

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

**[2019] NZERA 342
3034712**

BETWEEN

RACHEL DUNCAN
Applicant

AND

INSPIRE PROPERTY
MANAGEMENT LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul Kyle, Advocate for the Applicant
Anyos Gonczy, Representing the Respondent

Investigation Meeting: 30 May 2019

Determination: 10 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Rachel Duncan, claims that she was constructively dismissed by the Respondent, Inspire Property Management Limited (Inspire). Ms Duncan also claims that she is owed monies by Inspire and denies that she has benefitted by an overpayment made to her by Inspire.

[2] Inspire denies that it constructively dismissed Ms Duncan and claims that she was an independent contractor during the time that she worked for Inspire.

[3] Inspire denies that it owes monies to Ms Duncan and claims that she was overpaid significant amounts of money in error.

Issues

[4] This determination addresses as a preliminary issue whether or not Ms Duncan was an employee or an independent contractor whilst working for Inspire.

Background

[5] Inspire is a property management company. Mr Anyos Gonczy is the sole Director and main shareholder. Inspire has a workforce of approximately 300 employees and independent contractors based in ten regions of New Zealand.

[6] Ms Duncan had previously been employed in the hospitality area but decided to undertake a course of study in real estate during which she decided that she was more attracted towards property management.

[7] She therefore applied for a position in property management which she had seen advertised by Inspire on the Trade-Me website. She was contacted and interviewed by Ms Zelda Thompson, National Sales Manager.

[8] In the letter Ms Thompson sent Ms Duncan in response to her application, she described the position as a 'business builder' and set out the terms and conditions on offer:

- Car, phone, fuel and IT software systems etc....
- Base salary of \$10,000 commencing with signing the 10th management
- Incremental increases to your base salary of \$2,000 for every 5th net tenancy managed thereafter
- In the event we lose a few the base salary does not decrease for e.g. if you manage 20 and 2 sells we do not decrease to 18 on salary, however you would need to grow for 25 (7) to get the next increase
- \$450 plus GST (if any) per new converted cold leads
- \$200 plus GST (if any) for any new converted Google enquiries
- \$100 plus GST (if any) for any converted company referrals and new properties for existing clients
- Business cards, training and support by a National Sales Manager (Me)

[9] Requirements for the position were itemised as being:

- Stable internet
- Windows based desktop or laptop computer
- Multi page scanner

The Independent Contractor Agreement

[10] Ms Duncan was successfully video interviewed by Ms Thompson via an internet provided system and was provided with an Independent Contractor Agreement dated 27 October 2017 (the Agreement). The Agreement was clearly titled ‘ Independent Contractor Agreement for the provision of labour’ and contained the following clauses:

1.1 (a) The Principal wishes to engage the contractor as an independent contractor to provide labour. The parties acknowledge that the real nature of their relationship is that of independent contractor and principal and the contractor is in business on their own account.

2.2 (c) subject to the provision by the Principal of specific equipment and resources, provide, at their own cost, all personal tools and equipment (including personal protection equipment) necessary to enable them to perform their obligations under this agreement;

3.1 The contractor shall invoice the Principal on a fortnightly basis. ...

4.1 This agreement will commence on 01/11/2017 and continues until terminated in accordance with clauses 5.1 to 5.3. The Principal is under no obligation to provide work and the contractor is under no obligation to accept work....

8.1 The Contractor shall be solely responsible for payment of all taxes, duties or levies which may be payable in respect of payments made by the Principal to the Contractor under this agreement. The Principal shall make no deductions from any such payments on account of tax or any other impositions, except those which the Principal is required to make from payments to the Contractor

8.2 The contractor is obliged to deduct Withholding Tax (20%) for contracts which are substantially for the supply of labour unless the contractor is either a Principal or has an IRD Exemption Certificate (IR331 certificate). If you have any doubts contact the IRD.

8.3 (a) The contractor warrants that he is registered, and will at all times during the term, maintain such registration, for GST purposes.

(b) The Contractor is/is not registered for Goods & Services Tax.

(c) The Contractor’s GST Number is -----

(d) The Contractor shall provide a copy of their GST Registration Number to the principal, failure to produce a current copy will result in non-payment of the GST portion of the Contractors invoice.

8.4 The contractor shall be responsible for payment of all required levies in respect of the Contractor, for the purpose of the Accident Insurance Amendment Act 2000. ...

8.5 The Contractor shall maintain at its own cost during the Term, the insurance specified in the Schedule.

8.7 Should the contractor not be registered for GST at the time of signature of this agreement, than the contractor warrants that they will register for GST

within 10 days of the signature of this agreement and provide the necessary details to the company.

