

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 38
3059092

BETWEEN SHONA DEAN
 Applicant

AND STEVEN RAVENWOOD AND
 TANIA JOHNATHON TRADING
 AS STEVE RAVENWOOD
 SERVICES
 Respondent

Member of Authority: Vicki Campbell

Representatives: Ben Nevell, counsel for Applicant
 Tania Johnathon for Respondent

Investigation Meeting: 23 October 2019

Additional information 11 November 2019
received:

Determination: 30 January 2020

DETERMINATION OF THE AUTHORITY

- A. Ms Dean was an independent contractor and the Authority has no jurisdiction to investigate and determine her claims.**
- B. Costs are reserved.**

Employment relationship problem

[1] Ms Dean worked for Steven Ravenwood and Tania Johnathon trading as Steve Ravenwood Services (SRS) as a Telemarketer from August 2016 until 5 August 2018.

[2] SRS provides services cleaning and maintaining heat pumps in the Wellington area and throughout the South Island. Ms Dean was engaged to make telephone appointments for technicians to undertake the cleaning and maintenance work.

[3] Ms Dean says one or more conditions of her employment were affected to her disadvantage by the unjustified actions of SRS, that she was constructively dismissed, is owed arrears of wages and says SRS breached its statutory obligations of good faith.

[4] SRS denies the claims and says the Authority does not have jurisdiction because Ms Dean was not an employee but was at all times engaged as an independent contractor.

Issues

[5] In order to resolve Ms Dean's application I must determine the following issues:

- a) Was Ms Dean an employee or independent contractor?
- b) If Ms Dean was an employee:
 - i. Was one or more conditions of her employment affected to her disadvantage by the unjustified actions of SRS and if so what if any remedies should be awarded?
 - ii. Was Ms Dean unjustifiably constructively dismissed and if so what if any remedies should be awarded?
 - iii. Is Ms Dean owed arrears of wages for unpaid holiday pay and sick leave?
 - iv. Did Mr Ravenwood and Ms Johnathon trading as Ravenwood Services breach their statutory obligations of good faith?

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It does not record all evidence received but I record that all evidence has been carefully considered.

Background to the relationship

[7] Prior to being engaged by SRS Ms Dean worked as a telemarketer for Fuel Rebates Limited on a commission only basis. The Agent for whom she worked at Fuel Rebates gave Ms Dean the contact number for Ms Johnathon, who had advertised on Trade Me for a freelance telemarketer. Ms Dean contacted Ms Johnathon about the role.

[8] Ms Johnathon told me she explained the business to Ms Dean and that the role was for a telemarketer to make appointments for technicians to clean and/or maintain heat pumps.

[9] Ms Johnathon also told me she explained to Ms Dean that SRS supplied all the data and leads for her to make the calls and that all of the information was available in SRS's system. All Ms Dean needed to do was log into the system to access the information. Ms Johnathon says she also told Ms Dean she was able to access other lists if she wished through the internet or other systems. Ms Johnathon says she would also have explained to Ms Dean that she could work whatever hours she wanted, that it was a results orientated role and Ms Dean would be paid based on the number of confirmed appointments made.

[10] Ms Dean says she does not recall being given the information as told by Ms Johnathan. Ms Dean could recall only that she was told the role was ringing clients and that lists would be sent to her.

[11] I have concluded it is more likely than not that Ms Johnathon would have provided more of an explanation about the role than Ms Dean has recalled. It seems unlikely Ms Dean would have accepted a new role without knowing the full scope of what was expected of her.

[12] Ms Dean was keen to take on the role and during the call it was agreed Ms Dean would start the following day on 17 July 2016. Ms Johnathon provided training to Ms Dean by remote over the phone on her first day of work.

Employee vs contractor

[13] There is a dispute about whether Ms Dean was an employee or an independent contractor. The onus of establishing whether Ms Dean was an employee rests with her on the balance of probabilities. The starting point for the Authority is Section 6(1) of the Employment Relations Act (“the Act”) which states:

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.

[14] Section 6(3) states:

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 the relationship.

[15] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd.*¹

[16] The Employment Court in *Poulter v Antipodean Growers Limited* summarised the following applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:²

- 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 analyzing 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.

