

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 342  
3028771

BETWEEN	PAULA ELLIS Applicant
AND	YOUNG NAILS 2008 NZ LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Alex Kersjes for Applicant Darrell Harris for Respondent
Investigation Meeting:	1 November 2018
Oral Determination:	1 November 2018
Record of Oral Determination:	5 November 2018

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**RECORD OF ORAL DETERMINATION OF THE AUTHORITY**

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- A. Ms Ellis was not an employee of Young Nails 2008 NZ Limited and the Authority has no jurisdiction to investigate her claims.**
  
- B. Costs are reserved.**

**Employment relationship problem**

[1] Ms Ellis is a qualified nail technician. On 21 January 2016 she started working in a nail salon owned and operated by Young Nails 2008 NZ Limited. Young Nails was, at that time a new nail salon operated by Ms Darrell Harris who had experience as a nail technician, educator and was operating a distribution service of Young Nails' branded product.

[2] Ms Ellis says that at all times during the time she worked for Young Nails she was an employee and when the relationship ended in April 2017 she was unjustifiably dismissed. Ms Ellis also claims she is owed minimum wages for the period 11 October 2016 to 29 April 2017 plus holiday pay.

[3] Young Nails disputes that Ms Ellis was an employee and says that at all times she was an independent contractor.

### **Issues**

[4] In order to resolve Ms Ellis' employment relationship problems I must determine the following issues:

- a) Was Ms Ellis an employee or a contractor?
- b) If the answer to a) is yes, was she unjustifiably dismissed?
- c) If the answer to a) is yes, what, if any arrears of wages remain outstanding?

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

### **Credibility**

[6] The onus of proof on matters before the Authority is on the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. I have found this very difficult. However when I have reviewed the evidence from Ms Ellis I have found areas of her evidence which simply do not seem credible.

[7] I have carefully evaluated the evidence before me and have considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration there is and in particular what documentation exists to support one

version or another. Where there is a dispute in the evidence I have preferred the evidence of Ms Harris as being, on balance, the more credible evidence.

### **Employee or contractor?**

[8] The onus of establishing whether Ms Ellis was an employee rests with her on the balance of probabilities. The starting point for the Authority is Section 6(1) of the Employment Relations Act (“the Act”) which states:

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.

[9] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd.*<sup>1</sup>

[10] The Employment Court in *Poulter v Antipodean Growers Limited* summarised the following applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:<sup>2</sup>

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analyzing the tests that have been historically applied such as control, integration, and the “fundamental” test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[11] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice, then to apply the three tests known as the control, integration and fundamental or economic reality test.

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<sup>1</sup> [2005] ERNZ 372.

<sup>2</sup> [2010] NZEmpC 77 at [20].

[12] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.<sup>3</sup>

[13] The Court in *Atkinson v Phonenix Commercial Cleaners Ltd* noted:<sup>4</sup>

Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties' common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix's employee.

### ***Terms and conditions of the agreement***

[14] Ms Ellis heard from a friend that Ms Darrell Harris, Managing Director of Young Nails was looking for a nail technician. Ms Ellis contacted Ms Harris and the two ladies met at the salon. During their discussions Ms Harris advised Ms Ellis that the rate for the role was \$20 an hour and that she only engaged contractors. She asked Ms Ellis to get an invoice book so that she could invoice her hours each week and told her she was responsible for her own tax and acc payments.

[15] On or about 10 October Ms Harris discussed with Ms Ellis a change to their agreement. The new arrangement was that Young Nails would pay Ms Ellis a retainer of \$500 gross plus commission each week. Ms Harris explained to me at the investigation meeting that the retainer was based on the amount of income achieved through Ms Ellis' efforts each week. Any income achieved over and above the \$500 during the week would be paid by way of commission at the rate of 35% of the income exceeding the \$500.

[16] Ms Ellis denies understanding how the commission was to work and the commission structure was not set out in writing.

[17] From January until October 2016 Ms Ellis received payment for each hour she worked at Young Nails at the agreed rate of \$20 per hour. No deductions, such as for tax, were made from these payments and Ms Ellis did not question why that was the case. From 14 October Ms Ellis received the agreed payment of \$500 each week,

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<sup>3</sup> Ibid at [21].

<sup>4</sup> [2015] NZEmpC 19 at [58].

again without deduction and irrespective of the number of hours she worked. Ms Ellis did not raise any concerns or questions about the lack of any deductions.

[18] No documents have been drafted or signed by the parties setting out the terms and conditions of their arrangement and so there is nothing to confirm the agreements reached at the outset of the relationship.

