employee" is a person employed by an employer to do any work for hire or reward under a contract of service.<sup>6</sup> It is fundamental to an employment relationship that work assigned to the employee is personally performed. There is no suggestion that any member of the Liumahetautama family (other than the applicant) was an employee of NZL nor was Mr Liumahetautama required to advise NZL who was undertaking the cleaning or when. I am satisfied INZ did not exercise any direct control over who performed the work. This evidence strongly suggests that Mr Liumahetautama operated in a manner of an independent contractor.

*Control over leave*

[47] As noted, Mr Liumahetautama did not apply for annual leave (or any other leave entitlements) until after he stopped working in April 2017. I am therefore unable to assess whether NZL exercised any control over when Mr Liumahetautama took leave. However in May 2017 NZL paid Mr Liumahetautama a lump sum of money equal to the sum of three months' remuneration. This was characterised as annual leave in NZL's payroll system. Entitlement to annual leave is a feature of an employment relationship.

[48] The background to the payment is as follows: in early 2017 tensions, unrelated to Mr Liumahetautama, developed between Fetu Liumahetautama and NZL. She was subsequently banned from NZL premises. Mr Liumahetautama's ill health in

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<sup>6</sup> As defined at s 6(1) Employment Relations Act 2000

April 2017 gave cause for further dispute. Bharat's evidence, which I accept, is the payment was made to allow Mr Liumahetautama time away to recuperate and to dampen the conflict with Fetu. I am satisfied that the payment was intended to maintain goodwill between Mr Liumahetautama and the respondents and was not pursuant to obligations NZL considered it had as an employer.

*To what extent was Mr Liumahetau integrated into the business*

[49] The integration test requires an assessment as to the extent Mr Liumahetautama was integrated into, and part and parcel of, the respondents' business as opposed to an being accessory of it.

*Equipment*

[50] Who supplies the resources necessary to perform a role may indicate the level of integration in a business.

[51] On behalf of Mr Liumahetautama it is submitted that NZL acted as an employer by providing the equipment needed to perform the work (such as vacuum cleaners and a buffing machine). Mr Dayal says at the time the relationship began Mr Liumahetautama did not have the capital to purchase the equipment needed and NZL had already obtained most of the products required. He says it made sense to have Mr Liumahetautama utilise these.

[52] NZL points to Mr Liumahetautama personally replacing equipment over the years, including the purchase of a buffing machine valued at over \$1,000 which he took with him when he left, as indicative of his being an independent contractor. Mr Liumahetautama's written statement to the Authority says NZL ignored his requests for equipment and he was forced to make purchases so that he could perform his job. Mr Liumahetautama could not recall whether he sought reimbursement of monies spent on equipment and I consider it unlikely that he did.

[53] The purchase of equipment at various times by both parties tends to illustrate the relatively informal way the relationship operated, and a mutual interest in having their endeavour succeed.

[54] The arrangement tends to support a finding of principal and independent contractor but is not determinative.

*Alternative work*

[55] Mr Liumahetautama undertook cleaning work for two other companies (as an employee) from 2015 onwards including at a venue previously owned by NZL.

[56] Mr Liumahetautama's employment with other entities does not definitively exclude the possibility of an employment relationship with NZL and I am unwilling to consider the finding is determinative. The evidence does not advance an assessment as to whether Mr Liumahetautama was integrated into the business and is neutral.

[57] However it is clear Mr Liumahetautama understood he was free to negotiate for and obtain alternative work while concurrently maintaining a relationship with NZL which suggests a degree of autonomy similar to that of an independent contractor.

*Overall impression*

[58] There are features in the way the relationship operated that lean towards a relationship of employment but the overall impression gained by the Authority is that the underlying and true nature of the relationship between Mr Liumahetautama and NZL was of a contract for services, not employment.

[59] While the rate of remuneration paid to an applicant is not a decisive factor when determining whether s/he is an employee or contractor, I consider it a relevant factor in this matter. The level of remuneration paid to Mr Liumahetautama for his services was well beyond what he could reasonably have expected as an employee performing the same role. In exchange, he was obliged to ensure the work was always done, and NZL accepted that members of Mr Liumahetautama's family would be involved to perform the work to that end. Those arrangements place the nature of the relationship outside the parameters of an employment relationship and made Mr Liumahetautama an independent contractor.

[60] Mr Liumahetautama has not established he was an employee and the Authority therefore has no jurisdiction to investigate the claims he has raised.

[61] Costs are reserved.

[62] This determination has been issued outside the timeframe set out at s 174C(3)(b) where the Chief of the Authority has decided exceptional circumstances exist.<sup>7</sup>

**Michele Ryan**  
**Member of the Employment Relations Authority**

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<sup>7</sup> Employment Relations Act 2000, s 174C(4)