

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 422
5427945

BETWEEN

GRETCHEN AMBLER
Applicant

A N D

STEPHANUS PHILIPPUS
CROUS and MARIA CROUS
trading as RHODIUM TRUST
Respondent

Member of Authority: Rachel Larmer

Representatives: Stephen Tee, Counsel for the Applicant
Philip Grace, Counsel for the Respondent

Investigation Meeting: 03 October 2014 at Auckland

Date of Determination: 13 October 2014

DETERMINATION OF THE AUTHORITY

- A. Ms Ambler has discharged the onus of establishing on the balance of probabilities that the parties were in an employment relationship.**

Employment relationship problem

[1] Ms Ambler says she was employed by Mr and Mrs Crous (together trading as Rhodium Trust (the Trust)) as a Stable Hand. She worked from 10 March 2012 until her dismissal on 10 February 2013. Ms Ambler claims she was unjustifiably dismissed by the Trust.

[2] The Trust disputes that the Authority has jurisdiction to investigate Ms Ambler's dismissal grievance. It says the parties were not in an employment relationship and that they had entered into an independent contractor arrangement. The Trust says that it ended its relationship with Ms Ambler in accordance with the terms of the independent contractor agreement.

[3] This determination deals with the jurisdiction issue only which (by agreement) was dealt with at a preliminary investigation meeting.

Issue

[4] The sole issue for the Authority to determine is whether or not Ms Ambler falls within the definition in s.6(1)(a) of the Employment Relations Act 2000 (the Act) which defines “employee” as “any person of any age employed by an employer to do work for hire or reward under a contract of service”.

Relevant law

[5] In determining whether or not Ms Ambler is an employee, the Authority must determine the real nature of the relationship between the parties¹. This requires consideration of all relevant matters, including any matters that indicate the intention of the parties. However, the Authority is not to treat as determinative any statement by the parties describing the nature of their relationship.

[6] The leading case is the Employment Court’s decision in *Bryson v. Three Foot Six Ltd (No.2)*². The Supreme Court held that all relevant matters to be considered by the Authority in determining the real nature of the relationship included the written and oral terms of the contract/agreement between the parties as well as the way it operated in practice. The written intention of the parties is relevant, but not decisive, in determining the real nature of the relationship.

[7] Ms Ambler bears the onus of establishing on the balance of probabilities that she was an employee in terms of the definition of “employee” in the Act.

What did the parties intend?

[8] Ms Ambler was interviewed by Mr and Mrs Crous and by Mr Hugh Kelly who is the Stud Manager for the Trust. The parties agree that during the course of the interview, in which Ms Ambler was offered work, she was told she would be an independent contractor and provided with an Independent Contractor Agreement (the Agreement).

[9] There is no dispute that the Agreement was offered the same day that Ms Ambler was interviewed for the position of Stud Hand at Rhodium Stud. There is

¹ Section 6(2) of the Act
² [2005] NZSC 34

also no dispute Mr Crous took Ms Ambler through the independent contractor agreement and discussed the clauses with her and asked if she had any questions.

[10] Ms Ambler agrees that she was told by Mr Crous that the Trust was offering her work as an independent contractor. That was the only option available. Ms Ambler agrees that she was aware that the Trust required her to submit invoices in order to be paid and that she would not obtain paid sick leave, annual leave or public holiday pay.

[11] Mr Crous was very reluctant about explaining why an independent contracting arrangement was required. He initially declined to answer any questions about it and when pressed gave very limited information.

[12] However, from his evidence it appears that one of the reasons that the Trust wanted an independent contract arrangement was so that it could terminate the arrangement in March 2013. It appears from the evidence given by Mr Crous that there was no particular reason for wishing to do so other than wanting to retain flexibility to end the arrangement after 12 months without being subject to the obligations that relate to ending an employment relationship.

[13] Another reason is that the Trust did not want to take on liability for "*superannuation and the like*". I note it did employ Mr Kelly, the Stud Manager and a more junior Stable Hand who worked part-time. There was no real explanation as to why Ms Ambler, who I find was treated the same³ as these two employees, was not an employee.

[14] The suggestion of an independent contracting arrangement was proposed by the Trust, not by Ms Ambler. She was not expecting an offer to be made on the day of the interview or that the offer would relate to an independent contracting arrangement only not employment.

[15] Ms Ambler had no reason for wanting an independent contracting arrangement other than securing the work that was on offer. She was not someone who had set up in business on her own account. She was not GST registered and had not previously run a business. Ms Ambler was not aware of (and did not take advantage of) any tax benefits that may have been available to her as a contractor. She had not structured her affairs in such a way to obtain the benefits of self-employment.

³ Except she had to submit invoices to get paid and did not get any Holidays Act 2008 minimum entitlements.

[16] Ms Ambler had only ever previously been engaged as an employee. She had never run her own business and did not understand the ramifications of entering into an independent contract arrangement. Ms Ambler says that she felt pressured to sign the Agreement, although she was unable to provide any evidence of external pressure. I find that no pressure was put onto Ms Ambler by the Trust but that she decided to sign the Agreement she had been offered by the Trust at the interview.

[17] I find Ms Ambler knew she was entering into an independent contractor arrangement although I recognise that she did not fully appreciate that meant she would be in business on her own account.

[18] I consider that the weight of the evidence in relation to this factor is finely balanced and does not give a clear indication either way.

Agreement

[19] There is considerable ambiguity with the Agreement. I note that the word “Agreement” is more usually associated with an employment relationship. The word “Contract” is usually more associated with an independent contracting arrangement.

[20] The Trust is described in the Agreement as “*the Company or Employer*” (I note it is not actually a company – it is a trust) whilst Ms Ambler is described as “*the Contractor*”.

[21] The background to the Agreement records that:

“The parties acknowledge that the real nature of their relationship is that of independent contractor and principal and that the contractor is in business on her own account.”

[22] The Agreement is not determinative of the nature of the relationship. It is poorly drafted and it has approximately 43 references to “*employer*”, “*employee*” and “*employment relationship*”. It also refers to “*contractor*” and “*company*”.

[23] Likewise the terms in the Agreement are also ambiguous – some support the existence of an employment relationship and some support the existence of an independent contractor relationship.

[24] The following clauses are not typical of an independent contracting arrangement. For example:

- Clause 1.2 – no ability to delegate or subcontract tasks without prior written approval of the Trust;
- Clause 1.3 – an obligation to live in to “*devote substantially all of her time to the benefit of her employer during working hours*”;
- Clause 3.1 – statutory holiday pay rates, and references to employment, including “*where the employee is absent from work for a continuous period exceeding three days without notification to or consent from the employer or without good cause, she shall be deemed to have terminated her employment*”;
- Clause 4.4 – redundancy provisions.
- Clause 7 – contains obligations of fidelity and exclusivity, misconduct and grievance provisions.

[25] There are also a number of clauses which tend to suggest an independent contractor arrangement including:

- Clause 1.2(c) requiring Ms Ambler to provide, at her own cost, all tools and equipment.
- Clause 2.1 requiring her to submit invoices for services performed.
- Clause 2.3 providing that Ms Ambler’s salary would be subject to withholding tax.
- Clause 3 which provided that the engagement was for a fixed term, terminating on 11 March 2013.
- Clause 3 providing that there was no obligation on the Trust to provide work, and no obligation on Ms Ambler to accept work.
- Clause 3 allowed Ms Ambler to work on her own projects with the prior approval of the company.
- Clause 3.1 provided Ms Ambler was not entitled to any sort of paid leave and therefore not entitled to holiday pay or sick leave.
- Clause 5.1 made Ms Ambler responsible for her own taxes.

- Clause 5.3 made Ms Ambler responsible for her ACC levies.

[26] The evidence also contradicted some of the clauses in the Employment Agreement. For example the reality of the job differed from what was described in that:

- No personal tools or equipment were required to be provided by Ms Ambler, when the agreement required her to do so;
- Ms Ambler was not required to produce any Health and Safety in Employment Act documents, whilst the Agreement required her to do so;
- Ms Ambler was under an obligation to work as directed, as compared to clause 2.3 of the Agreement which suggests she has no such obligation.

[27] The nature and extent of the contradictions and ambiguities lead me to conclude that the Agreement is a neutral factor.

The control test

[28] The control test involves an assessment of whether the Trust had the right to control Ms Ambler, and if so to what extent.

[29] I consider it clear from Mr Kelly's evidence that the Trust exercised a large measure of control and supervision over Ms Ambler. She was told what to do, when to do it, how to do it and within what timeframes the work was to be undertaken. She appeared to have very little (if any) flexibility. Ms Ambler was expected to fully comply with the work that was allocated to her by Mr Kelly and to meet his priorities, expectations and timeframes.

[30] Ms Ambler was not left to work unsupervised in a manner which is typical of an independent contractor. She could not set her own priorities or manage her own time and activities.

[31] I also find that Ms Ambler's hours of work were specifically controlled in terms of having a designated start and finish time and her work was directed by way of a roster system which she was required to adhere to. Her break times were set by Mr Hugh and she was not free to come and go as she pleased to suit her own requirements or schedule.

[32] I do not accept Mr Crous' evidence that Ms Ambler was free to work the hours she chose. That aspect of the Agreement was a fiction. It was clear that she was required to be at work as per the roster and to remain at work until Mr Kelly indicated that she was free to go.

[33] Ms Ambler was required to provide medical certificates to support absence due to a work injury, despite there being no question that the work accident had occurred and she was unable to work due to her injuries.

[34] I find there was a high level of control which is indicative of an employment relationship.

Integration

[35] The integration test looks at the extent to which a person is integrated into the business.

[36] I consider that the work performed by Ms Ambler was an integral part of the business. She was part and parcel of the Stud Farm operation and treated exactly the same as the other two employees.⁴

[37] I consider Ms Ambler's integration is also evident by the live-in nature of the role, and the requirement to work additional hours and times as per the Stud demands required. For example Ms Ambler could (and sometimes was) called out during the night or wee hours of the morning or during a weekend when she was not rostered to work to help with a horse.

[38] Although under the terms of the Agreement Ms Ambler was to provide her own personal tools and equipment, she only provided her own personal clothing and boots. Everything else required to do her work was provided by the Trust.

[39] I consider that there was no real distinction between how Ms Ambler was treated and how the other two employees of the Trust were treated (apart from minimum entitlements and invoicing issues).

[40] I find that Ms Ambler worked as part of a team and had very little control over the work that she actually did which was allocated to her by Mr Kelly.

⁴ See only exceptions as per footnote 3.

Ms Ambler was supplied with work vehicles, all the requisite tools and was provided with live-in accommodation. Her work pattern was the same as for other individuals who were engaged as employees.

[41] I consider this factor supports the existence of an employment relationship.

Fundamental test

[42] The fundamental test involves an inquiry into whether Ms Ambler is in business on her own account.

[43] Ms Ambler had not registered for GST and had not set up her financial affairs so she could run a business on her own account. She did not take any degree of financial risk and was unable to profit from her own efforts, other than being paid per hour for the amount of work actually done.

[44] She was required to take her breakfast and lunch breaks at times directed by Mr Kelly. She was required to apply

“... all her efforts to the fields encompassed in the firm’s range of operations and services should be for the sole benefit of the firm. The contractor may not, for the duration of this contract, directly or indirectly engage in any activities covered by the firm’s range of operations or services without written permission from the firm nor will she engage in work for remuneration outside the service of the firm without the explicit permission of the company.”

[45] I consider the reality is that Ms Ambler did not engage with the Trust as a person in business on her own account. It appears that she was entirely controlled by the Trust in terms of her activities and the like.

[46] Although Ms Ambler was paid by invoice, the invoice template was provided to her by Mr Crous and she just added her specific hours of work each week into the template he had prepared for her.

[47] I consider that these factors tend to indicate an employment relationship.

Payment arrangements

[48] Ms Ambler prepared a timesheet which she submitted in an invoice template to the Trust’s accountants. I consider that is indicative of an independent contractor arrangement.

[49] However, I note that the agreement provided at clause 2.3 *“The contractor’s remuneration package will be NZ\$40,000 (Forty thousand NZ dollars) per annum, payable fortnightly into her designated bank account. Her payment will be subject to normal statutory withholding – and other applicable taxes.”*

[50] This suggests that Ms Ambler would be paid an equal amount fortnightly regardless of submitting invoices. That is indicative of an employment relationship.

[51] I consider on balance this is a neutral factor.

Industry practice

[52] There is insufficient evidence to make a finding on this. It seems that it could equally go both ways.

Conclusion

[53] Standing back and looking at the overall factual matrix, I consider it more likely than not that Ms Ambler was engaged as an employee, not as an independent contractor.

[54] I do not accept this was a situation where Ms Ambler set herself up in business on her account to take advantage of the tax and other benefits that it would afford and then turned around and claimed to be an employee. She was not expecting to be presented with an offer during her first interview, much less to be presented with an independent contractor agreement. Ms Ambler was not sophisticated in these matters and had no prior experience of anything other than employment.

[55] I consider that the real nature of the relationship is more likely to be one of employer/employee rather than an independent contracting arrangement.

[56] In particular:

- (a) The work hours were prescribed by the Trust including additional hours and the requirement to be available for weekend work;
- (b) She was required to live-in;
- (c) She was required to work as part of a team;
- (d) She was required to work as per the Trust’s roster;

- (e) She was required to undertake the tasks that were allocated to her on a daily basis;
- (f) She was supervised in terms of how she undertook those tasks;
- (g) She was required to meet the Trust's timeframes in terms of what tasks were to be undertaken how and by when;
- (h) She used the Trust's tools and equipment;
- (i) She worked exclusively for the Trust as part of a team (which included two other employees);
- (j) She was required to meet a duty of fidelity;
- (k) She was required to explain any absence from work and to provide medical certificates for any absences in the same way as an employee is required to do.

[57] I am satisfied that Ms Ambler has discharged the onus of establishing on the balance of probabilities that she was an employee in terms of the definition of "employee" under s.6 of the Act. I therefore conclude that the Authority does have jurisdiction to investigate Ms Ambler's personal grievance claim.

Mediation

[58] The parties are directed back to mediation given that the Authority's jurisdiction has now been clarified. That changes the landscape in terms of what the Trust's legal obligations were to Ms Amber when it decided to terminate her employment.

Costs

[59] Ms Ambler as the successful party is entitled to a contribution towards her costs. The parties are encouraged to discuss costs at mediation together with the substantive issues.

[60] If agreement on costs is not reached within 14 days of mediation occurring then Ms Ambler has seven days to file a costs memorandum, the Trust has 7 days to reply and Ms Ambler has three working days within which to respond.



Rachel Larmer
Member of the Employment Relations Authority



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