***Intention of the parties***

[19] As stated there was no written documentation between the parties to demonstrate their intention about whether Ms Ellis was to be an independent contractor or an employee at the time arrangements were entered into.

[20] Ms Ellis says she was unfamiliar with what is required to be an independent contractor and says that as far as she understood she was to be an employee. I do not accept that evidence as being credible. She told me that prior to working for Young Nails she had worked in a self employed capacity for NZ Nail Academy and was aware of her liability for payment of tax and she was receiving advice from a professional advisor at that time which continued until well after the relationship with Young Nails had started.

[21] I have concluded that it was Ms Harris' intention that Ms Ellis be engaged as a contractor. Young Nails' accountant gave evidence that she had spoken to Ms Harris about her intentions to engage Ms Ellis on a contract basis and that she would be responsible for her own income tax and ACC.

[22] I am satisfied that while Ms Ellis says now that she wanted to be an employee her conduct at the time the relationship started indicates she was happy with being a contractor and operated under that intention at all times.

[23] I am satisfied that during the initial stages of the relationship Ms Ellis did not work every day and worked only at times she had clients at the salon. She also did not question why she was receiving full payment of the hours worked at the \$20 rate.

[24] Ms Ellis points to two documents where reference is made to her being an employee to support her view that the intention was always that she be an employee. Firstly a Flexi Wage agreement between Young Nails and Work and Income (WINZ)

and secondly a letter written by Ms Harris on 15 May 2017 in which Ms Harris refers to Ms Ellis as an employee.

[25] Ms Harris explained to me that the first document came about because she had offered to train Ms Ellis in how to do eyelash extensions which would mean she would be able to earn more income by increasing her skills. It is usual for training in new skills to be paid for by the person receiving the training. When this was discussed between the two ladies Ms Ellis told Mr Harris not to worry about the payment as she would seek the assistance of WINZ to pay for her training. Ms Harris said she could do that but that she herself was too busy and it would be Ms Ellis' responsibility to arrange for the payments.

[26] In accordance with that agreement Ms Ellis completed a "Flexi-wage Subsidy Agreement application form in Ms Harris' name and submitted it to WINZ. That Ms Ellis completed this form without Ms Harris checking what she was doing was naïve on the part of Ms Harris.

[27] The Flexi-wage Subsidy is intended to subsidise a wage for an employee who is a WINZ candidate. The criteria for a person receiving the Flexi-wage includes:

- Being on a main benefit – e.g. a jobseeker Support, sole parent support or supported living;
- That the person did not have the skills for the job and either an employer wants to hire the person or the person was already working and the employer wanted the person to move the person into a role with more hours.

[28] Ms Ellis was in receipt of a WINZ benefit throughout the time that she worked for Young Nails. Each week Ms Ellis completed an invoice on line to ensure payment of the flexi wage subsidy was made to Young Nails. Ms Ellis used Ms Harris' email to submit the completed invoice forms. The first form submitted by Ms Ellis raised concerns at WINZ that Ms Ellis was being paid below the minimum wage. Ms Harris says she received an email from WINZ and asked Ms Ellis to rectify the problem. Ms Harris undertook no further enquiries about the payments or the forms completed by Ms Ellis.

[29] Ms Harris told me that after the relationship with Ms Ellis ended she received multiple texts from her seeking a letter for WINZ. In response to the requests, on 15 May she wrote a letter in which she states Ms Ellis is no longer an employee.

[30] Ms Harris says that when she wrote this she was busy and the use of the word employee was inadvertent.

[31] The intention test is about the intentions of the parties at the time the relationship commenced. I find it is more likely than not that both Ms Ellis and Ms Harris intended the relationship at that time to be a contracting relationship.

### ***The control test***

[32] This test examines the extent to which the activities of Ms Ellis were controlled by Young Nails. During the initial period of engagement Ms Ellis worked only the hours required to work on clients at the salon.

[33] Ms Ellis says that at the time the change was made from receiving an hourly rate to a retainer it was on the basis that Ms Ellis had to be at the salon Monday to Friday from 9.30 am to 4.30 pm and every Saturday from 10 am to 2 pm. Ms Harris denies Ms Ellis attended the Salon during these hours. Rather Ms Harris says Ms Ellis' conduct of attending the Salon just prior to her first appointment and leaving as soon as her last appointment had finished did not change and she observed this personally when at the salon. Ms Harris explained that the discussion around being at the Salon from 9.30 am was to encourage Ms Ellis to be present in the Salon to take "walk-ins". This was to assist Ms Ellis to increase her client base and also her opportunity to earn more by way of commissions.