[11] Ms Duncan was also provided with a Contractor Schedule` which formed an integral part of the contract and which set out the basis of payment at clause 3. Clause 3(ii) stated:

A base fee of \$10,000 plus GST (annual sum) payable on a fortnightly pro-rata basis. Such payments shall be paid to the contractor fortnightly in arrears. The base salary will commence on the rent being received for the 10th net management. This role starts with 0 active/net managements.

[12] Ms Thompson had sent the Agreement to Ms Duncan as confirmed in an email dated 27 October 2017 sent at 11.30 a.m. which stated: “Hi Rachel, Here is the complete contract, please do fill out where needed also initial each page for me please.”

[13] Ms Duncan said that she had read the Agreement and had sent it to a friend for comment.

[14] Ms Duncan replied to Ms Thompson at 3.30 p.m. the same day: “Hi Zelda, I have completed the forms. I have also read the contract and signed.’

[15] The following day, 28 October 2017, Ms Duncan sent a further email stating: “hi Zelda I have completed all documents. I am also happy with the contract.”

[16] Ms Thompson emailed Ms Duncan on 3 November 2017 responding to queries made by Ms Duncan, and stating in relation to a query relating to Tax, GST and ACC insurance:

Once you earn 60K per year you need to be registered for GST, it is up to you if you want tax in your own name and have 20% withholding tax deducted or if you want to open a company and do your own books and pay tax accordingly. I would suggest chatting to a bookkeeper regarding this to see the advantages/disadvantages around either option.

[17] Ms Duncan said she had contacted the IRD and been informed that she did not have to register for GST unless she earned more than \$60,000.00 per year.

[18] In addition to signing the Agreement, Ms Duncan completed the ‘New Employee Form’ sent with the Agreement which included a section in which she entered her Tax Code For Salary Payment as ‘M’.

Duties and working conditions

[19] Ms Duncan said that she had initially shadowed a colleague in order to understand the role in Inspire. She had a portfolio of properties which had been provided to her by Inspire.

[20] In carrying out her role Ms Duncan said she had been closely supervised by Ms Thompson who gave her Key Performance Indicators, a daily task sheet which she was told had to be completed, and was expected to attend twice weekly mandatory meetings.

[21] Inspire had provided Ms Duncan with the use of a company vehicle, a scanner, a mobile telephone, stationary and a fuel card. Ms Duncan had been expected to, and did, provide a laptop and paid for internet services.

[22] Ms Duncan said she had provided invoices in respect of her work using a template Ms Thompson had provided to her.

[23] Ms Thompson said she had provided Ms Duncan with a template for her invoices after Ms Duncan had asked about the format, general guidelines for conducting her work and provided a task list sometime after commencement as a suggestion for Ms Duncan in how to manage her work of managing properties. She had also provided Ms Duncan with coaching as Ms Duncan was inexperienced in the work.

[24] Ms Thompson said there were two weekly meetings held, the first with the contractors as a group, and the second was a coaching opportunity. Attendance was via internet link. The meetings were not compulsory and Ms Duncan sometimes did not attend them due to other commitments.

Working day

[25] Ms Duncan said normal working day commenced at 8.30 a.m. with telephone calls and she had been instructed to leave her mobile telephone on until 5 p.m. and to be available to take emergency calls.

[26] During an average day she would arrange property viewings, meet prospective clients, attend court in relation to issues arising from the property management, and carry out property inspections. Ms Duncan said at the time of leaving she managed approximately 26 properties and worked from 9 a.m. to 5 p.m.

[27] Ms Thompson said that whilst Inspire provided business generated leads to Ms Duncan, the expectation was that she would follow them up and generate leads for herself to build up her portfolio of clients.

[28] Ms Thompson said that the decision on when to complete tasks was Ms Duncan's own, provided that the tasks which involved rent monitoring, property inspections and overseeing the moving of tenants was completed.

[29] Ms Thompson said that Ms Duncan was expected to manage her own working week, and her workload would be governed by the size of the portfolio she established.

[30] Mr Anyos Gonczy, Director, said that he believed Ms Duncan had not worked many hours during an average week, basing that on the fact that she had no more than 20 properties in her portfolio at the time of leaving, whereas the full-time property managers had a portfolio of an average of 125 tenancies and worked a 40 hour week. On that basis he estimated Ms Duncan would work no more than 5 – 8 hours per week.

[31] Ms Duncan said she was required to apply for leave to take a holiday and was paid for statutory holidays and sick leave.

