

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 413
5370752

BETWEEN ANITA DUDLEY
Applicant

AND SUPER FINANCE LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Anita Dudley, in person
Arunjeev Singh, Counsel for Respondent

Investigation Meeting: 24 October 2012

Determination: 20 November 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Anita Dudley claims that she was unjustifiably dismissed from her employment as a Sales Consultant by the Director of Super Finance Limited (“Super Finance” or “the company”), Mr Saleem Raza. The dismissal occurred on the third day of her employment. She claims lost wages, compensation for hurt and humiliation, and the reimbursement of her filing fee. Miss Dudley has also asked the Authority to consider a penalty against Super Finance for failing to provide her with a written employment agreement.

[2] Super Finance Limited, trading as “Best Bargains”, is a direct marketing business which sells goods on finance arrangements. It does mail/flyer drops advertising various household, electronic, and garden furniture items and appliances, offering terms for payment. Potential customers contact telemarketers employed by

the company. The telemarketers have an initial discussion with the caller and make appointments for a Sales Consultant to visit them to follow up the customer's interest and, optimally, complete the documentation for a sale.

[3] Super Finance currently has nine staff comprising seven employees, who are office/shop based, and two independent contractors. Sales Consultants, who do not work from the office/shop, are generally engaged as independent contractors, the exception being one employee who started as an independent contractor but whose status changed to employee when, after several months, he took on a number of additional shop-based and delivery duties.

[4] The company asserts that Miss Dudley was an independent contractor and not an employee. It says that it terminated its relationship with her because she proved unsuitable for the position.

Issue

[5] The preliminary issue that I have to determine is whether Miss Dudley's relationship with Super Finance was that of an employee. If she was not an employee, I have no jurisdiction to consider further the matter of the termination of her relationship with the company.

Background to the Relationship

[6] Miss Dudley answered an advertisement in a local newspaper in early November 2011. The advertisement was headed "*Sales Consultants*", and stated that full time positions were available for in-house appointments for a South Auckland based business. Appointments would be supplied; experience was preferred, but not necessary, as full training would be given. There was excellent opportunity for growth; a retainer plus commission would be paid; and an immediate start was available.

[7] Miss Dudley, who had been unemployed for several years and was keen to re-enter the work force, was interviewed by Mr Raza at the company's shop and office premises and offered a position as Sales Consultant. A Miss Lavinita Vaeno also

responded to the newspaper advertisement; applied, and was interviewed, for the position on the same day as Miss Dudley. She too was offered a role as Sales Consultant. There is disagreement over the timing of those interviews, with Miss Vaeno and Mr Raza claiming that Mr Raza had interviewed Miss Dudley and Miss Vaeno together, while Miss Dudley said that she had met Ms Vaeno on the day of her interview, but claimed to have been interviewed separately by Mr Raza.

[8] There was agreement that Miss Dudley and Miss Vaeno received training together from Mr Raza over 3 days, comprising 6 hours training in total, and that they both commenced in their roles on 14 November 2011. There was also agreement that there was to be no payment made during that training period.

[9] Miss Dudley and Miss Vaeno disagreed over some of the information they had been given in their interviews, with Miss Dudley maintaining that she had questioned the hours of work and been informed that she was expected to be available five days per week during the business hours of 8.30 a.m. to 4.30 p.m. Miss Vaeno was equally clear that the starting time had been specified as 10.00 a.m. Mr Raza stated that the business never opened before 9.00a.m. and that appointments for Sales Consultants were made no earlier than 10.00 a.m.

[10] There was agreement that a retainer of \$350 was offered for five days' work, although there was some disagreement over the detail of how the retainer operated. There was also disagreement over the issue of whether or not a six week trial period had been specified at interview. Miss Dudley recollected that Mr Raza had specified a six week trial period, whereas Miss Vaeno emphatically denied that there had been any mention of a trial period. Mr Raza also denied that he had discussed or offered a trial period.

[11] Miss Dudley acknowledged that Mr Raza had told her the position was an independent contractor position. She told the Authority that she had not questioned this during the interview for the position, but had the view that it could not be a contracting position because she had not been given a contract document. She did not share that view with Mr Raza at the time. Miss Vaeno recalled that Mr Raza had been very clear about the relationship being that of an independent contractor.

[12] While it is unfortunate that there are differences in evidence among these three witnesses regarding some matters, I have no reason to doubt that their recollections are honestly held. Almost a year had elapsed between the date of the interviews and that of the investigation meeting and I ascribe the differences in accounts to the blurring of memory over the course of that time, rather than to any deliberate attempt by one or more of the witnesses to mislead the Authority.

The Working Relationship

[13] Miss Dudley commenced working for Super Finance on 14 November 2011. She was at home when she received her first lead from the company by telephone around or shortly after midday and duly drove to the appointment. She says that she was keen, prepared, and had done her homework. The clients were a young couple who were interested in purchasing a dining room suite advertised on the flyer as being available on no deposit, three years' finance and free delivery, from \$11 per week.

[14] Miss Dudley claimed to have been embarrassed and humiliated when the company's price list she had been given showed that weekly repayments for the young couple would be more than three times that amount, and that they would have to pay a sixteen week deposit before they could receive the furniture. The couple did not wish to purchase the furniture on those terms.

[15] Following the unsuccessful appointment, Miss Dudley returned to her home. She did not contact the company but waited for it to contact her. She stated, under questioning, that during training she had not been told that it was necessary for her to report back to the company after an appointment with a potential customer. She thought it was optional whether she contacted the company or it contacted her to ascertain the outcome of the appointment. For its part, Mr Raza and the company's office manager gave evidence that Miss Dudley had been told in training that she must contact the company after each appointment so that the company knew the outcome and could schedule her next appointment. I prefer Mr Raza and the office manager's evidence on that matter as it seems far more logical for the Sales Consultant to report back immediately after each appointment, than wait for the company, which would not know when the appointment ended, to contact her.

[16] In all, Miss Dudley followed up five leads provided to her by Super Finance on 14 and 15 November 2011, two of which were “no shows” by the potential customers. She claimed to have been embarrassed and humiliated at those where she spoke to potential clients and did not conclude any sales. The embarrassment and humiliation came from the mismatch between the terms listed on the flyer, and those applicable to the customers in accordance with the company’s price list. Miss Dudley left the customers’ homes following the appointments, and did not contact Super Finance to report the outcome.

[17] Towards the end of the second day (15 November) Mr Raza contacted Miss Dudley to request a meeting at the company’s premises the following morning. Mr Raza informed the Authority that he did so after asking the office manager how Miss Dudley was doing and being informed that she had not contacted the office after any of her appointments. Miss Dudley’s contact person in the office had had to telephone her to ascertain how each appointment had gone, and to remind her that she was required to phone or text back after her appointments. Mr Raza stated that he had made it clear during the training period that Sales Consultants were required to report back to the office after each appointment. That was how the office knew whether or not a sale had been made, and when to schedule the next appointment for the consultant.

[18] Miss Dudley and Mr Raza had different views about the meeting on the morning of 16 November 2011. Miss Dudley wanted to talk about the customers she had seen, their complaints, and the embarrassment she had felt as a result of the discrepancy, as she perceived it, between the advertised material and how it applied to those customers. Mr Raza said that he tried to explain to her about the different credit arrangements but that Miss Dudley said that she didn’t want to hear any more.

[19] Miss Dudley said that the meeting took place in the shop in front of two staff and one or two customers and that Mr Raza was “*a bit rude*”. However, in answer to a question, she also said that her conversation with Mr Raza was “*fairly relaxed*” and was “*not loud*”. In his evidence Mr Raza said that Miss Dudley became angry when he asked why she had not reported back after each appointment and that she left. Miss Dudley claimed that Mr Raza had dismissed her at the end of the meeting, while

he claimed that he would have been happy to give her an opportunity to improve, but that her attitude during the meeting had shown him that she was unwilling to listen.

[20] Following the meeting Miss Dudley returned the company property in her possession and was given a cheque for \$140 for the two days of her sales consultancy work. The company's view was that this was two days at \$70 a day, based on a retainer of \$350 for five days. Miss Dudley did not query with Mr Raza the amount of payment at the time she received it.

The Law and its application to the Relationship

[21] Section 6 of the Employment Relations Act 2000 concerns the meaning of *employee* and provides, at section 6(2), that:

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.

[22] In order to determine the real nature of the relationship the court or 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 relationship¹.

[23] The leading case in determining the real nature of the relationship is that of the Supreme Court judgment in *Bryson v Three Foot Six Ltd (No 2)*². In that case the court held (at page 386) that *all relevant matters* included the written and oral terms of the contract between the parties and the way it operated in practice. It required the court or Authority to *have regard to features of control and integration and to*

¹ Section 6(3) Employment Relations Act 2000

² [2005] ERNZ, 372

whether the contracted person has been effectively working on his or her own account (the fundamental test).

[24] Ms Dudley was not provided with a written contract. However, she did acknowledge that in course of her interview for the position Mr Raza had told her:

- (a) that the position was an independent contractor position;
- (b) that she would be paid a retainer of \$350 per full week (five days) worked, which would reduce when her commission payments exceeded that amount;
- (c) that commission payments should be \$700 to \$800 per week;
- (d) that she would have to pay her own taxes;
- (e) that her time was her own, except for the times at which she attended appointments provided by the company to follow up sales leads;
- (f) that she had to supply, and pay all expenses for, her own mobile phone and vehicle; and
- (g) (probably) that she had to invoice the company to receive payment.

Intention of the parties

[25] Although Miss Dudley may not have been happy that Super Finance wanted her to be an independent contractor, she did not challenge the nature of her engagement at the time of being interviewed for, or accepting, the position. I find that she was aware of the company's intention and chose to remain silent about any reservations she may have had. If she had considered herself to be an employee rather than a contractor, she would have been obliged under the good faith provisions of the Employment Relations Act to be open and communicative with Mr Raza regarding

her views. I find that she accepted the engagement on terms clearly specified by Super Finance to be a contract for services basis and, to that extent, the parties had a common intention regarding the nature of the relationship.

Control test

[26] Miss Dudley acknowledged that there was no direct control of her activities by the company once an appointment with a customer had been made for her. She was expected to keep those appointments, and to report back on whether a sale had, or had not, been made. How she conducted herself during the appointments was a matter for her to determine as long as she completed the requisite documentation if she concluded a sale.

[27] There was minimal supervision by the company and, apart from keeping appointments, and telephoning or texting a report on the outcome, she was not required to work for the company for the rest of her time. She could be at home or out in the community as she chose, provided that she was contactable by land line or mobile phone for the purpose of receiving information about appointments. She would be required to deliver the completed sales documentation to the company from time to time but was not otherwise required to attend the premises on a regular basis. She had no sales targets to reach, and had no reporting requirements other than in regards to sales.

[28] I find that Super Finance exercised control over the number of appointments that were arranged for Miss Dudley, but exercised only minimal control over the way Miss Dudley conducted her sales consultancy work on a day to day basis. This test alone is inconclusive in determining the real nature of the relationship although it points less to an employment relationship than to one of independent contracting.

Integration test

[29] Miss Dudley provided most of her own tools of trade in the form of a motor vehicle, land line and mobile phone, for which she was to pay all expenses from the retainer and commission she earned. She received minimal equipment from the company, in the form of a pricing manual and a photocopying machine. She was

based at home, rather than in the company's premises and was to invoice the company and be responsible for payment of her own taxes. While the role of Sales Consultant was important in terms of signing up sales for the company, I find that it fits more into the model of a contract for services than one of employment.

Fundamental test

[30] The essential question here is whether Miss Dudley was in business on her own account. The relationship was of such short duration that there is some difficulty in assessing this. However, looking at the evidence before the Authority, I find it more likely that Miss Dudley was in business on her own account than that she was an employee of Super Finance. She was to be paid solely by commission once her sales exceeded the level of the retainer, which appeared to be an interim measure to provide some remuneration until such time as she was fully functioning. The company provided the leads, but it was within Miss Dudley's power to increase her potential commission by the manner in which she conducted herself during appointments. She was able to increase her potential earnings by being proactive and contacting the company as soon as each appointment was completed, which would maximise the number of leads she was given daily, and therefore the potential sales she could achieve.

Conclusion

[31] I have considered the intention of the parties regarding the nature of the relationship, applied the usual tests, and have looked objectively at how the relationship worked in practice in the very short period of its existence. I have concluded that the evidence points to Miss Dudley being engaged on a contract for services and not as an employee. That being so, I have no jurisdiction to consider the matter further.

Costs

[32] Costs are reserved.

Trish MacKinnon
Member of the Employment Relations Authority