



[3] The preliminary issue to be decided is:

**Was Ms Hutchinson an employee or an independent contractor?**

**Background**

[4] The core business of SSL is the rent of water coolers and the sale of natural spring water. Ms Hutchinson was initially engaged to sell rental and service agreements for SSL.

**The first contract**

[5] It is commonly accepted that Ms Hutchinson was engaged as an independent contractor and the parties entered into a written contract. This recorded the terms and conditions of the engagement. The contract had a commencement date of 15 October 2009, albeit it was not executed until 3 November 2009. Key elements of the contract record that:

- (a) Ms Hutchinson was engaged as an independent contractor;
- (b) Ms Hutchinson was paid on a commission only basis;
- (c) Ms Hutchinson would register for GST with Inland Revenue and supply SSL with a copy of her GST number, and she would render a tax invoice to SSL for all commission charged to the company;
- (d) Withholding tax was to be deducted from all commission payments in accordance with Inland Revenue requirements and Ms Hutchinson was responsible for her income tax returns and any payments due to Inland Revenue.

**The employment agreement (the second contract)**

[6] It appears that Ms Hutchinson was unable to make a sufficient income as an independent contractor relying on commission payments. The evidence of Ms Kristine Bernadska, a director of SSL, is that Ms Hutchinson initiated negotiations pertaining to changing the relationship of independent contractor to one of being an employee of the company. Ms Bernadska says that on the basis of assurances given by

Ms Hutchinson about her ability to increase sales volumes, the parties entered into a fixed term employment agreement (the IEA).

[7] It seems that the reason for the employment being for a fixed term was that because SSL was paying Ms Hutchinson a salary of \$37,000 per annum; on a pro rata basis of \$3,083.33 per month, or \$1,541.66 a fortnight, the company required Ms Hutchinson to achieve a sales target in excess of 20 water dispensers per month, with a commission being paid for water dispensers sold in excess of that figure.

[8] It appears that SSL was not entirely confident regarding Ms Hutchinson's ability to make enough sales to cover her salary and hence the reason for the fixed term of the IEA. The relevant provisions of the document are:

3) Nature of the agreement

This is a fixed term employment agreement and supersedes any previous written or oral agreement. This agreement will commence on 12th of April 2010 and will end on 12th July [2010].<sup>1</sup>

The reason for the fixed term nature of the agreement is to rent out 60 or more water dispensers during these three months.

[9] Then at clause 7 the pay rate is set out:

- 7) The Employee's salary shall be at the pro rata rate of \$37,000 per annum, which shall be paid in equal fortnightly or monthly instalments. The Employee will be eligible for receiving commission if they (sic) achieving a sales target of in excess of 20 water dispensers in one calendar month period, i.e. Commission will become eligible once 21 or more coolers have been sold for that month, so the 21st cooler and above will attract Commission. For the sake of clarity, sales below 20 coolers in any one calendar month will not be eligible for any commission payment.

[10] And then a trial period is provided for at clause 9 of the agreement:

- a) A trial period will apply for the first 60 days of employment during which time the Employee's performance will be reviewed by the Employer to assess and confirm suitability for the position.

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<sup>1</sup> The year that is inserted in the agreement is 2101 but this is obviously a typing error.

[11] The evidence in regard to the two contractual arrangements that the parties entered into is included in this determination only as a record of the background to the matter currently to be decided by the Authority. It is commonly accepted by both parties that they entered into the two different contracts and that the first was a contract for services (Ms Hutchinson was an independent contractor); and the second was an employment agreement whereby Ms Hutchinson became an employee. The employment agreement was for a fixed term of three months.

### **A change in the relationship**

[12] As previously set out, the reason for the fixed term in the employment agreement was to assess if Ms Hutchinson could create sufficient sales to cover the cost of her salary. The evidence of Ms Bernadska is that Ms Hutchinson did not achieve the sales volume that she committed to. Indeed, only 21 units were achieved in total; well short of the 60 units expected as a minimum. Ms Bernadska says that the sales manager and the Board of Directors were concerned with the poor results. However Ms Bernadska attests that she was aware that Ms Hutchinson was in a “desperate” financial situation and she wanted to help her. Hence, Ms Bernadska requested that the Board of Directors give Ms Hutchinson a “second chance” to continue to work for SSL as an independent contractor.

[13] Ms Bernadska says that Ms Hutchinson was also very persuasive that she could achieve a greater number of sales.

[14] The further evidence of Ms Bernadska is that SSL had a desire that any continuing relationship with Ms Hutchinson would work well for both parties. The company believed that it would best if the relationship with Ms Hutchinson reverted to the original arrangement: that is, she would become an independent contractor again.

### **The third contract**

[15] As evidenced by the *Services Contract For Contractors* document executed by the parties on 1 August 2010, the parties entered into a contract that was identical to that which they had agreed to when Ms Hutchinson first formed a working relationship with SSL as an independent contractor. Indeed, apart from the dates, the two contracts are identical, even down to the typing and grammatical errors. In

addition to the relevant provisions of the first contract referred to earlier in this determination (at para.[5]): the following clauses are also particularly relevant:

- 9) **Performance Standards**  
The Contractor acknowledges that he/she will abide by any directions given by the Manager of the Company or appointed Sales Manager of the [Company]. From time to time, Company and personal goals affecting work schedules and income will be discussed by managers with the contractor and treated as serious objectives.
- 16) **Independent Contractor**  
It is acknowledged that the Contractor is an independent contractor and that nothing in this contract or the relationship of the parties shall be constructed so as to constitute a contract of employment.
- 23) **Acknowledgments by the Contractor**  
The Contractor hereby acknowledges that he/she has read and understood the terms of this contract and enters into it of his/her own free will knowing that this contract replaces all and any previously signed contract(s) between the parties hereto.

[16] And then finally:

- 25) **COMPLETENESS AND ADVICE**
- 1.1 This Agreement is between you, the Contractor, and the Company. Any alterations are strictly by mutual written agreement between the contracted parties. This contract of services replaces all previously written or oral agreements and understandings and it represents a full record of the agreement entered into between the parties.
- 1.2 By signing this agreement the Contractor acknowledges that it is complete in every respect and acknowledges that they have had a reasonable opportunity to obtain independent advice before signing it.

[17] The contract is then signed by both parties and an independent witness. Ms Hutchinson signed as “Contractor”.

[18] The evidence of Ms Hutchinson is that she does not recall signing the third contract, albeit she acknowledges that it “appears” to have her usual signature on it. At the investigation meeting, under cross examination from Mr Organ, Ms Hutchinson confirmed to the Authority that the signature on the contract is hers.

[19] Regrettably I must say that I found the evidence of Ms Hutchinson to be often less than credible and further; at times, I gained the impression that Ms Hutchinson was having considerable difficulty recalling, recognising or understanding certain evidence, some of which was not really in contention or irrefutable. Indeed my observations were such I felt it prudent to have a brief adjournment in order to discuss with the advocates whether or not Ms Hutchinson was well. Upon an assurance from Ms Hutchinson's counsel that she was a competent witness, the investigation meeting continued.

### **Determination**

[20] Firstly, I am satisfied that Ms Hutchinson willingly and knowingly entered into the third contract as evidenced by her signature affixed to the contract. I am also satisfied that Ms Hutchinson was fully cognisant of the fact that this contract, and the consequent relationship, was identical to the first agreement she had with the company, and that she was to become an independent contractor again.

[21] I also accept the evidence of SSL in preference to that of Ms Hutchinson in regard to the background to this contract coming into existence, including that she received a copy of it.

[22] Ms Hutchinson says that despite signing the third contract, she continued as an employee and nothing really changed. I do not accept this to be so, albeit I do accept that there were some irregularities in regard how Ms Hutchinson was paid. However, I accept that Ms Hutchinson was paid commissions in advance because SSL management were (to their credit) attempting to assist Ms Hutchinson to establish some financial stability while she built up her sales. Regrettably, this assistance was in vain.

[23] In deciding whether Ms Hutchinson was, or was not, employed by SSL under a contract of service, and as required by s.6 of the Employment Relations Act 2000 (the Act), I have considered all relevant matters,<sup>2</sup> including any matters that would indicate the intention of the parties.

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<sup>2</sup> All relevant matters include the written and oral terms of the contract between the parties which indicates clearly their common intention: *Bryson v Three Foot Six Ltd* [2005] NZSC 34.

[24] And while the Act also provides that the Authority is not to treat as a determining matter, any statement by the parties that describes the nature of the relationship, the existence of what, I accept, is a valid contract for services, must be given significant weight.

[25] Contrary to Ms Hutchinson's assertions and the submissions for her, I find that it is more probable than not that Ms Hutchinson was an independent contractor at the time of the termination of her relationship with SSL.

[26] It follows that I find that because Ms Hutchinson was an independent contractor and not in an employment relationship with SSL, the Authority does not have jurisdiction to investigate the substantive claims of Ms Hutchinson and hence they must be dismissed.

### **Costs**

[27] Costs are reserved. The parties are invited to resolve this matter. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file a memorandum with the Authority. The applicant has a further 14 days to file a memorandum in response.

**K J Anderson**  
**Member of the Employment Relations Authority**