

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 70
5413590

BETWEEN MELISSA FERNANDEZ
Applicant
AND SAVVY MARKETING
LIMITED t/a SAVVY DIRECT
Respondent

Member of Authority: Christine Hickey
Representatives: Emily de Franco and Ralph Boardman, Advocates for
the Applicant. Subsequently Ms Fernandez became self-
represented.
Andrew Marsh, Counsel for the Respondent
Investigation meeting: 1 November 2013 at Christchurch.
Submissions Received At the investigation meeting
Further evidence and submissions received on
4 November 2013 and 20 November 2013, 10 and
19 December 2013
After a further teleconference on 17 December 2013 the
matter was referred back to mediation.
Date of Determination: 1 May 2014

DETERMINATION OF THE AUTHORITY

- A. Melissa Fernandez was not an employee of Savvy Marketing Limited.**
**B. Melissa Fernandez' claim for a personal grievance is struck out for
lack of jurisdiction.**

Employment relationship problem

[1] Melissa Fernandez claims that she was unjustifiably dismissed by Savvy Marketing Limited (Savvy). Ms Fernandez' work for Savvy was terminated on 8 February 2012.

[2] Savvy says that Ms Fernandez was never an employee but was contracted to supply services and so the Authority does not have jurisdiction to investigate and determine her personal grievance claim.

Procedural background

[3] Ms Fernandez' claim was lodged with the Authority's Christchurch registry on 7 May 2013. It was not apparent to the Authority until the investigation meeting in Christchurch that Ms Fernandez had done work for Savvy's operation in Auckland and not in Christchurch. Ms Fernandez still lives in Auckland. There was no explanation available from Ms Fernandez' representative why the matter had been filed in Christchurch and not in Auckland. Ms Fernandez was represented at all times up to and including the investigation meeting and for a short time after the investigation meeting. She became self-represented after that and provided some more evidence and submissions on her own behalf.

[4] The parties held settlement talks on the day of the investigation meeting and subsequently they were directed to mediation which took place in Auckland. Unfortunately mediation did not resolve the matter. With the consent of both parties the Authority in Christchurch is determining the preliminary issue of whether Ms Fernandez was an employee. It was agreed that if the Authority determined that Ms Fernandez was an employee the matter would be transferred to Auckland for the substantive issue of unjustified dismissal to be determined.

[5] However, if Ms Fernandez was not an employee that is an end to the matter as the Authority does not have jurisdiction to consider her claim of unjustified dismissal.

Was Ms Fernandez an employee?

[6] The definition of *employee* is contained in s.6 of the Employment Relations Act 2000 (the Act) which reads in part:

(2) *In deciding ... whether a person is employed by another person under a contract of service¹,...the Authority ... must determine the real nature of the relationship between them.*

(3) *For the purposes of subsection (2)... the Authority –*

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

¹ Rather than a contract for services or some other business arrangement.

(b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[7] In *Bryson v. Three Foot Six Limited*² the Supreme Court said *all relevant matters* include:

- The written and oral terms of the contract, including terms indicating the party's intentions;
- Any divergences from those terms in practice;
- The day-to-day implementation of the contract; and
- The tests of control and integration, and whether the contracted person is effectively working on his or her own account (the fundamental test).

[8] Industry practice can also be relevant, although it is not determinative³. In this case there was no evidence of industry practice. The ultimate decision about whether someone is an employee *depends upon the entire factual matrix*⁴.

What Ms Fernandez did for Savvy

[9] Ms Fernandez worked in areas allocated to her daily by Savvy by going door-to-door collecting pledges to pay regular amounts to the Red Cross. The Red Cross was a client of Savvy. She was paid totally on a commission basis and Savvy paid 20% withholding tax to the IRD before paying her commissions earned.

[10] Prior to approaching Savvy for work, Ms Fernandez was undertaking her own business as a hair and beauty stylist. Ms Fernandez carried on operating her hair and beauty business while engaged by Savvy.

[11] Ms Fernandez says that she was asked if she would be available full time for five days a week. But she says she was clear with Savvy from the beginning that she needed to be able to carry on with her hair and beauty business and so would not be able to be engaged full time in work for Savvy. Ms Fernandez says she was initially told that she was able to carry out her own business on whatever days she needed to

² [2005] ERNZ 371

³ *Bryson v Three Foot Six Ltd*, Employment Court, [2003] 1 ERNZ 581 at paragraph [19]

⁴ *Ibid* at paragraph [21]

although there was work for her with Savvy every Monday to Friday if she wanted to do it. She says she was later asked to give at least 24 hours' notice to Savvy if she was not available for work on a particular day because of commitments in her hair and beauty business.

[12] Ms Fernandez also says that her work for Savvy was essentially of a casual nature. She worked when it suited Savvy and her.

The written agreement between the parties

[13] The starting point for considering whether the relationship between Ms Fernandez and Savvy was an employer/employee relationship is an examination of the contract between the parties. This is evidence of the intention of the parties at the beginning of the relationship.

[14] Ms Fernandez was given a written agreement prepared by Savvy in which she was described as being a:

(a) *Contractor will supply The [sic] Savvy Direct– “The Company” with services in relation to face-to-face recruitment programs of regular financial supporters for the clients of Savvy Direct. ...*

2. Appointment Status

- (a) *This Agreement is one for service and not of service. Nothing in this Agreement shall confer on the Contractor or its employees the status of an employee of Savvy Direct and the Contractor or its employees may not claim any benefits, which are normally available to Savvy Direct employees.*
- (b) *The Contractor is engaged as an independent contractor and nothing in this Agreement shall create or imply a relationship of employer/employee, partnership or agency.*
- (c) *The Contractor warrants that the Services are undertaken in the course of the Contractor's ordinary business.*
- (d) *Whilst the Contractor agrees to afford the Company such priority, as it is able in performing the Services, the Contractor may undertake such other work as it sees fit.*

[15] In line with the Employment Court case of *Narinder Pal Singh v Eric James and Associates Limited*⁵ I consider that although Ms Fernandez did not enter into the relationship with Savvy with any great consideration, if any, as to her status, that does

⁵ [2010] NZEMPC 1, paragraph [18]

not mean that she intended to be an employee and not a contractor to Savvy. Savvy's intention, evidenced by its written agreement formally recording the relationship was that Ms Fernandez was not an employee. She agreed with this position by accepting engagement on Savvy's terms.

[16] The words used in the agreement are an indication that at the time of entering into the agreement the common intention of the parties was that Ms Fernandez would not be an employee. Therefore the agreement is a factor that weighs against the existence of an employment relationship. However, in accordance with s.6(3) of the Act, the parties' statement about the nature of their relationship is not determinative of whether Ms Fernandez was an employee or not.

[17] It is clear that Ms Fernandez did not engage in the kind of work she did for Savvy before being engaged by it and so under clause 2(c) of the agreement it is unusual that she warranted that the services *are undertaken in the course of the Contractor's ordinary business*.

[18] There is no written evidence that either party changed their preliminary intention evidenced by the written agreement during the course of the contractual relationship. Ms Fernandez first claimed that she had been an employee after the arrangement between the parties was terminated on 8 February 2013.

Taxation and payment arrangements

[19] The agreement between the parties includes the following relevant clauses:

5. ***Taxation and Superannuation***

- (a) *The Company is not responsible for providing the Contractor with holiday pay, sick pay, long service leave or, if this Agreement is terminated, any termination pay and neither is the Company responsible for making superannuation contributions on behalf of the Contractor.*
- (b) *The Contractor acknowledges that they are liable for payment of taxes and other levies in respect of the consideration paid by the Company to the Contractor pursuant to this Agreement.*

...

8. ***Payment for Services***

- (a) *Payment for services will be determined by the rules of the Payment Schedule attached. The Company may from time to time change the Payment Schedule and will inform the Contractor of any such changes*

made by either verbal or written notice, with or without prior notice.

- (b) *The Company will only make payment on the supply by the Contractor of an IRD [sic].*
- (c) *All fees payable to you are exclusive of GST. If GST is payable to you, you are subject to providing us with a tax invoice.*
- (d) *The basis for the calculation of all commission entitlements will be the Company's electronic database, only pledges entered on that database will count towards commission totals. ...*

[20] The agreement between the parties provided that Ms Fernandez was responsible for paying her own tax. The agreement only asked for a GST invoice from Ms Fernandez if she was registered for GST. She was not. Ms Fernandez' evidence was that she did render invoices to Savvy, but that the invoice template she was asked to use was set up by Savvy.

[21] Acting consistently with an intention to treat Ms Fernandez as an independent contractor, PAYE was not deducted from payments made to her, nor were ACC levies paid on her behalf by Savvy. Instead, resident withholding tax of 20%⁶ was deducted by Savvy.

[22] Ms Fernandez says that she had her accountant completed her income tax returns for both her hair and beauty business and her income derived from Savvy. She said that she was told by Savvy that she could deduct vehicle expenses from the income she made from Savvy because she needed to use her own vehicle to go between the office and the various neighbourhoods that she worked in. She says her accountant did claim her vehicle expenses as part of her income tax return. However, Ms Fernandez says that that should not be determinative of whether or not she was an employee because she did not know at the time that if she was an employee she could not claim vehicle expenses against her income.

[23] Ms Fernandez transported other Savvy workers in her car from time to time from the Savvy office to the areas they were to work in. She asked those other workers for a contribution to the cost of transport, which they paid to her directly.

[24] Ms Fernandez says that in the previous thirteen years she had not been employed as an employee. Therefore, she had not had PAYE deducted or been eligible for paid sick leave and holiday pay. Ms Fernandez also says she never

⁶ A type of provisional tax shown as schedular payments on Mr Fernandez' IRD summaries of earnings.

expected that she would get paid sick leave if she was ill on any day that she may otherwise have worked for Savvy.

[25] I consider that the fact that Ms Fernandez rendered invoices to Savvy, albeit that the invoice form was designed by Savvy, and the fact that she paid tax as a self-employed person, and the fact that she personally charged other pledge collectors for transport are indicative of an independent contracting arrangement, rather than that of an employer/employee relationship.

The control and integration tests

[26] These traditional tests assist in the analysis of the real nature of the relationship between the parties.

[27] Ms Fernandez says that Savvy had a high level of control over her work. She says that she was asked if she could work full time. She started work on 17 July 2012 and was told that she could become a Leader depending on the number of sales she got within the first three days of work. She became a Leader in the second week and not long before her role with Savvy finished, she became a Team Leader *which meant greater responsibilities in the business*. This is a factor which leans towards a relationship of employer/employee but not strongly so.

[28] The rate of commission was set by Savvy. This is a neutral factor and does not point to an employer/employee relationship in all the circumstances.

[29] Savvy directed Ms Fernandez as to what client she would be working for; in her case the client was consistently the Red Cross. She was required to wear a Red Cross tee-shirt while she was working. Ms Fernandez says that there were other dress requirements and that one day she was told she could not wear a cap she had on and would have to get another one. The Red Cross required its pledge collectors to be readily identifiable as being linked to the Red Cross and the reason Ms Fernandez was told not to wear her cap was because it carried liquor advertising which Savvy knew that the Red Cross would not want to be linked to. This is not evidence of such control or integration into Savvy's business that it points to an employment relationship but is a neutral factor.

[30] Ms Fernandez says that if she was working on a particular day, she was required to attend a morning meeting at Savvy's offices during which she was allocated an area to work in and a team to work with.

[31] Savvy says it needed to allocate areas to its contractors but could only do so on the basis of which contractors came to work on any given day. I do not consider that the practice of a morning meeting during which Savvy provided pledge areas strongly aids Ms Fernandez' case that she was an employee. It was a practical way of providing 'leads'/pledge areas to its contractors.

[32] After the investigation meeting Ms Fernandez provided some further evidence in the form of a Savvy marketing training manual she was given in January 2013. The training manual sets out the expectations, including of dress code and attendance. There were instructions about looking after any stock. Expectations for the number of sales per day were set out. Requirements for paperwork, including pledge sheets which needed to be completed and given back to Savvy at the end of a day were set out in detail. There were also suggestions on how to make a sale which ran to at least ten pages.

[33] Marc Featherstone is the director of Savvy. He provided an affidavit dated 19 November 2013 commenting on the training manual supplied by Ms Fernandez. He says that the manual was provided to Ms Fernandez on 11 January 2013, some months after she first started working with Savvy. He says that the training manual –

... was not an official training manual and did not correctly reflect the Savvy Marketing Limited requirements. It was put together by one of the managers Cyril without my knowledge or consent sometime around January 2013. I discovered that this had been done in mid to late February 2013 and I withdrew the manual on 19 February 2013. As far as I am concerned, Melissa was never subject to the manual.

I can also confirm that the first two pages of the manual do not correctly reflect the nature of the business. In particular, while there is reference to what the contractor should be aiming to achieve in terms of pledges on the second page, this was not a target as such.

[34] Despite Mr Featherstone's view to the contrary from the time Ms Fernandez was issued with the manual she was *subject to* it. However, I accept his evidence that the 'targets' were more in the nature of aims and not fixed targets that must be met. I

do not consider that the manual assists Ms Fernandez in proving that Savvy had such great control of her work that she was an employee.

[35] On 19 December 2013 Ms Fernandez supplied some copies of text exchanges between her and other people also working for Savvy. Most of these do not assist her argument that she was an employee merely showing she worked collegially with other pledge collectors and managers.

[36] Ms Fernandez says that at the end of a day she had to return to Savvy's Newmarket office where she had to complete and return all her paperwork. This was a practical mechanism to ensure all completed pledges were actioned as soon as possible which also ensured contractors were able to claim commission as soon as possible. In and of itself it is a neutral factor and does not give weight to Ms Fernandez' claim to be an employee.

[37] Ms Fernandez says the number of hours to be worked was set by Savvy. She was told she needed to be available from 12 midday until 7pm or 8pm, Monday to Friday on days she worked and could not, for example, work a half day only after completing any hair/beauty business work. That and some of the text messages are evidence that Savvy controlled what time of the evening the pledge collectors should stop work is evidence that supports an employee relationship rather than that of an independent contractor who could usually be expected to control her own hours of work.

Fundamental test/economic reality test

[38] When I stand back and take into account how the relationship worked in practice between Ms Fernandez and Savvy I consider that Ms Fernandez behaved more as if she was operating in business on her own account for the following reasons.

[39] Ms Fernandez was experienced at being in business on her own account and had been so for 13 years. The agreement she signed with Savvy says she was an independent contractor, she was paid purely on commission, she was able to prioritise her hair and beauty business over any work for Savvy, she rendered invoices, and she had no expectation that she would receive any holiday pay or sick pay.

[40] Ms Fernandez was aware that withholding tax and not PAYE was being paid on her behalf to the IRD, she asked for and received payment from other Savvy workers for transporting them to work sites and she claimed vehicle/travel expenses off her income tax. Ms Fernandez says that she thought it was *odd* that she could claim expenses against her Savvy income. It would have been prudent then to seek advice from her accountant about whether she could do that if she was an employee, as she now claims that she was. But she did not and she left it up to her accountant to claim travel/vehicle expenses against her Savvy derived income knowing that she was being represented to the IRD as self-employed in both her hair and beauty business and in work done for Savvy.

[41] Ms Fernandez was not an employee of Savvy and therefore the Authority has no jurisdiction to consider her claim of unjustified dismissal.

Costs

[42] Costs are reserved. The investigation meeting took a little less than a full day. The parties are invited to agree on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

Christine Hickey
Member of the Employment Relations Authority