[32] Ms Thompson said that Ms Duncan had informed her that she intended to go on holiday, and she had asked her to document the dates in order that any queries regarding the properties in her portfolio could be addressed. As regards statutory holidays and sick leave, she understood Ms Duncan to be referring to the fortnightly payment of \$10,000.00 which did not vary.

Payment

[33] Payslips provided to Ms Duncan by Inspire itemised that PAYE and Kiwisaver deductions had been made from a fortnightly base salary.

[34] On or about May 2018 Ms Duncan noticed a change in her payments and the payslips which referred to a deduction for Withholding Tax rather than to PAYE, and the Kiwisaver deduction was nil.

[35] In regard to the method of payment Ms Thompson and Mr Anyos Gonczy, Director, said that Inspire used a payroll provider and that inadvertent errors had occurred, initially in providing Ms Duncan with the 'New Employee Form' and subsequently in entering her as an employee rather than as a contractor for tax purposes on the payroll.

[36] Mr Gonczy said that this issue had not been identified initially and Ms Duncan had raised no queries in relation to her payslips until March 2018. As a result the error in loading had been discovered by Inspire and corrected with effect from 30 April 2018.

[37] At that time Mr Gonczy said that it had come to light that Ms Duncan had been wrongly reimbursed and overpaid in relation to her commission payments and, therefore Ms Thompson had telephoned her to advise her of the overpayments. They had verbally agreed that Ms Duncan would make repayments of the overpaid amounts in the amount of \$100.00 per week.

[38] Ms Duncan said that she had been upset by the change in the payment arrangements, in the claim that she had been overpaid, and at having to make regular payments by way of reparation.

[39] Ms Duncan said she had become involved in trying to resolve her financial concerns with Inspire but decided to resign on 27 June 2018.

Was Ms Duncan an employee or an independent contractor whilst working for Inspire?

[40] In proceeding to determine whether Ms Duncan was employed by Inspire as an employee or engaged as an independent contractor I apply s.6 of the Employment Relations Act 2000 (the Act) which provides:

“s.6 Meaning of employee:

1. In deciding ... whether a person is employed by another person under a contract of service, the Authority-... must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2)... or the Authority-
 - (a) must consider any relevant matters, including any matters that indicate the intention of the parties
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[41] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

All relevant' matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters' equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test".

Contractual basis and common intention

¹ [2005] 1 ERNZ 372

[42] In *Cunningham v TNT Express Worldwide (NZ) Ltd*² the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship.

[43] Ms Duncan had been provided with the Agreement by Inspire dated 27 October 2017. It was clearly headed: '*Independent Contractor Agreement for the provision of labour*'.

[44] There are sections of that Agreement which indicate a contractual relationship was intended. Apart from the title, there is the clear statement in the first clause that the parties acknowledge that: "the real nature of their relationship is that of independent contractor and principal and the contractor is in business on their own account"

[45] In addition clause 4.1 of the Agreement states that: "The Principal is under no obligation to provide work and the contractor is under no obligation to accept work...."

[46] Ms Duncan was provided with the Agreement prior to commencing work and she read it and also sent it to a friend for comment. She had the opportunity to ask any questions about the Agreement.

[47] Ms Duncan had received written individual employment agreements in her previous employments, however although the differences in the types of agreements would have been clearly noticeable, she raised no concerns about the nature of the Agreement before or following the commencement date of the Agreement.

[48] Nor did she query the statements in it the Agreement regarding the nature of the relationship despite the evident disparity between it and the provision of a New Employee Form.

[49] Once the engagement commenced Ms Duncan submitted invoices using a template provided by Ms Thompson for doing so. Ms Duncan appears not to have queried the necessity for providing invoices which I find significant given her previous experience as an employee when submission of an invoice is not required..

[50] The Agreement contains express statements about the payment of taxes in clause 8, stating at clause 8.1 that the Contractor would be solely responsible for making such payment, and in the following clauses addressing the obligation of the Contractor regarding Withholding Tax and GST.

² [1993] 1 ERNZ 695

[51] These are not hallmarks of an employment relationship, and of which I find Ms Duncan would have been aware from her previous employment experience.

[52] Given the email exchanges at the commencement of the relationship between Ms Thompson and Ms Duncan, I find it is significant that if Ms Duncan had any doubts about the nature of the relationship, she did not at that point query the nature of the relationship with Ms Thompson as not being consistent with that of employment if that had been her understanding.

