

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 304
3192419

BETWEEN	TANIA KEANE Applicant
AND	GENUINE NZ LIMITED First Respondent
AND	GENUINE NZ INTERNATIONAL LIMITED Second Respondent

Member of Authority:	Claire English
Representatives:	Paul Matthews, counsel for the Applicant Charles Johnston, advocate for the Respondent
Investigation Meeting:	21 March 2023 at Blenheim
Submissions received:	28 March 2023 from Applicant 18 April 2023 from Respondent
Determination:	12 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Tania Keane, performed work for Ms Leanne Harris through the respondent companies, from approximately 17 March 2022 until her engagement was terminated on 13 June 2022.

[2] Ms Keane claims that she was an employee of the respondents, that she was unjustifiably dismissed without fair process, and she is entitled to remedies accordingly.

[3] The respondents, through their director Ms Harris, resist Ms Keane's claims, and say that she was never an employee, but was instead an independent contractor.

[4] Accordingly, the question as to whether Ms Keane was an independent contractor or an employee of the respondent/s needs to be determined as a preliminary matter.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Ms Keane and Ms Harris. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[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. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination were:

- (a) Was Ms Keane an employee of the respondent/s?

Background

[8] Ms Keane first met Ms Harris when she was hired to assist Ms Harris host a dinner event at Ms Harris's bed and breakfast business.

[9] Ms Keane had been working as a childcare provider, and was looking for other work. She was put in touch with Ms Harris by another of Ms Harris's staff members. Initially, Ms Keane performed cleaning services, a dinner service, and what she described as "general running around" jobs for Ms Harris connected with the bed and breakfast business Ms Harris was running at the time. This lasted for a short time, and then Ms Harris asked Ms Keane if she would be willing to help promote a pet food supplement called "Petpow", which Ms Harris was manufacturing and looking to sell.

[10] The Petpow business was in its infancy. Ms Harris had an arrangement to manufacture the Petpow supplements at a local factory, which were then offered for sale at local markets. Ms Harris wanted to grow the business, and one of the ways she wanted to achieve this was by increasing the business's on-line and social media presence. She was therefore offering Petpow products to potential customers on a trial basis, in exchange for on-line reviews to attract new customers, and in the hope and expectation of converting the trial customers into paying subscription customers in due course.

[11] Ms Keane's role was to assist with this process, including liaising with the trial customers, taking delivery of the wholesale product, packaging it attractively and ensuring it was couriered to all customers in accordance with their requests, marketing and promotional content on Facebook and local community pages, and selling at the local market.

[12] There was no written agreement between the parties. Ms Keane and Ms Harris agreed that Ms Keane was to be paid \$22 per hour, later increased to \$25 per hour. Ms Keane was given a template invoice by another staff member, and told to fill this in with her hours and rates of pay, and send this to a staff member named Frank for payment. Ms Harris gave evidence that she authorised the payments that were made by Frank. The invoice had the words "Contractor/Freelancer" above the box marked "Name".

[13] Although the invoices were made out to "Genuine NZ Foods Limited", Ms Keane was paid by the second respondent, Genuine NZ International Limited.

[14] Ms Keane's tasks were assigned to her by either Ms Harris, or occasionally by Coco Chinn, who was Ms Harris' daughter, and the other director of Genuine NZ Limited. (Ms Harris is the sole director of Genuine NZ International Limited.) Ms Harris assigned tasks to Ms Keane by way of personal meetings, or by way of instructions via the company WhatsApp groups. Ms Harris referred to these instructions as "projects".

[15] Ms Keane was given access to various WhatsApp threads and the relevant Facebook page. She was given a business card, naming her as a "Sales Executive" for "Genuine New Zealand", which she was to give to customers, and include in products she packaged and sent out to customers, so that they could contact her. She was also

given a phone and number, bank card, and an email address consistent with the format used by others working in the business, being her first name followed by “gennz” for “Genuine New Zealand”.

[16] In addition, when Ms Keane needed supplies, (examples given were a printer, and packaging materials) she obtained Ms Harris’ authorisation to purchase these via WhatsApp, and was reimbursed.

[17] Ms Harris gave evidence that she had a small number of other workers, who were happy to perform occasional part time hours, or projects, as Ms Harris referred to the work she assigned them from time to time. Ms Harris also gave evidence that her arrangement with the factory where the Petpow products were produced was informal and tenuous, and that she needed to carefully manage all these arrangements.

[18] In contrast, Ms Keane believed she had been asked to help market and grow the business, and proactively sought out more work from Ms Harris. This became a source of stress for Ms Harris, who felt that Ms Keane’s proactive approach was not welcomed by other staff. During the course of the investigation meeting, it became apparent, as Ms Harris acknowledged, that while Ms Keane was willing and able to put a lot of time and effort into marketing the business and pushing it forward, the business and Ms Harris was not yet ready for this.

