

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: WA 142/07  
File Number: 50555066

BETWEEN Mark Daley  
(Applicant)  
  
AND Tremain Real Estate Limited  
(Respondent)

Member of Authority: P R Stapp  
  
Representatives: Megan Williams for Applicant  
Michael Wenley for Respondent  
  
Submissions and Affidavits received: 18 April, 21 & 24 May 2007 from Applicant  
2 & 24 May & 14 September 2007<sup>1</sup> from Respondent  
  
Conference Calls: 28 March & 2 August 2007  
  
Determination: 19 October 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] By consent the parties have agreed for the Authority to make a determination on a preliminary point about whether or not Mr Daley was a contractor or an employee. The parties agreed for a determination on the papers.

[2] Mr Daley has relied upon being an employee to further his claim that he was unjustifiably dismissed. He is seeking to have that matter dealt with by the Authority in the fullness of time. He is seeking reinstatement, lost earnings and compensation and costs to resolve the employment relationship problem.

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<sup>1</sup> Affidavit from Quentin Owen McPherson, General Manager at Tremains from March 2005 until October 2006

[3] The respondent (“Tremains”) has submitted that Mr Daley is a contractor under the Real Estate Agents Act and is precluded from the jurisdiction of the Authority. The respondent otherwise denied the claims and is seeking costs.

### **Issues**

[4] The issue for me to determine at this time is whether or not Mr Daley was a contractor or employee at Tremain Real Estate Limited? There is a dispute over the label and a dispute over whether or not the role was an interim one based upon a promise that Mr Daley would be employed.

### **The parties’ positions in the matter**

[5] Mr Daley says he answered an advertisement placed in August 2005 for a General Manger’s position to run the company’s Napier and Taradale sales team. Despite that position not being filled, Mr Daley was later approached to fill a position of sales manager in Napier. Mr Daley says he was promised employment. He says earnings were discussed and other confidential information associated with the position was discussed. He says he had no doubt he was the new sales manager. A start date was agreed. He commenced selling real estate so as to get to know the area and the staff and to become familiar with the “*Tremains Way*”.

[6] Mr Daley says Tremains then reneged on the deal to employ him in the sales manager role and he was offered sales roles and someone else was appointed as the sales manager for the team on 28 March 2006. Mr Daley says he was subsequently dismissed in October 2006.

[7] Mr Daley’s contact at Tremains during these events was Simon Tremain, managing director. Mr Tremain says that they discussed the possibility of Mr Daley becoming an independent contractor. He says he made the decision to offer such a role to Mr Daley and for him to sell real estate.

[8] Mr Daley commenced working for Tremains under a written contract for services dated 12 September 2005. Tremains say that Mr Daley was engaged as an agent. Initially Mr Tremain fulfilled the sales manager role on a temporary basis until another person was appointed on 28 March 2006.

[9] Tremains has relied upon a contract that was signed off to engage Mr Daley as a sales person under s 51A of the Real Estate Agents Act to sell real estate.

### **Determination**

[10] Messrs Daley and Tremain have different understandings of the label put on the relationship and they dispute whether or not a promise was made for Mr Daley to become an employee. However there is no mistake that the contract that was signed by them was under the Real Estate Agents Act. The contract involved the engagement of Mr Daley as a sales person and as an independent contractor under s 51A of the Real Estate Agents Act 1976, without any preconditions. No intending employment agreement was given to Mr Daley. The salesperson's contract is unambiguous and it was signed off as such by both parties.

[11] It is not plausible that Mr Daley was promised employment and engagement in an interim arrangement. This is especially so given the comprehensive nature of the contractor's agreement and that it did not include any preconditions, and also considering Mr Tremain's role acting as the sales manager until the right person came forward. Mr Daley continued to act in his role even after someone else was engaged to be the sales manager that Mr Daley says was promised to him. No dispute was raised at the time by him. No other documentation was entered into that would reasonably have been expected in the circumstances. Furthermore I have considered an affidavit submitted by Karen Buckley, Mr Daley's partner, supporting Mr Daley and his version of the events. I have not given her evidence a lot of weight considering her evidence related to what she was told by Mr Daley and is not on its own proof of what actually happened, as she has relied in her statement upon her "*understanding*" of the situation. She does not say how she came to any such "*understand*" of the situation. She has not produced her own documents, and her references to other people, and their involvement, have not been corroborated.

[12] Mr Daley says that the promise of employment was made by Quentin Macpherson of Tremains. Mr Daley says that following a meeting, with Mr Macpherson, Simon Tremain and the incumbent sales manager, Glen Baker, he left (the meeting) with no doubt he was to be the new sales manager. Mr Daley says he left a paid sales manager's

job in another city to take up the role. Mr Tremain's evidence was particularly clear about offering Mr Daley an independent contractor role of selling real estate. He was supported by Mr Macpherson who was emphatic that he did not offer Mr Daley the position of sales manger. He deposed that he did not tell Mr Daley that he could have the position in the future. This was supported by the contract that was signed off. In the absence of any other documentation and evidence I have to accept that Mr Daley was not offered the position of sales manager. My conclusion is also supported by Mr Tremain acting in the position until the right person came forward.

[13] The submissions from the applicant rely upon words in the Tremains advertisement for "*employing*" sales consultants and various references to "*employment*", and rely upon the way Mr Daley was allegedly dismissed to support him being an employee. I conclude that these are ambiguous and are not enough to override the contract signed off by both parties.

### **Orders of the Authority**

[14] It is my decision that the independent contract overrides the other considerations raised by the applicant because at the time Mr Daley was engaged as a contractor sales person to sell real estate under the terms of a contract purportedly made having regard to S 51 A of the Real Estate Agents Act.. As such it is very clear under s 6 of the Employment Relations Act that this is permissible and that Mr Daley cannot rely upon being an employee.

[15] The applicant was a contractor. His claim that he was an employee is dismissed.

[16] Costs are reserved.

P R Stapp

Member of the Employment Relations Authority