

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 146/10
5279649

BETWEEN DONALD FRANCIS
ARMSTRONG
Applicant

AND SIGNATURE HOMES
HAWKE'S BAY LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Don Armstrong on his own behalf
Debra Law for the Respondent

Investigation Meeting: 13 July 2010 at Napier

Submissions Received: By 6 August 2010

Determination: 10 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant claims that he was not properly paid, not treated in good faith, unjustifiably disadvantaged and unjustifiably constructively dismissed by the respondent. The respondent denies all of the applicant's claims and in any event claims that he was a contractor to it rather than an employee.

The Facts

[2] As its name implies, Signature Homes Hawke's Bay Limited (Signature Homes) is the Hawke's Bay franchisee of the Signature Homes franchise. Again as the name implies, Signature Homes builds and sells new homes. Mr Armstrong took up a position with Signature Homes on 6 October 2008. He was appointed as an independent contractor to the position of new home consultant, to generate new home sales for Signature Homes. As the written agreement between the parties makes clear,

and Mr Armstrong accepts was the common intention of the parties at the time, Mr Armstrong was to be an independent contractor to be paid only by way of commissions on sales made. He was not entitled to sick pay, holiday pay or any other such payments.

[3] Mr Armstrong was required to meet any expenses in doing his job, including vehicle, home office, mobile telephone and fax machine. Under the contract, however, Signature Homes was to provide certain facilities, the cost of which was built into the commission structure. These facilities included office accommodation, secretarial facilities, stationery and business cards, point of sale and promotional materials, and regular advertising and marketing activities.

[4] Mr Armstrong was required to commit sufficient time and resources to the job to meet the sales targets (which were effectively one new home sale per month), had to be registered for GST and was not entitled to supply services which competed with, or were similar to, the services provided in the contract.

[5] The parties agreed to mediate any dispute privately.

[6] While Signature Homes was entitled to assign or transfer the benefit of the contract without Mr Armstrong's consent, he could not do the opposite unless agreed to in writing by Signature Homes.

[7] Mr Armstrong worked at Signature Homes until 15 September 2009. During the eleven month period he only sold one house, rather than the eleven expected. For that sale his company, Armco Limited, invoiced Signature Homes, and Armco was paid the commission. Mr Armstrong used Armco because it was a company that, although not trading, was registered for GST, as he himself was required to be under the contract.

[8] Mr Armstrong was one of three new home sales consultants, all of whom were employed on the same terms. There were three ways in which Mr Armstrong could gain leads from which to make sales. These were through inquiries generated through Signature Homes' showroom and office; inquiries generated through the show home (which was opened soon after Mr Armstrong started work); and by his own efforts.

[9] Mr Armstrong reported to Mr Darryl Pugh, then the general manager of Signature Homes. Mr Armstrong also had a relationship with Mr Brad Hay, the national sales manager for the franchisor.

[10] Whilst Signature Homes claimed that it never required Mr Armstrong to work certain hours, I conclude that Signature Homes was effectively exercising a great deal of control over the hours of work that the consultants had to undertake and the places where they had to undertake that work. This is because of the provision to the consultants of rosters prepared by Mr Pugh (to ensure there was cover in the show home Monday to Sunday and in the showroom Monday to Friday) and his expectation (but not requirement) of the consultants that they work from the office unless they were having the day off or working at the show home. I accept that such hours were effectively full time employment of 40 hours a week in and of themselves.

[11] I also accept that the new home consultants were part and parcel of the Signature Homes brand. This was reinforced by issues such as uniformed shirts, the advertising of the Signature Homes brand throughout the operation and the use of standard contracts for sale and purchase agreements (which the sales consultants had to utilise and had no flexibility over, including over price). From a purchaser's perspective, the new home sales consultants would therefore have been fully integrated into what was known as the Signature Way (TSW) and Signature Homes itself.

[12] New home consultants were trained in TSW, which included the need for a great deal of work on the computer system, part of which created a large database of potential clients for Signature Homes.

[13] As well as dealing with client inquiries to Signature Homes, the new home consultants were also encouraged to make their own connections with potential clients. Mr Armstrong, for instance, was pursuing options of subdividing a property owned by his parents (in combination with Signature Homes) with new Signature homes being built on such properties, giving commission to him. I do not accept, however, because of the work time requirements placed on new home consultants, that they were effectively able to run other businesses at the same time.

[14] I accept from the evidence of Mr Hay and two managing directors of large new home builders, that there is an industry practice of engaging new home

consultants as independent contractors. The consultants were described as people who ran a business within a business, being responsible for their own time and efforts, especially after normal business hours, and that the harder they worked the better the financial results were for them. Such independent contractors were engaged either exclusively on commission, or with a retainer at the beginning of their engagement to see them through the first few months. I also accept the evidence that there was some comparability with real estate agents, because the work is similar. Real estate agents, however, are covered by a statutory exception to the test of employment under the Act.