[19] It was this mis-alignment which led to the ending of Ms Keane’s engagement, which took the form of a dispute between Ms Keane and Ms Harris about Ms Keane visiting the factory to pick up finished product so she could package and send it to customers, and Ms Harris instructing her not to visit the factory. Without going into detail, it is relevant to consider how the engagement was ended, and the reasons given at that time, which were recorded in three separate letters.

[20] The first letter is headed “Genuine New Zealand” and dated 9 July 2022. It is signed by Coco Chinn, who is named as Director, Genuine NZ Limited, and Frank Tsai, who is named as Shareholder, Genuine NZ Limited¹. The letter states:

This notice terminates your contractual relationship with Genuine New Zealand as of 9th June 2022. Our business relationship is untenable and I no longer have trust and confidence that you are willing to accept instructions.

¹ I note that the Companies Office records that Mr Tsai is a 30% shareholder in Genuine NZ Limited, and it was not explained what authority he would have over staff.

Accordingly, I ask you return forthwith to our offices all documents, samples, stock and promotional materials for our Petpow products. Please submit your final invoice for work done on our behalf to today's date.

[21] This was followed by a second letter, again headed "Genuine New Zealand", dated 13 June 2022. This letter was signed by Ms Harris as Director. It stated:

This is to confirm we have today terminated your contract by giving two (2) weeks notice. You are required to return to our offices, the Genuine New Zealand offices the [redacted number] phone provided to you for business purposes, Genuine NZ Ltd. Bank card and all stock, samples, and promotional materials in your possession by the end of the notice period on 27th June 2022.

Please also submit during this period your final invoice for contract services supplied up to 13th June 2022.

[22] A third letter was also sent, dated 17 June 2022, again headed "Genuine New Zealand" and signed by Ms Harris as director. It stated:

Reviewing the invoices you have submitted for services rendered, I note that you have not provided any detail of the works you performed other than the dates.

Please provide details of the services you performed during the period 8/03/22 to 13/06/22, along with where carried out and the names of the persons involved.

I would ask that you refrain from contacting my daughter Coco, coming to my home or place of business. Should you need to contact me further, please do so in writing.

Tests of Employment Status

[23] Section 6 of the Act sets out matters which the Authority must consider when deciding whether a person is employed, as follows:

(2) 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.

(3) 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 their relationship.

[24] In addition, industry practice may be relevant, although it is far from determinative.

[25] The impact of section 6 is that it is for the Authority to determine the real nature of the relationship, and that the way the parties describe their relationship may not be determinative of the matter, taking into account the entire factual matrix. The position is that:

It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature².

[26] I will therefore consider the real nature of the relationship between Ms Griffiths and Boost, as it was while it existed between 1 January 2022 and 31 March 2022. I will analyse the relationship by applying the well-recognised tests of:

- a. Intention;
- b. Control;
- c. Integration;
- d. The “fundamental test”, or whether Ms Keane was in business on her own account; and
- e. Industry practice, to the extent that I received evidence about this.

Intention

[27] Ms Harris gave evidence that she intended to hire Ms Keane as an independent contractor. Ms Keane in contrast gave evidence that she thought she had been hired as an employee. The parties never formalised their relationship through a written agreement, so there is no contract or agreement that would help to shed light on their intentions at the time their agreement was formed.

[28] In any event, while the intention of the parties as expressed through any contractual documentation is relevant, it is not decisive³. I must consider substance as well as form.

[29] There are two type of contemporaneous documents that assist in demonstrating Ms Harris and Ms Keane’s intentions. First, the template invoice, and second, the three

² *Bryson v Three Foot Six Ltd* [2005] NZSC 34 at [32].

³ *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 (EmpC)

letters bringing the arrangement to an end. The template invoice used by Ms Keane to record the hours she worked in a fortnight and request payment accordingly, was sent to her by email by another staff member already working for Ms Harris. Ms Keane accordingly filled it out and send the completed invoices on to Ms Harris for payment. The evidence suggests that the invoice (and its form and wording) came from Ms Harris, or were at the least approved by her, as she passed them on and approved payment on the basis of them despite obvious inaccuracies such as the incorrect company name. Ms Harris's lack of concern over the accuracy of the details recorded in these invoices suggests that she had not turned her mind fully to the details of the arrangement. The invoice was not generated by Ms Keane, and does not tend to suggest any particular intention on her part.

[30] The details set out in the termination letters are more specific. In particular, the first letter referred to "Our business relationship is untenable and I no longer have trust and confidence that you are willing to accept instructions." Trust and confidence is an indica of an employment relationship, rather than an independent contractor relationship. If this matter was so important to Ms Harris that she considered a lack of trust and confidence to justify immediate termination of her working relationship with Ms Keane, this suggests Ms Harris expected and required Ms Harris to act as an employee and to fulfil those obligations. The reference to Ms Keane being unwilling to accept instructions (at least in Ms Harris' view) also suggests an employment relationship, as employees are required to follow the instructions of their employer, whereas independent contractors have freedom to decline instructions and associated work.

[31] The first and second letters contain a specific requirement to return certain items of property, again, indicating an employment relationship. Finally, the third letter raises (albeit quite belatedly) a request that Ms Keane account for her time despite having already been paid for her time. Again, this is a request that fits within the mutual obligations of good faith and that an employee should be accountable to an employer.

[32] Ms Harris gave evidence that she had been in business for many years, and had supported many staff members into gainful work. She had every opportunity to clarify the legal nature of the work she, through her companies, was offering Ms Keane, including providing Ms Keane with an independent contractor agreement. She chose

not to do so. However, the language she used at the time of the relationship was consistent with employment status.

[33] I find that while Ms Harris gave evidence that she had thought that Ms Keane was engaged as an independent contractor, in reality, Ms Harris did not communicate this to Ms Keane. Rather, she desired a level of control and mutual obligations more consistent with an employment relationship.

[34] As for Ms Keane, the evidence shows that she acted as Ms Harris directed, in filing out the template invoice given to her and submitting it for payment. Insofar as she turned her mind to the question of employment status, she thought she was an employee of Genuine New Zealand Limited.

[35] The question of intention is not determinative, as there was no shared intention. However, surrounding evidence points more towards employment status.

Control

[36] This test requires a consideration of the degree of control or supervision exercised over Ms Keane's work. Ms Harris exercised a high degree of control over Ms Keane and how she worked. This is shown by Ms Harris assigning work tasks or projects to Ms Keane on a personal basis. These tasks varied depending on what needed to be done from time to time, from the original work Ms Keane performed at the bed and breakfast cleaning, and serving customers, marketing and social media duties, packaging and posting product, pick and deliveries, up to and including various "odd jobs" including caring for Ms Harris' dog while she was away. Ms Keane was to perform the work herself, and could not delegate or arrange for others to perform work for her.

[37] When her assigned work was complete, she reported back to Ms Harris who would then assign further work. Ms Keane stayed in contact with Ms Harris (and other staff) via WhatsApp during the working day, and all-hands calls were held regularly.

[38] Although Ms Harris suggested that Ms Keane had flexibility in when and how much she worked, I find this was an overstatement of the situation. As the Court has noted, flexibility is not the same as autonomy, particularly in circumstances when the choice to exercise that flexibility (such as by refusing work or working at your own

pace) comes with economic consequences⁴. Ms Harris would assign tasks, and Ms Keane was to complete them in a timely manner. It was only once assigned tasks were completed, that Ms Keane would be in a position to request more work from Ms Harris. The reality of this situation was that Ms Harris retained a great deal of control over the amount of hours of work available to Ms Keane, and consequently, the amount of money Ms Keane could realistically earn.

[39] The true expectations of Ms Harris and the level of control she and Ms Chinn considered acceptable were clearly set out in the termination letters I have referred to above. Ms Keane was required to accept the instructions of the directors, and to be seen to be willing to do so. She was required to account for her time, on penalty of potential non-payment for time worked, and to return (and by implication care for in the interim) all company property. Genuine New Zealand Limited was the person providing the work, and it exercised and assumed supervision and control over Ms Keane in her performance of that work⁵.

[40] I find that the amount of control exercised over Ms Keane and her work was more indicative of employment than it was of an independent contractor relationship.

Integration

[41] Ms Keane was fully integrated into the “Genuine New Zealand” business. She was explicitly presented to customers and potential customers as a representative of that business and the “Petpow” brand. This is shown by the business cards she was given to use, as well as the business phone number and business email address assigned to her, the formatting of the email address being one which matched the formatting of the email addresses used by other staff, and explicitly referencing the business and name of “Genuine New Zealand”.

[42] Ms Keane herself was integrated into the business. She worked with other staff, had a job title of “Sales Executive” assigned her by Ms Harris that did not suggest separate or independent contractor status, and was an active contributor to the business WhatsApp chat groups and staff meetings.

⁴ *E Tu Inc v Raiser Operations BV* [2022] NZEmpC 192 at [59].

⁵ See for example, *Clark v Northland Hunt Inc* (2006) 4 NZELR 23 (EmpC) at [30].

[43] In addition, the work Ms Keane performed was, in the main, an important and necessary part of the business. Although Ms Keane performed “odd jobs”, her main role was that of marketing and social media management, and customer service through delivering of the Petpow product. Customer service and product delivery was key to the success of the business. It was not accessory to it.

[44] I find that the integration test points towards an employment relationship.

The Fundamental Test

[45] This is a test of whether Ms Keane was in business on her own account:

An employee works for the employer, within the employer's business, to enable the employer's interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.⁶

[46] There was considerable discussion at the investigation meeting focused on the idea that Ms Keane was an experienced business operator, who had acted as an independent contractor previously, and who was attempting to hide her true understanding of tax and GST matters.

[47] In fact, Ms Keane gave evidence that she had previously worked as an employee in the retail and service industries, prior to the birth of her children. More recently, she had worked providing in-home childcare, before the closing of that childcare provider left her in want of more work. She had begun offering her childcare services on Facebook, however, she was looking for work which was how she had come to be in touch with Ms Harris for cleaning and service duties at Ms Harris' bed and breakfast business. Ms Harris' representative stressed that Ms Keane's experience as an independent contractor performing childcare work meant that she was actively engaged in running her own business and her work for Genuine New Zealand was merely part of this.

[48] In contrast to these submissions, Ms Keane's actual evidence was that she provided her services to a childcare company. That company acted as liaison between her and parents who were seeking childcare services, and assisted both parties by having Ms Keane provide a weekly invoice for her services based on hours worked so that it could facilitate payment, as well as deducting tax, and instructing her that instead of

⁶ *Leota v Parcel Express Ltd* [2020] NZEmpC 61, [2020] ERNZ 164 at [30].

claiming for actual expenses, she should make nominal claims at a flat rate of \$4.50 per hour, in accordance with an agreement that the childcare company had reached with IRD. I do not accept that this arrangement means that Ms Keane was an experienced independent contractor running her own enterprise, and in any case, this arrangement had come to an end (due to the closing of the childcare provider) some time prior.

[49] The reality of the situation was that Ms Keane was providing her labour to Ms Harris's enterprises. She was paid on an hourly rate which was set by Ms Harris. The only way she could increase her earnings was by increasing the number of hours she worked, and the provision of work was at the control and discretion of Ms Harris.

[50] She assumed no business risk. The limited equipment she had was purchased by Genuine New Zealand, and she was required to return it when her contract with them ended. She had no clients or customers of her own (all customers were customers of Petpow). It was an explicit expectation that Ms Keane was to promote the Petpow brand, rather than her own interests.

[51] Taking all these factors into account, there is no doubt that Ms Keane was not in business on her own account. The fundamental test points towards an employment relationship.

Industry Practice and Other Matters

[52] For completeness, I note that the question of industry practice does not arise in this case. Genuine New Zealand was manufacturing and promoting a unique pet supplement product, and could perhaps be described as a boutique business. No particular evidence of industry practice was given.

[53] During the course of these proceedings, it emerged that there was a potential question as to which of the two respondent companies might be the employer. The template invoice provided to Ms Keane to use was addressed to Genuine NZ Foods Limited. Ms Keane received payment in accordance with those invoices from the second respondent, Genuine NZ International Limited. Ms Keane was directed in her work by Ms Harris and Ms Chinn, the directors of the first respondent, Genuine NZ Limited. The termination letters were in the name of Genuine NZ Limited.

[54] On balance, my view is that the company responsible for Ms Keane's arrangements is the first respondent, Genuine NZ Limited. It is this company which

received the benefit of Ms Keane’s efforts and labour, and this company which was most consistently referenced by both Ms Harris and Ms Keane in their evidence.

Conclusion

[55] I have found that there was no shared intention as to whether Ms Keane would be an employee or an independent contractor, although contemporaneous documentation from Ms Harris and Ms Chinn use language more consistent with employment obligations.

[56] I have found that Ms Harris exercised a level of control over Ms Keane and her work that was more consistent with that of an employee. I have also found that the degree of integration into the “Genuine New Zealand” business was more consistent with that of an employee. Finally, when looked at overall, Ms Keane was not in business on her own account, she was working for Ms Harris’ and Ms Chinn’s business.

[57] Standing back, and considering the true nature of the relationship between Ms Keane and Genuine NZ Limited, I find that the relationship was that of employee and employer. Ms Keane was working in that business by providing her labour, and the work she did enabled the company’s interests to be met, for which she was paid an hourly wage. When considering the question: “in whose interests is the work done?”⁷, the answer is clearly that the work was done in the interests of Genuine NZ Limited. Accordingly, I find that Ms Keane was an employee of Genuine NZ Limited between 8 March 2022 and 13 June 2022.

Outcome

[58] The parties will be contacted by the Authority in due course to discuss how the remaining issues between the parties (including costs) might be appropriately progressed, noting the applicant’s application for costs in respect of this matter. The parties could expect the Authority to determine costs in accordance with its usual daily tariff for a 1 day hearing.

Claire English
Member of the Employment Relations Authority

⁷ *E Tu Inc v Rasier Operations BV* [2022] NZEmpC 192.