[34] Ms Ellis says she was required by Ms Harris to wear a uniform. Ms Harris told me she always wore a smock as a uniform herself and asked Ms Ellis if she would like to wear one also. At that time Ms Ellis was wearing her own clothes and Ms Harris was concerned that her clothes could get ruined while working. Ms Harris had a stock of smocks and after Ms Ellis indicated a willingness to wear a smock she was given two from Ms Harris' stock. Later on further stocks were ordered and the smocks worn by both ladies were replaced.

[35] Ms Ellis told me she was required to be in the salon at all times and that she had to ask permission to leave to run errands. Ms Harris told me she did not have any set times when Ms Ellis had to be in the salon and that when she was absent from the salon she had received calls from clients who had been to the salon to purchase product but the salon was closed. She raised no issues about this with Ms Ellis because it was up to Ms Ellis whether she was at the salon or not.

[36] The diaries produced at the investigation meeting do not support Ms Ellis' evidence. There are days when Ms Ellis did not work during the week and neither did she work on all Saturdays. By my reckoning Ms Ellis worked 60% of the available Saturdays following the 10 October agreement.

[37] Ms Ellis' work was largely unsupervised although Ms Harris did have discussions with her about the standard of her work. Ms Harris told me she provided Ms Ellis with additional training to bring her up to date with current methods of work which in Ms Harris' view were quicker and resulted in much better results for the client.

[38] The control test is more indicative of a contracting relationship than an employee/employer relationship.

### ***Integration test***

[39] This test examines the extent to which Ms Ellis was integrated into Young Nails business. That is whether the work undertaken by Ms Ellis was integral to the business and whether Ms Ellis had become part and parcel of the business.

[40] Young Nails operates a nail salon. Ms Ellis worked on clients, both her own and those of Ms Harris when Ms Harris was absent.

[41] When Ms Harris was away from the salon Ms Ellis was left to manage it. Ms Ellis told me she was set tasks to be completed including clearing and responding to emails, ordering product and cleaning. Ms Ellis has provided no evidence that she was left task lists to perform. What was apparent was that Ms Ellis would sometimes write down tasks she had completed in the salon to account for her time when Ms Harris was away.

[42] Ms Harris told me she did ask Ms Ellis to assist from time to time in packing up orders for the distribution of Young Nail products but this was not a requirement of the job and she only asked when Ms Ellis did not have any clients and was at the salon. Ms Harris also told me that she had told Ms Ellis that as they both worked in the salon they both had to be responsible for cleaning.

[43] It was common ground that Ms Ellis assisted with stock takes.

[44] Clearly, the work undertaken by Ms Ellis was integral to the business of Young Nails but this test is not determinative of the relationship between the parties.

### ***Fundamental test***

[45] This test examines the extent to which Ms Ellis took on financial risk herself in providing her services to Young Nails including whether she was in business for herself.

[46] Ms Ellis did not take on any financial risk and was not operating her own business. She worked solely for Young Nails and used equipment and products provided by Young Nails and wore a uniform provided by Young Nails.

[47] Ms Harris told me Ms Ellis was able to undertake other work for clients outside the salon if she wished. She told me it is not uncommon for nail technicians to do wedding parties in their own time and receive payment for this. Ms Harris also told me Ms Ellis would purchase product which indicated she was doing nails outside the salon, something Ms Ellis denies.

[48] The fundamental test has elements of an employment relationship in that Ms Ellis did not account for her own tax for the income she derived from Young Nails and she did not pursue other job opportunities. Ms Ellis accepts Ms Harris did not make any deductions from the payments she received.

### ***Industry practice***

[49] Ms Harris has extensive experience in the industry. She told me that it is common to employ junior nail technicians but that once a person has some experience they prefer to be on a contracting basis as this provides the opportunity to earn more money, to have more flexibility over their hours of work and take on additional work.

[50] Ms Ellis told me that apart from her work with the NZ Nail Academy which was a training role she has always been an employee.

***Overall impression***

[51] The overall impression from all of the information available to me is that the underlying and true nature of the relationship between Ms Ellis and Young Nails is that of a contracting relationship.

[52] The Authority has no jurisdiction to investigate and determine Ms Ellis' claims further.

**Costs**

[53] Costs are reserved. While Young Nails was not represented at the investigation meeting I am aware that it had sought assistance with the drafting and lodging of its statement in reply. It is therefore entitled to apply for costs. In the first instance the parties are invited to resolve the matter between them.

[54] If they are unable to do so Young Nails shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Ellis shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[55] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority