

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 209
3134339

BETWEEN HWE
 Applicant

AND KENNETH
 KARUNANAYAKE
 Respondent

Member of Authority: Sarah Blick

Representatives: Applicant in person
 Respondent in person

Investigation Meeting: 12 April 2022 at Auckland

Determination: 24 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant carried out telemarketing work for a short period in June and July 2016 for the respondent, who is a real estate agent. The applicant estimates that she carried out about 40 hours of work for the respondent and says she was not paid for them. The respondent says the applicant was not an employee and was engaged on a commission only basis, and because she had not met the requirements to be paid, she was not entitled to any payment.

[2] The applicant now seeks a determination that she was an employee of the respondent, and the recovery of wages plus interest, for her work.

[3] Following attempts to engage with the respondent regarding payment, in around November 2017 the applicant contacted the Ministry of Business, Innovation and Employment's Mediation Services in an attempt to resolve the payment issue. Email correspondence filed by the applicant from Mediation Services shows the respondent declined to participate in mediation at that time.

[4] Much later, in August 2020 the applicant lodged a claim in the Disputes Tribunal (the Tribunal) seeking payment for the hours she worked. The Tribunal has adjourned the hearing of the matter to give the applicant the opportunity to obtain a determination from the Authority stating whether or not this is a contractual or employment matter.

[5] At the time of filing this application in April 2021, the applicant remained in time to commence this action.¹ The parties have attended mediation but were unable to resolve this matter.

Application for non-publication is declined

[6] The applicant sought name suppression after an investigation meeting was held. In determining whether the applicant's particular circumstances justify the grant of a non-publication order, I adopt as my starting point the principle of open justice which is fundamental to our common law system of civil and criminal justice. The principle can be displaced only for sound reasons. This includes a consideration of whether, in the particular circumstances of the case, the party seeking such an order has shown specific adverse consequences will likely follow unless some limit is set on the publication of names, identifying details or other aspects of the evidence.²

[7] The applicant seeks non-publication orders on the grounds that the publishing of details regarding her conflict with the respondent may negatively impact her professionally regardless of whether or not she is successful in her claim. In her application for non-publication orders, she said she wanted to assure the respondent that she is not pursuing her substantive application to damage his reputation. She says her

¹ Employment Relations Act 2000, s 142.

² *Erceg v Erceg* [2016] NZSC 135 at [2]-[3] and [13].

intention is to recover the amounts she believes are owing to her and would respect his wishes not to have his name published should he also make that request. The respondent has not made such a request.

[8] In response to the application for non-publication orders, the respondent advised he was “in the process of defamation application to the High Court” against the applicant for “putting my good name into a bad reputation and also baseless allegations and wasting my time in three different courts”. He then addressed the substance of the substantive application before the Authority, adding he was clueless as to why the Authority entertains such a person and wastes taxpayers' money when there is no jurisdiction for such a case.

[9] The applicant has provided no evidence showing negative effects on her work prospects, and is currently employed. She has not shown specific adverse consequences will likely follow unless the orders are granted. Although personal allegations have been made against the applicant by the respondent, the Authority has not found these to be either helpful or relevant in determining the substantive issues in this matter, being an arrears claim. For these reasons, permanent non-publication orders are declined.

[10] However, given that the applicant has a right to challenge my decision to refuse her application for non-publication, I grant an interim non-publication order so as to preserve her position for now.

[11] Accordingly, pursuant to cl 10 of Schedule 2 of the Employment Relations Act 2000 (the Act), I grant an interim non-publication order prohibiting the publication of the applicant's name and identifying details which will stay in place for the next 28 days commencing after the date of this determination. If no appeal is filed within that time, the interim non-publication order will lapse at that time and any further steps in relation to non-publication would need to be addressed to the Employment Court.

[12] Using a computer-generated string of three letters which bears no resemblance to the applicant's real name, the applicant is referred to as HWE in this determination.

The Authority's Investigation

[13] Neither party filed formal witness statements, but HWE filed a memorandum in accordance with the Authority's timetabling orders outlining her evidence. HWE attached documents including email correspondence and text messages between her and

the respondent, Mr Kenneth Karunanayake, and databases of names of homeowners. Mr Karunanayake responded to HWE's memorandum by adding comments to it.

[14] The investigation meeting was originally set down at 10am on 4 April 2022 and Mr Karunanayake failed to attend at that time. The Authority briefly adjourned the investigation meeting so that telephone inquiries could be made with Mr Karunanayake as to his whereabouts.

[15] Whilst the Authority's records indicated Mr Karunanayake had been duly served with its notice of the investigation meeting, and had subsequently been sent emails by HWE and the Authority pertaining to it, Mr Karunanayake indicated he had not received the notice. Mr Karunanayake offered to attend the investigation meeting later on 4 April 2022, but that time was not suitable to HWE. The Authority decided to adjourn the investigation meeting.

[16] HWE later updated her memorandum, which was served on Mr Karunanayake, and this was taken as the basis of her evidence.

[17] The investigation meeting then took place on 12 April 2022, with both parties in attendance. They each answered questions under affirmation from the Authority, were given the opportunity to ask each other questions and make oral closing statements or submissions.

[18] As permitted by s 174E of the Act, this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[19] The following are the issues for investigation and determination:

- a. What was the real nature of the relationship between HWE and Mr Karunanayake?
- b. If HWE was in fact an employee, how many hours of work did she carry out?
- c. What amount of payment is she entitled to receive for her work?

- d. Should either party contribute to the costs of representation of the other party?

What Happened

[20] In June 2016, while a student, HWE identified a Student Job Search (SJS) listing titled “Marketing & Promotions Assistant – Casual – Work From Home”. HWE responded to the listing, and met Mr Karunanayake at his home office where she did an unpaid trial on 10 June 2016. The trial involved role-playing calls to homeowners with Mr Karunanayake. HWE says this involved going through a written script, with Mr Karunanayake testing what she sounded like over the phone. HWE successfully completed the trial, and Mr Karunanayake offered her work. Both say the commission payments were discussed at this time. HWE says she understood she would be entitled to \$300 for successfully booking a home appraisal with a homeowner. Mr Karunanayake says that he advised her commission would only be paid once either the homeowner had listed their property, or a sale had occurred.

[21] No written contract or employment agreement was generated or provided in relation to their arrangement. HWE says she asked for one, and Mr Karunanayake says she did not.

[22] Email correspondence provided by HWE shows Mr Karunanayake sent her a database of names shortly after the unpaid trial. HWE commenced work on around 15 June 2016. She received additional databases, and says she called all 754 numbers provided to her. She stopped working in July 2016, when Mr Karunanayake stopped sending her databases of names. She received no payment for any time spent calling homeowners.

Real nature of the relationship

[23] The Authority only has jurisdiction to investigate claims that involve an employment relationship. HWE is therefore required to show on the balance of probabilities that she and Mr Karunanayake were in an employment relationship, as defined by the Act.

[24] Mr Karunanayake says HWE was engaged on a “commission only” basis, and says she was not an employee but was a contractor.

[25] The difference between the two forms of working relationship is broadly defined in this way:

An employee works for the employer, within the employer's business, to enable the employer's interest to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.³

[26] To determine whether HWE was a contractor or an employee s 6 of the Act requires the Authority examine the true nature of the relationship and assess all relevant factors. This includes applying the relevant legal tests set out and affirmed by the Supreme Court in *Bryson v Three Foot Six Limited* and considering how the parties went about meeting the terms of the agreement once established.⁴

[27] For the reasons that follow, the Authority is satisfied the real nature of the relationship between Mr Karunanayake and HWE was one of employment.

Intention of the parties

[28] There was no clear mutual intention regarding the status of the parties' relationship. HWE appears to have assumed that she was an employee who was entering into an employment relationship, similar to other telemarketing work she had done. Conversely, Mr Karunanayake assumed HWE was an independent contractor, apparently due to his own status as one working on a commission only basis.

[29] No written contract or agreement was entered into between the parties which could have indicated the parties' intention as to contractor or employment status. The job listing of the work itself, however, is instructive. While Mr Karunanayake says he did not draft the job listing, it includes certain information that more likely than not was provided by him. As noted above, the role was described as "Marketing & Promotions Assistant" and as "Casual". The Job Description provided the following details:

As a Marketing & Promotional Assistant, you will be playing a vital role in talking to people about our outstanding service throughout the Auckland area over the phone or in the office. We are looking for a team of fun, energetic and dedicated individuals!

The job involves telemarketing. There will be a brief initial training period in Stonefields, but after that you may complete the work from home. The work will

³ *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [30].

⁴ *Bryson v Three Foot Six Limited* [2005] 3 NZLR 721.

involve calling up homeowners for a brief conversation – generally no longer than a minute, so you can do quite a few at a time.

No experience necessary – Immediate start – Initial training will be provided.

To be successful you need to **enjoy talking to people and possess excellent and clear communication skills**. The ability to speak any other language (Hindi, Korean, Mandarin, Cantonese etc) would be advantageous but is not a requirement.

The work is to be done in your own time, but the hours in which you would be expected to call homeowners are **5.30pm – 8.30pm weekdays, or from 9am – 8.30pm on weekends**. You will be given 100 names to call at a time, and once you have worked through these, the employer will give you another 100. Given the brief nature of the calls you're making, you could work through 100 in a day if you are efficient.

Payment is made via commission – for every lead you generate that leads to a successful appraisal, you will be paid \$300, and \$1000 upon an unconditional sale. Although it varies every time, on average you could expect to make 1-2 sales per 100 calls. **Because this is a commission only role, most students on student visa are ineligible for this work.**

Please note that there will be a short unpaid trial of no more than 1-2 hours, to determine your suitability and interest in the position.

ADDITIONAL PAYMENT INFORMATION

You will receive \$300 if the customer lists with us and \$1000 if their property sells.

[30] Beside this Job Description, a “Job Details” section stated:

- a. there were 10 vacancies;
- b. the job type was casual;
- c. the start date was 2 June 2016;
- d. indicative hours per work were 20; and
- e. the hourly payrate was “\$15.25-\$15.25”.

[31] For a number of reasons, the Job Description and Job Details indicate the role advertised was for an employee. It certainly reads as if it were an employment advertisement. The Job Details state there are “vacancies” existing, the job type as “casual”. The Authority further notes there is reference to “the employer” providing names to call, and to the applicable minimum wage at the time of \$15.25. An objective view of the job listing suggests the role being advertised was one of employment.

[32] HWE has provided information sourced from SJS’s current FAQ webpage, which states the following information:

Can I list a commission-only job?

We'll only list a commission-only job if it's guaranteed that students will earn at least the legal minimum wage with commission added, or if students earn less than minimum wage, they will be topped up to minimum wage as required.⁵

[33] In response to this, Mr Karunanayake says SJS has changed its approach since he engaged HWE. Previously, he says, it allowed job listings for non-employment commission only work such as this listing. On its website, SJS says that since being set up in 1982, its goal was alleviating student poverty. The Authority acknowledges that since 2016, SJS may have tightened rules around the employment of students and the requirement to pay at least the minimum wage to them, such that the issue of employment or contractor status may not have been as clear as it is now. SJS's current guidance to employers must therefore only be a neutral factor when determining the intention of the parties.

[34] Entitlements to holidays or leave are not referred to in the job listing, nor were these discussed by the parties before or during the period of work. No public holidays fell during the period of work, and HWE was not paid any holiday pay on finishing work.

[35] Mr Karunanayake gave evidence that he never mentioned to HWE whether she would be an employee or a contractor. The Authority considers that if Mr Karunanayake had wanted to create an independent contractor arrangement, then he should have made this clear to HWE by specifically discussing the status of the intended relationship and providing her with the documentation that was associated with an independent contractor relationship, such as a contract, so she could properly consider her options.

The Control Test

[36] This consideration involves the Authority examining where the ultimate authority in the relationship lies.

[37] The timing and allocation of work, being the provision of databases of names, was completely under Mr Karunanayake's control. HWE appears to have had some control over when she performed the work, however, the job listing sets out a clear expectation of when homeowners should be called.

⁵ https://www.sjs.co.nz/content/employers-employer-faqs#content_contract

[38] HWE was sought direction from, and was given direction by, Mr Karunanayake via email, text messages and phone calls on how to do the job. She was also provided a script of what to say.

[39] Mr Karunanayake says that HWE was expected to attend home appraisals she had booked, along with him. HWE disputes this was a requirement of the role, but says Mr Karunanayake invited her to attend home appraisals on one occasion. Email correspondence shows she contacted him advising she was unwell and did not attend on that occasion. While Mr Karunanayake says HWE was meant to attend a home appraisal on more than this one occasion, he provided no documentary evidence to support this. In any event, that Mr Karunanayake says it was part of the requirement to earn commission demonstrates his intention to exercise control over her attendance at home appraisals.

[40] In an email to a homeowner dated 6 July 2016 whom HWE had set up a market appraisal booking with, Mr Karunanayake refers to “my PA (personnel assistant) made an appointment to see you”. While this reference may have been an inaccurate reference, it does provide some indication of Mr Karunanayake’s view of HWE’s status and where the control lay in the relationship.

[41] HWE also stated she attended Mr Karunanayake’s home office a second time to go over the script he had provided. Mr Karunanayake made it clear in his statement in reply and in evidence that he thought bookings with tenants were made due to incompetence or deliberately and that he tried to address this issue. In an apparent attempt to do so, Mr Karunanayake emailed HWE on 12 July 2016 with a new script she was to follow, which contained instructions of what to say and do.

[42] While HWE worked from home physically unsupervised, Mr Karunanayake exercised control over when, what and how HWE carried out the telemarketing work.

[43] On balance, the Authority considers Mr Karunanayake exercised actual and perceived control and authority in the relationship.

The fundamental/economic reality test

[44] The fundamental/economic reality test looks at whether a person performing services is in business on their own account.

[45] Mr Karunanayake says that he told HWE that she could claim her own petrol and expenses and so forth.

[46] HWE was a student who applied for a job via SJS. Although HWE was able to work for other employers while working for Mr Karunanayake, other factors under this test indicate she was an employee, in that she:

- a. did not charge a fee for her work;
- b. was not GST registered and did not have to pay an ACC levy;
- c. was not able to ensure she received a profit as she did not set her payment rates;
- d. was not able to engage someone else to do her work if she was not available;
- e. did not advertise for work;
- f. did not send out invoices;
- g. did not carry financial risk.

The Integration Test

[47] The integration test requires an assessment of whether HWE is integrated into, and part and parcel of, Mr Karunanayake's business as opposed to being an accessory of it.

[48] Who supplies the resources necessary to perform a role may indicate the level of integration in a business. HWE used her own laptop, phone and phone plan to make calls. That HWE supplied her own resources appears a wholly pragmatic arrangement on Mr Karunanayake's part, given the risk involved in supplying casual workers without the security of a written contract with costly resources and equipment.

[49] Mr Karunanayake says he told her she was responsible for her own tax. The email correspondence shows that on 15 June 2016, being on or around the day she started work, HWE emailed Mr Karunanayake providing her bank account number, IRD number and tax code (MSL). Mr Karunanayake responded to that email and said he will call HWE. HWE says she and Mr Karunanayake never discussed the issue of tax.

Conclusion on real nature of the relationship

[50] After weighing all of the various factors, applicable legislation and well-established legal tests, the weight of the evidence strongly supports the existence of an employment relationship. The Authority is therefore satisfied that HWE has proven, on the balance of probabilities, that the real nature of the parties' relationship was more likely than not an employment relationship, as defined by the Act.

