

**CONTRACTUAL BENEFIT CLAIM
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00796

CORAM : COMMISSIONER D J MATTHEWS

HEARD : MONDAY, 31 AUGUST 2020

DELIVERED : FRIDAY, 11 SEPTEMBER 2020

FILE NO. : B 94 OF 2020

BETWEEN : RICHARD STERN
Applicant

AND

TONY'S AUTO AUCTIONS PTY LTD
Respondent

CatchWords : Industrial law (WA) – Denied contractual benefit claim – Claimed entitlement to royalties from television advert – No employment contract existed between parties - Claim for denied contractual benefit dismissed

Legislation :

Result : Claim dismissed

Representation:

Applicant : In person
Respondent : Mr P Pernechele as agent

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings – as edited by
Commissioner Matthews)

- 1 Mr Stern, by an application for denied contractual benefits filed on 21 July 2020, seeks the payment of royalties related to a piece of acting that he says he did for the respondent in 2014. He says the piece of acting resulted in the production of a television commercial which was played on television in 2014, 2015, 2016, 2017, 2018 and 2019. He says that he has not been paid royalties for the years 2018 and 2019, having received the royalties for the showing of the advertisement on television in the previous years.
- 2 Mr Stern asserts that he was an employee of the respondent and that his entitlement to royalties may be enforced as an incident of his employment contract. He is not able in these proceedings to produce a written employment contract.
- 3 Mr Stern says, nonetheless, that he was informed there was an employment contract between himself and the respondent and there is an inference available that he was employed by the respondent. When pressed on why I ought draw that inference he referred to:
 - (1) in 2014 he said, his agent had said the matter was nothing to do with her anymore;
 - (2) a director of White Pixel Productions confirmed that, after that point in time, any arrangement for payment of royalties was one between himself and the respondent; and
 - (3) bank statements that indicated that the respondent, or someone from that business, had paid him the royalties in the years other than 2018 and 2019.
- 4 These were the three things upon which the applicant relied to try and establish, or have me draw an inference of, employment.
- 5 Employment is indicated by a person establishing that an entity had the requisite measure of control over a person in relation to their work. There are certain long-term established indicia of that control such as the payment by the putative employer of pay as you go tax, the putative employee having to deal with the putative employer in relation to issues such as attendance at work or leave from work, and ongoing direction from the putative employer to the putative employee in relation to the organisation of the putative employee's work life.
- 6 Mr Stern, by way of submissions to me, me not having called upon him to go into the witness box, tells me that he made an advertisement for the respondent back in 2014 and that he had very little else to do with the business after that time, that he received some royalty payments from the respondent but they ceased and were not paid in the calendar years 2018 and 2019. He claims that under the contract of employment he is entitled to payment of royalty money for those years.
- 7 I find that no question arises as to whether Mr Stern was an employee of the respondent. He has raised nothing to make me think he was controlled by the respondent in the relevant way, and certainly not in the years 2018 and 2019 to which his claim relates. If there had been any document, a letter or something that had passed between the applicant and the respondent of a contractual nature that suggested employment, or Mr Stern had told me something from the bar table about being directed or controlled on an ongoing basis, or even over a short period of

time, by the respondent, in such a way as to have me thinking about the question of employment, I may have heard more in relation to this matter. However, nothing Mr Stern has told me gives me any pause for thought on the question of there being an employment relationship between the applicant and the respondent, and for that reason I told Mr Stern the claim would be, and it is now, dismissed.