

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA Auckland 210
5614006**

BETWEEN LINDA HUFFMAN
 Applicant

AND CALIBRE HAIRCARE
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Thuzar Win, Advocate for Applicant
 Greg Bennett, Advocate for Respondent

Investigation Meeting: 23 June 2016 at Auckland

Submissions received: 23 June 2016 from Applicant and from Respondent

Date of Determination: 24 June 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Linda Huffman, claims that she was unjustifiably dismissed by the Respondent, Calibre Haircare Limited (Calibre) on 17 December 2015.

[2] Calibre denies that Ms Huffman was unjustifiably dismissed and claims that she was not an employee but an independent contractor whilst working for it.

Issues

[3] This determination addresses as a preliminary issue whether or not Ms Huffman was an employee or an independent contractor with Calibre.

Background Facts

[4] Ms Huffman was working at the hair salon Hair World prior to moving to Calibre where she said she had been employed as a Stylist. She did not have a written employment agreement at Hair World.

[5] Ms Lesley Sharp, director and previous owner of Calibre said that during the course of a conversation on or about early 2014 with Ms Karen Durante, a previous work colleague and friend, mentioned that she would be interested in engaging another stylist for Calibre.

[6] Ms Sharp said that although Mr Delahunty and the other Stylist at Calibre were employees whom she had provided with written individual employment agreements, she had decided to only engage a self-employed Stylist due to the responsibilities involved in having employees.

[7] Ms Durante, who was a personal friend and client of Ms Huffman at Hair World, had offered to speak to Ms Huffman.

Meeting 3 May 2014

[8] Ms Sharp and Ms Huffman subsequently met on 3 May 2014 to discuss the position being offered at Calibre. Mr Chris Delahunty, Salon Manager, was also present at that meeting.

[9] Ms Huffman said that during the discussion with Ms Sharp, she had been offered employment at Calibre, but was not provided with a written individual employment agreement. The agreed terms of her employment were a payment of commission only payment with on a 50/50 split basis between herself and the Salon; however Ms Sharp agreed that Calibre would ensure she would receive \$750.00 per week during the first month of working at Calibre.

[10] There were no other terms of employment agreed. Ms Huffman said that she would not be paid sick pay, and was responsible for making her own tax arrangements and paying any ACC levies due from her.

[11] Prior to joining Calibre, Ms Huffman had engaged an accountant to assist in completion of a tax return on her behalf. The accountant has supplied the Income Statement and Tax Return for the financial year period from 1 April 2014 to 31 March 2015. The Income Statement and Tax Return signed by Ms Huffman states:

- in reply to question 11 that that no PAYE was withheld;
- in reply to question 23 that her self-employed income was \$40,859.00; and
- a claim for total expenses of \$5,484.00.

[12] Ms Sharp said she had made it clear to Ms Huffman that the position they were discussing was that of self employed stylist which was commission-based. She said the commission split discussed was a 50/50 split between Calibre and Ms Huffman.

[13] Ms Sharp said that Ms Huffman had expressed concern about her earnings during the transition period and as a result she had agreed to meet any shortfall in her income expectations to ensure a level of income of \$750.00 during the first month.

[14] Mr Delahunty said that he had been introduced to Ms Huffman at the start of the meeting on 3 May 2014 and she had told him that she worked as a self-employed hair stylist at Hair World.

[15] He said it had been made very clear to Ms Huffman that the position at Calibre was that of a self-employed stylist, and she had appeared to be pleased with the basis of the offer which represented an increase on the commission she was receiving at Hair World which had been a 30/60 split in favour of Hair World.

[16] Mr Delahunty said that at no stage during that meeting had Ms Huffman asked to become an employee at Calibre. Ms Huffman had told him that she had been self-employed for years and had a large clientele.

[17] Ms Kerry Sharman, a previous client of Ms Huffman at Hair World, said that just prior to moving to Calibre Ms Huffman had told her that she had applied for and been offered a job at Calibre. She had asked Ms Huffman if the pay would be better

at Calibre and Ms Huffman had replied that she would be an independent contractor at Calibre which was more beneficial as she intended to take her Hair World clients with her when she moved.

[18] Ms Huffman commenced at Calibre on 13 May 2014. She said that Ms Sharp had instructed the Calibre receptionist to call her (Ms Huffman) regular customers and notify them she was now working at Calibre.