¹ [2005] ERNZ 372.

² [2010] NZEmpC 77 at [20].

[17] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice, then to apply the three tests known as the control, integration and fundamental or economic reality test.

[18] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.³

[19] The Court in *Atkinson v Phonenix Commercial Cleaners Ltd* noted:⁴

Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties' common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix's employee.

Intention of the parties

[20] As set out earlier in this determination the relationship came about as a result of Ms Dean making contact with Ms Johnathon after Ms Dean had been given her telephone number by her Agent at Fuel Rebates.

[21] Ms Dean did not meet Ms Johnathon; instead they had a telephone conversation which resulted in an offer being made to Ms Dean which Ms Dean accepted. No written documentation was provided to Ms Dean prior to her accepting the role.

[22] Ms Johnathon told me the intention was that Ms Dean would be an independent contractor paid by commission based on the number of appointments Ms Dean made each week.

[23] Ms Dean says she was told she would be paid an hourly rate for up to 20 hours work each week and that the hourly rate would vary depending on the number of appointments she made. For example if she booked 10 to 14 appointments in a week she would be paid at the hourly rate of \$15.50 per hour. If Ms Dean booked 15-19

³ Ibid at [21].

⁴ [2015] NZEmpC 19 at [58].

appointments in a week then she would be paid \$17.50 per hour and for weeks where she booked more than 19 appointments she would be paid \$20.00 per hour.

[24] On 16 August 2016 Ms Dean received a copy of a written “Telemarketing services agreement” (the agreement) which confirms the hourly rates as described by Ms Dean. The agreement states that the role is commission only and no holiday pay or sick pay would apply. Ms Dean never signed a copy of this agreement because she had difficulty printing it off after receiving it by email.

[25] The agreement records Ms Dean is contracted for a minimum of 20 hours a week and set as a minimum 10 confirmed appointments each week for three consecutive weeks in a row. The agreement records that a failure to meet the standard would result in dismissal.

[26] The agreement provided for all disputes to be resolved by the use of an independent arbitrator. It does not address payment for goods and services taxes, ACC payments or how payments for the commissions payable under the agreement are to be paid, that is whether on invoice or by some other method.

[27] The agreement was never executed as it was not signed by either party. At the outset of the relationship Ms Dean was paid in accordance with its terms, that is, she was paid for 20 hours each week at the appropriate hourly rate for the number of confirmed appointments.

[28] In October 2016 the commission structure was changed. From October 2016 until the end of the relationship Ms Dean was paid per appointment on the basis of \$20 for each appointment for returning clients and \$35 for each appointment for new clients. The calculation for payment of the commissions was extrapolated by the number of heat pumps serviced or maintained for each client. For example just prior to the relationship ending Ms Dean confirmed an appointment at a school in Nelson. The school had 20 heat pumps and was a new client. Ms Dean was paid \$700 ($\35×20) in commissions for that appointment.

[29] In April 2017 a new agreement was given to Ms Dean which she accepted by acknowledging in an email on 20 April. Surprisingly the new agreement did not reflect the changed commission structure, instead it provided for the same hourly payments as those set out in the August 2016 agreement with additional payments for

35 and more confirmed appointments and for 40 and more confirmed appointments. Ms Dean did not raise any questions about the terms set out in the revised agreement in April despite them being contrary to the commission structure she was being paid under.

[30] Mr Ravenwood told me he spoke to Ms Dean before sending the updated agreement but did not read through the entire agreement with her. Instead he just updated her on the improved commission structure payments. Mr Ravenwood told me Ms Dean was very happy with the changes he discussed with her and confirmed to him that she was happy not to be on the hourly rate structure.

[31] Contractual statements asserting the nature of the relationship are not decisive. In this case there was no signed document. However, the way the parties operated in practice from the outset points to the intent and nature of the relationship being one of independent contractor.

[32] When Ms Dean received the written agreement on 16 August she did not challenge the nature of the engagement at that time. Then when the commission structure was changed in October 2016 Ms Dean did not raise any concerns about the nature of the relationship or the changes in the commission structure.

[33] I am satisfied Ms Dean was aware of the intention that she be an independent contractor at the outset of her relationship with SRS and chose to remain silent rather than raise a view that she was an employee. To that extent I find the parties had a common intention regarding the nature of the relationship.

Control

[34] The control test looks at the degree of control or supervision exercised by the employer over the work performed. The greater the level of control, the more likely a contract of service exists.

[35] In her written evidence Ms Dean says she was treated like an employee, was instructed to work on Saturdays and worked in the manner required by Ms Johnathon.

[36] Contrary to her written evidence, in her oral evidence at the investigation meeting Ms Dean told me she worked as a volunteer on Fridays and chose to make up the time by working on Saturdays.

[37] Ms Dean told me that in her first year of working, although she was told to take a week off over the Christmas/New Year period she ended up working after being instructed to do so by Ms Johnathon. Ms Dean also told me that when she wanted to take time off to visit her daughter in the North Island she had to continue working and fit her time off between making calls for SRS.

[38] Ms Dean said that in 2017 she was told not to work on Good Friday and Easter Monday, but in 2018 Ms Johnathon became upset when she took those same two days off. Ms Dean says she was instructed to work on ANZAC day in 2018 and was embarrassed to be making calls on that day when most people were away.

[39] Ms Johnathon denies instructing Ms Dean to work on specified days. Ms Johnathon told me her only concern was that Ms Dean achieve the minimum number of confirmed appointments each week. When or how she did that was entirely up to Ms Dean.

[40] I have preferred the evidence of Ms Johnathon in respect of when and how Ms Dean was to undertake her duties. I find on balance it is more likely than not that Ms Dean had considerable flexibility in when and how she worked.

[41] For example in May 2018 Ms Dean started attending a gym each day from 3 pm to 4 pm. Ms Dean told me she worked during her evenings to achieve her sales calls. Ms Dean did not seek permission to spend time during her day at the gym and chose for herself to make up the hours in the evening.

[42] Further, Ms Dean did not meet Ms Johnathon at all during the relationship. All their communications were undertaken by telephone, email or text messages. There was therefore no physical supervision of how and when Ms Dean undertook her duties.

[43] I find some aspects of the relationship were akin to an employment relationship with elements of control in the working activities such as Ms Johnathon's expectations that Ms Dean would make a minimum number of confirmed appointments each week. However, as noted by the Court in *Singh v Eric James &*

Associates Limited such elements of control are not uncommon in non-employment situations.⁵

[44] I find Ms Johnathon exercised minimal control over the way Ms Dean conducted her telemarketing work on a day to day basis. This test is not conclusive in determining the real nature of the relationship although it points less to an employment relationship and more to one of independent contracting.

Integration

[45] This test examines the extent to which the work performed by Ms Dean was an integral part of the business and whether she had effectively become “part and parcel” of the organisation as opposed to being an adjunct to the business.

[46] Apart from her telemarketing role, during the relationship Ms Dean says she was asked to undertake other duties including following up overdue accounts for appointments she had made.

[47] Ms Dean started following up unpaid invoices after she had accepted the additional commission payments for 40 or more confirmed appointments. From April 2017 payment of commission for confirmed appointments of 40 or more each week was reliant on the payment of all invoices being paid by the end of the following month. I find it is more likely than not that Ms Dean agreed to follow up invoices relating to her appointments as it was to her advantage to do so. If the invoices were not paid on time, it directly affected Ms Dean’s ability to earn commissions.

[48] Ms Dean told me she was instructed by Ms Johnathon to provide training to new workers on telephone manner including how she spoke to people and treated them during the telemarketing calls. Ms Dean told me she trained at least 4 people in total. The training was completed remotely. I accept Ms Dean provided training with no extra recompense. However, there is no evidence Ms Dean raised this with Ms Johnathon during the relationship or requested payment for the training.

[49] Ms Dean was provided with remote access to SRS’s computer system and an email address through which she would communicate with Ms Johnathon. Ms Johnathon provided Ms Dean with a password to enable her to access company

⁵ *Singh v Eric James & Associates Limited* [2010] NZEmpC 1 at [23].

documents including a spreadsheet showing a list of names and numbers of people she was to contact within a specific geographic area. She also had access to a calendar to fill in appointment times for people who booked appointments. These documents were also accessible by other telemarketers engaged by SRS.

[50] Ms Dean worked from home and used her own computer and made all calls using her own phone. Ms Dean had negotiated a deal with a telephone company whereby she paid a flat rate of \$50 per month and could call anywhere in New Zealand at no extra cost.

[51] The work undertaken by Ms Dean for the period of her involvement was integral to the business but could have been undertaken equally as an employee or in some other capacity.

[52] The integration test has elements of an employment relationship and elements of a contracting relationship. While the role of telemarketer was important in terms of achieving appointments for SRS's technicians overall I find the test to be indeterminate of either an employment or contracting relationship.

Fundamental or Economic Reality

[53] This test examines the extent to which Ms Dean took on financial risk herself in providing her services to SRS including whether she was in business for herself. In *Downey v New Zealand Greyhound Racing Association Inc.* the Court indicated that the fundamental test requires an examination of whether and how Ms Dean structured her business.⁶

[54] The question to be asked is whether Ms Dean engaged herself to perform the services for SRS as a person in business on her own account?⁷ Ms Dean did not operate under a registered company and did not provide invoices for payment for her services.

[55] Ms Dean provided Ms Johnathon with a spreadsheet detailing the commission payments due to her and calculated 20% withholding tax which was identified as a separate amount deducted from the total payment due. Ms Johnathon remitted the tax

⁶ *Downey v New Zealand Greyhound Racing Association Inc.* (2006) 3 NZELR 501 at [34].

⁷ *Ibid.*

portion to the IRD on Ms Dean's behalf as a scheduler payment and paid Ms Dean the balance.

[56] Ms Dean entered into an arrangement with 2 Degrees regarding payment of her telephone to enable her to make unlimited toll calls. At the investigation meeting she told me she kept all receipts relating to the use of her telephone, and computer which she then claimed as expenses through her tax consultant.

[57] In a letter from her tax consultant Ms Dean is referred to as an independent contractor. Ms Dean was advised in the letter that as she had not had ACC levies deducted from her scheduler payments she may receive an invoice from ACC seeking payment of ACC levies.

[58] Ms Dean was able to increase her earnings by being proactive and by the way she conducted herself when making calls to arrange appointments. Ms Dean told me that within the first week of working in the role she reached the required threshold to receive payment at the lowest hourly rate but in the second week she was elevated to the next level of payment due to her performance in securing appointments. By week four Ms Dean was earning at the highest level and was being paid \$20 per hour.

[59] In April 2017 Ms Dean accepted SRS's offer to increase her earnings potential when SRS offered bonus payments (over and above the usual commission payments) on 35 and 40 or more confirmed appointments. The changes included an additional payment for 35 or more confirmed appointments of \$20 per appointment and an additional payment of \$5 per appointment for 40 or more confirmed appointments.

[60] While SRS provided leads for Ms Dean to follow up she was able to increase her success rate by sourcing additional leads from other places such as the internet. Ms Dean told me that she took advantage of those opportunities and was successful.

[61] When Ms Dean was asked to follow up on unpaid invoices she was provided with a further opportunity to increase her income levels. She was offered and accepted a commission payment of \$5 for each call made as a follow up call. This payment was in addition to the payments made to her in respect of confirmed appointments.

[62] Ms Dean benefited from the arrangement. She was able to reduce her tax liability by claiming business expenses which is not a benefit available to employees.

[63] This test is indicative of an independent contractor relationship.

Industry practice

[64] There was no evidence about industry practice and so I am not able to take this into account.

Overall impression

[65] Standing back and considering the evidence as a whole I have concluded that on balance Ms Dean was engaged and worked as an independent contractor and was not an employee.

[66] The Authority has no jurisdiction to investigate and determine Ms Dean's claims.

Costs

[67] Costs are reserved. The parties are invited to resolve the matter. I am of a mind to let costs lie where they fall. SRS was not represented at the investigation meeting by a professional representative and so it is unlikely it has incurred any costs.

[68] However, if I am wrong about that, and if the parties are unable to resolve the matter SRS shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Dean shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[69] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.