Hours of work

[51] HWE says she completed the work she was given, produced three leads for Mr Karunanayake and provided other useful data for his future use in identifying potential clients. She provided evidence in the way of name databases containing 754 names and contact details for potential homeowners, along with comments against each of these identifying the result of her calls. Comments included "na" for no answer, "ni" for not interested, "T" for tenant, "Eee" means engaged, "nanana" means she called three times and received no answer. HWE says she emailed the completed databases back to Mr Karunanayake, providing them for his own knowledge so that he would gain a sense of the residential areas and have a record of people looking to sell in the next few months.

[52] HWE started work on or around 15 June 2016. She says the last time she received any databases from Mr Karunanayake was on 28 or 29 July 2016. HWE also said she spent a small amount of time door-knocking for Mr Karunanayake, which he denies.

[53] Mr Karunanayake says HWE was unreliable and was sick on occasions. He also says that because he did not observe the hours HWE worked and she did not meet the requirements to earn a commission, he does not believe she is entitled to payment for the hours she claims.

[54] As I have found that HWE was an employee, as an employer Mr Karunanayake was obliged to keep wages and time records in respect of HWE's employment under s 130 of the Act. Where an employer fails to keep a wages and time record as required, and this failure has caused difficulty to the employee in making an accurate claim, the onus of proof shifts to the employer to disprove the employee's claim.⁶ In light of the

⁶ The Act, s 132.

documentary evidence (which amply demonstrates HWE carried out work) as well as both parties' oral evidence, I am not satisfied Mr Karunanayake has disproven HWE's claim that she worked for about 40 hours. Accordingly, I accept she worked for 40 hours and is entitled to payment for them.

Arrears

[55] The Authority considers the remuneration outlined in the job listing would have likely been confusing to any person applying for the role. It appears that due to this confusion, HWE misunderstood what was required to earn commission. It also appears that despite HWE's efforts, the likelihood of earning commission under the arrangement was low. In light of this, the Authority is not satisfied HWE is entitled to commission of \$300 gross for the three appraisals she booked, but instead is entitled to be paid the relevant minimum wage.

[56] At the time HWE carried out the work, the prescribed minimum wage rate per hour for adult employees was \$15.25.⁷ At this rate, HWE would have been entitled to be paid \$610.00 gross for 40 hours work. I therefore find she is owed that amount.

Holiday Pay

[57] As an employee HWE was entitled to holiday pay upon the termination of her employment calculated at 8% of her gross earnings, being \$48.80 gross in annual holiday pay.

Interest

[58] HWE is entitled to an award of interest on the total wages claimed including the holiday pay component. The Authority has the power to award interest under clause 11, Schedule 2 of the Act. It is appropriate where a person has been deprived of the use of money to make an award for interest.

[59] Mr Karunanayake is ordered to pay interest, using the civil debt interest calculator, within 14 days of the date of this determination, as follows:

⁷ Minimum Wage Order 2016, cl 4(a).

- a. Interest on the sum of \$610.00 from 12 August 2016 (being two weeks following the provision of the final database of names) until the date payment is made in full; and
- b. Interest on the sum of \$48.80 from 12 August 2016 until the date payment is made in full.⁸

Orders

[60] Mr Karunanayake is ordered to pay to HWE in full and within 14 days of the date of this determination:

- a. Minimum wages of \$610.00 gross; and
- b. Annual holiday pay of \$48.80; and
- c. Interest on those amounts, as calculated above.

Costs

[61] As the successful party, HWE is entitled to a refund of the Authority's filing fee of \$71.56, which Mr Karunanayake is ordered to pay within 14 days of the date of this determination.

[62] HWE also seeks the filing fee she paid to the Tribunal. As this relates to another statutory body, it is not appropriate for the Authority to order its reimbursement. If HWE wishes to attempt to recover that fee, she should liaise with the Tribunal regarding it.

[63] HWE has also asked for damages and/or compensation for hurt and humiliation for the time and energy she has put into the application, and for comments Mr Karunanayake has made to and about her. The Authority finds no basis for ordering damages, nor does it have jurisdiction to order the compensation sought.

[64] As the parties are both self-represented, I order that any other costs incurred lie where they fall.

Sarah Blick
Member of the Employment Relations Authority

⁸ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>