[19] Ms Huffman confirmed that she had provided the contact details for the clients to the Calibre receptionist in order that she could contact them, and that she had hoped they would continue to book appointments with her at Calibre.

Payment Information

[20] Ms Sharp said that after Ms Huffman commenced at Calibre, she maintained detailed records on a salon software package, Kitomba, which keeps a record of each stylist's hours that they are available, start and end times, and extended periods of absence from the salon during the day, and all client appointments. From that information Kitomba generates a commission report that confirms the exact commission each stylist would be paid.

[21] Ms Sharp had provided the Kitomba reports for the period 13 May 2014 to 7 June 2014, 24 March 2015 to 18 April 2015, and 6 October 2015 to 3 November 2015. The records provided include staff timetables, daily sheets, business summaries, wages and commission reports, and Ms Huffman's invoices for services.

[22] Ms Huffman said that Ms Sharp insisted that she obtain a Tax Invoice Book and prepare pay slips in the form of invoices.

[23] Ms Sharp said that Ms Huffman had a Tax Invoice Book from the date she commenced working at Calibre and had provided to the Authority copies of the Tax Invoice Statements supplied by Ms Huffman with the Kitomba records. The first copy provided is dated 18 May 2014 and has been completed by Ms Huffman to show: "*Services Rendered*" for 12.5.14 – 18.5.14" in the sum of \$902.10 less tax in the sum of \$152.10, resulting in a net payment due of \$750.00.

[24] The Tax Invoice Statements have been provided throughout the period Ms Huffman worked at Calibre with the last one provided dated 24 October 2015.

[25] Virtually all of the Tax Invoice Statement amounts for 'Services Rendered' correlate to the amount set out on the copies of the corresponding Wage and Commission Reports provided, which refer to a '*Commission Only plan*'.

[26] Ms Sharp said that Ms Huffman had asked her to deduct withholding tax on her behalf which she would then remit this on Ms Huffman's behalf to the IRD, except for the weeks when Ms Huffman requested her not to do so.

Independent Contractor Agreement March 2015

[27] Ms Huffman said that on or about March 2015 Ms Sharp had decided to alter the terms of the working arrangements and to her surprise had provided her with an Independent Contractor Agreement.

[28] Mr Delahunty said that by February 2015 he had built up a good clientele and believed that it would be more financially beneficial to him to become self-employed. He had therefore spoken to Ms Sharp and asked if he could become a self-employed contractor.

[29] He said he and Ms Sharp had discussed this request openly in the Calibre salon and Ms Huffman had suggested that some form of contract should be provided. As a result, Ms Sharp had given him, Ms Huffman, and another stylist the draft Independent Contractor Agreement and advised them all to seek their own legal advice.

[30] Mr Delahunty said he had taken legal advice from a law firm and been advised that the Independent Contractor Agreement provided was completely acceptable and to industry standards. He had made this information known to the other stylists, including Ms Huffman.

[31] Mr Delahunty said he had signed the Independent Contractor Agreement on or about 1 March 2015.

[32] Ms Huffman said that Ms Sharp had spoken to her about her wish to move Mr Delahunty on to a self-employed basis, and she had signed the Independent Contractor Agreement which had been provided to her to encourage him to do the same.

[33] Ms Sharp said that Mr Delahunty had been the first to sign the Independent Contractor Agreement, but she had to ask Ms Huffman and the other stylist to sign and return their Independent Contractor Agreements.

[34] Ms Huffman signed the Independent Contractor Agreement on 25 March 2015, and initialled each page. She said she had not taken legal advice, but she had perused it, and had been aware that Mr Delahunty had taken legal advice on agreement.

[35] The Independent Contractor Agreement set out the terms of engagement including clauses:

3. INDEPENDENT CONTRACTOR

The relationship between the Contractor and Lesley Ann Sharp (Calibre Haircare Limited) is that of an independent contractor and nothing expressed or implied herein shall constitute the relationship of employer and employee between the parties.

CONTRACTOR OBLIGATIONS

The Contractor will comply with any timeframe specified in the Schedule B and will work such days and hours as are necessary to provide the services with this contract.

The Contractor will, in the performance of the Services:

- (a) At all times promote and protect Lesley Ann Sharp (Calibre Haircare Ltd)'s interests and reputation.*
- (b) Comply with all reasonable and lawful directions*
- (c) Comply with Lesley Ann Sharp (Calibre Haircare Ltd)'s policies and procedures*

6. REMUNERATION

- (d) ... Without affecting the generality of this provision, The Contractor acknowledges that there is no entitlement to payment from Lesley Ann*

Sharp (Calibre Haircare Ltd) for injury, sickness, superannuation, holidays, redundancy or overtime.

8, TAX

The Contractor is responsible for, and will pay on time and in full, all taxes and other levies (including income tax, GST and accident compensation levies).

12 TERMINATION

Either party may terminate this contract by providing one month's notice of termination in writing.

Lesley Ann Sharp (Calibre Haircare Ltd) may terminate this contract with immediate effect by providing written notice if the Contractor:

(a) breaches this contract, fails or is unable to perform the Services,

[36] Ms Huffman said that she was required to attend Calibre on set days and work regular hours.

[37] Ms Sharp said that Ms Huffman did not work set regular hours weekly, but operated her business according to her client bookings, she was free to start work and finish work at Calibre according to her client bookings. She said that Ms Huffman did not work every day, sometimes organising her client bookings into a Thursday so that she need not work on a Wednesday.

[38] Ms Huffman said that she had been integral to the running of Calibre and had assisted in growing the business, however during questioning at the investigation Meeting she said: *"The business was nothing to do with me. I was just there to do the haircuts"*.

[39] Ms Sharman said that she was aware of Ms Huffman carrying out work on her own behalf. On two occasions Ms Huffman had come to her home to style her hair for her, and had paid her \$100.00 in cash. Ms Huffman had also told her of one other occasion when she would be having an appointment with a client outside of Calibre opening hours.

[40] Ms Huffman confirmed that she had on occasion carried out hair dressing privately in her own time. On these occasions she was paid in cash.

[41] Ms Sharp said that she had accepted that as an independent contractor Ms Huffman was entitled to service her clients in her own time, and had no objection to her having retained 100% of the cash payments made to her on those occasions.

[42] Ms Huffman said that she charged her clients rates which had been set by Calibre, and was unable to vary these.

[43] Ms Sharp did not agree and pointed out that the Kitomba Daily Sheets provided noted that the prices charged to Ms Huffman's clients varied from client to client. She explained that Ms Huffman set her own prices and these varied on an individual basis, depending on how she viewed her clients, referring to: "*special prices for special clients*".

[44] Ms Huffman at the Investigation Meeting confirmed that she would give a reduced rate to elderly clients.

[45] Ms Huffman said that Calibre provided her tools and equipment whilst she was working there, although she supplied her own scissors, combs and brushes.

[46] Ms Sharp said that Calibre had purchased three new high quality hairdryers which she allowed the stylists to use, and Calibre provided the hair and colouring products, the cost of which had been taken into consideration in setting the 50/50% commission arrangement.

Termination

[47] On 3 November 2015 Ms Huffman had an accident and was unable to attend her clients at Calibre. She had suffered extensive injuries as the result of a fall and was unable to attend Calibre for a protracted period of time.

[48] During this period prior to her services being terminated on 17 December 2015, some of her clients attended appointments with the other Calibre stylists.

[49] On 17 December 2013 Ms Sharp wrote to Ms Huffman stating:

This letter is to inform you that I, Lesley Ann Sharp (Calibre Haircare Ltd), have elected to terminate the independent contractor agreement entered into on 1 March 2015 ... as per clause 12(a), on the grounds that you are unable to perform the services as outlined in the agreement and have been unable to provide those services since 4 November 2015. The termination of the agreement will take effect immediately.

Determination

[50] In deciding whether Ms Huffman was employed by Calibre as an employee, I apply s.6 of 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

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

¹ [2005] 1 ERNZ 372

“‘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

[52] 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. This broad approach in *Cunningham* was held by Chief Judge Goddard in *Muollo v Rotaru*³ to apply to orally agreed terms, in that the relevant intention could be inferred from words or conduct at the time the contract was formed or subsequently varied.

[53] There is disagreement between the parties as to whether it was employment or self-employment which was discussed at the meeting held on 3 May 2014. However Ms Sharp and Mr Delahunty agree that what was discussed at the meeting was Ms Huffman’s engagement at a self-employed contractor.

