

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 569
5395959

BETWEEN

MARION ATKINSON
Applicant

A N D

PHOENIX COMMERCIAL
CLEANERS LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Dharmen Prasad, Counsel for Applicant
Douglas Hall, Counsel for Respondent

Investigation Meeting: 25 November 2013

Submissions Received: 28 November 2013 from Applicant
29 November 2013 from Respondent
02 November 2013 from Applicant

Date of Determination: 11 December 2013

DETERMINATION OF THE AUTHORITY

A. Ms Atkinson failed to establish on the balance of probabilities that she was an employee in terms of the s.6 definition in the Employment Relations Act 2000.

B. Accordingly, the Authority does not have jurisdiction to hear her claims so this matter is struck out.

Employment relationship problem

[1] Ms Atkinson claims that she was employed by Phoenix Commercial Cleaners Limited (Phoenix) as a commercial cleaner. She had a number of separate engagements (she estimated three) with Phoenix but both parties were unclear about the dates of each different engagement.

[2] Ms Atkinson claims that the last engagement she had with Phoenix ended as a result of an unjustified dismissal. She also claims that she was unjustifiably disadvantaged by Phoenix and that Phoenix breached its good faith obligations to her.

[3] Phoenix disputes that the Authority has jurisdiction to deal with Ms Atkinson's claims. It says she was never an employee and was only ever engaged to work as an independent contractor for each of the separate engagements she had with it.

[4] This investigation is only concerned with her last engagement and this determination relates to the jurisdiction point only.

Issue

[5] The sole issue for the Authority to determine is whether or not Ms Atkinson 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*.

[6] In determining whether or not Ms Atkinson 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.

[7] The leading case is the Supreme Court judgement in *Bryson v. Three Foot Six Limited (No.2)*². The Supreme Court held that all relevant matters to be considered included the written and oral terms of the contract between the parties as well as the way it operated in practice. The written intention of the parties was relevant, but not decisive, in determining the real nature of the relationship.

[8] Ms Atkinson bears the onus of establishing on the balance of probabilities that she was an employee.

¹ Section 6 of the Act.

² [2005] NZSC 34

What did the parties intend?

[9] Mr Shayne Thomson is the sole director of Phoenix. He says that when he first interviewed Ms Atkinson at the beginning of her three separate engagements³ he provided her with a Subcontractor Agreement and made it clear to her he was offering an independent contracting role only.

[10] Mr Thomson says that he runs the business with independent contractors only and that Phoenix has never employed employees and does not intend to do so. He claims he made that clear to Ms Atkinson at the initial interview.

[11] Ms Atkinson agrees she was told that Mr Thomson was offering an engagement as an independent contractor and she admits she was given an independent contractor contract. Ms Atkinson says that she took that home and decided she was not happy with some aspects of it (she felt she was not being paid enough to provide her own cleaning materials) so she decided not to sign it. However, instead of negotiating with Mr Thomson Ms Atkinson just started work with Phoenix. She did not advise Phoenix that she did not accept the terms it proposed.

[12] I find that Ms Atkinson did not go back to Phoenix with a counter offer and she did not make it clear that she did not accept the written terms that had been offered. I accept Mr Thomson's evidence that Ms Atkinson told him she did not want to sign the contract because she did not consider it was necessary.

[13] Ms Atkinson also signed a Non-Disclosure Confidentiality Agreement on 07 October 2009 which referred to her as a "subcontractor" in the document. Ms Atkinson signed her name above the notation "subcontractor."

[14] I consider that the available documentation supports the existence of an independent contract arrangement rather than an employment relationship.

[15] The parties agreed that Ms Atkinson left her engagement with Phoenix on at least three occasions. Ms Atkinson suggested that one of the reasons for her leaving Mr Thomson's failure to give her an employment agreement. Mr Thomson

³ The parties were unclear about when this occurred and I was unable to obtain any clarity around the dates of the various engagements.

acknowledges that Ms Atkinson told him she wanted to be an employee but he says he told her the business did not engage employees.

[16] There is a conflict in the evidence around the circumstances of Ms Atkinson's return to Phoenix on each occasion. Ms Atkinson claims that Mr Thomson approached her and asked her to return to work while he denies that. Ms Atkinson claims that at least in respect of her last engagement with Phoenix Mr Thomson said he would provide her with an employment agreement. Mr Thomson strongly refutes that.

[17] I have resolved this conflict in the evidence on the balance of probabilities in favour of Mr Thomson because I consider his evidence is more likely to be correct. Phoenix never employs employees and that is a position Mr Thomson has consistently maintained. It would therefore be surprising if after two engagements an exception was suddenly made for Ms Atkinson only in that regard. Everyone else who has worked or does work for Phoenix is an independent contractor.

[18] I also found Ms Atkinson's evidence about that odd in light of her previous evidence that the failure to provide an employment agreement had been an ongoing issue for her during the last engagements and she had left at least partly because of that issue. If that was the case it was unusual for her to go back to work for Phoenix before she had actually been presented with an employment agreement when her own evidence was that Mr Thomson had not kept his word about that at least twice previously.

[19] I consider it more likely that Ms Atkinson returned to work at Phoenix on the same basis as she had done so previously (ie on the basis of the independent contractor contract she was presented with at the initial interview) because it was offering better money than the company she was working for at the time.

Fundamental test

[20] The fundamental test involves inquiring into whether the worker is in business on their own account. Ms Atkinson was not registered for GST and had not set up her financial affairs so that 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.

[21] The contracting agreement was silent on whether or not Ms Atkinson could hire sub-contractors. The confidentiality provisions in the independent contractor contract could have presented an issue had Ms Atkinson wished to sub-contract her duties however that situation never arose.

[22] There was a conflict in the evidence over the extent to which Ms Atkinson provided her own equipment. I accept Mr Thomson's evidence that he provided a company vehicle about 50% of the time when Ms Atkinson was unable to provide her own transport.

[23] Phoenix also provided cleaning materials which Mr Thomson says was done for health and safety reasons so that it could be sure about what chemicals were being used for its customers. I accept Ms Atkinson's evidence that she did not provide her own cleaning equipment.

[24] Phoenix provided Ms Atkinson with a branded tee-shirt to wear while cleaning. Mr Thomson says this was to ensure a required standard of presentation and for easy identification whilst cleaners were on clients' premises.

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

Control test

[26] There is a conflict in the evidence about the degree of control or supervision that was exercised by Phoenix over Ms Atkinson's activities. I accept Mr Thomson's evidence that Ms Atkinson could arrange directly with the client which days and hours she worked. She could also change her days around or decide not to work on a particular day, in which case Phoenix would arrange cover for her.

[27] I find that Ms Atkinson had the ability to accept or reject an offer of work. When Phoenix got a new client it would offer the new work to all of its cleaners and then the cleaner who wanted to do the job would meet directly with the client and develop a relationship to ensure that the work could be done in a way convenient to both. I consider Phoenix had limited if any control over Ms Atkinson and the manner in which she performed the work.

[28] I consider that this test indicates there was an independent contractor arrangement not an employment relationship.

Integration test

[29] Ms Atkinson went out to clients' premises to clean so she did not have an office. She did wear a Phoenix branded tee-shirt which Mr Thomson says was provided to ensure a tidy standard of presentation whilst on a client's premises. I consider that is more a practical factor rather than determinative of Ms Atkinson's status.

[30] Mr Thomson provided evidence from Phoenix clients which confirms that Phoenix made it clear to clients that the cleaners were sub-contractors, not employees. That tends to indicate that Ms Atkinson had not been integrated into Phoenix's business which I consider suggests the existence of an independent contractor arrangement.

Payment arrangements

[31] Ms Atkinson prepared a timesheet which she submitted each week to Phoenix in order to be paid. I consider that is indicative of an independent contractor arrangement.

[32] However, Phoenix provided Ms Atkinson with pay slips which recorded "*WT*" to indicate withholding tax and then coded the amount actually deducted as "*PAYE*". *PAYE* relates to employees only. Mr Thomson says the payroll system automatically did it that way.

[33] Even if that is the case Phoenix should have made it clear to Ms Atkinson that although the pay slip recorded *PAYE* she was responsible for her own tax and that the amounts deducted were withholding tax, not *PAYE*. I consider that the reference to *PAYE* on the payslip tends to indicate that there was an employment relationship.

Industry practice

[34] I consider this a neutral factor as commercial cleaners may be either independent contractors or employees.

Conclusion

[35] Standing back and looking at the factual matrix overall, I am left with considerable doubt as to whether or Ms Atkinson was in fact an employee. That

doubt means she has failed to discharge the onus of establishing on the balance of probabilities that she was an employee in terms of s.6 definition of employee in the Act.

[36] I therefore conclude that the Authority does not have jurisdiction to investigate her claims. Her proceedings are therefore struck out.

Costs

[37] Phoenix as the successful party is entitled to a contribution towards its costs. The parties should attempt to resolve costs by agreement. If that is not possible then Phoenix has 14 days within which to file costs submissions, Ms Atkinson has 14 days within which to respond, with Phoenix having a further 7 days within which to reply.

Rachel Larmer
Member of the Employment Relations Authority