

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

Determination: AA 176/07
File Number: 507 6361

BETWEEN Trevor Elwin
Applicant

AND Barfoot & Thompson Limited
Respondent

Member of Authority: Marija Urlich

Representatives: Blair Edwards, Counsel for Applicant
Christine Chilwell, Counsel for Respondent

Investigation Meeting: 18 May 2007

Submissions received: 22 May and 5 June 2007 from Applicant
29 May 2007 from Respondent

Determination: 14 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Trevor Elwin says Barfoot & Thompson Ltd unjustifiably dismissed him from his employment on 31 August 2006. At the time of his alleged dismissal he managed Barfoot & Thompson's City Rental division. City Rentals lets and manages rental accommodation. Mr Elwin and Barfoot & Thompson have a long association. He has held positions in the property management division of Barfoot & Thompson since 1966.

[2] Barfoot & Thompson Ltd says it was not in an employment relationship with Mr Elwin, rather the relationship was one of principal and contractor.

Employee or Independent Contractor?

[3] This determination deals only with the question whether the parties were in an employment relationship.

[4] Section 6 of the Employment Relations Act provides the meaning of employee and in most cases would be the starting point of any consideration of employment status. However, because the written contract entered by Barfoot & Thompson and Mr Elwin states that those arrangements are entered under the Real Estate Agents Act 1976¹ the issue of whether those provisions are determinative of this issue must be considered first.

[5] As you would expect, Mr Elwin and Barfoot & Thompson entered a number of written agreements over the many years of their association. The latest of these is dated 9 October 1997 and begins:

“Mr Trevor Elwin

CONTRACT FOR SERVICES

We offer you a contract as the branch manager of the Head Office Rents branch from 9 October 1997 on the following terms and conditions.

1. The relationship between us shall be that of employer and independent contractor as expressly provided for by the Real Estate Agents Act 1976. Accordingly you are required to register for GST and supply us with your GST number.

2. You are to provide your own car which should be insured as a business car.

3. The basis of remuneration shall be 72% of the relevant month net trading profit of your branch. When the monthly profit and loss accounts are available we will pay your share of the profit to a bank account nominated by you. Barfoot & Thompson Limited undertakes to have the monthly profit and loss accounts available no sooner than the 16th of the second month following and no later than the 20th of the second month following the end of the relevant month. You are not permitted to make any personal drawings on our bank account. If your profit and loss account shows a loss for the month you authorise us to direct debit your bank account with your share of the loss.

¹ Section 6(4) ERA provides that the Real Estate Agents Act 1976 is not limited or affected by the subsections (2) and (3).

[6] This contract was provided to Mr Elwin along with a memorandum dated 8 October 1997. That memorandum provides the following explanation as to why the contracts had been distributed to Mr Elwin and other Barfoot & Thompson managers:

“The Inland Revenue Department are currently questioning our payments to managers for their shares of profit.

In light of the issues raised by them combined with concerns expressed by the REINZ, there is a possibility that we are not currently complying with the current tax law. If this is the case, the following issues arise.

Barfoot & Thompson could be liable for Penalty tax.

Managers could be deemed employees which would require full PAYE deductions and managers would lose their rights to claim any business expenses.

...”

[7] The memorandum also sets out the changes to existing conditions, including the removal of a retainer, asks that the enclosed contracts are signed and returned as soon as possible and invites managers and their tax advisors to a meeting to answer any queries they may have about the contract.

[8] Mr Elwin signed and returned the contract. Mr Elwin confirmed in his oral evidence that he had received the 8 October 1997 memorandum and passed it on to his tax advisor.

Illegal contract?

[9] There is no dispute between the parties that Mr Elwin was never a branch manager for the purposes of section 54(2) of the REAA. He was not qualified to hold that position. The term was used in the contract because it was mistakenly understood the branch manager grandfathering provisions in the REAA would credit Mr Elwin’s experience.

[10] I accept that it is reasonable to conclude from the chain of correspondence provided to the Authority that the Real Estate Institute accepted, for the purposes of section 54(2) of the REAA, Mr Garth Barfoot’s explanation that Mr Elwin was a manager of City Rentals under the effective control of Mr Graham Smith, the branch

manager of City Sales. No disciplinary action was taken against Barfoot & Thompson or Mr Elwin by the Real Estate Institute.

[11] Mr Edwards', on behalf of Mr Elwin, primary submission is that the 1997 contract is illegal and should be declared of no effect pursuant to the Illegal Contracts Act 1970.

[12] Mr Edwards relies on the Employment Court judgment *Raine Blackadder Ltd t/a Ray White Commercial v Noonan*². In that case Mrs Noonan was not a salesperson under the relevant provision of the REAA ie, she did not hold a salespersons certificate of approval. The Court held that the contract entered by the parties was an illegal contract because it is an offence under section 42 REAA to enter such a contract in such circumstances. That section provides that it is an offence, liable to a fine not exceeding \$1500, to employ a salesperson without a certificate of approval.

[13] There is no suggestion in the evidence that Mr Elwin was placed in a situation whereby an offence was committed under section 54(5) of the REA ie, that he was in effective control of the business or branch office for a continuous period of more than 4 weeks. The situation is different to that in *Raine*.

[14] Though Mr Elwin was not a branch manager, the fact that the contract describes him as such does not constitute an offence under the REAA and there was no evidence that any illegality arose from the performance of that contract. The contract is not illegal³ and no orders under the Illegal Contracts Act 1970 will be made.

Salesperson

[15] Section 51A of the REA Amendments Act 1992 provides:

“51A Employment status of certain salespersons

This section applies ... to a salesperson and a real estate agent at any time if

—

...

(b) Before that time and on or after the commencement of the Real Estate Agents Amendment Act 1992, they agree expressly that the relationship

² Judge Couch, 16 March 2006, Christchurch (CC3/06)

³ Section 3 Illegal Contracts Act 1970

between them at that time should be that of employer and independent contractor.

...

(5) At a time after the 31st day of March 1992 when this section applies to a salesperson and a real estate agent, the salesperson shall for all purposes be deemed to be engaged by the agent under a contract for services."

[16] Mr Elwin says he is not a salesperson for the purposes of section 51A of the REAA as defined in section 2:

"Salesperson means a person who, being employed or engaged (whether under contract of service or a contract for services) by a real estate agent, works for the agent in selling or otherwise disposing of land or businesses... or leasing or letting land; and – Includes an officer of a licensee company who is not eligible to apply for or obtain in his or her own right; but Does not include a licensee, or an employee whose work is primarily and predominately clerical:"

[17] In his evidence Mr Elwin said that as the manager of City Rentals he was responsible for the smooth running of the property management division. He said that he did not become personally involved with tenants seeking accommodation or the letting of properties and that he did not deal with new business. Using the language of the section 2 definition of salesperson, I understand Mr Elwin to be saying that his work was "*primarily and predominately clerical*" and that he was not involved in the letting or leasing of land.

[18] It is common ground between the parties that someone engaged in property management only does not need a salespersons certificate of approval.

[19] Mr Elwin held a certificate of approval as a real estate salesperson at all relevant times. Mr Elwin said he knew nothing about the application for or requirement that he should have a salespersons certificate of approval. While I accept Mr Elwin may not have known that it had been applied for on his behalf by Barfoot & Thompson I do not accept that he did not appreciate the requirement that he should hold one. Mr Elwin's letter to Ms Joanne McCahill, Barfoot & Thompson's human resources manager, 15 June 2005, demonstrates that he understood his name, and not that of staff without a salesperson certificate of approval, should be used for placing advertisements to let.

[20] In a letter to the Barfoot & Thompson families written after his dismissal Mr Elwin described his role in letting and property management:

“My Position ...Property Manager

From my employment history, as above, I have always been a “Property Manager”. That is my trade and my skill set.

I have been totally involved in the day-to-day letting and management of the company’s rent roll properties. However, as the business expanded it was necessary to employ “personal assistants” in order to delegate the workload. In some instances these needed to be specialists in facets of property management business. Such as Letting Specialists.

This has a parallel with the activities of many of the Top Sales performers in the company. They have “Personal Assistants”, and other helpers, who work as a team to produce sales for the salesperson.

Similarly, I have taken on assistants to assist me with my onerous tasks.

I have had Administrators, Typists, Inspectors, and Letting Specialists who work as a team to produce my turnover. In essence the property management staff are my personal assistants.”

[21] This letter vividly summarises the evidence received at the investigation meeting. Mr Elwin was actively involved in managing all the aspects of City Rental’s business – letting and property management. The attempt to draw a line between property management of the rent roll and the letting of properties by the letting specialists fails in the face of clear evidence that Mr Elwin actively managed all aspects of the City Rentals business.

[22] I am satisfied that the evidence establishes that Mr Elwin was directly involved in letting and leasing activities:

- (i) he signed off tenancy agreements (it is necessary to hold a salespersons certificate of approval to do so) and received commission payments which went into the “pool” from which Mr Elwin’s profit share was derived;
- (ii) he canvassed work from landlords;

- (iii) he placed advertisements in the newspaper for properties to let with his own contact details as well as those of the letting agents' employed at City Rentals;
- (iv) he canvassed for new business from new landlords and wrote appraisals for potential new property managements;
- (v) 24% of his income came from letting fees; and
- (vi) he employed letting specialists.

[23] For these reasons I find that the section 51A deeming requirements of the ERAA have been fulfilled. Mr Elwin expressly agreed with Barfoot & Thompson that he was an independent contractor and he was a salesperson.

Section 6 ERA

[24] If I am wrong and Mr Elwin is not a salesperson for the purposes of section 51A of the REAA then an assessment of the work he performed under section 6 of the ERA is necessary. Following are the relevant facts to weigh.

[25] Mr Elwin employed and dismissed clerical staff at City Rentals and set their pay rates. He was required to seek the approval of a director before hiring any sales staff or property management specialist. Complaints from staff or customers could be escalated to those directors.

[26] The day to day running of City Rentals was Mr Elwin's business. He did not receive direction concerning the running of the branch.

[27] Mr Elwin worked long hours and six days a week. The contract set out the hours the office had to be open but did not specify the hours Mr Elwin had to work. The terms of the agreement with Barfoot & Thompson required that he pay for managerial cover for leave of a specified duration.

[28] Mr Elwin was registered for GST and claimed motor vehicle expenses and depreciation against his income. He paid his own ACC levies. His accounts were prepared by his accountant.

[29] Mr Elwin did not receive a salary or retainer. His income was derived solely from the net monthly trading profit of City Rentals.

[30] There was no indication that Mr Elwin took or sought sick leave or holiday leave or that he was paid for working public holidays.

[31] Applying these facts to the established tests. The intention of the parties is clear. The contract expressly states that Mr Elwin is to be an independent contractor. There is no indication that this contract was a sham. I accept also that all other Barfoot & Thompson managers whose income derived from a profit share were engaged as independent contractors.

[32] I accept that Mr Elwin was under the control of Barfoot & Thompson and that this control was necessary to comply with the legislative requirements of the REAA. On a day to day basis the evidence was clear that Mr Elwin operated City Rentals as he saw fit and with little interference from Barfoot & Thompson. Mr Elwin controlled how City Rentals operated and how and when he worked, which directly impacted on his earning ability.

[33] Integration requires an assessment of the extent to which Mr Elwin was part and parcel of the organisation⁴. As with the control test, it was necessary for Mr Elwin to be part of Barfoot & Thompson to meet statutory requirements.

[34] The fundamental test asks the question – is this person in business on their own account⁵? Mr Elwin was registered for GST and paid his own ACC levies, he claimed tax rebates and did not claim of receive sick or annual leave. Mr Elwin could benefit from his endeavours to the extent that all his income was derived from a share of the monthly profit of the City Rentals.

[35] On balance, Mr Elwin was engaged on a contract for services.

⁴ *Bank Voor Handel en Scheepvaart NV v Slatford* [1952] 2 All ER 956, Denning LJ

⁵ *Market Investigations Ltd v Minister of Social Security* [1968] 3 All ER 732 Cooke J, pg 737

Costs

[36] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If this is not possible, then Ms Chilwell should file and serve a memorandum of costs within 28 days of the date of this determination. Mr Edwards should file and served any response within a further 14 days of receipt of such.

Marija Urlich

Member of the Employment Relations Authority