² [1993] 1 ERNZ 695

³ [1995] 2 ERNZ 414 (WEC64/95)

[54] I find that Ms Sharman's evidence also supports the intention at the outset of the relationship between Ms Huffman and Calibre as being that of an independent contractor.

[55] During March 2015 Ms Huffman was provided with an Independent Contractor Agreement, the terms of which clearly set out the nature of the relationship as that of independent contractor.

[56] Despite Ms Huffman having had over two weeks since being provided with the Independent Contractor Agreement and perusing it, she had initially read each page and signed it without raising any questions concerning its content. In particular she did not question the nature of the relationship described at clause 3 as: "*that of an independent contractor and nothing expressed or implied herein shall constitute the relationship of employer and employee between the parties*" being radically different to that which she claimed she had understood had been previously orally agreed.

[57] I find that both the evidence of what took place at the meeting on 3 May 2014 and the written Independent Contractor Agreement indicate that what was intended between the parties was an independent contractor relationship.

Control and Integration

[58] Ms Huffman said that he worked under the control of Calibre, specifically that of Ms Sharp who set her hours of work and the prices charged. Ms Sharp controlled only the opening hours of the Calibre salon,

[59] The Kitomba records provided by Calibre support Ms Sharp's evidence that Ms Huffman did not work to consistent hours, but worked as and when she had clients bookings.

[60] I note that Ms Huffman was able to absent herself from Calibre on some days for her own personal reasons without Calibre taking any form of disciplinary action or requiring her to make up the hours. This is consistent with an independent contractor position.

[61] I find that Ms Huffman was able to, and did, set her own prices which she charged for her clients.

[62] Whilst the Independent Contractor Agreement specifies at clause 5 that the contractor will comply with reasonable and lawful directions and policies and procedures, I find this to be not inconsistent with an independent contractor providing services to a hairdressing salon with clients.

[63] Further I accept that a hairdressing salon would want to ensure that the services provided by the independent contractor ensured a satisfactory quality of work at Calibre. I do not find this fact of itself determinative of an employment relationship, but rather of a normal commercial contracting function.

[64] I find that these circumstances, though highly persuasive, are not of themselves determinative and have to be balanced against considerations of contractual intention between the parties and examination of the question of whether Ms Huffman was in business on her own account, the fundamental test.

The Fundamental Test

[65] Calibre did not calculate, deduct or pay PAYE on behalf of Ms Huffman. Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*⁴ that: “*Taxation arrangements, both generally and in particular are a relevant consideration.*”

[66] Calibre deducted withholding tax on behalf of Ms Huffman and remitted this on her behalf to the IRD, although I note that this was not a consistent procedure at Ms Huffman’s request.

[67] The Income Statement and Tax Return for the financial year period from 1 April 2014 to 31 March 2015 confirms that Ms Huffman had self-employment income, paid no PAYE, and claimed for expenses which I find to be consistent with a person in business on his or her own account.

[68] Whilst Ms Huffman did not pay GST, I note that her income for the financial year ended 31 March 2015 was below the income level at which payment of GST becomes mandatory, therefore I do not find this fact to be determinative.

⁴ [2010] NZEMPC 1

[69] Whilst Ms Huffman was able to use Calibre's hairdryers I note that she supplied some of her own equipment, and whilst she used Calibre's hair products, I note that this was taken into consideration in setting the commission rate. I do not find the use of Calibre's hairdryers or hair products to indicate an employment relationship.

[70] Significantly I find Ms Huffman accepted a large degree of financial risk: she paid her own ACC levies, withholding tax, and had no entitlement to the normal items which comprise terms and conditions of employment, namely an entitlement to holiday and sick leave, and Kiwisaver contributions.

[71] In addition Ms Huffman could benefit from servicing her clients using the facilities available at Calibre and privately without paying 50% commission of the sale to Calibre without any disciplinary repercussions. This is consistent with an independent contractor position.

[72] In summary, I find that there is sufficient evidence to indicate that Ms Huffman was in business on her own account.

[73] I determine that Ms Huffman was an independent contractor whilst working at Calibre, and am unable to assist her further

Costs

[74] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant 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.

[75] 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