[15] Mr Armstrong provided some evidence from job advertisements of the engagement of such people on salaries as employees. However, I conclude that those who were employed in salaried positions were not new home sales consultants as such, but rather support staff. While the real nature of the relationship was not clear from a number of the advertisements, because of the section about remuneration, I accept the evidence of the experienced managers in the field that such positions were in fact independent contractor positions.

[16] I therefore accept that there is an industry practice supporting engagement of new homes consultants as independent contractors rather than employees, but this is simply one factor and is not determinative.

[17] Over time, Mr Armstrong came to resent Mr Pugh's style of management, which included him regularly asking Mr Armstrong whether he made any sales today. Of course Mr Armstrong was extremely conscious of his failure to make sales, as without sales he made no income.

[18] Mr Hay met with Mr Armstrong on 5 May 2009 about his progress. He then gave Mr Pugh his appraisal of his progression in the business and recommendations for future training needs. It was Mr Hay's assessment that unless this further training was given to Mr Armstrong and was successful, he would never work out as a sales consultant.

[19] From that point, Mr Armstrong believed that Mr Pugh tried to take potential clients from him. In this regard, a client was established as a client of a particular consultant once their name was put into TSW, to stop consultants fighting over

clients. Mr Armstrong was often rather lax in doing so and this may have led to his concerns.

[20] Mr Pugh remained concerned about Mr Armstrong's performance and by the end of July had decided to place him on a three month trial, requiring him to reach his targets in the next three months, or his services would no longer be required.

[21] On 16 August, after Mr Armstrong believed that Mr Pugh had not followed through on certain matters for Signature Homes (which would have made Mr Armstrong look bad at a meeting the next day), he resigned with immediate effect.

[22] Mr Armstrong then filed proceedings in the Authority claiming penalties for breach of good faith, unjustified disadvantage for an alleged assault (evidence before the Authority showed that Mr Pugh had, during an argument, twice placed a finger on Mr Armstrong's upper chest or neck), being unsupported in his employment and taking clients from him, together with a claim for constructive dismissal. These applications were, of course, all based on his assumption that, during the course of his time with Signature Homes, he had operated in effect as if he were an employee.

[23] The problems between the parties have remained unresolved, despite mediation, and it therefore falls to the Authority to make a determination.

The Law

[24] As is set out in *Singh v. Eric James & Associates Ltd* [2010] NZEMPC 1, WRC18/09, Colgan CJ, 18 January 2010, the principles in deciding whether a person is an employee or not include:

Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law:

- *The Authority or Court, in deciding whether a person is employed under a contract of service, is to determine "the real nature of the relationship between them": s.6(2).*
- *The Authority or the Court must consider "all relevant matters" including any matters that indicate the intention of the persons: s.6(3)(a).*
- *The Authority or the Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship: s.6(3)(b).*

- *“All relevant matters” include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of the relationship.*
- *“All relevant matters” will also include divergences from, or supplementation of, those terms and conditions which are apparent from the way in which the relationship is operating in practice.*
- *“All relevant matters” includes features of control and integration and whether the contracted person has been effectively been working on his or her own account (the fundamental test).*
- *Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental tests.*
- *Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor.*
- *Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.*
- *Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of a contractual labelling of a person as an independent contractor.*

Determination

[25] There are a number of factors which support Mr Armstrong’s assertions that despite what the parties had agreed at interview and in the contract, the way the contract operated meant that the real nature of the relationship between them was in fact one of employer and employee.

[26] First, Mr Armstrong was clearly integrated into the operations of Signature Homes. There was no way that a potential customer would consider Mr Armstrong as other than part and parcel of Signature Homes’ organisation and structure. Furthermore, there was considerable control exercised over the way in which Mr Armstrong worked. He was required to cover rosters for the show home and office/showroom. He was *requested*, in a manner that appeared more of a direction, to work from the office if not taking a day off. His leads basically came from Signature Homes and he was required to follow them up. Signature Homes expected him to wear its business shirts. He had no way of varying the pricing or other terms of the sales contracts for the new homes. It is difficult to see how Mr Armstrong

could generate any significant goodwill from the arrangements with Signature Homes, because of the degree to which this was a contract for personal services and because he was so tied to the Signature Homes brand or *way*.

[27] On the other hand, there are also significant features in the relationship which point to its real nature being other than that of an employer and employee. The terms of the employment agreement make it very clear, as was the parties' mutual intention at the commencement of the contract, that this was to be an independent contracting arrangement. Mr Armstrong was to be paid only by way of commission on sales made. He was not entitled to any sick leave, annual leave or other such payments. This did continue for the duration of his time with Signature Homes. Mr Armstrong was free to use his own contacts or work his own hours outside of those already discussed in order to help achieve such sales.

[28] In terms of common intention, Mr Armstrong never claimed that he was an employee until the date of his resignation.

[29] Mr Armstrong also provided certain tools of the trade, such as a car and mobile phone, and presumably was able to deduct those expenses against income. Furthermore, Mr Armstrong used a third party, albeit one that he controlled, namely Armco Limited, to receive payment from Signature Homes. Mr Armstrong benefited from all these arrangements. In this regard, each new home consultant was required to be registered for GST and would have withholding tax rather than income tax deducted from sales income.

[30] While he could probably not generate any goodwill, Mr Armstrong's personal efforts did generate a greater return. In other words, the harder he worked the more likely it was that he would achieve higher earnings for himself as well as Signature Homes, although such arrangements could easily be structured in an employer/employee setting anyway, albeit without the commission only arrangements. The industry practice of contracting is also a factor that supports the finding of Mr Armstrong being a contractor for services.

[31] The factors that are neutral include the degree of training provided for Mr Armstrong, particularly in TSW, and the fact that Mr Armstrong was placed on trial. While there was no need for that under the terms of the contract, I do not consider that Signature Homes should be penalised for providing training to

consultants, or putting them on an employment-like trial, because the alternative would simply be to sever relationships, which could be counterproductive for both parties, as performance may be improved with more training and monitoring.

[32] There was significant control over the way in which Mr Armstrong operated, which was in effect a contract for personal services, as he was not able to delegate or subcontract his work and he was required to be at the employer's premises for most of a 40 hour week stretching from Monday to Sunday. He was required to follow training and reporting arrangements. He could not work in the same field without Signature Homes' agreement. There was, however, no control of his remuneration as to the level of his income and he had considerable freedom to influence that.

[33] Mr Armstrong was in effect an integral part of Signature Homes' business but I accept that he was given considerable freedom to manage the relationship between clients and Signature Homes in terms of the sales process, albeit within guidelines. To this end, he was clearly associated with and benefitted from advertising by Signature Homes, and he was expected to wear a business shirt with the Signature Homes logo on it. On the other hand, he rendered invoices not for time worked but for sales made.

[34] Signature Homes is in the business of making and selling new homes, which is an entrepreneurial activity. Mr Armstrong's position could be described as sub-entrepreneurial, and that he took substantial business risks not normally seen in an employment situation, i.e. commission only payments, and equally could make significant earnings, which would not normally be available to an employee.

[35] The fact that Mr Armstrong invoiced the one sale he made through an independent company, albeit one he controlled, as well as claiming expenses, are tax arrangements that are not merely a consequence of the labelling of Mr Armstrong's activities as a business, as the company was one step removed from the process.

[36] Given the freedom that he had to meet new customers and make sales, I conclude that the evidence favours a conclusion that he was, in effect, in business on his own account. As one witness said, the harder he worked, the more likely he was to make more money.

Conclusion

[37] On balance, I accept that while the control test is neutral, the integration test slightly favours a finding of an employee. On the other hand the fundamental test favours a finding to the contrary, as does industry practice and the common intention of the parties for the period the latter lasted (but these are lesser factors).

[38] I consider that this case is very close to the case of *Singh*. Although there was a greater control of Mr Armstrong and Mr Armstrong was more strongly integrated into Signature Homes' business than Mr Singh, industry practice was stronger and Mr Armstrong used a company to invoice Signature Homes, a factor that was not present in the *Singh* case. Furthermore, it is important to remember that any work function can be structured such that the real nature of the relationship may be either one of employment or of independent contracting. Taking all these matters into consideration, I find that there are no reasons to determine this case differently than *Singh*.

[39] In conclusion, there is a certain amount of merit to Mr Armstrong's claim that, over time, the way that the contract operated meant that in fact the true relationship between him and Signature Homes was that of employee and employer. In particular, the amount of control exercised by Signature Homes would not have been apparent to him prior to the commencement of the contract. This is the major reason why Mr Armstrong considered he was, in effect, being treated as an employee. I also note that the other industry chief executives who gave evidence indicated that the close degree of control over the hours and locations of work was not as great in their companies as occurred in Signature Homes.

[40] I am not, however, satisfied that the operation of the contract was so removed from the mutual intention of the parties to have a contracting relationship that the control factors, together with the degree of personal services required by Mr Armstrong for Signature Homes and his close integration with the operation of Signature Homes, are sufficient to outweigh the fact that Mr Armstrong provided personal services in a *sub-entrepreneurial* way (see *Singh*) and therefore he was in business on his own account, as was envisaged at the formation of the contract, which is also consistent with apparent industry practice.

[41] I therefore dismiss Mr Armstrong's claims for want of jurisdiction.

Costs

[42] Costs are reserved.

G J Wood
Member of the Employment Relations Authority