[53] The confusion regarding the PAYE and Kiwisaver deductions is unfortunate but significantly Ms Duncan did not query these despite having entered the information that she had opted out of Kiwisaver on the New Employee Form, and moreover having sought advice from the IRD on her responsibility regarding GST.

[54] I have considered whether or not the provision of the 'base fee' of \$10,000 plus GST is a salary and as such determinative in this matter. On balance I find it has to be set against (i) the description of it as a 'fee' rather than a 'salary' or 'wages'; (ii) the fact that it was conditional upon Ms Duncan fulfilling a primary condition i.e. obtaining ten properties to manage; and importantly, (iii) it attracted a GST component which is not a hallmark of salary or wages paid to an employee.

[55] I find the terms of the Agreement between the parties to demonstrate the intention of both parties at the outset of the relationship to be that of principal and contractor, and that Ms Duncan entered into the Independent Contractor Agreement with "her eyes open".

Control and Integration

[56] In examining whether Ms Duncan was an employee or an independent contractor whilst working for Inspire I find that the evidence establishes that Ms Duncan had flexibility in carrying out the duties. There were no set parameters to a working day, and it was for Ms Duncan to determine the size of the portfolio of properties she managed.

[57] Although Ms Duncan had two weekly meetings which it was recommended she attend, the evidence is that she did not do so on occasion whether she had other commitments.

[58] The provision of equipment by Inspire I find to be consistent with clause 2.2 (c) of the Agreement in accordance with which Inspire was to provide specific equipment and resources, and Ms Duncan was to provide, at her own expense, equipment necessary for her to perform her obligations under the Agreement.

[59] I find no entitlement in the Agreement to the normal items which comprise terms and conditions of employment, specifically an entitlement to holiday and sick leave and: “a plain language explanation of the services available for the resolution of employment relationship problems, including reference to the period of 90 days ... within which a personal grievance must be raised.”³ None are referenced in the Agreement and the fortnightly payment of \$10,000.00 plus GST is not based on the number of hours worked, rather upon the base number of 10 properties achieved after the commencement of employment.

[60] I find it not inconsistent with a contractual relationship that Inspire, a property management company, would require Ms Duncan to document the dates of any planned absence from attending to her portfolio in order that management of the properties in her portfolio could be dealt with if required during such absence.

[61] I find that these circumstances, whilst indicative of a contractor relationship, are not of themselves determinative of the true nature of the relationship and have to be balanced against considerations of contractual intention between the parties and examination of the question of whether Ms Duncan was in business on her own account, the fundamental test.

The Fundamental Test

[62] Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*⁴ that: “*Taxation arrangements, both generally and in particular are a relevant consideration.*”

[63] I observe that Ms Duncan had not queried the fact that PAYE was being deducted from her payments despite the fact that she had not only read the Agreement, but queried the GST component with Ms Thompson and sought advice and information from the IRD.

[64] Moreover whilst Ms Duncan did not invoice Inspire in respect of GST, I note that her income for the financial year ended 31 March 2017 was below the income level at which invoicing of GST becomes mandatory for a contractor or self-employed person, therefore I do not find this fact to be determinative. At no stage during the period she worked for Inspire did Ms Duncan question the requirement that she provide invoices for the payment of monies due to her as not being consistent with her previous experience as an employee.

[65] Consistent with its understanding of the Agreement that Ms Duncan was an independent contractor Inspire started deducting Withholding tax from her payments as soon as it became aware that her taxation status had been incorrectly coded.

³ Employment Relations Act 2000 s65 (2)(vi)

⁴ [2010] NZEMPC 1

[66] Turning to examine her ability to work on her own account, based on the number of properties Ms Duncan managed at the time of her resignation from Inspire as compared to the number managed by a full-time property manager, I find Mr Gonczy's estimate of the number of hours required to be worked by Ms Duncan to be a realistic estimate.

[67] Whilst there is no evidence that Ms Duncan whilst working for Inspire had other sources of income I observe that the degree of flexibility and hours required to be worked to manage the small number of properties in her portfolio would assist the possibility of such a step.

[68] Having considered all the circumstances, I determine that Ms Duncan was an independent contractor whilst working for Inspire.

[69] Accordingly as a result of this determination I have no jurisdiction to consider the claims by either party for outstanding monies.

Costs

[70] Costs are reserved. While costs are reserved, I note here that, subject to its submissions, Inspire represented itself and, unless it incurred legal costs, it is therefore unlikely it has grounds to claim a contribution to any fair and reasonable costs.

[71] If Inspire does wish to claim it may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Ms Duncan will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[72] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority